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Court of Appeals No. 68321-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VLADIK BYKOV,
Petitioner,

vs.

HONORABLE STEVEN ROSEN and CITY OF SEATTLE,
Respondents.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENTS

The Honorable Steven Rosen and the City of Seattle ask this court to deny review of the decision designated in Part B of this answer.

B. DECISION

The Court of Appeals decision, entered on August 12, 2013, affirmed the superior court order denying petitioner's petition for a writ of habeas corpus.

C. ISSUE PRESENTED FOR REVIEW

Does the Court of Appeals' unpublished decision upholding the trial court's now-expired probation condition involve a significant question of constitutional law or involve a substantial issue of public interest justifying review under RAP 13.4(b)(3) or (4)?

D. STATEMENT OF THE CASE

Petitioner was convicted of Harassment in Seattle Municipal Court based on sending an email to the victim. CP at 149. This email was sent by a computer. RP at 11. As the victim stated, "In that email, Mr. Bykov made an express threat that I am going to end

up like Rasputin. And he specifically mentioned a dagger." CP at 20. Petitioner also wrote "Mr. Fresonke, I am writing to you this email to warn you of the future. If something bad happens to you, always remember that you are responsible for it." CP at 47. Petitioner also sent to the victim an email with a photograph of his father and inquired how to get in contact with him. CP at 20. According to the victim, petitioner also has used the victim's name to open fraudulent email accounts. CP at 20.

One condition of petitioner's two-year suspended sentence, entered on November 3, 2011, was that he not use any device connected to the Internet. CP at 150. He sought a writ of habeas corpus, alleging a variety of claims, including that this Internet restriction was unconstitutional in that it hindered his ability to communicate with his counsel and conduct legal research. CP at 4-5, 13-14, 76 & 86-87; RP at 10-12. The superior court denied petitioner's request for relief, in pertinent part, as follows:

> 5. Inasmuch as the basis for petitioner's conviction was an email he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional. *See State v. Riley*, 121 Wn.2d 22, 36-

> 38, 846 P.2d 1365 (1993) (sentence condition imposed on defendant convicted of Computer Trespass prohibiting owning a computer or communicating with computer bulletin boards not unreasonable or unconstitutional). The constitutional rights of a convicted defendant are subject to reasonable restrictions to protect the public. *State v. Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000) (prohibition on using computer not unconstitutional). Petitioner's ability to use a telephone or mail to contact his lawyer and to use a law library for legal research is not impaired. Petitioner has ample and adequate substitutes for use of the internet.
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> CP at 155-56.

Petitioner appealed the denial of his request for relief, challenging only this Internet restriction. The Court of Appeals rejected petitioner's arguments that this internet prohibition was a prior restraint and that it was unconstitutional because it was not the least restrictive means of accomplishing the government's legitimate interest. Slip opinion, at 6-10. The court later denied petitioner's Motion for Reconsideration.

E. ARGUMENT

Petitioner has not established that this case involves a significant question of constitutional law or an issue of substantial public interest justifying review under RAP 13.4(b)(3) or (4).

Petitioner contends that review of the Court of Appeals decision is warranted under RAP 13.4(b)(3) and (4)[1] because use of the internet is ubiquitous in 21st century life as a means of expressing and receiving constitutionally protected speech. While petitioner may well have presented a constitutional issue and an issue of public interest, he has not shown that it is a *significant* constitutional issue or an issue of *substantial* public interest. The Court of Appeals' decision was an unpublished opinion so has no effect on anyone other than petitioner. Petitioner's two-year suspended sentence was imposed on November 3, 2011. His many motions to stay the sentence were denied by the trial court, the superior court and the

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[1] RAP 13.4(b) provides, in pertinent part:

Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

. . .

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Court of Appeals.[2] Petitioner did fail to appear for a hearing on May 8, 2012, but he was arrested on the bench warrant the same day so the probationary period was not tolled.[3] Petitioner's suspended sentence thus expired yesterday. Petitioner is no longer subject to this probation condition. The City has never alleged that he has violated this internet prohibition.

Petitioner does not contend that an internet prohibition is never permissible, only that it was improper based on the unique facts in this case. Whether such a restriction is improper in another

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[2] The superior court did at one point, however, stay the probation condition of obtaining a mental health evaluation. That stay was later lifted.

[3] *See* RCW 35.20.255(1) provides, in pertinent part:

Judges of the municipal court, in their discretion, shall have the power in all criminal proceedings within their jurisdiction including violations of city ordinances, to defer imposition of any sentence, suspend all or part of any sentence including installment payment of fines, fix the terms of any such deferral or suspension, and provide for such probation as in their opinion is reasonable and necessary under the circumstances of the case, but in no case shall it extend for more than five years from the date of conviction for a defendant to be sentenced for a domestic violence offense or under RCW 46.61.5055 and two years from the date of conviction for all other offenses. A defendant who has been sentenced, or whose sentence has been deferred, and who then fails to appear for any hearing to address the defendant's compliance with the terms of probation when ordered to do so by the court, shall have the term of probation tolled until such time as the defendant makes his or her presence known to the court on the record.

case should be decided based on the unique facts in that case, a case in which the prosecution and the defendant have an ongoing interest, as opposed to petitioner's now-finished case. The Court of Appeals' decision is no longer significant to anyone and has no substantial effect on the public.

Petitioner also argues that the Court of Appeals improperly considered information relating to charges for he was not convicted. He might well have a point if this case involved an appeal from a criminal conviction and he could show that the sentencing court relied on improper information, but this case involves an appeal from the denial of a writ of habeas corpus by the superior court, not the sentencing court. Petitioner elected to present to the superior court all the information it and the Court of Appeals relied on. He undoubtedly presented it hoping that it would support his argument, but he certainly is in no position to complain that it was used, instead, to reject his argument. Is petitioner seriously suggesting that the information he presents to a court can be used only in his favor? Petitioner chose both the remedy and the evidence in support of that remedy and has only himself to blame if these were poor choices.

Petitioner already has had this challenged probation condition reviewed by two courts and does present any compelling reason for review by a third court.

F. CONCLUSION

Based on the foregoing argument, this court should deny review of the Court of Appeals decision.

Respectfully submitted this 4th day of November, 2013.

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