

64648-6

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NO. 64648-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KELLY,

Appellant.

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STATE OF WASHINGTON  
JULIA A. HARRIS

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The probation condition prohibiting Mr. Kelly from wearing badges or security paraphernalia or uniforms was unreasonable.

2. The State failed to prove Mr. Kelly violated the condition prohibiting him from wearing badges or security paraphernalia or uniforms.

3. As applied to Mr. Kelly, the condition “Do not wear a badge or security paraphernalia or uniform” is unconstitutionally vague.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Probation conditions must bear a reasonable relation to the duty to make reparation or prevent future crimes. The crime for which Mr. Kelly was on probation was attempted failure to register as a sex offender. He was required to register because when he was 13 years old he lay on top of a younger child while naked, resulting in a conviction for child molestation. Is the probation condition prohibiting Mr. Kelly from wearing security-style paraphernalia invalid because it is not reasonably related to reparation or crime-prevention?

2. The sentencing court imposed the following condition on Mr. Kelly: “Do not wear a badge or security paraphernalia or

uniform.” On November 5, 2009, Mr. Kelly was wearing a black jacket and olive green button-down shirt. It is undisputed that Mr. Kelly had removed all of the security patches from the jacket, and put them inside his breast pocket. Did the State fail to prove Mr. Kelly violated the condition prohibiting him from wearing security paraphernalia?

3. A sentencing condition is unconstitutionally vague if it fails to provide adequate notice of what conduct is prohibited or allows for arbitrary or ad hoc enforcement. As applied to Mr. Kelly, who was punished for wearing a jacket from which he had removed the security patches, is the condition prohibiting the wearing of security paraphernalia unconstitutionally vague?

#### C. STATEMENT OF THE CASE

Michael Kelly is a 22-year-old homeless man. When he was 13 years old, he was convicted of child molestation for lying on top of a younger child. CP 4, 14; 1/22/09 RP 18. As a result of that felony, he is required to register as a sex offender. CP 7. In 2007 he pled guilty to attempted failure to register as a sex offender because he was homeless and failed to report weekly. CP 16, 19. He received a 12-month suspended sentence. CP 19.

Mr. Kelly largely complied with his conditions of probation. 3/12/08 RP 17. However, the court occasionally found he violated his conditions, including by spending one night at his mother's house in Snohomish County instead of staying in King County, and by sleeping in a tent under the freeway instead of in a homeless shelter. CP 25, 38, 48; 3/12/08 RP 18; 3/20/09 RP 30-39.

In January of 2009, the Department of Corrections asked the court to impose a condition prohibiting Mr. Kelly from wearing security-style uniforms. 1/22/09 RP 16. DOC opined that Mr. Kelly should not wear security uniforms because he might use them to lure children, even though he had not committed any crimes against children – let alone a sex crime – since he was himself a child of 13. Mr. Kelly's mother explained that Mr. Kelly wore security-guard patches on his jackets in order to protect himself from harassment. 1/22/09 RP 20-21. The court nevertheless imposed the following condition: "Do not wear a badge or security paraphernalia or uniform." CP 32.

About 11 months later, DOC alleged that Mr. Kelly violated the above condition. 12/1/09 RP 59. On November 5, 2009, Mr. Kelly was wearing a black jacket and an olive green shirt. 12/1/09 RP 61-76; Exs. 1, 2. Although the black jacket had an American

flag patch on one arm, the security badges had been removed and were inside Mr. Kelly's breast pocket and pocketbook. 12/1/09 RP 64-65, 78. DOC argued that Mr. Kelly violated the condition "do not wear a badge" because "he possessed patches that were within his clothing." 12/1/09 RP 76.

Mr. Kelly's attorney pointed out that Mr. Kelly was not "wearing" the badges, and that the shirt was a plain green shirt that looked like a safari shirt, not a security shirt. 12/1/09 RP 70, 78. The court nevertheless found that Mr. Kelly willfully violated the order to "not wear a badge or security paraphernalia or uniform," and terminated his probation and ordered him to serve the remainder of his sentence in jail. 12/1/09 RP 84; CP 56-57.

#### D. ARGUMENT

1. THE PROBATION CONDITION PROHIBITING MR. KELLY FROM WEARING A BADGE OR SECURITY PARAPHERNALIA OR UNIFORM WAS UNREASONABLE.

Conditions attached to probation must be reasonable. State v. Langford, 12 Wn. App. 228, 230, 529 P.2d 839 (1975). A sentencing court abuses its discretion by imposing a condition that does not (1) relate to the defendant's duty to make reparation, or

(2) tend to prevent the future commission of crimes. State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962).

In Summers, the defendant was convicted of manslaughter, and his sentence was suspended upon several conditions, including that he “support his own children (now living with their mother) in such amounts as his probation officer may direct.” Id. at 703. The Supreme Court held the condition was improper because it did “not bear a reasonable relation to defendant’s duty to make reparation, or tend to prevent the future commission of crimes.” Id. at 707.

In Langford, the defendant was convicted of heroin possession. Langford, 12 Wn. App. at 229. This Court held that requiring the defendant to identify the source of her drugs as a condition for granting probation was unreasonable. Id. at 230.

In State v. Farmer, the defendant was convicted of violating a zoning ordinance. State v. Farmer, 5 Wn. App. 25, 486 P.2d 296 (1971). The jail sentence was suspended on the condition that he “remove all wrecked motor vehicles and parts, scrap lumber, scrap metal and other miscellaneous items not necessary for the operation of a household or housemoving business.” Id. at 26.

This Court held the condition was invalid because it deprived the

defendant of items necessary to his demolition business, and therefore did not bear a reasonable relation to the duty to make reparation or prevent future crimes. Id. at 29.

As in the above cases, the condition here is not reasonably related to the duty to make reparation or prevent future crimes. First, preventing Mr. Kelly from wearing clothing with security patches clearly has nothing to do with reparation. Second, it has nothing to do with preventing future crimes. DOC theorized that “[i]f [Mr. Kelly] were then to encounter minors, portraying a person of authority with the lack of sexual deviancy treatment in his history, these are all great risk factors that we are concerned about .” 1/22/09 RP 16. But Mr. Kelly committed his one and only sex offense when he was only 13 years old, and he was not wearing a security uniform or anything like it when he committed the offense. Thus, the condition does not bear a reasonable relationship to the prevention of future crimes. This Court should hold the sentencing court abused its discretion in imposing the condition.

2. BECAUSE MR. KELLY HAD REMOVED THE SECURITY PATCHES FROM HIS JACKET AND PUT THEM IN HIS POCKET, THE STATE FAILED TO PROVE MR. KELLY VIOLATED THE CONDITION PROHIBITING HIM FROM WEARING SECURITY PARAPHERNALIA.

Even if the condition were valid, the sentencing court's finding that Mr. Kelly violated the condition is erroneous. DOC failed to prove by a preponderance of the evidence that Mr. Kelly "wore a badge or security paraphernalia or uniform."

DOC argued that "the State has established that the defendant was wearing security-style clothing, that he possessed patches that were within his clothing, in fact, several patches that were security-related that were specifically prohibited by the court." 12/1/09 RP 76 (emphasis added). But "possess" is not the same as "wear." It was undisputed that Mr. Kelly had removed the patches, as the court had previously ordered, and simply carried them inside his shirt pocket. 12/1/09 RP 62, 65-66, 70, 76, 78. The State therefore failed to prove that Mr. Kelley violated the condition "do not wear a badge."

Without the badges, the jacket and shirt are not security uniforms or security paraphernalia. The shirt is a plain olive green button-down, and the jacket is a warm, black winter coat with a flag

on the sleeve. Exs. 1, 2; 12/1/09 RP 70-71, 78. The State failed to prove Mr. Kelly violated the condition prohibiting him from wearing “a badge or security paraphernalia or uniform.” This Court should therefore reverse the order finding Mr. Kelly willfully violated the condition. CP 56.

3. THE CONDITION PROHIBITING MR. KELLY FROM WEARING “A BADGE OR SECURITY PARAPHERNALIA OR UNIFORM” IS UNCONSTITUTIONALLY VAGUE.

Due process requires that individuals (1) receive adequate notice of what conduct is proscribed and (2) are protected from arbitrary enforcement. U.S. Const. amend. XIV; State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776 (2008). A sentencing condition that does not comport with these requirements is unconstitutionally vague. Moultrie, 143 Wn. App. at 396.

In Moultrie, this Court held that a condition prohibiting the defendant from contacting “vulnerable, ill, or disabled adults” was unconstitutionally vague. Id. at 397-98. This Court explained that the terms “are ambiguous and thereby fail to provide clear notice” of what would constitute a violation. Id. at 397.

In another case, this Court held that a condition prohibiting a defendant from possessing “pornography” was unconstitutionally

vague. State v. Sansone, 127 Wn. App. 630, 634, 111 P.3d 1251 (2005). The Court reasoned, “The term has not been defined with sufficient definiteness such that ordinary people can understand what it encompasses.” Id. at 639. Furthermore, “[t]he condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Id.

As in Moultrie and Sansone, the condition in this case is unconstitutionally vague if it can be applied to Mr. Kelly’s conduct. Nothing about the phrase “do not wear a badge or security paraphernalia or uniform” provides fair notice that wearing a black jacket and olive green shirt with no security badges or patches would violate the condition. Furthermore, Mr. Kelly was subjected to arbitrary enforcement when he was jailed for possessing security paraphernalia, after being told only that he could not wear security paraphernalia. This Court should hold that as applied to Mr. Kelly, the condition prohibiting him from wearing security paraphernalia was unconstitutionally vague.

E. CONCLUSION

For the reasons above this Court should reverse the January 4, 2010 order modifying probation and jail commitment.

DATED this 17<sup>th</sup> day of June, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lila J. Silverstein', with a long horizontal flourish extending to the right.

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