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NO. 67925-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GLENN NORTHROP,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether Northrop must be resentenced because the sentence imposed is based on the standard range for the completed crime of rape of a child in the second degree rather than attempted rape of a child in the second degree.

2. Whether the condition of community custody prohibiting the possession of “pornographic materials” should be stricken or clarified because it is unconstitutionally vague.

3. Whether the trial court correctly found that Northrop had violated a condition of his SSOSA by engaging in “employment” without prior DOC approval where the evidence proved, and Northrop admitted, that he had taken photographs of nude women and posted them on the internet for the purpose of making money.

4. Whether Northrop’s claim that a new SSOSA revocation hearing should be held should be rejected because the trial court specifically stated that either basis upon which the suspended sentence was revoked – one of which Northrop does not challenge on appeal – was sufficient in itself to justify the revocation.

**B. STATEMENT OF THE CASE**

The defendant, Glenn Northrop, was charged with attempted rape of a child in the second degree, patronizing a juvenile prostitute, and possessing depictions of minors engaged in sexually explicit conduct in November 2002. CP 1-2. These charges arose after a cooperating witness informed a King County detective that Northrop, with whom she had been communicating via a telephone chat line, had expressed interest in having sex with an underage girl and had told her that he enjoyed watching child pornography on his computer. CP 3.

Based on this information, the detective set up a sting operation whereby the cooperating witness asked Northrop to meet her at a motel room, where she promised Northrop that a (fictitious) 12-year-old girl would be waiting to have sex with him. Northrop agreed to the meeting. He also promised to bring child pornography that they could watch on his computer, and he said he would bring his photography equipment so that he could photograph his sexual encounter with the 12-year-old girl. CP 4-5.

The meeting took place at a motel in SeaTac on November 11, 2002. The police set up video equipment in the motel room to document the meeting. Northrop arrived at the motel room with a

camera to photograph his encounter with the 12-year-old, and he brought a flash drive containing three videos of very young girls performing fellatio on adult men. CP 6. Northrop showed these videos to the cooperating witness and an undercover detective who was posing as the mother of the fictitious 12-year-old. CP 6. Northrop told the cooperating witness and the detective about the sexual acts he planned to perform with the 12-year-old, and he gave the detective \$200 in exchange for having sex with her “daughter.” Northrop was then arrested. CP 6.

Northrop pleaded guilty as charged in order to obtain a Special Sex Offender Sentencing Alternative (SSOSA). CP 9-33. Northrop received a SSOSA at sentencing on March 10, 2004. CP 34-43. The sentencing court imposed a minimum term of 131 months on count I, attempted rape of a child in the second degree,<sup>1</sup> and suspended all but 6 months on condition that Northrop complete sex offender treatment and abide by conditions of community custody under the supervision of the Department of Corrections (DOC) for the maximum term of life. CP 37, 39.

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<sup>1</sup> As will be discussed below, this minimum term is erroneous because it is based on the completed crime of rape of a child in the second degree rather than attempt.

Northrop completed sexual deviancy treatment and was released from his treatment program in September 2007. CP 47. However, in the summer of 2009, Northrop's community corrections officer (CCO) became aware that Northrop was advertising his services as a photographer specializing in nude photography, and that he was posting photographs of nude women on the internet using the pseudonym "Glenn Allen." CP 81-82, 218-19. After further investigation, Northrop's CCO discovered additional solicitations for nude models and photographs of nude women on the internet. CP 224-26. As a result of this behavior, the superior court judge who was monitoring Northrop's SSOSA expressly ordered Northrop to immediately remove all nude photographs and advertisements for nude photography services from the internet, and also ordered him to reenter sex offender treatment. CP 48-53.

Northrop's sex offender treatment provider, William Satoran, conducted an evaluation of Northrop when he was ordered back into treatment. During that evaluation, Northrop stated that he had "started making money in 2008 for digital photography," that he "started doing nudes because [he is] an artist." CP 229. Northrop further stated that his nude photography was not "salacious," and that he "did it for the money." CP 230.

During Northrop's second round of sex offender treatment, Northrop wrote an essay entitled "What I learned about my actions and behaviors surrounding my Fine Art Nude Photography and how it affected those invested parties involved." CP 238. In this essay, Northrop admitted that he had intentionally failed to inform DOC that he was taking photographs of nude women, that he did not tell these women his true name or that he was a registered sex offender, and that this behavior was "deceptive," "clearly not adherent to treatment guidelines," and "flat out wrong, and should not be tolerated from someone placed in the privilege of community custody." CP 238-39. Northrop completed the second course of sex offender treatment, and was again released from treatment in August 2010. CP 240-43.

In June 2011, Northrop's newly-assigned CCO, Michelle Kaiser, ran a Google search of Northrop's name and discovered that Northrop was again posting photographs of nude women on several internet websites. CP 247; 1RP 20-21, 30-31.<sup>2</sup> Northrop was offering the photographs for sale on at least one of these websites. 1RP 35-36. Two days after discovering these websites,

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<sup>2</sup> The verbatim report of proceedings consists of two volumes, which are referenced as follows: "1RP" is September 26, 2011, and "2RP" is October 7, 2011.

Kaiser had Northrop arrested and searched his apartment. 1RP 36-37. Among the items that were seized from Northrop's apartment were computer discs containing numerous photographs of nude women. CP 247; 1RP 40-42. Many of the photographs were sexually explicit. CP 247; 1RP 43-45. Kaiser contacted one of Northrop's nude models, D.G. D.G. told Kaiser that Northrop had photographed her in December 2010. D.G. did not know that her nude photographs had been posted on the internet or that Northrop was a sex offender. CP 247-48; 1RP 49-53.

The State moved to revoke Northrop's SSOSA. During the revocation hearing, Northrop stipulated that he had posted photographs of nude women on the internet, that he possessed photographs of nude women in his apartment, and that he had photographed D.G. 1RP 33-35, 46, 49, 192-94. Northrop further admitted that he had posted photographs of nude women on at least one internet website in order to sell them, and that he did not inform his CCO that he was doing this because he was afraid that the CCO would not allow it. 1RP 192-94.

The State alleged three violations as grounds to revoke Northrop's SSOSA: 1) posting photographs of nude women on the internet in violation of the court's 2009 order; 2) possessing

pornography in violation of the conditions of community custody; and 3) engaging in employment without prior approval from DOC in violation of the conditions of community custody. CP 85; 2RP 4. The court declined to find that Northrop had possessed pornography, recognizing that Washington appellate courts have held that such conditions of community custody are unconstitutionally vague. 2RP 7-8. The court found that Northrop had admittedly violated its order by posting nude photographs on the internet, and the court further found that Northrop had engaged in employment without prior approval from DOC.<sup>3</sup> CP 95; 2RP 4-5, 8-10. Based on these violations, the court revoked Northrop's SSOSA and ordered him to serve the previously-suspended prison sentence. The court expressly found that either of the two violations was sufficient in itself to justify revoking Northrop's SSOSA. CP 95-96; 2RP 28-32.

Northrop now appeals. CP 252-54.

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<sup>3</sup> Northrop argued that his photography was not "employment," but the court rejected that argument. 2RP 10, 18.

**C. ARGUMENT**

**1. THE STATE CONCEDES THAT NORTHROP SHOULD BE RESENTENCED BASED ON THE CORRECT STANDARD RANGE.**

Northrop first claims that he must be resentenced because the minimum term was imposed based on an incorrect standard range. More specifically, Northrop argues that he was sentenced to a minimum term based on the standard range for the completed crime of rape of a child in the second degree rather than attempted rape of a child in the second degree. Brief of Appellant, at 13-17. Northrop is correct.

Under the Sentencing Reform Act (SRA), the standard sentencing range for attempt is 75 percent of the standard range for the completed crime. RCW 9.94A.533(2). This was also the case in 2002, when Northrop committed his crimes. Former RCW 9.94A.595 (2002). In 2002, the completed crime of rape of a child in the second degree had a standard range of 111 to 147 months for an offender, like Northrop, with an offender score of 4. Former RCW 9.94A.510 (2002); Former RCW 9.94A.515 (2002). This is the sentencing range upon which Northrop's 131-month minimum term is based. CP 35, 37. But for the crime of attempted rape of a child in the second degree, the standard range for the minimum

term should have been 83.25 to 110.25 months – 75 percent of the range for the completed crime. Accordingly, Northrop's sentence is incorrect.

The State concedes that this case should be remanded for resentencing within the correct standard range.

**2. THE CONDITION OF COMMUNITY CUSTODY PROHIBITING THE POSSESSION OF "PORNOGRAPHIC MATERIALS" SHOULD BE CLARIFIED ON REMAND.**

Northrop next claims that upon remand for resentencing, the condition of community custody prohibiting the possession of "pornographic materials" must be stricken because it is unconstitutionally vague. Brief of Appellant, at 17-19. The State concedes that Washington law holds that such conditions are unlawful; however, this condition should be clarified on remand rather than stricken entirely.

The Washington Supreme Court and this Court have held that a prohibition on the possession of "pornography" or "pornographic materials" is unlawful because it is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005). Such a

condition is unlawful whether or not the condition in question allows the community corrections officer to define what materials are prohibited. Bahl, 164 Wn.2d at 758; Sansone, 127 Wn. App. at 641-42.

In this case, one of the conditions of Northrop's community custody is as follows:

Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

CP 39 (condition no. 7). Under Bahl and Sansone, this condition is unconstitutionally vague. Accordingly, it should be clarified on remand. See Sansone, 127 Wn. App. at 643 (remanding to the sentencing court "for imposition of a condition on Sansone's possession of materials that contains the necessary specificity"). It should not be stricken entirely, particularly in light of Northrop's conviction for possession of child pornography, and in light of the conduct that led to the revocation of the SSOSA.

**3. THE TRIAL COURT CORRECTLY FOUND THAT NORTHROP HAD ENGAGED IN "EMPLOYMENT" WITHOUT PRIOR APPROVAL FROM DOC.**

Northrop next argues that the trial court erred when it found that he had violated the condition of community custody that he obtain approval from DOC before engaging in "employment." More specifically, Northrop argues that his photography did not constitute "employment" because: 1) the women did not pay him to take their nude photographs, and thus, he did not have an "employer"; and 2) he was not "employed" when he posted photographs of nude women on the internet for sale because that was merely an attempt to sell personal belongings or assets, and was not "employment" in the formal sense. Brief of Appellant, at 19-29. These arguments should be rejected. By his own admission, Northrop engaged in these photographic pursuits in an effort to make money. Therefore, under a common-sense understanding of what constitutes "employment," the trial court's finding is correct.

Under the SRA, as Northrop notes,<sup>4</sup> the sentencing court may order as a standard condition of community custody that the defendant "work at department-approved education, employment, or community restitution, or any combination thereof."

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<sup>4</sup> See Brief of Appellant, at 26-27.

RCW 9.94A.700(4)(b) (2002). Statutory interpretation is a question of law, which courts review *de novo*. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The reviewing court's primary duty in interpreting a statute is to give effect to the intent of the legislature. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

The first step in statutory interpretation is to examine the statute's plain language. Gonzalez, 168 Wn.2d at 263. "When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning." Id. Moreover, there is one rule of statutory construction that "trumps every other rule": the court must not construe the statutory language in a way that results in absurd consequences. Davis v. Dep't of Licensing, 137 Wn.2d 957, 971, 977 P.2d 554 (1999); *see also* State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) ("Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided").

In this case, Northrop provides a definition of "employment" from Black's Law Dictionary, which appears to require a two-party relationship between the "employer" and the "employed." Brief of Appellant, at 27. But the ordinary meaning of "employment," as found in a common-usage, non-legal dictionary is not so narrow.

“Employment” is defined as an “activity in which one engages and employs his time and energies,” “work (as customary trade, craft, service, or vocation) in which one’s labor or services are paid for by an employer,” “temporary or occasional work or service for pay,” or an “occasional activity engaged in such as an avocation, pastime, habit, or expedient[.]” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 743 (1993).<sup>5</sup> This common definition of “employment” encompasses Northrop’s photographic pursuits.

Moreover, if the term “employment” for purposes of the community custody statute were as narrow as Northrop suggests (*i.e.*, requiring a two-party relationship between the “employer” and the “employed”), DOC and the courts would have no ability whatsoever to monitor a convicted sex offender who pursues any form of self-employment, no matter how potentially injurious to public safety that self-employment might be. This would defeat the legislature’s intent that sex offenders should be closely supervised, and would lead to absurd results that the legislature did not intend. This case is an example of those absurd results. Northrop’s argument is that he should be allowed to pursue his vocational

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<sup>5</sup> This is the same dictionary that the Washington Supreme Court utilized in Gonzalez, albeit a more recent edition. See Gonzalez, 168 Wn.2d at 263-64 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) for the definition of “amount”).

interest in nude photography with impunity so long as the nude women he photographs do not pay him to take those photographs, and so long as he only tries to sell those photographs as his “personal assets.” This is plainly not what the legislature intended.

In sum, the trial court did not err when it found that Northrop’s pursuit of a vocation as a photographer of nude women was a violation of the condition that he not engage in “employment” without prior approval from DOC. This Court should reject Northrop’s arguments to the contrary, and affirm.

**4. EVEN IF THIS COURT HOLDS THAT NORTHROP WAS NOT ENGAGED IN “EMPLOYMENT,” THERE IS NO NEED FOR ANOTHER REVOCATION HEARING.**

Lastly, Northrop argues that if this Court agrees that he did not engage in “employment” without prior DOC approval when he posted nude photographs for sale on the internet, this Court should also order that a new SSOSA revocation hearing should be held upon remand. Brief of Appellant, at 30-34. Although the court expressly ruled that either of the two violations it had found was independently sufficient to justify revoking Northrop’s SSOSA, Northrop contends that the court’s finding “is hardly the type of

thoughtful trial court analysis that breeds appellate confidence or deference.” Brief of Appellant, at 33. This claim should be rejected, as the record demonstrates that the court meant what it said.

In the context of exceptional sentences, remand for resentencing is not required even if all but one of the bases for an exceptional sentence is held to be invalid on appeal if it is clear from the record that the sentencing court would have imposed the same sentence based on the sole remaining, valid basis. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). This rationale also applies in the context of SSOSA revocations, as Northrop acknowledges. Brief of Appellant, at 31. Therefore, if the record is clear that the court would have revoked Northrop’s SSOSA based solely on his admitted violation of the court’s order not to post photographs of nude women on the internet, there is no need for a new SSOSA revocation hearing even if this Court strikes the other violation. The record in this case meets that standard.

Again, the court expressly stated that either of the two violations it had found would justify revoking Northrop’s SSOSA. 2RP 30; CP 254. In her oral ruling revoking Northrop’s SSOSA, the judge stated that her main concern was that Northrop had

completed sex offender treatment twice, yet he continued to take photographs of “young, slender females with no visible body hair,” and that he would “continue to photograph nude models” if his SSOSA were not revoked. 2RP 29-30. In other words, it was not Northrop’s attempts to make money from photographs of nude women that constituted the sole driving force behind the court’s decision; rather, it was the fact that he took photographs of nude women at all. Accordingly, the sentencing court’s ruling that either violation would justify revoking the SSOSA is not a meaningless afterthought, as Northrop suggests. Rather, it is the ruling of the court.

There is no reason to remand for another revocation hearing. To hold otherwise would require concluding that the court did not mean what it said when expressly stating that either of the two violations would justify revoking Northrop’s SSOSA. The record does not support this notion. This Court should reject Northrop’s argument, and affirm.

**D. CONCLUSION**

This Court should remand for resentencing within the correct standard range, and the condition of community custody prohibiting

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GLENN NORTHROP, Cause No. 67925-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

LC Brame  
Name  
Done in Seattle, Washington

2/8/13  
Date