FILED
Court of Appeals
Division I
State of Washington
5/19/2021 3:35 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
5/20/2021
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CLERK

Supreme Court No. 99786-1
Court of Appeals No. 80503-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYRONE JOEL MOORE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Tyrone Joel Moore requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Moore, No. 80503-7-I, filed on April 19, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review and hold the sentencing court abused its discretion in denying a SSOSA, where Moore admitted the crime, understood it was wrong, and was open to treatment, and where the psychologist who evaluated him said he was a low average risk to reoffend, was amenable to treatment, and a SSOSA was appropriate?

2. Should this Court grant review and hold the trial court erred in imposing a condition of community custody requiring Moore to disclose his sex offender status prior to any consensual sexual contact with an adult, and prohibiting sexual contact in a relationship without the approval of his community corrections officer (CCO) or treatment provider, where the condition is not crime-related and unreasonably infringes on Moore's First Amendment rights to freedom of association and to refrain from speech?

3. Should this Court grant review and strike conditions of community custody that prohibit Moore from accessing the internet on any computer or electronic device, "except as necessary for employment purposes," and that prohibit him from possessing or accessing a computer unless authorized by his CCO, where the conditions are overbroad in violation of the First Amendment?

C. STATEMENT OF THE CASE

Tyrone Moore pled guilty to one count of first degree rape of a child. CP 198-213, 218. Moore admitted that on two occasions, he convinced CP that in order for her to use his computer, she must first allow him to take nude photos of her. CP 165, 176. He also admitted that on one occasion, he attempted penile/vaginal penetration and touched CP's breasts and buttocks. CP 165, 176. Moore was remorseful and understood it was wrong. CP 165.

Psychologist Paul Spizman evaluated Moore to determine if he was eligible for a SSOSA. CP 173-93. Dr. Spizman determined Moore's risk of reoffense was at the lower end of the average range. CP 184-92. He concluded that a SSOSA was appropriate. CP 192. He did not recommend any restrictions on Moore's access to the internet,

although he recommended that his therapist monitor his usage to ensure that he was not engaging in inappropriate use of the internet. CP 192.

At sentencing, the defense requested a 12-month prison-based SSOSA. RP 8. A SSOSA was appropriate because Moore had admitted the allegations and knew his behavior was wrong. RP 8. He was willing to participate in therapy and understood he needed help. RP 8. He also understood he had caused great pain to CP and wanted "to improve the way he sees relationships going forward." RP 8.

The court refused to impose a SSOSA. RP 10-11. The court imposed a mid-range standard-range prison sentence of 108 months to life. CP 15; CP 37. The court also imposed lifetime community custody with several conditions. CP 37-38, 50-52.

Moore appealed, arguing the trial court abused its discretion in refusing to impose a SSOSA where the record and Dr. Spizman's evaluation supported it. Moore also challenged three conditions of community custody. The Court of Appeals affirmed but remanded to the trial court to clarify two conditions of community custody that restrict Moore's access to computers and the internet.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The sentencing court abused its discretion in refusing to impose a SSOSA because Moore was amenable to treatment and he and the community would benefit from a SSOSA.

A SSOSA is a sentencing alternative designed to enable certain first-time sex offenders who are amenable to treatment to receive treatment in the community rather than serve their sentences in prison where treatment is often unavailable. RCW 9.94A.670. A court may impose a SSOSA if the court determines that suspending the sentence and ordering treatment would be in the best interests of the offender and the community. State v. Jackson, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991); RCW 9.94A.670(4).

An offender may be eligible for the option if he is convicted of a sex offense other than a serious violent offense or second degree rape. RCW 9.94A.670(2)(a). If he pleads guilty, he must as part of his plea, voluntarily and affirmatively admit he committed all of the elements of the crime. RCW 9.94A.670(2)(a). He must have no prior sex offense convictions. RCW 9.94A.670(2)(b). And he must have had an established relationship with or connection to the victim, such that the sole connection with the victim was not the commission of the crime. RCW 9.94A.670(2)(e).

Before a SSOSA can be granted, the offender must be evaluated by a certified sex offender therapist. The evaluator must assess and report the offender's amenability to treatment and relative risk to the community. RCW 9.94A.670(3).

On receiving the evaluator's report, the court will decide whether the offender and community will benefit from a SSOSA. The court should consider the following factors: (1) whether a SSOSA is too lenient in light of the extent and circumstances of the crime; (2) whether the offender has other victims; (3) whether the offender is amenable to treatment; and (4) the risk the offender presents to the community, the victim, or other persons of similar ages and circumstances. The court should also consider the victim's opinion on whether the offender should be sentenced under SSOSA. RCW 9.94A.670(4).

If the court decides to grant a SSOSA, it will impose a sentence within the standard range and then suspend the sentence and place the defendant on community custody for the statutory maximum term. RCW 9.94A.670(5)(b). The court must impose treatment, either inpatient or outpatient, for any period up to five years in duration. RCW 9.94A.670(5)(c).

The granting of a SSOSA is at the trial court's discretion, so long as the court does not abuse its discretion by denying a SSOSA on an improper basis. State v. Sims, 171 Wn.2d 436, 445, 256 P.3d 285 (2011).

Here, the trial court abused its discretion in denying Moore's request for a SSOSA. Granting a SSOSA would fulfill the aims of the statute because it would benefit both Moore and the community. RCW 9.94A.670(4); CP 192. Only through a SSOSA would Moore be assured of receiving treatment. Although he is generally high functioning, he struggles with romantic and friendship relationships, which affect his risk of reoffending. CP 191. Moore is much more likely to learn lasting ways of improving his social relationships in treatment than in prison without treatment. Moreover, treatment is the ideal place—perhaps the only place—where he can learn how to manage his sexual thoughts about young girls.

A SSOSA was appropriate because Moore is amenable to treatment. CP 192. He admitted his crime and understands what he did was wrong and harmful. CP 165, 176, 198-213. He is open to treatment and learning new skills to help him avoid offending again. CP 177. Other factors increase his chance of success. He has no issues with

alcohol or drugs. CP 176, 181-82. His family is supportive and lives nearby. CP 174.

Because the court failed to appreciate that a SSOSA would benefit both Moore and the community, the court abused its discretion in denying Moore's request for a SSOSA. Sims, 171 Wn.2d at 445. This Court should grant review and reverse.

2. The court erred in imposing three conditions of community custody that are not sufficiently crime-related and violate Moore's First Amendment rights.

Community custody conditions must be "reasonably crime related." State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). The record must provide a factual basis for concluding a condition is crime-related. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (citing David Boerner, Sentencing in Washington § 4.5 (1985)).

In addition, community custody conditions must not unreasonably infringe an offender's constitutional rights. Where a condition interferes with a fundamental constitutional right, the condition "must be sensitively imposed" and "must be reasonably necessary to accomplish the essential needs of the State and public order." Warren, 165 Wn.2d at 32. A restriction on First Amendment rights "must be narrowly tailored and directly related to the goals of

protecting the public and promoting the defendant's rehabilitation." State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). Courts consider whether a statutorily-based sentencing condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. State v. Riles, 135 Wn.2d 326, 346-47, 957 P.2d 65 (1998).

a. Condition number 18 restricting Moore's ability to engage in consensual sexual relationships is not reasonably crime-related and impermissibly infringes his First Amendment rights.

The court imposed the following condition burdening Moore's ability to engage in consensual adult sexual relationships:

> Do not date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider/Community Corrections Officer approves of such.

CP 51 (Condition 18).

This condition prohibiting sexual contact with a consenting adult without prior approval and requiring disclosure of sex offender status prior to any sexual contact is not sensitively imposed because nothing in the record supports a risk to consenting adults. The condition is not crime-related because Moore's crime was against a minor. Also,

it infringes his First Amendment right to free association and is an unconstitutional compulsion of speech.

The prohibition against dating or having consensual sexual contact with childless adults without prior approval is not crime-related because Moore's crime involved a child. Other conditions specifically restrict his contact with children. CP 51. Limiting his ability to form relationships with adults who do not have children is not reasonably related to the State's essential need to protect children. See State v. Moultrie, 143 Wn. App. 387, 399, 177 P.3d 776 (2008). The condition is not crime-related.

Moreover, the condition infringes Moore's First Amendment rights. The First Amendment right to freedom of association protects a person's right to enter into and maintain human relationships. Moultrie, 143 Wn. App. at 399 n.21; Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (recognizing that First Amendment provides a "freedom of association" right to make choices to enter into and maintain certain human relationships); U.S. Const. amend. I.

The Sentencing Reform Act expressly authorizes a sentencing court to order an offender to "[r]efrain from direct or indirect contact

with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). But a restriction on an offender's freedom to associate with a specified class of individuals must be "'reasonably necessary to accomplish the essential needs of the state and public order.'" Moultrie, 143 Wn. App. at 399 (internal quotation marks omitted) (quoting Riley, 121 Wn.2d at 37-38).

In addition, the First Amendment right to freedom of speech includes the freedom to refrain from speech. Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); U.S. Const. amend. I. "The protection from compelled speech extends to statements of fact as well as of opinion." State v. K.H.-H., 185 Wn.2d 745, 749, 374 P.3d 1141 (2016). "The compelled speech doctrine generally dictates that the State cannot force individuals to deliver messages that they do not wish to make." Id.

That portion of condition number 18 prohibiting Moore from having sexual contact with consenting adults without prior approval violates his First Amendment right to associate freely with individuals who do not belong to the same class of individuals as the victim of his crime. The portion of the condition requiring him to disclose his sex offender status before engaging in consensual sexual contact also

violates his First Amendment right to refrain from speech. The condition is neither "sensitively imposed" nor "narrowly tailored," and is not reasonably necessary to accomplish the essential needs of the State and public order. See Warren, 165 Wn.2d at 32; Bahl, 164 Wn.2d at 757.

This condition bears no relationship to the crime. Moore was convicted of sexually abusing the daughter of friends with whom he was living. CP 160-62. The record contains no suggestion that Moore was engaged in a romantic or sexual relationship with either of the parents. There is no suggestion that any romantic or sexual relationship Moore had with any adult somehow led to the crime. Requiring him to obtain permission before engaging in sexual contact with a consenting adult who has no children does not "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

This case is distinguishable from State v. Lee, on which the Court of Appeals relied. State v. Lee, 12 Wn. App.2d 378, 460 P.3d 701, review denied, 195 Wn.2d 1032, 468 P.3d 622 (2020). In that case, Lee was convicted of second degree rape and second degree assault for an incident involving a woman with whom he had a dating

relationship. Id. at 383. When a person is convicted of assaulting and raping a romantic partner, "[r]equiring him to forewarn future partners, so that they can make an informed decision regarding their personal safety in relation to their association with Lee, is plainly crime-related." Id. at 402.

Here, by contrast, Moore was not convicted of any crime involving a romantic partner. The State has no great need to protect any future potential adult romantic partner from Moore. This Court should grant review and strike condition 18.

b. Conditions 23 and 26, restricting Moore's access to computers and the internet, are overbroad in violation of the First Amendment and must be stricken.

The trial court imposed the following conditions restricting Moore's access to the internet and computers:

> Do not access the Internet on any computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches) in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider. The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor compliance with this this [sic] condition.

CP 52 (Condition 23).

> You may not possess or maintain access to a computer, unless specifically authorized by your supervising Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or storage.

CP 52 (Condition 26).

Taken together, these conditions prohibit Moore from accessing the internet on any device for any reason, "except as necessary for employment purposes," from accessing online communities of people who communicate simultaneously with one another, and even from accessing a computer or computer peripherals. CP 52. Considered alone or taken together, each condition is overbroad and must be stricken.

The First Amendment prohibits the government from proscribing speech or expressive conduct. State v. Halstien, 122 Wn.2d 109, 121, 857 P.2d 270 (1993); U.S. Const. amend. I. "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). First Amendment principles also ensure "that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Packingham v. North Carolina,

__ U.S. __, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). In particular, the United States Supreme Court has recognized the "'vast democratic forums of the Internet'" in general, "and social media in particular," as "the most important places . . . for the exchange of views." Id. (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)). In our modern age, these cyberspaces are equivalent to the street or park, traditionally recognized as "a quintessential forum for the exercise of First Amendment rights." Packingham, 137 S. Ct. at 1735.

The Supreme Court recently addressed a sweeping internet restriction in Packingham, 137 S. Ct. 1730. At issue was a North Carolina statute making it a felony for any registered sex offender to "access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." Id. at 1733. Recognizing "the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that presages a sexual crime, like contacting a minor or using a website to gather information about a minor," id. at 1737, the Court nonetheless warned that any prohibition "must not 'burden

substantially more speech than is necessary to further the government's legitimate interests.'" Id. at 1736 (quoting McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)).

While Packingham's sexual abuse of a 13-year-old girl was a serious crime, North Carolina's prohibition was vast in its breadth, barring access to sites such as Facebook, LinkedIn, and Twitter, and arguably barring access "to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com." Id. at 1736.

After describing North Carolina's restriction as "unprecedented in the scope of First Amendment speech it burdens," the Court reasoned:

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.

Id. at 1737. The Court continued:

> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive

> legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

Id.

Because the State could not meet its burden to show the sweeping prohibition was necessary or legitimate to serve its purpose of keeping sex offenders away from vulnerable victims, the Court held it invalid. Id. at 1737-38.

Similarly here, the condition prohibiting access to the internet on any device, "except as necessary for employment purposes," is overly broad. CP 52. The State can have no legitimate interest in completely barring Moore from accessing sites such as Facebook, LinkedIn, or Twitter for any purpose other than employment. It can have no interest in restricting Moore's access to shopping for groceries and household items on Amazon.com, access to world news on WashingtonPost.com, or access to online medical care on Webmd.com.

As noted in Packingham, the internet has become the principal means through which individuals in society receive information and interact with the world around them. Packingham, 137 S. Ct. at 1737. Without access to internet browsing, Moore's ability to comply with other imposed conditions, such as looking for housing, applying for school, or even potentially participating in treatment or counseling

programs with an online component will be severely restricted. See CP 50 (Condition 5 requiring participation in sexual deviancy treatment); CP 50 (Condition 6 requiring participation in offense-related counseling programs); CP 51 (Condition 10 requiring employment or education).

A prohibition on internet browsing could also limit Moore's ability to engage in many important, everyday tasks. Many doctors' offices now communicate with patients, including regarding scheduling, billing, important test results, follow-up instructions, and responses to patient inquiries, via patient portals that require access to an internet browser to log in to their closed system. Internet browsing access can also be critical to receive timely news on any topic, including weather, safety, and local traffic conditions.

Internet browsing is also important for shopping for basic necessities—for everything from toilet paper to toothpaste and groceries. This is particularly true in light of the conditions prohibiting Moore from maintaining prolonged contact with children or frequenting places where children's activities occur. CP 51 (Conditions 15 and 17). Moore's good faith efforts to avoid children may significantly limit his ability to go to movie theaters for entertainment,

to visit restaurants for dinner, or even to go to certain grocery stores. As such, access to online shopping becomes particularly helpful in facilitating his continued compliance with other conditions.

Condition 26 prohibiting possession or access to computers or peripherals is broader still and borders on the absurd. CP 52. A vast array of practical devices incorporate "computers," "hard drives," "storage devices," "or device[s] to store or reproduce digital media or images." CP 52 (No. 26).

Conditions 23 and 26 prohibit a wide range of activities, including everything from basic email use, to communicating with a doctor and utilizing prescribed potentially life-saving medical devices, to driving a car, to navigating to required appointments. The State can have no legitimate interest in prohibiting this wide range of activities. This is particularly true here, where Moore's other conditions already prohibit him from violating certain laws and otherwise provide ample protection for the public. See CP 51 (Condition 20 prohibiting possession of sexually explicit images of children); CP 51 (Conditions 15, 16, 17, 18, and 19 restricting contact with children); CP 50 (Conditions 5, 6, 7, and 8 requiring participation in sex offender treatment and imposing monitoring conditions); CP 51-52 (Conditions

13 and 23 requiring Moore to consent to search by his CCO of his home and any computers or devices to which he has access). These conditions are more than sufficient to protect the community and ensure Moore does not use the internet or computer devices to arrange communication with children, or to access, store, or transmit illicit images.

Given the widely expanded scope of computers and related devices, and their necessary role in everyday life, this Court should grant review and find Conditions 23 and 26 burden substantially more First Amendment activities than necessary to further the State's legitimate interests. Given the significant overlap of Conditions 23 and 26 with other existing conditions, and the fact that other conditions are comprehensive and more than sufficient to protect the community and ensure Moore does not engage in problematic behaviors, these conditions should be stricken in full and not merely remanded for clarification.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 19th day of May, 2021.

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TYRONE JOEL MOORE, Appellant.	No. 80503-7-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Moore asserts the trial court abused its discretion in declining to impose a SSOSA at sentencing. He asserts the trial court erred in imposing a condition of community custody restricting his ability to engage in certain relationships. He asserts two conditions restricting his access to computers and the internet violate his First Amendment rights as overbroad. We remand for clarification of conditions of community custody 23 and 26, and otherwise affirm.

FACTS

In April 2019, Tyrone Moore pleaded guilty to one count of rape of a child in the first degree. Moore requested a special sex offender sentencing alternative (SSOSA) pursuant to chapter 94A.670 RCW. He was evaluated by a certified sexual offender treatment provider who felt he was an appropriate candidate for a SSOSA. The Department of Corrections (DOC) investigator recommended a standard range sentence as the best option for Moore. The State recommended

a standard range sentence of 108 months with lifetime community custody. The victim also spoke at sentencing. She indicated she was opposed to a SSOSA.

The court denied Moore's request for a SSOSA. It imposed a sentence of 108 months of confinement with a lifetime of community custody. Conditions included restrictions on computers and internet access as well as dating women or forming relationships with families with minor children.

Moore appeals.

DISCUSSION

Moore asserts that the trial court erred in declining to impose a SSOSA at sentencing. Further, he asserts three of the conditions of community custody were improperly imposed.

I. Imposition of a Standard Range Sentence

Moore challenges his standard range sentence, asserting the court abused its discretion in denying his request for a SSOSA. He argues he was amenable to treatment and that both he and the community would benefit from a SSOSA.

Under RCW 9.94A.585(1), a sentence within the standard sentence range for an offense shall not be appealed. But, a defendant may challenge a standard range sentence where they challenge the trial court's interpretation of the SSOSA statutes. State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009).

A SSOSA may be available for some people convicted of sex crimes who meet statutory criteria. State v. Osman, 157 Wn.2d 474, 477 at n.3, 139 P.3d 334 (2006). If a court finds that a defendant is statutorily eligible for a SSOSA, it may order an examination to determine whether the defendant is amenable to

treatment. RCW 9.94A.670(3). The examiner assesses and reports regarding the defendant's amenability to treatment and relative risk to the community. RCW 9.94A.670(3)(b). After receipt of the reports, the court weighs a list of considerations provided by RCW 9.94A.670(4). It must give great weight to the victim's opinion regarding whether the offender should receive a treatment disposition. Id.

The decision to impose a SSOSA is entirely within the trial court's discretion. Osman, 157 Wn.2d at 482. The court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. Id.

While Moore alleges there were grounds upon which a court could have granted his sentencing request, he does not allege an impermissible basis upon which the court denied it.

The record demonstrates that the trial court followed proper sentencing procedure. The DOC and Moore's treatment provider each prepared a report for the court. The treatment provider recommended the court grant Moore's sentencing request, but the DOC disagreed.

At sentencing, the court referenced both reports. The reports contained information regarding Moore's risk to the community, his amenability to treatment, and the circumstances of the offense. The court also explicitly considered the victim's opposition to a SSOSA, noting "that is supposed to carry great weight as well." The record demonstrates that the

court properly weighed the necessary considerations under RCW 94A.760(4) when it imposed a standard range sentence.

We hold the trial court did not abuse its discretion when it denied Moore's sentencing request.

II. Conditions of Community Custody

Moore next challenges three of the conditions of community custody. He asserts condition 18 is not sufficiently crime related and challenges conditions 18, 23, and 26 on constitutional grounds.

A crime-related prohibition "prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). We review a trial court's imposition of crime-related conditions of community custody for abuse of discretion. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Sassen Van Elsloo, 191 Wn.2d 798, 806, 425 P.3d 807 (2018).

The sentencing court may impose conditions that restrict a defendant's constitutional rights provided those conditions are imposed sensitively. State v. Bahl, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). Limitations on constitutionally-protected conduct must be "narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Id.

Generally, sentencing courts have the power to delegate some aspects of community placement to the DOC. State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005). "While it is the function of the judiciary to determine guilt and

impose sentences, 'the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body.'" Id. (quoting State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937)). But, a community custody standard must not delegate boundless discretion. State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016), abrogated on other grounds by State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Such conditions are unconstitutionally vague if (1) they do not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) they do not provide sufficiently ascertainable standards to protect against arbitrary enforcement. Padilla, 190 Wn.2d at 677.

Contrary to the State's assertion, Moore's constitutional challenges to three of his community custody conditions are ripe. A preenforcement challenge to a condition is ripe if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). The court must also consider the hardship to the parties of withholding court consideration. Bahl, 164 Wn.2d at 751. Using this ripeness test, in Bahl, our Supreme Court held that a preenforcement challenge to a community custody condition prohibiting the possession of pornographic material was ripe for review. Id. at 743, 751-752. Because pornography implicated First Amendment rights, the challenge dealt with a purely legal issue that courts could solve on the record without the need for additional facts to aid the court's inquiry. Id. at 752. Similarly, Moore alleges three of his conditions violated his First

Amendment rights. His challenges do not require further factual development, satisfying the Bahl ripeness test.

A. Restrictions on Sexual Contact and Relationships

Condition 18 provides,

> Do not date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections officer. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider/Community Corrections Officer approves of such.

Moore argues condition 18 impermissibly infringes on his First Amendment rights. He argues requiring him to disclose his sex offender status violates his freedom to refrain from speech. Generally, individuals have the right to speak freely and the right to refrain from speaking at all. Wooley v. Maynard, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). However, an offender's usual constitutional rights during community placement are subject to SRA-authorized infringements. State v. Lee, 12 Wn. App. 2d 378, 402, 460 P.3d 701, (citing the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW), review denied, 195 Wn. 2d 1032, 468 P.3d 622 (2020). The 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)(d).

In Lee, this court held requiring the defendant to disclose his sex offender status did not violate his freedom to refrain from speech because the required utterance was crime-related. 12 Wn. App. 2d at 402. Because the required

utterance here is also crime-related, we hold that it does not violate Moore's constitutional right to refrain from speaking.[1]

Next, he argues that condition 18 violates his freedom of association. The First Amendment protects an individual's right to enter into and maintain certain human relationships. U.S. CONST. amend. 1; Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). But, the SRA permits the court to order a defendant to refrain from direct or indirect contact with the victim of the crime or a specified class of individuals. RCW 9.94A.703(3)(b).

Moore gained access to his victim when he moved in with her parents, one of whom was an old friend. He was the victim's godfather. The trial court reviewed the reports and expressed concern over Moore's continued attempts to manipulate those around him as well as his lack of empathy for his victims. The requirements prevent Moore from gaining access to minor children by exploiting his relationships with adults in their lives. They allow adults to make informed decisions regarding social contact between Moore and any children in their care, homes, or families. This restriction is reasonable.

Neither the requirement not to form certain relationships nor the prohibition of sexual contact in a relationship are total bans on protected activity. Both provide

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[1] Moore also asserts the final two sentences of this condition are not reasonably crime-related. The State contends Moore waived any challenge to condition 18 on the basis that it was crime related when he did not object to them. We agree with the State. See State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (whether a condition of sentence is crime-related is a question of fact that we will not review for the first time on appeal), review denied, 193 Wn.2d 1029, 445 P.3d (2019). We will, however, consider contentions that solely present questions of law. See Bahl, 164 Wn.2d at 751-52.

for a community corrections officer (CCO) or treatment provider to provide approval for the protected activity. Unlike conditions which have been found to be impermissibly vague, this condition does not delegate the definition of a key term to the CCO or treatment provider. See Magana, 197 Wn. App. at 201 (condition vesting supervising CCO with the sole authority to define spaces where children congregate was unconstitutionally vague); Irwin, 191 Wn. App. at 654-55 (same). It is well settled that some delegation of the court's power is permitted, and if the condition is permitted for treatment purposes, assigning the responsibility of such approval to Moore's CCO or treatment provider would not constitute an excessive delegation. See State v. Autrey, 136 Wn. App. 460, 469, 150 P.3d 580 (2006). These prohibitions are directly related to the goals of protecting the public and promoting Moore's rehabilitation.

We hold the trial court did not abuse its discretion in imposing condition 18.

B. Restrictions on Computer and Internet Access

Finally, Moore argues two conditions restricting computer and internet access, considered alone or taken together, are overbroad and must be stricken. Conditions 23 and 26 provide,

> 23. . . . Do not access the Internet on any computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches) in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider. The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor compliance with this . . . condition.
>
> . . . .

> 26. . . . You may not possess or maintain access to a computer, unless specifically authorized by your supervising Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store [or] reproduce digital media or storage.

The First Amendment generally bars the government from dictating what we see, read, speak, or hear. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). Moore relies on Packingham, which concerned the constitutionality of a North Carolina statute restricting internet usage for registered sex offenders. Id. at 1733. The statute made it a felony for sex offenders to access commercial social networking websites where the sex offender knew the site permits minor children to become members or to create or maintain personal Web pages. Id. The Court held this statute violated the First Amendment. Id. at 1737. It found,

> North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.

Id.

Here, Moore used digital devices and the internet to facilitate his crimes. He showed the victim pornography on his computer and took explicit photographs of her with a digital camera. He manipulated her by trading time on her computer

in exchange for taking explicit photos of her. Crime-related restriction on his access to the internet, computers, and other digital devices is merited. The conditions imposed are not a complete ban on computer or internet access as addressed in Packingham. Moore is allowed to use the internet on any device for employment purposes. He may also use the internet and computers with prior CCO approval. However, the conditions provide no guidance to the CCO regarding what types of computer and internet access should be approved.

Moore argues this court should either strike conditions 23 and 26 in their entirety, or strike every portion of them except the final sentence of condition 23 that allows the CCO to make random searches of any computer, phone, or computer-related device to which Moore has access. We decline this invitation.

Instead, we remand for clarification of these conditions. In view of the potential impact on recognized free speech rights, the scope and meaning of any limitation on the use of computers must be clarified on remand. Specifically, the sentencing court should clarify (1) the distinction between merely using a computer and possessing or maintaining access to a computer, (2) what standards apply to the CCO in determining what access to computers is allowed, and (3) given the ubiquitous presence of computers in our society, if, and why, the conditions impact any use or possession of items that include computers with no capacity to store or download images. The sentencing court should also clarify with regards to condition 23 what standards apply to the CCO in determining what internet access unrelated to employment purposes is allowed.

We affirm in part, and remand for clarification of community custody conditions 23 and 26.

Appelwick, J.

WE CONCUR:

Hazelrigg, J. Chun, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80503-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

WASHINGTON APPELLATE PROJECT

May 19, 2021 - 3:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80503-7
Appellate Court Case Title:	State of Washington, Respondent v. Tyrone Joel Moore, Appellant
Superior Court Case Number:	18-1-01935-9

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