Supreme Court No. 97147-1
Court of Appeals No. 35680-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SCOTT ALEXIS CASIMIRO,
Defendant/Appellant/Petitioner.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Samuel P. Swanberg, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER/DECISION BELOW

Scott Alexis Casimiro requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in *State v. Casimiro*, No. 35680-9-III, filed April 2, 2019. A copy of the opinion is attached as Appendix A.

II. ISSUES PRESENTED FOR REVIEW

1. Division Three's use of waiver and/or invited error in its declination to consider whether sentencing conditions are invalid as not being crime-related is in conflict with reported decisions of this Court and the Court of Appeals.

2. A sentencing court exceeds its statutory authority and/or abuses its discretion by imposing certain conditions of community custody that are not crime-related and/or are unconstitutionally vague.

III. STATEMENT OF THE CASE

The State charged Casimiro with second degree rape of a child. CP 4. Casimiro pleaded guilty as charged. 7/11/2017 RP 5. In his statement on plea of guilty, Casimiro stated that, "I engaged in sexual intercourse with a person who was 13 years old while I was more than 36 months older than her. We were not married. This happened in Franklin County, Washington on or about 12/25/2016." CP 18.

The State recommended a standard range sentence of 78 months. CP 15. Casimiro requested a Special Sex Offender Sentencing Alternative (SSOSA) sentence. 7/11/2017 RP 8–9. The State did not object to Casimiro's request. CP 15; 7/11/2017 RP *passim*.

The court considered but denied Casimiro's request for a SSOSA sentence. 7/11/2017 RP 11–13. The court imposed an indeterminate sentence of a minimum term of 78 months to life. CP 56. That term was followed by community custody for up to life. CP 57; 10/17/2017 RP 14.

The court imposed community custody conditions in both the judgment and sentence and Appendix F to the judgment and sentence. CP 58 (judgment and sentence); CP 65–67 (Appendix F).

Casimiro appealed, challenging among other things various sentencing conditions imposed by the court. CP 68–69; Brief of Appellant ("BOA") at pages. 4–41. At sentencing, the following colloquy took place:

> THE COURT: [Defense counsel], have you had a chance to look through the crime-related prohibitions on the Appendix F?
>
> [DEFENSE COUNSEL]: No, Your Honor.
>
> THE COURT: Just want to know whether or not you were – I'm not saying you should, I'm saying whether or not you or your client are objecting to any of those conditions as a part of the community custody in this matter.

> [DEFENSE COUNSEL]: We are not objecting. These I've seen before. We are not objecting to these, Your Honor.

10/17/2017 RP 15.

In a published opinion, Division Three of the Court of Appeals opted not to consider any specific arguments Casimiro made that certain sentencing conditions were invalid as not being crime-related, summarily stating that, "[Casimiro] had the opportunity to raise that contention in the trial court and, instead, agreed to the conditions." *Slip Op.* at 3 (citing no direct authority). Correctly observing "[w]hether a sentence condition is related to the circumstances of a crime is an inherently factual question," Division Three incorrectly maintained, "The [Pre-Sentence Investigation report] is not part of our record, which is a further reason we decline to consider the factually based challenges." *Id.* at footnote 3. Oddly, in the Facts section of the opinion, Division Three apparently had access to the pre-sentence report after all, because it noted that the "PSI documents a history of drug and alcohol abuse by Mr. Casimiro." *Slip Op.* at 1. This report is found in the Clerk's Papers at pages 22–37.

Division Three considered constitutional vagueness challenges "and summarily addressed several of the challenged conditions" on that

basis, stating that "those not addressed are affirmed without discussion." *Slip Op.* at page 4.

IV. ARGUMENT IN SUPPORT OF REVIEW

1. This Court should grant review to determine whether Division Three's use of waiver and/or invited error in its declination to consider whether sentencing conditions are invalid as not being crime-related is in conflict with reported decisions of this Court and the Court of Appeals.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P .3d 258 (2003). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. *State v. Sanchez Valencia*, 169 Wn.2d 782, 786–90, 239 P.3d 1059 (2010). Pre-enforcement constitutional challenges to sentencing conditions are ripe for review "'if the issues raised are primarily legal, do not require further factual development, and the challenged action is final."' *Id.* at 786 (quoting *Bahl*, 164 Wn.2d at 751).

A sentencing court lacks authority to impose a community custody condition unless it is authorized by the legislature. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050

(2009). Any condition imposed in excess of a court's statutory authority is void. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

Under RCW 9.94A.703(3)(f), the trial court is authorized to require an offender to "[c]omply with any crime-related prohibitions." "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct." RCW 9.94A.030(13). Directly related community custody conditions must be "reasonably crime-related" to the underlying offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870, *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014).

Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). Conditions that do not

reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones,* 118 Wn .App. at 207–08.

The court has the power to impose sentences only as provided in the SRA. RCW 9.94A.505(1). Division Three's use of waiver and/or invited error in its declination to consider whether sentencing conditions are invalid as not being crime-related is in conflict with the above-noted decisions of this Court and reported decisions of the Court of Appeals. Review is warranted under RAP 13.4(b)(1) and (2).

2. This Court should grant review because the following sentencing conditions are constitutionally infirm, and Division Three erroneously either found they met constitutional muster or did not address them and affirmed without discussion.

a. Condition 13 of Appendix F relates to dangerous weapons, and states:

> Do not own, use or possess any dangerous weapons to include, bow and arrows, hunting knives.

CP 66. Division Three stated it "[does] not believe the term "dangerous weapon" is vague given the illustrative list provided. *Cf.*, [*State v.*] *Johnson*, 4 Wn. App. 2d [352,] 360[, 421 P.3d 969 (2018)] (illustrative list

of conditions provided sufficient guidance to ascertain meaning).” *Slip Op.* at 4–5.

Under Wash. Const. art. I § 3 and U.S. Const., Fourteenth Amendment, “a statute is void for vagueness if its terms are ‘so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.’” *State v. Worrell*, 111 Wn.2d 537, 540, 761 P.2d 56 (1988), *quoting Myrick v. Board of Pierce Cy. Comm’rs*, 102 Wn.2d 698, 707, 677 P.2d 140 (1984). This rule applies equally to conditions of community custody which have the effect of a criminal statute in that their violation can result in a new term of incarceration. *State v. Simpson*, 136 Wn. App. 812, 150 P.3d 1167 (2007).

The test for vagueness rests on two key requirements: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 752–753. “A sentencing condition is not a law enacted by the legislature, however, and does not have the same presumption of validity. Instead, imposing conditions of community custody is within the discretion of the sentencing court and *will be* reversed if manifestly unreasonable.” *Bahl*, 164 Wn.2d at 753 (emphasis added), *citing State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Imposition of an

unconstitutional condition would, of course, be manifestly unreasonable. *Bahl*, 164 Wn.2d at 753.

In *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005), a condition of community placement that prohibited the defendant from possessing or perusing pornography without approval from his probation officer was unconstitutionally vague, in large part because Sansone had to show the material to the probation officer just to get a determination if the material was pornographic. In *State v. Bahl*, *supra*, a similar condition was found unconstitutionally vague where statutory definitions of "lewd matter", "obscene matter," and "obscenity" were insufficient to provide adequate notice of the meaning of "pornography." *Bahl*, 164 Wn.2d at 757.

Here, as in *Sansone* and *Bahl*, there is no concrete definition of the term "dangerous weapon." Chapter 9.41 RCW is titled "Firearms and Dangerous Weapons." RCW 9.41.230(1)(c) prohibits setting a trap using a "spring pistol, rifle, or other dangerous weapon." RCW 9.41.280(1)(a) and (b) prohibit bringing onto school grounds a firearm or "any other dangerous weapon as defined in RCW 9.41.250." RCW 9.41.250 does not actually define "dangerous weapon", but prohibits with certain exceptions the manufacture, sale, disposition, possession of:

> [W]eapon[s] of the kind usually known as slung shot, sand club, or metal knuckles, or spring blade knife;

RCW 9.41.250(1)(a). The statute defines "spring blade knife" as:

> [A]ny knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. …

and further prohibits the "furtive carrying with intent to conceal" of:

> [A]ny dagger, dirk, pistol, or other dangerous weapon; …

RCW 9.41.250(1)(b).

These statutory examples of "dangerous weapons" do not make the term "dangerous weapon" any less vague as it applies to Casimiro possessing a dangerous weapon. May he legally possess a kitchen knife, a tire iron, an ice pick, a screwdriver or any other common household item? Or, is he only in violation if he uses any of the above items in a manner likely to produce harm or death? As in *Sansone* and *Bahl*, an ordinary person cannot tell what conduct is prohibited, thus leaving the way for arbitrary enforcement. The condition prohibiting possession of "any dangerous weapons" is constitutionally vague. The imposition of an unconstitutional condition is manifestly unreasonable, and therefore the condition must be stricken. *Bahl*, 164 Wn.2d at 753, 757.

b. Pre-printed and checked box in Judgment and Sentence

regarding conditions ordered by Department of Correction. The judgment and sentence requires that Casimiro:

> [A]bide by any additional conditions imposed by Department of Corrections order. RCW 9.94A.704 and .706.

CP 57, paragraph 4.6 at pre-printed Condition (10). It also requires that Casimiro:

> Comply with any and all conditions as ordered by the Department of Corrections.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition. Because Division Three did not address this argument, it was affirmed by default.

These two conditions appear to be in conflict with each other. The first condition is limited to additional conditions imposed pursuant to RCW 9.94A.704 (general) and .706 (firearms). The second condition is not limited in any manner.

The second condition "does not place any limits on the ability of" Casimiro's CCO to designate additional mandatory obligations. *State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). In *Magana*, the Court struck a community custody condition barring the defendant from going to "parks, schools, malls, family missions or establishments where children are known to congregate or other areas defined by supervising

CCO." *Id*.at 200–201. This condition was fatally flawed because it "affords too much discretion" to the assigned CCO and is "susceptible to arbitrary enforcement." *Id*. Similar to the condition stricken in *Magana*, the second condition here enables an individual CCO to direct Casimiro to do any particular thing the CCO demands and makes it a violation of community custody should he fail to adequately comply. CP 59. It is not limited to complying with the conditions listed in the judgment and sentence. CP 58. This "boundless" requirement that Casimiro comply with unnamed "conditions as ordered" by a CCO is impermissibly vague. The second condition should be stricken. *Magana*, 197 Wn. App. at 201.

3. This Court should also grant review because the following sentencing conditions are not crime-related and are therefore invalid, and Division Three erred in refusing to address the arguments.

a. Condition 13 of Appendix F relates to dangerous weapons, and states:

> Do not own, use or possess any dangerous weapons to include, bow and arrows, hunting knives.

CP 66. Division Three observed that "Mr. Casimiro may well have had a strong crime-relatedness challenge to this provision, based on what little of the record is before us." *Slip Op.* at 4. Because Division Three did not

address the argument whether it was crime-related, this condition was affirmed by default.

This condition is invalid because there is no evidence that any weapons, much less "dangerous weapons," played a part in Casimiro's crime. *See* Pre-Sentence Investigation Report at CP 22–37 (the circumstances of the crime disclosed in the report do not include use of any weapons, and no reason is given for why the community Corrections Officer requested the special condition); *see also* RCW 9.94A.703(3)(f) (court in its discretion may impose a crime-related prohibition). As noted in the Facts section above, Division Three inconsistently claimed it had access to the PSI for documenting Mr. Casimiro's alleged history but had no access to it for addressing his factually-based arguments regarding crime-related conditions.

Furthermore, prohibiting possession of a "dangerous weapon" is not one of the conditions that a court may impose at its discretion, such as prohibiting the consumption of alcohol. *See* RCW 9.94A.703(3)(e). While the court has the authority to prevent him from possessing firearms, it does not have the authority to prevent Mr. Casimiro from possessing deadly weapons, particularly where there is no evidence that his crime was related to such weapons. *See State v. Combs*, 102 Wn. App. 949, 954, 10 P.3d

1101 (2000) (no sentencing provision allows court to prohibit the use or possession of weapon other than firearm). Since this condition is invalid on the grounds of being unrelated to Casimiro's crime, it must be stricken.

b. Pre-printed condition in Judgment and Sentence: Association with drug users or dealers or being in high drug use areas.

The judgment and sentence requires that Casimiro:

> Shall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition. Because Division Three did not address the argument whether it was crime-related, the condition was affirmed by default. This condition is not authorized by statute because it is not crime-related and the condition should be stricken.

RCW 9.94A.703(3)(b) provides a court may in its discretion order an offender to "refrain from direct or indirect contact with the victim of the crime or a specified class of individuals." When ordering an offender to have no contact with a "specified class of individuals", the specified class must bear some relationship to the crime. *State v. Riles*, 135 Wn.2d 326, 350, 957 P2d 655 (1998), *abrogated on other grounds by State v. Sanchez-Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010); *cf. State v.*

Llamas–Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) ("[s]ince associating with individuals who use, possess, or deal with controlled substances is conduct intrinsic to the crime for which Llamas was convicted, it is directly related to the circumstances of the crime.").

In *Munoz-Rivera*, this Court struck an identical condition. It agreed with the reasoning set forth in the preceding paragraph and additionally stated:

> Furthermore, it is not illegal to associate with drug users or dealers or to be in high drug use areas. Therefore, because this condition is not sufficiently crime related in this case, in which there is no evidence of drug use, it must also be stricken.

190 Wn. App. 870, 893, 361 P.3d 182 (2015).

There was no evidence of associating with drug users or dealers or being in a high drug use area in the commission of Casimiro's offense, which took place in the house where the victim was staying with relatives. CP 22–23. The condition must be stricken because it is not crime-related. *Munoz-Rivera,* 190 Wn. App. at 893.

c. Pre-printed condition in Judgment and Sentence: Vehicles owned or regularly driven by Casimiro.

The judgment and sentence requires that Casimiro:

> Notify the community corrections officer of any vehicles owned or regularly driven by defendant.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition. Because Division Three did not address the argument whether it was crime-related, the condition was affirmed by default.

In *State v. Weatherwax,* the Court struck an identical condition. In that consolidated case, co-defendants Weatherwax and Rodgers successfully obtained reversal of drive-by shooting convictions. The court determined the challenged condition was therefore not-crime-related and must be stricken, stating:

> With the reversal of the drive-by shooting convictions, the requirement and Mr. Rodgers keep his CCO [community corrections officer] informed of vehicles owned or regularly driven does not relate directly to the circumstances of his remaining convictions. The condition should be excluded when Mr. Rodgers is resentenced.

193 Wn. App. 667, noted in unpublished portion at paragraph 68[1], 376 P.3d 1150 (2016), *reversed on other grounds, State v. Weatherwax*, 188 Wn.2d 139, 392 P.3d 1054 (2017).

Here there was no evidence of use of a vehicle in the commission of Casimiro's offense. This condition is not authorized by statute because it is not crime-related. The condition should be stricken.

d. Pre-printed condition in Judgment and Sentence and Condition 7 of Appendix 7: Use of alcohol. The judgment and sentence requires that:

Defendant shall not consume any alcohol.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition.

Condition 7 of Appendix F orders Casimiro to:

[N]ot use, consume or possess any alcohol.

CP 65. Because Division Three did not address the argument whether it was crime-related, the condition was affirmed by default.

The court had authority to prohibit consumption and possession of alcohol, but lacked authority to prohibit Casimiro from using alcohol. The "use" aspect of the condition is not crime-related and should be stricken from the judgment and sentence.

Under RCW 9.94A.703(3)(e), a sentencing court may order an offender to refrain from consuming or possessing alcohol. Such a condition is authorized regardless of whether alcohol contributed to the offense. *Jones*, 118 Wn. App. at 207. But the only possible statutory authority for the prohibition on "use" of alcohol is RCW 9.94A.703(3)(f), which authorizes the court to impose crime-related prohibitions. There is no evidence that Casimiro "used" alcohol in connection with the events forming the basis for conviction.

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[1] Pursuant to GR 14.1(a), Casimiro cites this unpublished portion of the case as nonbinding authority but asks that the portion be accorded significant persuasive value.

"Use" of alcohol is different from the consumption of alcohol. *State v. Norris*, 1 Wn. App. 87, 404 P.3d 83, 90 (Wash. Ct. App. 2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 12 (2018), and *aff'd in part, rev'd in part sub nom. State v. Nguyen*, 191 Wn. 2d 671, 425 P.3d 847 (2018). There are many ways to use alcohol that do not involve consuming it, from sterilizing cuts to killing snails in the garden to getting the food odor out of a wooden cutting board. Because RCW 9.94A.703(3)(f) authorizes the imposition of a condition only on "consuming alcohol," the "use" aspect of the condition should be stricken because it is not crime-related. *See State v. Nease*, noted at 189 Wn. App. 1048, 2015 WL 5139088 at *12 (2015) (unpublished) (for condition that ordered "do not use/possess/consume alcohol," holding the "use" aspect of the condition was invalid because it was not crime-related).[2]

e. Pre-printed condition in Judgment and Sentence: Loitering for the purpose of engaging in drug-related activity. The Judgment and Sentence requires that Casimiro:

> Shall not unlawfully possess or deliver or use or introduce into his/her body without a valid prescription for its use, any controlled substances or legend drug, *and shall not possess or use drug paraphernalia or commit the offense of loitering for the purpose of engaging in drug related activity*.

[2] Pursuant to GR 14.1(a), Casimiro cites this unpublished portion of the case as nonbinding authority but asks that the portion be accorded significant persuasive value.

CP 58, paragraph 4.6, box checked as imposing the pre-printed condition (emphasis added). Division Three addressed only the "possess or use drug paraphernalia" argument, which petitioner does not challenge. *Slip Op.* at 5; *see BOA* at pages 24–27. However, as argued below by petitioner, the prohibition against loitering for the purpose of engaging in drug-related activity is not authorized by statute because it is not crime-related, and should be stricken.

Under the Sentencing Reform Act, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. RCW 9.94A.703. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(e) specifically permits the court to order a defendant not to consume alcohol. RCW 9.94A.703(2)(c) directs the court to order the defendant to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions" unless the condition is waived. Under RCW 9.94A.703(3)(f), the sentencing court may also order the defendant to "comply with any crime-related prohibitions."

A "crime-related prohibition" is "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); *State v. Motter*, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), *overruled on other grounds*, *State v. Sanchez Valencia*, 169 Wn.2d 782, 785, 239 P.3d 1059 (2010). Such a prohibition must be supported by evidence showing the factual relationship between such prohibition and the crime being punished. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989); *see Motter*, 139 Wn. App. at 801 (substantial evidence must support that the prohibition is crime-related).

Here, there was no evidence that "loitering for the purpose of engaging in drug- related activity" played any role in Casimiro's offense. By its nature, a crime-related prohibition must be specific to the offense. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008); *Parramore*, 53 Wn. App. at 531; *cf. Motter*, 139 Wn. App. at 803–04 (prohibition on drug paraphernalia upheld where crime related to offender's substance abuse). "'For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime related requirement out of

the statute.'" *Parramore*, 53 Wn. App. at 531 (quoting David Boerner, Sentencing in Washington § 4.5 (1985)).

In *State v. Munoz-Rivera*—which like Casimiro's case originated out of Franklin County—this Court struck an identical condition. It stated:

> The State presented no evidence that possession or use of drug paraphernalia or loitering for the purpose of engaging in drug-related activity was in any way related to the crimes for which he was convicted. … Therefore, th[is] condition[] must be stricken.

190 Wn. App. at 892. The condition prohibiting Casimiro from loitering for the purpose of engaging in drug related activity must be stricken because it is not crime-related. *Id.*; *O'Cain*, 144 Wn. App. at 775.

V. CONCLUSION

For the reasons provided, this Court should grant review.

Respectfully submitted on May 2, 2019.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 2, 2019, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of appellant's petition for review and Appendix A:

Scott A. Casimiro (#400841)
Airway Heights Corrections Center
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Shawn P. Sant/Teresa Chen
Franklin County Prosecutor's Office

_____
s/Susan Marie Gasch, WSBA #16485

APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. SCOTT ALEXIS CASIMIRO, Appellant.	)	No. 35680-9-III PUBLISHED OPINION

KORSMO, J. — Scott Casimiro appeals various sentencing conditions imposed following his guilty plea to second degree child rape. We primarily affirm, although we remand for the trial court to modify three conditions.

FACTS

Mr. Casimiro entered his plea and sought a special sexual offender sentencing alternative sentence (SSOSA). An evaluation was obtained and a presentence interview (PSI) was conducted by the Department of Corrections. The PSI documented a history of drug and alcohol abuse by Mr. Casimiro.

The trial court declined to impose the SSOSA sentence and imposed an indeterminate sentence pursuant to RCW 9.94A.507, followed by community custody for the rest of his life. Clerk's Papers (CP) at 56-57. Part of that sentence includes 28

conditions of community custody found in Appendix F to the judgment. CP at 65-67. When asked if he objected to any conditions found in Appendix F, defense counsel took a moment to review the appendix, indicated he was familiar with the conditions, and advised the court that "we are not objecting to these." Report of Proceedings at 15.

Mr. Casimiro then timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

This appeal raises numerous challenges to the conditions of community custody, the time for reporting upon release, and one of his financial obligations. We address the arguments in that order.

Community Custody Conditions

Mr. Casimiro takes a scattershot approach, arguing that 11 of the conditions are either not crime-related or are vague, despite telling the trial judge that he had no objection to those conditions. Given the circumstances, we will take limited review of his arguments.[1]

Appellate review normally does not extend to arguments not raised in the trial court. RAP 2.5(a). Courts, however, have discretionary authority to consider issues of

[1] He also asks that a scrivener's error in the footer section of the judgment and sentence that identifies a different person as the offender be corrected. We trust the court will correct this problem on remand.

manifest constitutional error that were not raised in the trial court, provided that an adequate record exists to consider the claim. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Washington courts also will consider some sentencing errors that are raised for the first time on appeal, including some claims challenging conditions of community custody. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). But, courts need not consider claims of constitutional error that were invited or waived. *E.g.*, *State v. Studd*, 137 Wn.2d 533, 545-49, 973 P.2d 1049 (1999) (invited error); *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995) (waived).

Whether a sentence condition is related to the circumstances of a crime is an inherently factual question.[2] Given Mr. Casimiro's agreement to the conditions, there was no reason for the trial court or the parties to explain the relationship between the crime and the subsequent conditions.[3] For that reason, we decline to consider Mr. Casimiro's arguments that some conditions are not crime-related. He had the opportunity to raise that contention in the trial court and, instead, agreed to the conditions.

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[2] Determining whether a relationship exists between the crime and the condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore*, 53 Wn. App. 527, 530, 768 P.2d 530 (1989). Thus, we review sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

[3] The PSI also is not part of our record, which is a further reason we decline to consider the factually based challenges.

We will, however, consider contentions that solely present questions of law. *Bahl*, 164 Wn.2d at 744. Some of the conditions Mr. Casimiro challenges also have been the subject of recent litigation. Accordingly, we will summarily address several of the challenged conditions; those not addressed are affirmed without discussion.

The bulk of Mr. Casimiro's remaining legal challenges involve vagueness concerns for several of the community custody conditions. A provision is unconstitutionally vague if either a reasonable person would not understand what conduct is prohibited or if it lacks ascertainable standards that prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

The parties agree that condition 19, limiting Mr. Casimiro from frequenting places that cater to children, is invalid. We recently discussed this condition in *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969 (2018). We remand for the court to reconsider this condition in light of *Johnson*.

Mr. Casimiro challenges conditions 20 and 21 that prohibit him from possessing sexually explicit material and frequenting X-rated movies or adult book stores. These conditions are valid. *State v. Nguyen*, 191 Wn.2d 671, 679-81, 425 P.3d 847 (2018).

The next challenge is to condition 13, a provision that prohibits Mr. Casimiro from owning or possessing dangerous weapons such as hunting knives or a bow and arrow. Mr. Casimiro may well have had a strong crime-relatedness challenge to this provision, based on what little of the record is before us. Nonetheless, his vagueness challenge is the only issue before us and we do not believe the term "dangerous weapon" is vague

given the illustrative list provided. *Cf.*, *Johnson*, 4 Wn. App. 2d at 360 (illustrative list of conditions provided sufficient guidance to ascertain meaning).

Condition 5 prohibits possession of "paraphernalia for the use of controlled substances." This condition is not vague. A condition prohibiting possession of "paraphernalia" was found vague in *Bahl* because it did not reference controlled substances. 164 Wn.2d at 752. Unlike that condition, this provision does qualify paraphernalia by defining it in terms of use for controlled substances. As phrased, this condition satisfies *Bahl*.

Condition 22 requires Mr. Casimiro to notify the corrections officer and sex offender treatment therapist "of any romantic or sexual relationship" in order to assure no children might be endangered. The term "romantic" was questioned in *Nguyen*. 191 Wn.2d at 682-83. We agree that the term is "highly subjective" and problematic. *Id.* at 683. We remand with directions to strike "romantic" from this condition, and suggest that the court consider whether to substitute "dating relationship" instead. *Id.* at 681-83.

Mr. Casimiro also challenges conditions 26 and 27 that require he notify employers and landlords about his sexual criminal history. These conditions are authorized by RCW 9.94A.703(2)(b) and (3)(d), and, therefore, are within the power of the trial court to order.

The final provision we consider is a vagueness challenge to condition 23 that requires Mr. Casimiro to obtain approval from his corrections officer before engaging in

volunteer, church, and travel activities. While we believe that a reasonable person would understand this provision, it does not provide the corrections department ascertainable standards to guide its enforcement of the provision. Presumably, the court was concerned about the defendant's access to children similar to the thrust of condition 19. We thus reverse condition 23 without prejudice to the trial court's ability to substitute a similar provision that advises the department of the permissible scope of its oversight in this area.

In sum, we remand conditions 19, 22, and 23 for further consideration in light of this opinion. The remaining conditions are affirmed.

Notification Provision

Mr. Casimiro also challenges the sentence notification provision advising him to report to the county sheriff within 24 hours of his release from custody. CP at 59. He correctly notes that the statute gives him 72 hours to report to the sheriff, but only 24 hours to report to the department of corrections upon his release. RCW 9A.44.130(4)(a).

We question how this provision harms Mr. Casimiro since no charges could be filed except in compliance with the statute and this notification provision imposes no obligation on him. Nonetheless, since we are remanding for other reasons, the last sentence of section 1 of paragraph 5.6 should be modified to reflect that reporting to the sheriff need only occur with 72 hours, while reporting to the corrections department must occur within 24 hours.

Financial Concerns

Lastly, Mr. Casimiro challenges the imposition of the filing fee against him in light of his indigency and requests that we not impose appeal costs.

A decision released after the sentencing in this case determined that statutory changes to legal financial obligation assessments apply retroactively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018). As a result, indigent offenders need not pay the criminal filing fee. Since Mr. Casimiro is indigent, we direct that the trial court strike that assessment.

He also asks that we disallow costs on appeal due to his indigency. By the terms of RAP 14.2 and our General Order of February 19, 2019, we leave that issue to our commissioner in the event that the State seeks costs in this court.

Remanded for further consideration in accordance with this opinion.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, C.J.

GASCH LAW OFFICE

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