68349-7

68349-7

COA NO. 68349-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHANNON TRAYLOR

Appellant.

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

The Honorable Ronald L. Castleberry, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT IN REPLY

1. THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM ENTERING "ESTABLISHMENTS WHERE ALCOHOL IS THE CHIEF COMMODITY FOR SALE" IS UNCONSTITUTIONALLY VAGUE.

A sentencing condition is unconstitutionally vague if it does not (1) define the offense 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. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

The State, however, claims a community custody condition is not unconstitutionally vague unless it is vague in all its applications. Brief of Respondent (BOR) at 3. That is not the law.

The State's misunderstanding stems from its misreading of Bahl. It cites a footnote in Bahl for the proposition that "[u]nless a law implicates constitutional rights, 'a facial vagueness challenge can succeed only if *the statute* is impermissibly vague in all of its applications.'" BOR at 3 (citing Bahl, 164 Wn.2d at 745 n.2) (emphasis added). That rules applies when a *statute* is challenged on vagueness grounds. Bahl, 164 Wn.2d at 745 n.2. It does not apply to pre-enforcement challenges to *sentencing conditions*.

The Court of Appeals in Bahl had relied on the rule applicable to statutory challenges as the basis for refusing to address the merits of pre-

enforcement challenges to sentencing conditions. Id. at 745. The Supreme Court rejected that position, holding the pre-enforcement challenges to sentencing conditions were ripe for review. Id. at 745, 749-51. Argument regarding the ability to bring a facial vagueness claim is misplaced in the context of a challenge to sentencing conditions that apply uniquely to an individual defendant, who clearly has standing to challenge them on the basis of claimed illegality. Id, at 750-51; accord State v. Sanchez Valencia, 169 Wn.2d 782, 786-88, 239 P.3d 1059 (2010).

Traylor has standing to raise his vagueness challenge. He does not need to demonstrate that the condition is vague in all applications. Bahl, 164 Wn.2d at 748-49 (citing United States v. Loy, 237 F.3d 251, 260-61 (3d Cir. 2001)). It is indisputable that some applications of a pornography or paraphernalia prohibition are not vague. Yet those prohibitions were struck down as unconstitutionally vague under the established two-part test. Bahl, 164 Wn.2d at 758; Sanchez Valencia, 169 Wn.2d at 795-95.

Traylor need only show the condition that prohibits him from frequenting "establishments where alcohol is the chief commodity for sale" does not (1) define the offense 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.

He has done so. See Brief of Appellant at 2-6. Indeed, the State concedes the prohibition at issue here is unconstitutionally vague when applied to someone frequenting a sports stadium because a person of ordinary intelligence would not understand the court's prohibition applied to that conduct. BOR at 4.

The State seeks to avoid the vagueness problem by pointing out the resulting sanction would be unconstitutional. BOR at 4. That misses the point. Pre-enforcement vagueness challenges are authorized precisely because they conserve judicial resources and help "prevent hardship on the defendant, who otherwise must wait until he or she is charged with violating the conditions of community custody, and likely arrested and jailed, before being able to challenge the conditions on this basis." Bahl, 164 at 751.

The State elsewhere maintains the condition here is not vague by comparing it to one of the conditions at issue in Bahl, which prohibited the defendant from frequenting "establishments whose primary business pertains to sexually explicit or erotic materials." BOR at 3; Bahl, 164 at 758.

The comparison fails. The restriction in Bahl applied to "adult bookstores, adult dance clubs, and the like." Bahl, 164 at 759. Sex establishments are obvious to everyone. One does not attend a Mariners

game at Safeco Field wondering whether sexually explicit or erotic materials are the primary item for sale. Nor does one frequent a restaurant, a supermarket or Costco wondering the same thing.

The same cannot be said of alcohol and whether it is the chief commodity for sale in such establishments. The challenged condition here does not provide Traylor with adequate notice as to what places he is prohibited from frequenting. Nor does it prevent arbitrary enforcement. The sentencing condition prohibiting Traylor from frequenting "establishments where alcohol is the chief commodity for sale" should be stricken as unconstitutionally vague. CP 17.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING TRAYLOR FROM POSSESSING DRUG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE.

The State claims the community custody condition prohibiting possession of "drug paraphernalia" is not unconstitutionally vague because the term is defined by statute. BOR at 5.[1]

[1] RCW 69.50.102(a) defines drug paraphernalia as "all equipment, products, and materials of any kind which are *used, intended for use, or designed for use* in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance." (emphasis added).

The judgment and sentence, however, fails to link the condition to the statutory definition. In State v. Moultrie, the defendant challenged the condition of his sentence prohibiting contact with "vulnerable, ill or disabled adults" as unconstitutionally vague. State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (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. Moultrie, 143 Wn. App. at 397.

This Court rejected the State's argument because the statutory definitions were more specific than the general terms used in the no contact condition: "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. The court remanded for the trial court to clarify what it meant by those terms. Id. at 398.

Similarly, the term "drug paraphernalia" in the judgment and sentence is not tied to its statutory definition. As in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on possession of drug paraphernalia to its statutory definition.

As in Moultrie, the sentencing condition is broader than the statutory definition. The condition here prohibits Traylor from *possessing* drug paraphernalia, whereas the statutory definition is limited to things that are *used, intended for use, or designed for use* in drug-related activities. RCW 69.50.102(a); see State v. Neeley, 113 Wn. App. 100, 107, 52 P.3d 539 (2002) (possession of drug paraphernalia by itself is not a crime; the crime requires an improper use).

The lack of a mens rea component for the prohibition on possession of drug paraphernalia supports Traylor's vagueness argument. The Supreme Court found the lack of a mens rea requirement to be significant in concluding the paraphernalia condition at issue there was vague. Sanchez Valencia, 169 Wn.2d at 794. Even Justice James Johnson, in his concurring opinion, recognized the need for such a requirement. Sanchez Valencia, 169 Wn.2d at 796 (J.M. Johnson, J., concurring) ("By inserting the word 'drug' into the prohibition (*and the appurtenant use, intent, and design requirements implied by the term*), due process would be satisfied.") (emphasis added).

In this regard, the State's citation to Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994) actually supports Traylor's argument. The federal drug paraphernalia statute defining the criminal offense avoided a vagueness problem in part

because it contained a scienter requirement: "[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." Posters, 511 U.S. at 526 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S. Ct. 1186, 1194, 71 L. Ed. 2d 362 (1982)). The prohibition on simple possession of drug paraphernalia, as written in Traylor's judgment and sentence, does not contain any mens rea requirement.

Moreover, Traylor was not convicted of a drug offense. The statutory definition of "drug paraphernalia" cannot be used to cure the vagueness problem for this additional reason. 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). Traylor was not convicted of violating the Uniform Controlled Substances Act (a VUCSA offense), so definition of the term "drug paraphernalia" in the Uniform Controlled Substances Act cannot defeat Traylor's vagueness challenge.

The Court in Bahl recognized the problem in declining to decide whether the statutory definition of "sexually explicit" alone would be

sufficient notice, given that Bahl was not convicted under that statute. Bahl, 164 Wn.2d at 760. Similarly, Justice James Johnson, in his concurring opinion 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 VUCSA offense. Sanchez Valencia, 169 Wn.2d at 796 n.1 (J.M. Johnson, J., concurring). Traylor was convicted of burglary. CP 58. No statutory definition of the term "drug paraphernalia" found in the drug offense statute dispels the vagueness problem.

It is also worth pointing out that the Court in Posters declined to address the possible application of the federal statute to a legitimate merchant that sold items with multiple uses because the defendant operated a full-scale "head shop," a business devoted substantially to the sale of products that clearly constituted drug paraphernalia. Posters, 511 U.S. at 526. The theoretical possibility that an entity could be prosecuted for something that did not clearly constitute drug paraphernalia only attained due process significance once the possibility ripened into an actual prosecution. Id.

In contrast, Traylor's pre-enforcement challenge to a community custody condition is ripe under Washington law. Sanchez Valencia, 169 Wn.2d at 787-89; Bahl, 164 Wn.2d at 751-52. The due process problem

presents itself now and is ready for review. Part of that review requires scrutiny of the problem associated with items that can be possessed for multiple reasons, including many innocent ones.

Finally, the State attempts to distinguish Sanchez Valencia on the ground that the vague condition at issue there was "any paraphernalia" as opposed to "drug paraphernalia." BOR at 6-7. The Supreme Court found the distinction significant in discussing the first prong of the vagueness test, i.e., whether the condition was defined with sufficient definiteness such that ordinary people can understand what conduct is prohibited. Sanchez Valencia, 169 Wn.2d at 794.

The slight difference in wording, however, is immaterial in considering whether the prohibition violates the second prong of the vagueness test: whether a condition provides ascertainable standards of guilt to protect against arbitrary enforcement. In that regard, the reasoning of Sanchez Valencia applies with as much force to the prohibition on "drug paraphernalia" in Traylor's case as it does to the prohibition on "any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances." Id. at 785, 794-95. In both cases, the condition leaves too much to the discretion of the individual community corrections officers tasked with enforcing it. Id. at 794-95. The condition prohibiting Traylor

from possessing drug paraphernalia is void for vagueness and should be stricken from the judgment and sentence.

B. CONCLUSION

For the reasons set forth in the opening brief and above, Traylor requests the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 14th day of February, 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
Respondent,	)	
v.	)	COA NO. 68349-7-I
SHANNON TRAYLOR,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF FEBRUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] SHANNON TRAYLOR
DOC NO. 977009
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF FEBRUARY 2013.

X Patrick Mayovsky