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SUPREME COURT NO. _____

NO. 75258-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOMINIQUE NORRIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Dominque Norris asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' published decision in State v. Dominique Norris, filed October 30, 2017 ("Opinion" or "Op."), which is appended to this petition.[1]

C. ISSUE PRESENTED FOR REVIEW

As a condition of community custody, the court ordered the petitioner to "[i]nform the supervising [community corrections officer (CCO)] and sexual deviancy treatment provider of *any dating relationship*." CP 43 (emphasis added).

Is this condition unconstitutionally vague?

D. STATEMENT OF THE CASE

The State charged Dominique Norris with two counts of second degree child rape, alleged to have occurred between December 1, 2009 and February 28, 2010. CP 1-2. The complainant, 13-year-old D.T., was the younger brother of Norris's children's father. CP 3. The State alleged

[1] The opinion can also be found at State v. Norris, ___ Wn. App. ___, 404 P.3d 83 (2017).

Norris and D.T. initially had sexual contact at D.T.'s residence, when Norris was staying there, and later at Norris's own residence. CP 3.

Norris pleaded guilty to three counts of second degree child molestation in March of 2012. CP 11-24, 35; RCW 9A.44.086. The court suspended a standard-range 72-month sentence and imposed a Special Sex Offender Sentence Alternative (SSOSA) under RCW 9.94A.670. CP 38. The court ordered Norris to, among other requirements, undergo sex offender treatment and comply with certain conditions as set forth in Appendix H of the judgment and sentence. CP 39. The court added additional conditions at subsequent hearings. E.g. CP 113-17.

The State sought revocation of Norris's SSOSA in April of 2016. CP 70. The State alleged Norris violated the conditions of her suspended sentence by consuming marijuana and consuming more oxycodone than the prescribed amount. CP 121, 124.

Norris agreed the underlying acts occurred. CP 74. But she requested that, rather than revoking the SSOSA, the court sanction Norris with jail time and then permit her to enter drug treatment. Norris argued in the alternative that, even if true, the factual allegations did not, as a matter of law, permit revocation of the SSOSA. CP 72-76; RP 92-104 (defense counsel's argument at May 17, 2016 hearing on revocation).

The court revoked Norris's SSOSA. RP 117; CP 96-97 (written findings, stating that Norris willfully violated the terms of suspended sentence by "ingest[ing] marijuana" and "failing to consume . . . oxycodone . . . as prescribed").

The court imposed the previously suspended sentence including 72 months of confinement and 36 months of community custody. CP 38, 40. The court also imposed a plethora of community custody conditions. CP 43-44.

Norris appealed, challenging six of the conditions. The Court of Appeals held four of the six challenged conditions were invalid, Op. at 6, 9, 11, 12, but it affirmed two others, including the one Norris now challenges. Op. at 4-6 (rejecting vagueness challenge to dating relationship condition).

Norris now asks this Court to accept review and reverse the Court of Appeals as to the dating relationship condition.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2) AND (3) BECAUSE THE CASE HIGHLIGHTS A CONFLICT BETWEEN DIVISIONS OF THE COURT OF APPEALS AND PRESENTS AN SIGNIFICANT CONSTITUTIONAL QUESTION.

This Court should accept review under RAP 13.4(b)(2) and (3). The case presents a significant constitutional question involving a vague community custody condition. This case, therefore, potentially affects the

supervision of several probationers throughout the State. Moreover, the Court of Appeals' published decision conflicts with an unpublished decision from Division Three of the Court of Appeals. This Court should grant review and reverse the unconstitutionally vague condition.

1. The "dating relationship" condition is unconstitutionally vague.

The condition requiring Norris to inform her CCO and treatment provider of any dating relationship is unconstitutionally vague and should be stricken.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

The condition here does not provide Norris with adequate notice of what she must do to avoid sanction and does not prevent arbitrary enforcement. The question is what constitutes a "dating relationship."

Commonly understood, a "relationship" is "a state of affairs existing between those having relations or dealing." WEBSTER'S THIRD NEW INT'L DICTIONARY 1916 (1993). In the context of interaction between people, a "date" means "an appointment or engagement [usually] for a specified time . . . [especially]: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity" or "an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex." Id. at 576. Referring to a person, a "date" is "a person of the opposite sex with whom one enjoys such an occasion of social activity." Id.

Such behavior conceivably covers a large range of human interaction. The condition, as written, leaves the dividing line between a non-dating relationship and a dating relationship intractably blurry. The condition requires Norris to take affirmative action to avoid running afoul of her sentence but requires her to do so without a standard for determining when she must do so. The condition does not provide Norris adequate notice as to what relationships she is prohibited from forming. A reasonable person cannot describe a standard necessary to avoid arbitrary enforcement.

Suppose Norris has dinner with a man in a restaurant. Is that a date? Would that constitute a "dating relationship"? What if it was a one-time occasion? Is that enough to form a "relationship" with someone? Does meeting someone twice for a social activity turn an ordinary relationship into a dating relationship? Three times? Suppose Norris strikes up a relationship with a man online, and then they go out to a movie together. Is that a dating relationship or something else? What if Norris and another person often enjoy social activities together, but consider themselves "just friends." Does that nonetheless qualify as a dating relationship?

A condition that leaves so much room for speculation is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking down prohibition on "paraphernalia" as follows: "'an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper . . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.").

If the phrase "dating relationship" is meant to be limited to a romantic relationship, however, the vagueness problem remains. United

States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation department upon entry into a "significant romantic relationship" was vague, in violation of due process. Id. at 79, 81. The court observed that "people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a 'significant romantic relationship.'" Id. at 81. "What makes a relationship 'romantic,' let alone 'significant' in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders." Id. The condition had "no objective baseline," as "[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a 'significant romantic relationship.'" Id.

The condition in Norris's case suffers from the same sort of defect. "Subjective terms allow a 'standardless sweep' that enables state officials to 'pursue their personal predilections' in enforcing the community custody conditions." State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted). Norris's liberty during supervised release should not hinge on the accuracy of her

prediction of whether a given CCO, prosecutor, or judge would conclude that a targeted relationship had been entered without first informing the CCO or treatment provider. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as "dating relationship," and what does not, in a non-arbitrary manner.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The condition here is unconstitutional because it fails to provide reasonable notice as to what Norris must do to comply with it. The condition exposes Norris to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken altogether or modified to comply with due process.

2. This case represents a conflict between two divisions of the Court of Appeals.

This case represents a conflict between Division One and Division Three of the Court of Appeals.

The Court of Appeals' opinion asserts that Reeves is distinguishable because it involved a prohibition on "significant romantic" relationships. Op. at 6. According to the Court of Appeals, the qualifiers "significant" and "romantic" created an extra layer of subjectivity, rending the condition

in that case vague. Norris's condition does not suffer from that sort of defect. Op. at 6.

Unlike Division One, however, Division Three of the Court of Appeals adopted the Reeves court's reasoning in State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016) (unpublished).

In Dickerson, the trial court imposed a community custody condition prohibiting Dickerson from "enter[ing] a romantic relationship without the prior approval of the [community corrections officer] and Therapist." Dickerson, 2016 WL 3126480 at *1 (alteration in original). Relying on Reeves, Division Three of the Court of Appeals held the condition was unconstitutionally vague because "it is not clear which relationships will require the permission of both the community custody corrections officer and therapist." Id. at *5. Further, "[t]he condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic." Id.

The condition in Dickerson, by prohibiting "romantic" relationships, did not contain "highly subjective qualifiers"[2] but still the court struck it down as vague. Contrary to the Court of Appeals opinion in

[2] Op. at 6.

this case, the condition in Norris's case suffers from the same kind of defect afflicting the invalid conditions in Dickerson and Reeves.

3. The existence of a statutory definition somewhere in the Revised Code of Washington does not insulate the condition from a vagueness challenge.

The mere existence of a statutory definition for a phrase used in a community custody condition does not insulate the condition from a vagueness challenge.

The Court of Appeals noted, in a footnote, that the phrase "dating relationship" is defined by statute at RCW 26.50.010(2). Op. at 6 n. 6.

This is of no moment. The condition in this case references no statute or statutory definition. Moreover, Norris was not convicted of a crime under the statutory scheme that contains the definition. A statutory definition of a term does not give notice of the term's meaning as used in a sentence unless the definition is contained in the same criminal statute that the defendant was convicted of violating. Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006) (cited by Bahl, 164 Wn.2d at 755); accord United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011). Norris was not convicted of violating a protection order under chapter 26.50 RCW, so the definition of the term "dating relationship" in that chapter cannot defeat Norris's vagueness challenge.

In Bahl, this Court declined to decide whether the statutory definition of "sexually explicit" alone would provide sufficient notice. Bahl was not convicted under that statute. Bahl, 164 Wn.2d at 760. Similarly, the concurrence in Sanchez Valencia maintained a statutory definition of the term "drug paraphernalia" would be sufficient "to dispel vagueness concerns" only where the person was convicted of a drug offense. Valencia, 169 Wn.2d at 796 n.1 (J.M. Johnson, J., concurring).

Norris was convicted under chapter 9A.44 RCW. CP 35. No unreferenced statutory definition of the term "dating relationship" found in the domestic violence statute dispels the vagueness problem.

In this respect, Norris's case is like State v. Moultrie, in which the defendant challenged as unconstitutionally vague the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults". State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776, review denied, 164 Wn.2d 1035 (2008). The State argued the terms "vulnerable" and "disabled" provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined by statute. Id. at 397. The Court of Appeals rejected the State's argument: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98. In Moultrie, the

statutorily defined terms of "vulnerable" and "disabled" were the exact terms used in the sentencing condition and the condition was still found to be lacking. Id. at 396-97.

Again, as in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on "dating relationships" to its statutory definition. Cf. RCW 26.50.010(2) (specifying that the "[f]actors that the court may consider in [determining whether a dating relationship exists] include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties.").

A community custody condition prohibiting conduct must give ordinary people sufficient notice to "understand what conduct is proscribed." State v. Irwin, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (quoting Bahl, 164 Wn.2d at 753). And it must also be sufficiently definite to prevent arbitrary enforcement. Irwin, 191 Wn. App. at 655.

The prohibition here fails in both respects. This Court should grant review, reverse the Court of Appeals, and determine that the dating relationship condition is unconstitutionally vague.

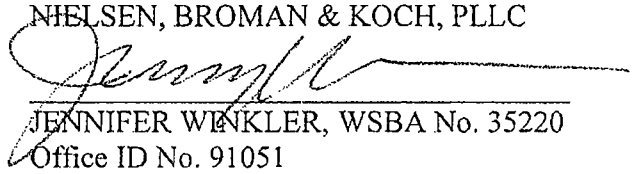
F. CONCLUSION

This Court should accept review under RAP 13.4(b)(2) and (3) and reverse the Court of Appeals.

DATED this 28th day of November, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent,	)	No. 75258-8-I
v.	)	PUBLISHED OPINION
DOMINIQUE DEBRA NORRIS, Appellant.	)	FILED: October 30, 2017

SCHINDLER, J. — A court has the statutory authority to impose crime-related prohibitions as a condition of community custody. Dominique Debra Norris pleaded guilty to three counts of child molestation in the second degree. Norris challenges several of the community custody conditions. We hold the condition that requires Norris to inform the community corrections officer of a "dating relationship" and imposition of a condition that prohibits Norris from entering "any parks/playgrounds/schools where minors congregate" are not void for vagueness. The condition that prohibits her from possessing, using, accessing, or viewing sexually explicit material is crime-related. But the condition that imposes a curfew and the condition that prohibits Norris from entering sex-related businesses are not crime-related. We also conclude the court had the

statutory authority to prohibit "consumption" but not "use" of alcohol. We affirm in part, reverse in part, and remand.

Imposition of SSOSA

In August 2010, the State charged 25-year-old Dominique Debra Norris with two counts of rape in the second degree of a 13-year-old boy. Norris pleaded guilty to three counts of second degree child molestation. The State agreed to recommend imposition of a special sex offender sentencing alternative (SSOSA).

In the statement of defendant on plea of guilty, Norris admits:

> Between Dec. 1, 2009 and Feb 28, 2010 in King Co. WA I had sexual contact for the purpose of sexual gratification with D.T. who was 13 years old at the time and not married to me or in a state registered domestic partnership at the time of the contact. I was at least 36 mo. older than D.T. This happened on three occasions.

As part of the plea agreement, Norris stipulated the court could consider the certification for determination of probable cause as real facts.

The certification of probable cause states that on August 12, 2010, D.T.'s mother contacted the police after his basketball coach told her that D.T. "had been having sex with an adult female for a period of a few months." D.T.'s mother told the police, "Dominique has known the family since DT was a small boy and was aware of how old he was. [Norris] is also the mother of DT's brother's children." D.T. gave a statement to police.

The certification states Norris repeatedly had sexual intercourse with 13-year-old D.T. beginning in December 2009 and had sex "several times at Dominique's residence" and the boy's home. Norris and D.T. communicated by

cell phone and had a "code" for sex. "During the relationship as well as afterwards, Dominique sent DT messages about her love for him and also sent a photo of herself in pants and a bra. The cell phone involved . . . was being used solely by DT." The certification also states that on August 12, 2010, Norris disclosed to a member of her church "that she had been having sex with DT."

At sentencing on March 30, 2012, the court imposed a concurrent SSOSA sentence of 72 months on each count suspended on condition that Norris engage in and successfully complete sex offender treatment. The judgment and sentence states that revocation of the suspended sentence will result in 36 months of community custody and compliance with "the conditions of Community Custody set forth in Appendix H herein or any other conditions imposed by the Court." Appendix H includes standard conditions, sex offense conditions, and additional prohibitions related to crimes involving minors.

Revocation of SSOSA

Four years later, the court entered an order on May 17, 2016 revoking the SSOSA and the suspended 72-month sentence. The order states Norris shall comply with the terms of the 2012 judgment and sentence and the community custody conditions "as set forth in Appendix H of the original Judgment and Sentence."

Appeal of Community Custody Conditions

Norris challenges several of the community custody conditions. Norris contends the conditions are either (1) void for vagueness or (2) not crime-

related.[1] A defendant may assert a preenforcement challenge to community custody conditions for the first time on appeal if the challenge is primarily legal, does not require further factual development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

(1) Vagueness

As a general rule, the imposition of community custody conditions is within the discretion of the court and will be reversed only if manifestly unreasonable. Bahl, 164 Wn.2d at 753. The imposition of an unconstitutional condition is manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). There is no presumption that a community custody condition is constitutional. Sanchez Valencia, 169 Wn.2d at 793. A sentencing condition that interferes with a constitutional right must be "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State and public order." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. A condition is void for vagueness if the condition either (1) does not define the prohibition with sufficient definitiveness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards that " 'protect against arbitrary enforcement.' " Bahl, 164 Wn.2d at 752-53 (quoting City of Spokane v. Douglass, 115 Wn.2d

[1] Norris and the State cite a number of unpublished opinions. GR 14.1 allows parties to cite unpublished opinions as nonbinding authority. But the rule states unequivocally that "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." GR 14.1(c).

171, 178, 795 P.2d 693 (1990)). If either requirement is not met, the condition is unconstitutional. Bahl, 164 Wn.2d at 753. However, a community custody condition is not unconstitutionally vague " 'merely because a person cannot predict with complete certainty the exact point at which [her] actions would be classified as prohibited conduct.' " Sanchez Valencia, 169 Wn.2d at 793[2] (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)).

Norris claims the condition that requires her to inform the community corrections officer (CCO) of "any dating relationship" is unconstitutionally vague. Crime-related "Special Sex Offense Condition" 5 states:

> Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.[3]

A condition will withstand a vagueness challenge if "persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement." Douglass, 115 Wn.2d at 179. "Terms must be considered in the context in which used," and " '[i]mpossible standards of specificity' are not required since language always involves some degree of vagueness." Bahl, 164 Wn.2d at 759[4] (quoting State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)).

Citing United States of America v. Reeves, 591 F.3d 77 (2d Cir. 2010), Norris argues because the term "dating relationship" does not provide notice of

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[2] Internal quotation marks omitted.

[3] Emphasis added.

[4] Internal quotation marks omitted.

an adequate ascertainable standard, the condition does not prevent arbitrary enforcement. Reeves does not support her argument.

In Reeves, the Second Circuit concluded a condition that required the defendant to notify the probation department " 'when he establishes a significant romantic relationship' " was unconstitutionally vague. Reeves, 591 F.3d at 80-83.[5]

> What makes a relationship "romantic," let alone "significant" in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be "significant."

Reeves, 591 F.3d at 81.

Use of the term "dating relationship" is easily distinguishable from the condition in Reeves. The requirement to report a "dating relationship" does not contain highly subjective qualifiers like "significant" and "romantic." A "date" is commonly defined as "an appointment between two persons" for "the mutual enjoyment of some form of social activity," "an occasion (as an evening) of social activity arranged in advance between two persons." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 576 (2002).[6] We conclude the condition is neither unconstitutionally vague nor subject to arbitrary enforcement.

Norris also contends Special Sex Offense Condition 18 is unconstitutionally vague. Condition 18 states, "Do not enter any parks/

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[5] Emphasis added.

[6] We note the legislature defined "dating relationship" in the context of domestic relations to mean "a social relationship of a romantic nature." RCW 26.50.010(2).

playgrounds/schools and or any places where minors congregate." Citing State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015), the State concedes the portion of the condition that prohibits Norris from entering "any places where minors congregate" is unconstitutionally void for vagueness. We accept the State's concession.

In Irwin, we addressed a community custody condition that prohibited the defendant from frequenting " 'areas where minor children are known to congregate, as defined by the supervising CCO.' " Irwin, 191 Wn. App. at 650-55. We held that "[w]ithout some clarifying language or an illustrative list of prohibited locations," the condition "does not give ordinary people sufficient notice to 'understand what conduct is proscribed.' " Irwin, 191 Wn. App. at 655[7] (quoting Bahl, 164 Wn.2d at 753). Because the condition was subject to definition by the CCO, the court also concluded that "it would leave the condition vulnerable to arbitrary enforcement." Irwin, 191 Wn. App. at 655.

At oral argument, Norris' attorney conceded, and we agree, that the imposition of a condition that deletes "and or any places" and states, "Do not enter any parks/playgrounds/schools where minors congregate" gives notice to ordinary persons of what is prohibited and is not unconstitutionally vague.[8] We hold the imposition of a condition that states, "Do not enter any parks, playgrounds, or schools where minors congregate" is not unconstitutionally vague or void for vagueness.

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[7] Internal quotation marks omitted.

[8] Wash. Court of Appeals oral argument, State v. Norris, No. 75258-8-I (Sept. 27, 2017), at 1 min., 40 sec. through 2 min., 48 sec. (on file with court).

(2) Crime-Related Conditions

Norris contends the community custody conditions that impose a curfew, prohibit her from entering sex-related businesses, and prohibit her from possessing, using, or accessing sexually explicit material are not crime-related and must be stricken.[9]

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW; specifically, former RCW 9.94A.505(8) (LAWS OF 2009, ch. 389, § 1) and RCW 9.94A.703(3)(f), authorize the court to order a defendant to comply with crime-related prohibitions while on community custody. Former RCW 9.94A.505(8) states:

> As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.[10]

RCW 9.94A.703(3)(f) states, "As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." The SRA defines a "crime-related prohibition," in pertinent part, as an "order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

Community custody conditions are "usually upheld if reasonably crime related." Warren, 165 Wn.2d at 32; see also State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (there must be a factual basis for concluding the

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[9] The court applies the statute in effect when the offense was committed. State v. Munoz-Rivera, 190 Wn. App. 870, 891 n.3 & n.4, 361 P.3d 182 (2015).

[10] The current version of the statute uses the same language and states, in pertinent part, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." RCW 9.94A.505(9).

sentence condition is crime-related) (citing DAVID BOERNER, SENTENCING IN WASHINGTON § 4.5 (1985)). "[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender," the appropriate standard of review is abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

Curfew Condition

Special Sex Offense Condition 7 states:

> Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours.

The State concedes that the curfew condition is not crime-related and must be stricken. We accept the concession of error.

Sex-Related Businesses Condition

Special Sex Offense Condition 10 states:

> Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.

Norris contends condition 10 is not crime-related. The State cites State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016), to argue the nature of the crime alone justifies imposition of condition 10 as crime-related. In Magana, Division Three held that because the defendant was convicted of "a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." Magana, 197 Wn. App. at 201. To the extent Magana stands for either a categorical approach

or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree. As previously noted, there must be some evidence supporting a nexus between the crime and the condition. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition prohibiting defendant's Internet use after finding "no evidence" defendant "accessed the Internet before the rape" or "Internet use contributed in any way to the crime"); State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) (State conceded, and we agreed, conditions prohibiting a sex offender from possessing sexually explicit material and frequenting establishments selling such materials were not crime-related "because no evidence suggested that such materials were related to or contributed to his crime.").

In support of a categorical approach, the State submitted Paul J. Wright, et al., A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies, 66 J. Comm., 183 (2015); and Drew A. Kingston, et al., Pornography Use and Sexual Aggression: The impact of frequency and type of pornography use on recidivism among sexual offenders, 34 Aggressive Behavior, 341 (2008), as additional authority. RAP 10.8 allows parties to file additional case law authority, not additional evidence. Further, public policy decisions are the prerogative of the legislature, not the courts. John Doe A v. Wash. State Patrol, 185 Wn.2d 363, 384, 374 P.3d 63 (2016); State v. Costich, 152 Wn.2d 463, 479, 98 P.3d 795 (2004).

Because there is no evidence in the record showing that frequenting sex-related businesses is reasonably related to the circumstances of the crime, the trial court must strike Special Sex Offense Condition 10.

Sexually Explicit Materials Condition

Norris challenges Special Sex Offense Condition 11. Condition 11 states:

> Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

Norris claims condition 11 is not crime-related. We disagree. So long as there is some evidence that the offense and the challenged condition are "reasonably" related, the condition should be upheld. Kinzle, 181 Wn. App. at 785.

Norris stipulated the court could consider the certification of determination of probable cause as real facts at sentencing. The certification establishes Norris and the 13-year-old boy had a code for sex, exchanged sex-related text messages, and Norris sent the boy "a photo of herself in pants and a bra."

We conclude the prohibition on possessing, using, accessing, or viewing sexually explicit or erotic materials is "reasonably" related to her offense. See Irwin, 191 Wn. App. at 657-59 (where defendant took and stored pornographic images as part of his act of molesting underage females, condition prohibiting possession of or access to computers was reasonably related to child molestation convictions).

Use of Alcohol Condition

Norris challenges Special Sex Offense Condition 12. Condition 12 states, "Do not use or consume alcohol."[11]

Norris concedes former RCW 9.94A.703(3)(e) (LAWS OF 2009, ch. 214, § 3) authorizes the court to impose a condition that prohibits offenders "from consuming alcohol," regardless of whether alcohol contributed to the offense.[12] See State v. Jones, 118 Wn. App. 199, 206-07, 76 P.3d 258 (2003) (analyzing the similar language of former RCW 9.94A.120(8)(c)(iv) (LAWS OF 1988, ch. 153, § 2), "offender shall not consume alcohol").

But Norris contends the court did not have the authority to prohibit her from the "use" of alcohol. Norris asserts there is no evidence that use of alcohol is crime-related. The State disagrees, arguing that although redundant and unnecessary, "consume" and "use" are synonymous. We disagree with the State.

"Use" of alcohol is different from the consumption of alcohol. Because former RCW 9.94A.703(3)(e) authorizes the imposition of a condition only on "consuming alcohol," on remand, the court shall strike the words "use or" from condition 12.

Appellate Costs

The State has not requested costs on appeal. However, Norris asks us to deny appellate costs if the State claims it is entitled to costs as the substantially

[11] Emphasis added.

[12] In 2015, the legislature amended RCW 9.94A.703(3)(e) to state, "Refrain from possessing or consuming alcohol." LAWS OF 2015, ch. 81, § 3 (emphasis in original).

prevailing party. Appellate costs are generally awarded to the substantially prevailing party. RAP 14.2. However, where a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2. Under RAP 14.2, the State may file a motion for costs with the commissioner if financial circumstances have significantly improved since the finding of indigency. State v. St. Clare, 198 Wn. App. 371, 382, 393 P.3d 836 (2017).

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

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