

NO. 72338-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL IRWIN,

Appellant.

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

The Honorable Michael E. Rickert, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	5
1. THE COMMUNITY CUSTODY CONDITION PROHIBITING IRWIN FROM FREQUENTING AREAS WHERE MINOR CHILDREN CONGREGATE IS UNCONSTITUTIONALLY VAGUE.	5
a. <u>The Condition Violates Due Process Because It Does Not Provide Fair Notice and Invites Arbitrary Enforcement</u>	5
b. <u>This Pre-enforcement Claim Is Ripe for Review</u>	10
2. THE COMMUNITY CUSTODY CONDITION PROHIBITING IRWIN FROM POSSESSING A COMPUTER OR ANY DIGITAL MEDIA STORAGE DEVICE IS NOT CRIME-RELATED.....	11
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	5, 6, 8, 10, 12
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	5
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	8
<u>State v. O’Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	13, 14
<u>State v. Riley</u> 121 Wn.2d 22, 846 P.2d 1365 (1993).....	13
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	6, 8, 10
<u>State v. Sansone</u> 127 Wn. App. 630, 111 P.3d 1251 (2005).....	7, 8
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008) <u>reversed in part on other grounds</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	12, 13
<u>State v. Zimmer</u> 146 Wn. App. 405, 190 P.3d 121 (2008).....	12, 13, 14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A	12
RCW 9.94A .030	3, 12, 13
RCW 9.94A.505	12
RCW 9.94A.703	12
Sentencing Reform Act of 1981	12

A. ASSIGNMENTS OF ERROR

1. The community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as defined by the supervising CCO” violates due process because it is unconstitutionally vague.

2. The trial court erred in imposing the community custody condition prohibiting appellant from possessing or maintaining access to a computer or “any device to store or reproduce digital media or images,” because it is not crime-related.

3. The trial court erred in imposing the community custody condition prohibiting appellant from possessing “any device to store or reproduce digital media or images” because it is overbroad.

Issues Pertaining to Assignments of Error

1. Is the community custody condition requiring appellant to “not frequent areas where minor children are known to congregate, as defined by the supervising CCO” unconstitutionally vague because it does not provide fair warning of proscribed conduct and exposes appellant to arbitrary enforcement?

2. The trial court imposed community custody only on appellant’s convictions for child molestation. Is the community custody condition prohibiting appellant’s possession of computers and digital

media storage devices not crime-related where appellant did not use any of those devices to commit the molestation offenses?

3. Is the community custody condition prohibiting appellant's possession of digital media storage devices overbroad because it encompasses virtually any digital device?

B. STATEMENT OF THE CASE

The State charged Samuel Irwin with three counts of second degree child molestation (Counts 1-3) and one count of second degree possession of depictions of minors engaged in sexually explicit conduct (Count 4). CP 87-88. The State alleged Irwin had sexual contact with Z.J.N., J.E.H., and A.E.D. CP 87-88. The three children were either family friends or relatives of Irwin's. CP 56, 106. The State also alleged Irwin used a digital camera to take sexually explicit photos of juvenile females, which he then stored on a desktop computer. CP 107-12. Z.J.N. was identifiable in one of the photos based on her distinctive shirt. CP 112.

Irwin pleaded guilty to the four counts as charged. CP 97. The standard range sentence for the molestation convictions was 87 to 116 months, with a statutory maximum of 10 years. CP 121. The standard range sentence for the depictions charge was 60 months, with a statutory maximum of five years. CP 121.

The trial court imposed 116 months total confinement. CP 123. The court also imposed four months of community custody on the three molestation convictions (Counts 1-3), but not the conviction for possession of sexually explicit depictions of minors. CP 123. As part of community custody, the court imposed several crime-related prohibitions, including:

5. Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer (CCO)].¹

....

11. You may not possess or maintain access to a computer unless specifically authorized by CCO. 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 images.

CP 134.

At sentencing, defense counsel challenged Condition 5 as void for vagueness. 2RP 10.² He acknowledged that some prohibited locations were obvious, like schools, playgrounds, and public swimming pools. 2RP 10. But he argued other locations, like shopping malls or restaurants, were less

¹ RCW 9.94A.030(4).

² This brief refers to the verbatim reports of proceedings as follows: 1RP – April 2 and July 11, 2014; 2RP – August 7, 2014.

clear. 2RP 10. Therefore, the condition gave the CCO too much discretion to define areas where minors are known to congregate. 2RP 10.

Defense counsel also argued Condition 11 was too broad, because it was not crime-related to prohibit possession of all devices capable of storing digital media. 2RP 11. He asserted the condition included “virtually every phone that’s made today” and was therefore “much broader than it needs to be.” 2RP 11.

The trial court agreed that the prohibition on possessing digital cameras was too broad, “because there’s a camera in every device in America today,” and so struck that provision from Condition 11. 2RP 12; CP 134. The court acknowledged the condition “needs to be seriously reworked to bring it into the 21st century, that’s for sure.” 2RP 14-15. As to Condition 5, the court stated, “He shouldn’t frequent areas of high concentration of children, such as swimming pools and schools and things like that. Public restaurants would be all right.” 2RP 12. The court further noted:

I think we just let the language ride. If we tried to micromanage that language, we’d have a document a hundred pages long, and if . . . [the] DOC officer believes there’s a violation, we’d just have to look at it circumstance by circumstance and see if it was.

. . . .

We've got to hope that they have the common sense that they can determine the wheat from the chaff. Now, some of them may not, knowing DOC. We're not talking about rocket scientists there with that agency.

2RP 15. Irwin timely appealed. CP 135.

C. ARGUMENT

1. THE COMMUNITY CUSTODY CONDITION PROHIBITING IRWIN FROM FREQUENTING AREAS WHERE MINOR CHILDREN CONGREGATE IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered Irwin to “not frequent areas where minor children are known to congregate, as defined by the supervising CCO” (Condition 5). CP 134. The condition is unconstitutionally vague because it is insufficiently definite to apprise him of prohibited conduct and it allows for arbitrary enforcement by the CCO.

a. The Condition Violates Due Process Because It Does Not Provide Fair Notice and Invites Arbitrary Enforcement.

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens fair warning of proscribed conduct. Id. at 752. The doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is

therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Community custody conditions must be reversed if manifestly unreasonable. Id. at 791-92. Imposition of an unconstitutionally vague condition is manifestly unreasonable. Id. at 792.

In Bahl, the trial court imposed the following condition: “Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 743 (quoting clerk’s papers). The Washington Supreme Court held this to be unconstitutionally vague. Id. at 758. The court explained, “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Id.

In Sanchez Valencia, the challenged condition specified the defendant “shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to

facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” 169 Wn.2d at 785 (quoting clerk’s papers). The supreme court held the condition failed both prongs of the vagueness test.

First, the term “paraphernalia,” without specifying *drug* paraphernalia, was so broad that it failed “to provide the petitioners with fair notice of what they can and cannot do.” *Id.* at 794. Second, the condition “might potentially encompass a wide range of everyday items,” like sandwich bags or paper, depending on the particular CCO’s whim. *Id.* “A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.” *Id.* at 795.

Likewise, in State v. Sansone, a community custody condition was unconstitutionally vague where it specified Sansone could “not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to be defined by the therapist and/or [CCO].” 127 Wn. App. 630, 634-35, 639, 111 P.3d 1251 (2005). “Pornography” was not defined with sufficient definiteness such that ordinary people could understand what it encompassed. *Id.* at 639. The court explained that “[t]his is supported by the fact that the community placement condition includes a requirement that

‘pornography’ be defined by the probation officer, a requirement that would be unnecessary if ‘pornography’ was inherently definite.” Id.

The community custody condition prohibiting Irwin from frequenting areas where minors are known to congregate, as defined by his CCO, does not provide sufficient definiteness such that Irwin knows where he can or cannot go. Some locations are obvious: schools, playgrounds, or public swimming pools. But many other locations are not obvious: public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, and so on. The trial court said restaurants “would be all right,” but there is a huge range of restaurants, some of which attract groups of children and some do not. 2RP 12. A particular restaurant in a certain locale may attract children while the same restaurant in a different area may not. How is Irwin to know which is prohibited and which is not?

Indeed, the indefiniteness of this condition was fully recognized in State v. McCormick, where McCormick was held in violation of the same condition when he went to a food bank that happened to be in the same building as a grade school. 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009). Because an ordinary person would not know what conduct is prohibited, Condition 5 fails the first prong of the vagueness test.

The condition also fails the second prong of the vagueness test. Bahl, Sanchez Valencia, and Sansone all involved delegation to the CCO to

define the parameters of a vague condition. This did not sufficiently protect against arbitrary enforcement. The same is true here. A creative CCO could come up with almost any location where he or she believed minors congregated. The Sanchez Valencia court clearly held that where a condition leaves so much discretion to an individual CCO, it is unconstitutionally vague. 169 Wn.2d at 795. Condition 5 gives Irwin's CCO almost unfettered discretion to define where minors congregate. This "virtually acknowledges that on its face," Condition 5 "does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758.

The trial court's own statements demonstrate the potential for arbitrary enforcement. Specifically, the court stated, "We've got to hope that [CCOs] have the common sense that they can determine the wheat from the chaff. Now, some of them may not, knowing DOC. We're not talking about rocket scientists there with that agency." 2RP 15. Leaving it up to chance and hoping the CCO will exercise appropriate discretion all but proves the condition is at risk of arbitrary enforcement. Therefore, Condition 5 also fails the second prong of the vagueness test because it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

The condition here is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Irwin to arbitrary enforcement. As such, the condition does not meet the

requirements of due process and should be stricken. See Sanchez Valencia 169 Wn.2d at 795.

b. This Pre-enforcement Claim Is Ripe for Review.

A defendant always has standing to challenge the legality of community custody conditions even though he has not been charged with violating them. Sanchez Valencia, 169 Wn.2d at 787. Although the State has not yet charged Irwin with violating Condition 5, this pre-enforcement challenge is ripe for review. Courts routinely entertain pre-enforcement challenges to sentencing conditions. Id. A pre-enforcement challenge to a community custody condition is ripe for review ““if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.”” Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

The issue in Irwin’s case is ripe. First, it is primarily legal: does the condition prohibiting Irwin from frequenting areas where minor children are known to congregate violate due process vagueness standards? In other words, does the condition provide Irwin with sufficient notice of what he may or may not do? See, e.g., Sanchez Valencia, 169 Wn.2d at 790-91 (condition prohibiting use of drug-related paraphernalia was ripe for vagueness review); Bahl, 164 Wn.2d at 752 (vagueness of a condition prohibiting possession of pornography was a purely legal question).

Second, this question is not fact-dependent. Either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not. Id. at 788-89 (“[I]n the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development.”).

Third, the challenged condition is final because Irwin has been sentenced to abide by the condition. Id. at 789 (“The third prong of the ripeness test, whether the challenged action is final, is indisputably met here. The petitioners have been sentenced under the condition at issue.”). The condition prohibiting Irwin from frequenting areas where minor children are known to congregate is ripe for review.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING IRWIN FROM POSSESSING A COMPUTER OR ANY DIGITAL MEDIA STORAGE DEVICE IS NOT CRIME-RELATED.

The trial court imposed community custody only on Irwin’s molestation convictions. The community custody condition (Condition 11) prohibiting Irwin’s possession of computers and digital media devices is not related to those offenses. The condition is also too broad, because it encompasses virtually any digital device. It should therefore be stricken from the judgment and sentence.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, allows trial courts to impose crime-related prohibitions during the course of community custody. RCW 9.94A.505(8), .703(3)(f). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A .030(10). Crime-related prohibitions may last only as long as the maximum sentence allowed for the associated offense. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A community custody condition is overbroad if it encompasses matters that are not crime-related. State v. Bahl, 137 Wn. App. 709, 714-15, 159 P.3d 416 (2007), reversed in part on other grounds, 164 Wn.2d 739, 193 P.3d 678 (2008).

In State v. Zimmer, Zimmer was convicted of methamphetamine possession. 146 Wn. App. 405, 410-11, 190 P.3d 121 (2008). The trial court imposed a community custody condition prohibiting her possession of cellular phones and data storage devices. Id. at 411. The appellate court reversed, holding the condition did not directly relate to Zimmer’s crimes. Id. at 413. Though such devices may be used to further illegal drug possession, the court explained, there was no evidence in the record (1) that Zimmer possessed a cell phone or data storage device in connection with possessing methamphetamine, or (2) that she intended to distribute or sell methamphetamine using such devices. Id. at 414.

In State v. O’Cain, O’Cain was convicted of second degree rape. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). As a condition of community custody, the trial court prohibited O’Cain from accessing the internet without prior approval from his CCO and sex offender treatment provider. Id. at 774. This court struck the condition, reasoning:

There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775. By contrast, in State v. Riley, restriction on Riley’s computer use was crime-related because he was convicted of computer trespass. 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Zimmer and O’Cain are on point. The trial court imposed community custody for Irwin’s molestation convictions. CP 123. The court did not impose community custody for the depictions conviction. CP 123. Nor could it, because any community custody imposed on that count would exceed the statutory maximum. CP 121; Warren, 165 Wn.2d at 32.

Therefore, the condition prohibiting Irwin’s possession of a computer or any digital media storage device must be related to the molestation convictions. See RCW 9.94A .030(10); Zimmer, 146 Wn. App. at 413. The record demonstrates the condition is not related to those crimes. The

molestation convictions arose from Irwin's sexual touching of Z.J.N., J.E.H., and A.E.D. CP 87-88. He knew the children through preexisting social contacts—he did not use a computer or digital device to perpetrate the crimes. See CP 56, 106.

Rather, Irwin's use of the computer and digital camera related only to his conviction for possessing sexually explicit depictions of minors. Z.J.N. is identifiable in at least one of the sexually explicit photographs. CP 112. However, this photograph was not the basis of the molestation conviction related to Z.J.N. Rather, that conviction was based on three incidents where Z.J.N. said Irwin touched her "bathing suit area." CP 102-03. Z.J.N. never mentioned Irwin photographing her or said Irwin touched her while taking the photographs. See CP 102-12.

This demonstrates that Condition 11, specifying Irwin "may not possess or maintain access to a computer" and "may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, or any device to store or reproduce digital media or images," is not crime-related. CP 134. Like in Zimmer and O'Cain, no evidence shows these convictions involved computers or digital media devices. Nor did the trial court make a finding that a computer or digital device contributed to these offenses. See 2RP 12-19. Because the prohibition is not crime-related, it should be stricken from the judgment and sentence.

Even if this court holds that restricting Irwin's possession of computers is crime-related, the remainder of the prohibition is too broad. The record shows Irwin used a digital camera and a desktop computer to take and store sexually explicit photographs of juvenile females. CP 107-12. But Condition 11 also prohibits Irwin's possession of "any device to store or reproduce digital media or images." CP 134. This encompasses a staggering array of digital devices and digital media, including cell phones, iPods, commercial DVDs and CDs, electronic photo frames, and the like.

Strangely enough, the trial court agreed that restricting Irwin's possession of digital cameras was too broad because it would encompass almost every cell phone. 2RP 12; CP 134. The court accordingly struck the specific prohibition of "digital cameras, web cams, wireless video devices or receivers, CD/DVD burners." CP 134. But the court then left the broader general prohibition of "any device to store or reproduce digital media or images." CP 134. This language subsumes the stricken devices and includes virtually any digital device imaginable. Such a broad sweep is not crime-related where Irwin used only a desktop computer and a digital camera. Therefore, even if this court does not strike Condition 11 in its entirety, it should strike the language, "or any device to store or reproduce digital media or images." CP 134.

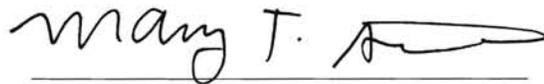
D. CONCLUSION

Irwin requests the challenged community custody conditions be stricken from the judgment and sentence.

DATED this 14th day of January, 2015.

Respectfully submitted,

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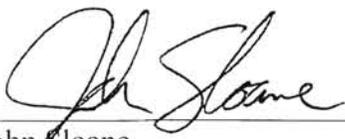
On January 14, 2015, I E-served and or mailed a copy of the Opening Brief, directed to:

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Containing, re Samuel Irwin.
Cause No. 72338-3-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.



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01-14-2014
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Done in Seattle, Washington

