95274-4

SUPREME COURT NO. _____ -_
COURT OF APPEALS NO. 75258-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOMINIQUE NORRIS,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Norris, ___ Wn. App. ___, 404 P.3d 83, No. 75258-8-I, filed October 30, 2017.

C. ISSUE PRESENTED FOR REVIEW

The State asks this Court to deny Norris's petition for review because the court of appeals correctly held that "dating relationships" is sufficiently clear to survive constitutional challenge. The State cross-petitions for review of the court of appeals' decisions regarding crime-related community custody conditions. The issue the State presents is whether, under the Sentencing Reform Act of 1981 (SRA), the subject of a crime-related community-custody prohibition must have been actually involved in the commission of the crime to be reasonably related to the circumstances of the crime.

D. STATEMENT OF THE CASE

Dominique Norris repeatedly had sex with a 12-year-old boy. CP 3, 27. In March 2012, she pleaded guilty to three counts of second-degree child molestation. CP 9-34. The sentencing court

imposed a 72-month standard range sentence, suspended under a special sexual offender sentencing alternative (SSOSA). CP 35-41. The judgment and sentence included an appendix with standard and special conditions of community custody. CP 43. After a pattern of violations, the SSOSA was revoked in May 2016 and the sentencing court imposed the original 72-month term, including the community custody conditions. CP 47-68, 96-97.

Norris appealed several of her community-custody conditions. The Court of Appeals in a published opinion affirmed two of the conditions, reversed two others entirely and ordered still two more to be partially stricken. State v. Norris, ___ Wn. App. ___, 404 P.3d 83, No. 75258-8-I, (Wash. Ct. App. October 30, 2017).

Most relevant to this answer and cross-petition, the court of appeals affirmed a condition requiring Norris to report any "dating relationships," finding that the term is not unconstitutionally vague. 404 P.3d 87. It reversed the crime-related prohibition on entering sex-related businesses because such businesses were not factually involved in the commission of Norris's crimes. Id. at 89. It affirmed the prohibition on sexually explicit material because Norris had exchanged sex-related text messages with her victim. Id.

E. ARGUMENT

For the reasons outlined below, this Court should reject Norris's petition for review of the community-custody condition pertaining to dating relationships. Instead, this Court should grant the State's cross-petition to review the lower court's reversal of the condition pertaining to sex-related businesses, and its reasoning pertaining to the prohibition on sexually explicit materials. RAP 13.4(d).

1. THE COURT SHOULD DENY NORRIS'S PETITION FOR REVIEW.

RAP 13.4(b) governs consideration of a petition for review. It provides that a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (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.

For the following reasons, review should be denied.

a. Review Is Unnecessary Because The Published Court Of Appeals Decision Clearly And Correctly Addressed The Constitutional Vagueness Question.

Norris repeats the argument she made to the court of appeals that the community-custody condition requiring her to report any "dating relationships" is unconstitutionally vague. But she does not explain why the published opinion of the court of appeals is not sufficient to resolve this question without this Court's review. To the contrary, the court of appeals' opinion on this issue is quite succinct, well-reasoned, commonsensical and in line with prior opinions of this Court. See, e.g., State v. Sanchez Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010) (community custody condition not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which actions would be prohibited). The court of appeals correctly, and quite naturally, determined that the term "dating relationships" is clear.

Norris complains that the court of appeals included a footnote to "note that the legislature defined 'dating relationship' in the context of domestic relations to mean 'a social relationship of a romantic nature.'" 404 P.3d at 87 fn 6 (citing RCW 26.50.010(2)).

But Norris did not argue below that statutory definitions are irrelevant (she did not file a reply brief or raise the claim at oral argument). This Court should not review this claim. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993) (issue not raised or briefed in the Court of Appeals will not be considered by this Court).

Regardless, the court of appeals did not rely on the statutory definition to conclude the term "dating relationship" is clear. Its decision was controlled by a common understanding of the term and a dictionary definition. 404 P.3d at 87. Review is not warranted simply to comment on a tertiary point in a footnote.

No significant constitutional issue is presented.

b. There Is No Conflict Between Divisions On This Issue.

Norris contends that the published opinion in her case is in conflict with an unpublished opinion by division three, State v. Dickerson.[1] That is not so. Dickerson addressed a different term, "romantic relationship," not "dating relationship." 2016 WL 3126480 at *1. The term in Dickerson is far less concrete than the term at issue here. In fact, the court of appeals in Norris specifically

[1] No. 32899-6-III, 2016 WL 3126480 (Wash. Ct. App. May 26, 2016).

distinguished "dating relationship" from "romantic relationship" by finding that "romantic" is "highly subjective" while "dating" is not. 404 P.3d at 87. There is no conflict between divisions.

This Court should not accept review of this issue.

2. THIS COURT SHOULD GRANT THE STATE'S CROSS PETITION TO REVIEW THE COURT OF APPEALS' DECISIONS REGARDING SEX-RELATED BUSINESSES AND SEXUALLY EXPLICIT MATERIAL.

Review is warranted as to the court of appeals' decision and reasoning regarding crime-related prohibitions. The lower court's decision followed an untenably restrictive interpretation of what constitutes a "reasonably related" prohibition for the purposes of community custody. This is an issue of substantial public interest that should be determined by the Supreme Court because it involves community-custody conditions in countless sex-offense sentencings. See RAP 13.4(b)(4). Also, Division One's narrow interpretation here is in conflict with another opinion from Division Three of the court of appeals. See RAP 13.4(b)(2).

a. The Court Of Appeals Interpretation Of "Reasonably Related" Is Untenably Narrow.

Trial courts have authority to impose "crime-related prohibitions" as conditions of community custody. RCW 9.94A.703(3)(f). "Crime-related prohibitions" must "directly relate[] to the circumstances of the crime for which the offender has been convicted[.]" RCW 9.94A.030(10). But such conditions are usually upheld if "reasonably crime related." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940, 947 (2008). For example, in Warren, this Court upheld a lifetime prohibition directing Warren to avoid contact with the mother of Warren's child-molestation and child-rape victims, even though the mother was not a victim. Id. at 32.

Appellate courts review the factual basis for crime-related conditions under a "substantial evidence" standard. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015). Reviewing courts will strike community custody conditions when there is "no evidence" in the record that the circumstances of the crime related to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is some basis for the connection; there is no requirement that the prohibited activity be factually identical to the crime. Id. For

example, in State v. Kinzlè, also a child molestation case, the court upheld a prohibition on dating women with minor children, even though the defendant had not molested children of the women that he dated. 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Here, the court of appeals followed an unworkably narrow interpretation of "reasonably related" that, if taken to its logical conclusion, would prevent a large number of quite reasonable community-custody conditions that are important for public safety. Under the strict interpretation of the appeals court here, a condition is "reasonably related" to the crime only if such facts were actually involved in the commission of the crime, not just related to its circumstances, i.e., the broader nature of the offense.

For example, by the lower court's reasoning, a felon convicted of committing a serious, violent assault by punching or kicking someone could not be prohibited from possessing weapons because a weapon was not actually involved in the commission of the crime. Such a narrow interpretation would undercut the legislature's intent in prohibiting "crime related" prohibitions and would undermine public safety. The more reasoned interpretation

is that prohibiting weapons is reasonably related to the circumstances of violently attacking people.[2]

That more measured interpretation allows sentencing courts the discretion to look at the broader circumstances of each crime to impose reasonably related prohibitions. That means, as here, that prohibitions on entering sex businesses and possessing sexually explicit material are reasonably related to the circumstances of sexually victimizing and objectifying vulnerable people. But a rigid rule that requires those materials or businesses to have been materially involved in the actual commission of the crime, rather than the overall circumstances of the crime, would prevent such reasonable conditions from being imposed to protect the public.

Regardless of how this Court were to resolve the issue, it is an important one that affects countless criminal cases, and it should be clarified by this Court to provide guidance to the lower courts.

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[2] The court of appeals here appears to have misunderstood the State to be arguing simply for a "categorical" approach, i.e., that prohibitions on sexually explicit materials and sex-related businesses are *always* related to *all* sex offenses *per se*. That is not what the State argued here. While the State agreed that it would be difficult to imagine a situation where a prohibition on such materials and businesses was not reasonably related to a felony sex offense, the State's position is that each case should be determined separately, but what is "reasonably related" to the circumstances of the crime should not be rigidly construed to prohibit only those things that were factually involved in the commission of the crime.

b. This Decision Conflicts With Another Decision By The Court Of Appeals.

In interpreting "reasonably related" to mean that the subject of the prohibition must have been utilized or otherwise actually involved in the commission of the crime, the court of appeals here expressly disagreed with the published opinion by Division Three of the court of appeals in State v. Magana, 197 Wn. App. 189, 194, 389 P.3d 654, 657 (2016). This Court should resolve this conflict to provide clarity to the lower courts on this issue.

In Magana, the defendant was convicted of third-degree child rape for having sex with a 14-year-old girl he met online. Id. at 193. On appeal, he challenged as not crime-related his community-custody prohibitions on sex businesses and sexually explicit material, identical to Norris here. The Division Three court held that the trial court had not abused its discretion in imposing the prohibitions: "Because Mr. Magana 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." Id. at 201.

Here, the court of appeals considered Magana and concluded that "[t]o 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." 404 P.3d at 89. Magana and Norris fundamentally conflict, and this Court should resolve that conflict.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However it respectfully asks that it grant the State's cross petition to review the issue in Section 2 above.

DATED this 5th day of December, 2017.

Respectfully submitted,

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December 06, 2017 - 2:26 PM

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