

NO. 72942-0-1

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

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STATE OF WASHINGTON

Respondent

v.

JAMES W. BURKE,

Appellant

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BRIEF OF RESPONDENT

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## **I. ISSUE PRESENTED**

Did the trial court err in imposing a community custody condition that requires appellant to be directly supervised at all times when at work, when the defendant is retired and committed his crimes at home?

## **II. STATEMENT OF THE CASE**

James Burke was originally charged in Snohomish County Superior Court with two counts of Child Molestation in the First Degree (Domestic Violence) committed against his step-granddaughter (N.B., born in August, 2001) while she was 7 to 12 years old. CP 101. The defendant's repeated molestation of his granddaughter came to light only after N.B.'s older friend L.F. (born in May, 2000) reported that the defendant molested L.F. while she was spending the night with N.B. at the defendant's trailer in Grays Harbor County in December, 2013. CP 97. L.F.'s disclosure prompted adults to ask N.B. about her own experiences with the defendant. N.B. disclosed ongoing sexual abuse by the defendant, and he reluctantly confessed when confronted by a Grays Harbor County Sheriff's Detective. He admitted molesting N.B. twelve to fifteen times at his old home in Everett, Washington and an

additional four to five times in starting in August 2013 at their new home in Grayland, Washington. CP 97-99.

The State filed an amended information adding a third count, Child Molestation in the Second Degree, naming L.F. as the victim. CP 94. The defendant pleaded guilty as charged in the Amended Information and obtained a sexual deviancy evaluation in support of his request for a SSOSA sentence. CP 75-93, CP 45-62. He agreed that the court could consider the Affidavit of Probable Cause in imposing his sentence. CP 81, 85.

The sexual deviancy evaluation revealed that the defendant had additional minor victims beyond the two involved in his current case. CP 60. The defendant admitted to viewing child pornography over the internet at least 50 times since 1997, but claimed each time was accidental. CP 56. The evaluation also discussed the defendant's work history, explaining that from 1997 through 2012 the defendant was employed as a Technical Specialist for a company that provided networking systems to businesses and restaurants. CP 52. However, the defendant has been retired and unemployed since 2012. CP 24.

Ultimately the court declined to impose a SSOSA sentence, instead imposing a low-end standard range indeterminate sentence

of 98 months to life. The court explained that a SSOSA sentence was simply too lenient in light of the totality of the circumstances. 1/8/15 RP 20-21.

The court also imposed a lifetime term of Community Custody and adopted 17 "Additional Conditions of Community Custody" which were originally proposed by the Department of Corrections. CP 16-17, 28-29. The conditions included a requirement to participate and make progress in any treatment recommended in his sexual deviancy evaluation, and to obtain an additional drug/alcohol evaluation and follow that course of treatment. CP 17. The court prohibited the defendant from having contact with the two named victims N.B. and L.F., but also imposed multiple conditions designed to prohibit his contact with minor children more broadly. CP 16 (conditions 1, 4, 5, 6, 8, 9). The court also imposed multiple conditions designed to ensure accurate and timely monitoring of the defendant's compliance with the requirements of his treatment providers and the Department of Corrections. CP 17 (conditions 14-17).

The defendant has challenged only Community Custody condition number 11, which states, "Hold employment only in a position where you always receive direct supervision." CP 16. As

stated further below, the State concedes in this particular case that the challenged condition was imposed without legal authority because it was not sufficiently crime-related given the facts of the defendant's crimes.

### III. ARGUMENT

The legislature has granted trial courts the statutory authority to impose conditions of community custody. RCW 9.94A.703. 9.94A.505. Among the discretionary powers available to the sentencing court is the authority to impose "crime-related prohibitions." RCW 9.94A.703(3)(f). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, whether a court has exceeded the authority granted by the Sentencing Reform Act is an issue of law reviewed de novo. Id.

A "crime-related prohibition" is defined as "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). But no causal link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. State v. Acrey, 135 Wn. App. 938, 946, 146 P.3d 1215 (2006).

The State concedes that the challenged condition restricts the defendant's potential options for future employment in a manner that is not sufficiently crime-related based on the record before the trial court. The crimes charged by the State were committed exclusively within the defendant's own home, and there was no evidence within the extensive sexual deviancy evaluation, the presentence investigation report, or the affidavit of probable cause that the defendant used his employment as a means of committing his crimes or identifying potential victims. There is no evidence that the defendant used his employment as a means of facilitating his "accidental" interest in child pornography. The State therefore concedes that the challenged condition exceeds the authority granted by the SRA because it was not sufficiently related to the facts of the defendant's crimes.

The State's concession should not be viewed broadly, as the very nature of this type of challenge requires rigorous inquiry into the precise factual nature of each defendant's crimes. The State

also recognizes the defendant's concession<sup>1</sup> that there are additional portions of the SRA which do authorize employment-related prohibitions even when a defendant's crimes have no relation to employment. For example, the SRA grants courts the authority to require the defendant to hold employment only under conditions approved by the Department of Corrections. RCW 9.94A.703(2)(b). Also, the court's ability to prohibit contact with a specified class of people (here, minor children) may lawfully impact a defendant's employment conditions. See CP 16.

But those separate sources of statutory authority do not authorize the challenged condition here. The proper remedy appears to be remand to the sentencing court for a hearing in which condition number 11 should be stricken.

#### **IV. CONCLUSION**

For the reasons stated above the State respectfully asks this Court to grant the defendant's appeal and remand for further hearings consistent with this opinion.

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<sup>1</sup> The defendant does not challenge the legality of the other conditions affecting the conditions of any future employment he may obtain, such as "work at DOC-approved education, employment and/or community restitution" (CP 7), "Do not seek employment or volunteer positions, which place you in contact with or control over minor children" (CP 16), and "Do not hold employment without first notifying your employer of this conviction." (CP 16).

Respectfully submitted on August 19, 2015.

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THE STATE OF WASHINGTON,  
  
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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

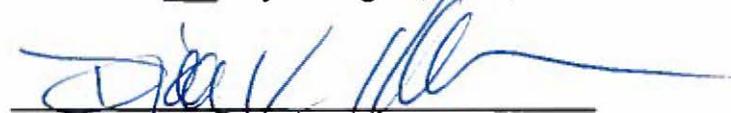
The undersigned certifies that on the 20<sup>th</sup> day of August, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer Sweigert, Nielsen, Broman & Koch, [SweigertJ@nwattorney.net](mailto:SweigertJ@nwattorney.net) and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

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

Dated this 20<sup>th</sup> day of August, 2015, at the Snohomish County Office.



Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office