

No. 38215-5- II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALLEN BOYD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS
DIVISION II

The Honorables Rosanne Buckner, Vicki Hogan, Katherine Stolz and
Ronald Culpepper, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing conditions of community custody which were not statutorily authorized or were unconstitutional.

2. The condition that appellant Michael Boyd not possess or peruse pornographic materials and authorizing the community corrections officer to define what constituted such material was unconstitutionally vague and in violation of Boyd's due process and First Amendment rights.

3. The condition that Boyd not use the internet without prior approval was not a statutorily authorized crime-related prohibition.

4. The sentencing court erred and violated former RCW 9.94A.530(2) (2004) by failing to hold an evidentiary hearing on "facts" contained in the presentence investigation report (PSI) to which Boyd objected, before relying on that PSI in imposing the sentences.

5. The condition that Boyd submit to plethysmograph testing was not statutorily authorized, because it was not sufficiently limited to legitimate treatment purposes.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A sentencing court may only impose conditions of community custody which are statutorily authorized and constitutionally proper.

a. To satisfy due process mandates, a condition of community custody must be sufficiently definite so that an ordinary person can understand what conduct was proscribed and must provide ascertainable standards of guilt to protect against arbitrary enforcement. In

addition, where a condition infringes on a defendant's First Amendment rights, it must meet a stricter standard of definiteness.

In State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008), the Supreme Court struck down a condition which prohibited a defendant from viewing or accessing pornographic materials and which delegated to the community corrections officer the authority to determine when materials met that standard. The Court found the condition was unconstitutionally vague and a violation of due process in light of the First Amendment issues involved.

Did the sentencing court err in imposing a virtually identical condition in this case and should this Court therefore strike the condition as unconstitutional?

2. Under former RCW 9.94A.530 (2004), a sentencing court may only rely on facts which are admitted, acknowledged or proved in determining the sentence. If a defendant objects to a "fact" contained in the presentence investigation report, the court must either not rely on the disputed fact or must hold an evidentiary hearing at which the prosecution must prove that fact, by a preponderance of the evidence.

a. A sentencing court may impose a prohibition of the defendant's conduct as part of the sentence so long as that prohibition is "crime-related." A prohibition is only "crime-related" if it directly relates to the circumstances of the crime of conviction.

Did the sentencing court act outside its statutory authority in ordering Mr. Boyd not to have access to the internet without prior approval where there were no facts admitted, acknowledged or proved establishing

that the internet was used in any way in the crimes?

b. Boyd objected to the “facts” contained in the PSI: which claimed that Boyd “enjoyed entertaining the neighborhood children,” and that he was a “danger to our community and the community’s children” and had displayed “deviant and dangerous behaviors and will continue to pose a substantial threat to the safety of our community until he cooperates with sexual deviancy treatment” because he was “not fully admitting wrongdoing” by entering Alford¹ pleas.

Did the sentencing court err in relying on those “facts” without holding the required evidentiary hearing and requiring the state to meet its burden of proof?

3. Under State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), overruled on other grounds sub silentio by Bahl, supra, because plethysmograph testing is irrelevant to monitoring compliance with conditions of community custody and is only a tool used in treatment, a condition that an offender submit to plethysmograph testing may only be ordered if such testing is part of a treatment condition.

The sentencing court did not order Mr. Boyd to undergo treatment as a condition of community custody but left it up to the Department of Corrections (DOC) or the Indeterminate Sentencing Review Board (ISRB) to later decide if such treatment should occur. The court nevertheless ordered him to submit to plethysmograph testing not only if requested by a therapist but also if the CCO ordered it, without limiting such an order to

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

treatment purposes. Was this condition unauthorized under Riles?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Michael Boyd was charged by amended information with fifteen counts of first-degree child molestation, five counts of possession of depictions of a minor engaged in sexually explicit conduct with sexual motivation, four counts of sexual exploitation of a minor, and one count of first-degree rape of a child, many of which were alleged as “domestic violence” incidents. CP 8-24; RCW 9.68A.040(1)(b); RCW 9.68A.040(1)(c); RCW 9.68A.070; RCW 9.94A.030; RCW 9A.44.073; RCW 9A.44.083; RCW 10.99.020.

After a successful interlocutory appeal on a discovery issue which went all the way to the state Supreme Court, on April 2, 2008, before the Honorable Judge D. Ronald Culpepper, Boyd entered an Alford plea to a second amended information. CP 132-34, 136-47; 1RP 3, 2RP 4, 3RP 2, 4RP 2, 5RP 4, 6RP 3-4 15-25.² That information charged three counts of first-degree child molestation, one count of sexual exploitation of a minor and one count of second-degree assault. CP 132-34; RCW 9.68A.040(1)(b); RCW 9A.36.021(1)(e); RCW 9A.44.083.

On August 1, 2008, Judge Culpepper imposed standard-range

²The verbatim report of proceedings in this case consists of six volumes, which will be referred to as follows:

June 26, 2007, as “1RP;”

July 24, 2007, as “2RP;”

August 31, 2007, as “3RP;”

October 12, 2007, as “4RP;”

November 29, 2007, as “5RP;”

the chronologically paginated volume containing the proceedings of December 19, 2007, April 2, May 29, June 13 and July 9, 2008, as “6RP.”

sentences including indeterminate sentences with minimum terms at the high end of the standard range for the child molestation offenses. CP 152-66; 6RP 46-89. At that same hearing, Boyd reaffirmed his plea in light of an error in the standard sentencing range listed on the plea forms. CP 176-77; 6RP 47-48.

Boyd appealed and this pleading follows. See CP 178.

2. Facts relating to the issues on appeal

The second amended information charged Boyd with three counts of first-degree child molestation, one count of sexual exploitation of a minor and one count of second-degree assault. CP 132-35. In entering an Alford plea to those charges, Boyd declared, in the Statement of Defendant on Plea of Guilty to Sex Offense:

I assert my innocence, but enter this plea to take advantage of the state's offer. I have reviewed the evidence with my attorney, investigator and expert and understand that there is a substantial likelihood that I would be convicted by a jury.

CP 143-44. The Statement also had a check mark in a box next to boilerplate language which provided: “[i]nstead of making a statement I agree that the court may review the police report and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 144.

After accepting the Alford plea, the court ordered the Department of Corrections (DOC) to conduct a presentence investigation and prepare a presentence investigation report (PSI) for sentencing. CP 148. At sentencing on August 1, 2008, counsel objected to large portions of that report. First, she objected that the PSI far exceeded the information which

was supposed to be included in the report and contained improper “facts.” 6RP 49-50. She provided the court with a redacted version of the PSI, arguing that the court could not rely on the redacted information in sentencing. 6RP 50. She also noted that the court had stated that it had read the PSI prior to sentencing and asked the court to “examine its conscience and ability to enter a sentence in this case without considering the material that was in that original report” and to which Boyd objected. 6RP 50.

Counsel argued that many of the “facts” contained in the unredacted version of the PSI would “violate the real facts doctrine” if the court relied on them. 6RP 51-52. For example, counsel noted, she had never advised her client “not to discuss the details of the crime” as the PSI indicated, nor had she ended the interview because of her schedule. 6RP 52. The date of Boyd’s high school graduation was wrong, as was the claim that Boyd said he “enjoys entertaining the neighborhood children,” something the report writer included in the “risk assessment” portion of the PSI and which was absolutely not something Boyd had said. 6RP 53.

Counsel also pointed out the error in the PSI declarations that Boyd was a “danger to our community and the community’s children” and displayed “deviant and dangerous behaviors and will continue to pose a substantial threat to the safety of our community until he cooperates with sexual deviancy treatment,” which were claims based upon Boyd’s “not fully admitting wrongdoing.” 6RP 53-54. Counsel noted that there were many reasons for a person to enter a plea, that Boyd had never admitted his guilt and that the fact that he was maintaining his innocence was not

“being in denial” but rather taking advantage of the plea bargain. 6RP 54. Counsel argued that it was constitutionally offensive for anyone to suggest that Boyd’s entry of an Alford plea itself should be relied on to “make the conclusion in a sex case that a defendant presents a special danger.” 6RP 54.

These errors in the PSI were not “trivial or inconsequential,” counsel pointed out, because the Indeterminate Sentencing Review Board would consider the PSI when it makes its later decisions such as when deciding Boyd’s date of release or whether to release him at all. 6RP 57, 59.

The court stated that it appeared that the PSI writer was stating an “opinion” on Boyd being “in denial” by entering the Alford pleas. 6RP 57. The court then asked whether such an opinion would, in fact, be “unfair.” 6RP 57. The court also said it had “a bit of concern” about how the PSI writer “apparently wants to be an advocate for the victims,” which was not “the job of the PSI.” 6RP 60. When the judge stated that all of the information on behalf of the victims or “repeating what the victims told them” was probably not proper in a PSI report, the prosecutor agreed. 6RP 60. The court also noted that it had “flagged” several parts of the PSI report as inappropriate. 6RP 60. The court stated, however, that it not heard any concerns voiced about the PSI until that day, even though the case had been set for sentencing several months earlier. 6RP 60.

At that point, counsel pointed out that the relevant sentencing statute provided for objections to the PSI to be made at sentencing, so that the objections were timely. 6RP 61.

Although the prosecutor objected to several of the proposed changes to the PSI reflected in the redacted version, the court accepted nearly all of them. 6RP 61-67. The prosecutor claimed it would be proper to have multiple incidents remain for each count and to have the court consider more than one alleged act for each charge but the court declined, stating it would only rely on a single act for each count in sentencing. 6RP 63-67. The court did not, however take out the declaration in the PSI about Boyd “entertaining neighborhood children,” saying it was a “reasonable inference” from the PSI information. 6RP 70-71. The court also refused to redact the portion of the PSI about Boyd being a danger and having engaged in deviant behavior. 6RP 71-72. The court then relied on that amended PSI in imposing the sentences, which were all at the top of the standard range for each offense, including high end mandatory minimums for the molestation counts. 6RP 71-88.

Counsel also objected to several of the proposed conditions of community custody, which were contained in proposed Appendix H to the proposed judgment and sentence. 6RP 80. Specifically, she objected to a condition (condition 11) requiring Boyd to “[e]nter and complete a state approved sexual deviancy treatment program through a certified sexual deviancy counselor. 6RP 80. She noted that Boyd would not be released by the ISRB until they felt he was “safe to be at large” and that he would have already participated in treatment while in prison. 6RP 80. As a result, she argued, he should not be required to participate in treatment once released unless DOC deemed it appropriate. 6RP 80.

Proposed condition 19 required Boyd to “[s]ubmit to polygraph

and plethysmograph testing upon direction of your community corrections officer or therapist at your expense,” and counsel objected to that condition, as well. 6RP 80.

Finally, counsel objected to proposed condition 25, which provided, “[y]ou shall not have access to the Internet or webcams or any device used to photograph.” 6RP 81. That condition was not “crime related,” counsel argued, because although Mr. Boyd’s computer had photographs of a sexual nature found on it, there was no evidence those photographs stored on the computer were ever sent or received through the internet, nor was there any indication that Boyd had used the internet to look at pornography or that the internet was involved in any way in the crimes. 6RP 81. Counsel noted that “simply putting pictures on a computer and not disseminating them should not prohibit a person from accessing the internet as long as they don’t go to pornographic sites, which DOC will be able to monitor.” 6RP 82.

In response, the prosecutor declared that he did not want Boyd to use a computer, because the prosecutor believed that Boyd had “used the computer to commit the crimes.” 6RP 83. Counsel objected, stating that Boyd “didn’t use the computer to commit the crimes.” 6RP 82.

The court decided to impose several of the disputed conditions, making amendments to some. 6RP 85-87. The condition regarding sexual deviancy treatment was amended so that Boyd was required to participate in treatment during community custody only “if required by community custody officer” or by the ISRB as part of release. 6RP 87; CP 173-75. The condition regarding internet access was imposed but amended so that

it provided “[y]ou shall not have access to the Internet or webcams without prior approval of community custody officer.” 6RP 87-88; CP 173-75.

The condition which included the requirement that Boyd submit to plethysmograph testing at the direction of a therapist or his community corrections officer (CCO) was imposed without amendment. 6RP 87-88; CP 173-75.

In addition, the court also imposed a condition (condition 15) which provided: “Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.” CP 173-75. Counsel did not object. 6RP 54-88.

D. ARGUMENT

1. CONDITION 15 IS UNCONSTITUTIONALLY VAGUE UNDER DUE PROCESS AND FIRST AMENDMENT MANDATES

Both the state and federal due process clauses mandate that citizens be given “fair warning” of proscribed conduct. City of Seattle v. Montana, 129 Wn.2d 583, 596, 91 P.2d 1218 (1996); Fourteenth Amend.; Art. I, § 3. As a result, a statute must define a criminal offense “with sufficient definiteness that ordinary people can understand what conduct is proscribed” or must “provide ascertainable standards of guilt to protect against arbitrary enforcement.” City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990), citing, Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Put another way, there must be sufficient definition or standards set forth so that a person of common intelligence does not have to guess at the meaning of a penal statute. See State v. Smith, 111 Wn.2d 1, 4-6, 759 P.2d 372 (1988).

Conditions of community custody must also meet these standards in order to be constitutional. Bahl, 164 Wn.2d at 753-54.

These requirements are enhanced and further protections against vagueness apply where a statute or condition “concerns material protected under the First Amendment.” Bahl, 164 Wn.2d at 753. Because a vague condition or standard can chill the exercise of First Amendment rights, there is a “stricter standard of definiteness” required, because the consequences of the vagueness or lack of clarity is greater. Id.

In this case, this Court should strike condition 15 of the conditions of community custody, because that condition implicates First Amendment rights and is unconstitutionally vague.

As a threshold matter, this issue is properly before the Court. It is well-established that “illegal or erroneous sentences may be challenged for the first time on appeal.” Bahl, 164 Wn.2d at 744, quoting, State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

Further, the issue is ripe for review even though the condition will not be enforced against Mr. Boyd ostensibly until he has served his time in prison and is on community supervision or custody. See Bahl, 164 Wn.2d at 747-48. Where, as here, the issue is a challenge to a condition implicating First Amendment rights, the challenge does not require further factual development to be decided, the issues are primarily legal and the challenged action is final, the issue is “ripe.” Id., quoting, First United Methodist Church v. Hr’g Exam’r, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996). Further, “[t]he risk of hardship” to the defendant is “significant” if review is not given on direct appeal, because upon the defendant’s release

from prison the conditions will immediately restrict him and he could be subject to punishment immediately for their violation. Bahl, 164 Wn.2d at 751-52.

Thus, in Bahl, on direct review, the Court addressed a challenge to a condition nearly identical to the one here, despite the prosecution's arguments that such "preenforcement" review was premature and improper. 164 Wn.2d at 751-52. The condition at issue in Bahl prohibited the defendant from "possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer." 164 Wn.2d at 754. In the lower appellate court, the prosecution had conceded that the condition was vague, but in the Supreme Court, it changed its position, arguing the condition was proper. 164 Wn.2d at 754.

In deciding to the contrary, the Supreme Court noted that pornography is, in fact, protected speech. 164 Wn.2d at 757. The Court held that it was permissible to limit fundamental rights such as those guaranteed by the First Amendment, so long as those restrictions are "reasonably necessary to accomplish the essential needs of the state and public order." 164 Wn.2d at 757, quoting, State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (quoting, Malone v. United States, 502 F.2d 554, 556 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975)). Thus, the Court held, while Bahl could be restricted in the materials he possessed or accessed, those restrictions "implicating his First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order." Bahl, 164 Wn.2d at 757-58.

After examining both authorities from other jurisdictions and other

Washington statutes which might help clarify the definition of pornography, the Court found the term unconstitutionally vague. 164 Wn.2d at 757-58. There was simply not sufficient definition of what amounted to “pornography” to give the defendant proper notice of what was prohibited, as required under due process and the First Amendment. Id.

Indeed, the Court noted, the condition itself acknowledged the lack of definition by allowing the CCO to decide what the term means:

[t]he 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.

Bahl, 164 Wn.2d at 758. As a result, the condition did not meet the standards of specificity required to comport with due process mandates, in light of the First Amendment rights involved, and the case was remanded for resentencing to remove that condition. 164 Wn.2d at 758.

Bahl is virtually on point with this case. Condition 15 of Boyd’s conditions of community custody provides, “[d]o not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.” CP 173-75.

Just as in Bahl, condition 15 uses the undefined term “pornographic materials,” failing to provide sufficient definition of what Boyd is prohibited from possessing or perusing. CP 173-75. And just as in Bahl, the condition here virtually acknowledges on its face that it does not provide ascertainable, plain standards for enforcement, because it leaves it up to the community corrections officer to direct what falls within

the condition. If anything, the condition in this case is more clearly egregious than the one in Bahl, because the condition here is even more clear about its delegation to the CCO to decide what is prohibited under the rule.

Notably in Bahl, the Court recognized that the standards for reviewing a condition of community custody were not the same as the standards use when a statute is challenged. For statutes, the challenger bears the heavy burden of establishing the law unconstitutional, because the presumption is that the legislature only enacts constitutional laws. Bahl, 164 Wn.2d at 757-58. In contrast, a condition of community custody is not subject to such a presumption, because it is imposed at the discretion of the trial court. Id. As a result, the question is whether the condition was “manifestly unreasonable,” and an unconstitutional condition meets that standard. Id., citing, Riley, 121 Wn.2d at 37.

Because condition 15 fails to pass the scrutiny required for conditions implicating First Amendment rights and allows the CCO to define what is prohibited, the condition fails to satisfy due process and is unconstitutionally vague. It is a manifestly unreasonable condition under Bahl. This Court should so hold and should strike the condition.

2. CONDITION 25 WAS NOT STATUTORILY
 AUTHORIZED BECAUSE IT WAS NOT “CRIME-
 RELATED” AND THE COURT ERRED IN RELYING
 ON FACTS WHICH WERE NOT ACKNOWLEDGED,
 ADMITTED OR PROVED

The Sentencing Reform Act of 1981 structures sentencing court discretion and limits the court’s authority. State v. Fitch, 78 Wn. App. 546, 551, 897 P.2d 494 (1995). As a result, sentencing courts may only

impose sentences which are authorized by the SRA. See In re Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

One of the limits on the sentencing court's discretion is contained in RCW 9.94A.530(2). Under the version of that statute in effect for Boyd's case, "[i]n determining any sentence other than a sentence above the standard range," the sentencing court is limited to considering only "information than is admitted by the plea agreement, or admitted, acknowledged or proved in a trial or at the time of sentencing." Former RCW 9.94A.530(2) (2004). Where a defendant challenges "facts" set forth in a PSI report, the sentencing court must either decline to rely on those disputed "facts" or must hold an evidentiary hearing, at which those "facts" must be proven by the prosecution by a preponderance of the evidence, before the court may use those facts in sentencing. Former RCW 9.94A.530(2) (2004).

In this case, the sentencing court acted outside its authority and imposed a condition which was not authorized by law when it imposed condition 25, the condition which prohibited Boyd from having "access to the Internet or webcams without prior approval of community custody officer." See 6RP 87-88; CP 173-75. There were no facts admitted, acknowledged or proved which established that the condition was "crime-related." Further, the sentencing court erred in relying on the disputed "facts" that Boyd liked entertaining neighborhood children, was a danger to the community because he had entered Alford pleas and was therefore in "denial" about the offenses, and that he had committed deviant acts and was a danger as a result.

As a threshold matter, again, these issues are properly before the Court. Counsel objected to this condition below. 6RP 54-88. Further, she objected to the challenged “facts” at the sentencing, arguing that those facts were improper and unproven. Id. The objection to the court’s reliance on the improper facts and failure to strike those facts from the PSI preserved that sentencing issue for appeal. See, e.g., State v. Crockett, 118 Wn. App. 853, 78 P.3d 658 (2003). And counsel’s objection to the condition below similarly preserved the issue regarding the condition, although challenges to conditions of community custody may be raised for the first time on appeal. See Bahl, supra.

Further, the issue of the improper condition is “ripe” for review. The question of whether this Court should address a challenge to a condition of community custody or supervision on direct review from a conviction or sentencing depends upon “ripeness,” which this Court determines by examining several factors. Bahl 164 Wn.2d at 747-49. First, the Court looks at whether the issues raised are primarily legal. Id. Second, the Court examines whether the challenge can be addressed without further factual development. Id. Third, the Court asks whether the challenged action is “final.” And finally, related to the question of “ripeness,” the Court looks at whether there will be “hardship” to either side if the condition is not addressed on direct review. Id.

All of those considerations support review of the “internet/webcam” condition of community custody now, rather than subjecting Mr. Boyd to delay before the propriety of the condition is addressed. The issue is primarily legal, i.e., whether the sentencing court

had statutory authority to order the condition. In addition, no further factual development is required. All of the facts relevant to what was admitted, acknowledged or proven at the time of sentencing regarding the crime and the PSI have already been established. Further, the challenged action of imposing the condition is final unless amended by this Court.

Finally, delay will, in fact, cause Mr. Boyd hardship. Bahl, supra, is instructive. In Bahl, the Court rejected the idea that the defendant would suffer no hardship because he was still in prison and the conditions of community custody did not yet apply. 164 Wn.2d at 751-52. Instead, the Court found, “[t]he risk of hardship is significant,” because upon the defendant’s release the conditions will immediately restrict him and he could be subject to punishment immediately for their violation. Id. As a result, it was proper to permit a “preenforcement” challenge where the other conditions for “ripeness” supported such review. Id. This was especially true because there was nothing which could occur between the time of the current appeal and the defendant’s release which would change the relevant analysis on the issue. Id.

Similarly, here, there is nothing which could happen to affect the analysis of whether the internet prohibition condition was sufficiently “crime-related” to have been statutorily authorized. The facts relating to the challenge to the condition do not depend upon later enforcement; they already exist. This Court should address this challenge at this time.

On review, this Court should strike both the internet condition and the objected-to portions of the PSI, relied on by the sentencing court, as improper.

First, the internet condition should be stricken because it was not statutorily authorized. Boyd was sentenced for the child molestation counts under RCW 9.94A.712, which provides for a term of community custody equal to the remainder of the statutory maximum upon release from prison - in this case, life. See RCW 9.94A.712(5). For those offenses, as well as the others, there were mandatory terms of community custody set forth in RCW 9.94A.700(4) and permissible additional terms set forth in RCW 9.94A.700(5). See former RCW 9.94A.505 (2004); RCW 9.94A.712; former RCW 9.94A.715(1) (2004).

The required provisions under RCW 9.94A.700(4) include such things as paying supervision fees and not consuming controlled substances without a valid prescription. RCW 9.94A.700(4). The permissible optional provisions include ordering the offender to “participate in crime-related treatment or counseling services” as well as ordering the offender to “comply with crime-related prohibitions.” RCW 9.94A.700(5). Further, under RCW 9.94A.712 and former RCW 9.94A.715(2) (2004), the court was authorized to order participation in “rehabilitative programs” and to order “affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” And under former RCW 9.94A.505(8) (2004), the court was permitted to impose both “crime-related prohibitions” and “affirmative conditions” as provided in the sentencing statute.

A condition prohibiting access to the internet without prior CCO approval is not a condition of “affirmative conduct” but rather is a “crime-related prohibition” and must meet the requirements for such a prohibition

to be imposed. See State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008). Those requirements are that the condition must prohibit conduct “that directly relates to the circumstances of the crime” for which the offender was convicted. State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006); RCW 9.94A.030(11). It is not sufficient that the court believes the prohibition would be good for the defendant or help in rehabilitation, because defendants may only be punished for their crime and “prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.” State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989), quoting, D. Boerner, *Sentencing in Washington*, § 4.5 (1985).

Here, the prohibition on internet access without prior approval was not “crime-related,” based upon the facts before the sentencing court. Under former RCW 9.94A.530(2) (2004), the court was limited to considering only those “facts” which were “admitted by the plea agreement or admitted, acknowledged, or proved in a trial or at the time of sentencing.” Because Boyd entered Alford pleas not admitting guilt or accepting the facts as alleged by the state, the only facts before the sentencing court were those set forth in Boyd’s declaration in the plea or to which he failed to object in the PSI. See State v. Young, 51 Wn. App. 517, 521-23, 754 P.2d 147 (1988). In addition, by entering an Alford plea a defendant does “not admit the allegations contained in the certification for probable cause, notwithstanding his stipulation that the plea judge could consider it in the determining the validity of the guilty plea.” State

v. Talley, 134 Wn.2d 176, 182-83, 949 P.2d 348 (1998); see Young, 51 Wn. App. at 521-22 (improper to rely on facts “alleged by the State in the certification of probable cause” at sentencing because the defendant “clearly manifested his intention not to” admit to those facts in entering an Alford plea).

Here, the only facts before the sentencing court regarding commission of the crime were Boyd’s declaration of innocence and the facts to which he did not object in the redacted version of the PSI, which were as follows, in relevant part:

The following was extracted from various reports filed under the Wilkeson Police Department’s case number 04000059.

S.R. He showed S.R. “how to make sperm” by rubbing her hands on his penis. Over the weekend Boyd took multiple pictures of S.C. and S.R. separately and together in various sexually explicit poses.

D.C. disclosed that Boyd started touching her during June or July 2002 when she was sitting on Boyd’s lap watching a fireworks display and Boyd would reach up and point at fireworks and his hands would touch her breasts over her clothing.

S.C. reported that during the summer of 2003, while D.C. Was living in Washington, Boyd started touching her. He would touch her and D.C.’s vaginas without clothing on.

Boyd had grabbed her butt more than once, and described it, “like a boyfriend/girlfriend would do.”

B.W.’s cousin . . . Boyd made her touch his penis through his clothing on two occasions.

B.B. reports that in July 2004 her oldest daughter reported being molested by Boyd and she regrets not believing her. She explained that D.C. had a history of telling stories and Boyd and her younger daughter convinced her that D.C. was lying about the abuse.

After S. C. went to live with her father in Idaho, she talked about the terrible things Boyd made her do.

Supp. CP ____ (redacted presentence investigation report (hereinafter PSI2) at 1-6).³ There was also an indication that S.R.'s mother wanted Boyd to stay in prison "for as long as possible" and thought that there were "videos and pictures he took that have ended up who knows where." PSI2 at 7.

The PSI also set forth Boyd's statement that the crime of child abuse was reprehensible to him, that he did not commit the crimes, that he was not "ducking responsibility" but was maintaining his innocence, that he had given a camera to his former wife and let her take unclothed pictures of him during their marriage, that his wife had a lover who was the person Boyd thought was in the photos which were the subject of the criminal charges, that his ex-wife had looted his assets and fled the state and that he was sickened by the photos which were the subject of the allegations. PSI2 at 9. Other information in the PSI was about how the victims were affected, not about the facts relating to the crime. PSI2 at 1-19.

None of these facts indicate that internet access or webcams in any way related to the crimes for which Boyd was convicted.. There was nothing showing that Boyd accessed the internet before the crimes, used the internet during the crimes, or uploaded or downloaded photos from the internet as part of the crimes.

Nor was there anything in the Statement of Defendant on Plea which indicated any internet use; Boyd's statement simply maintained his

³A supplemental designation of clerk's papers was filed on April 18, 2009 with an effective filing date of April 20, 2009, asking for this document marked "confidential" by Pierce County and the original, unredacted PSI report to be transmitted appropriately to this Court.

innocence and said he was taking advantage of the plea offer. CP 136-47.

In addition, there was no other evidence of facts before the court which would have supported a finding that internet use or webcams were in any way involved in the crimes. There was nothing in the informations or declarations of probable cause which would provide that support and, again, even if there had been, reliance on such “facts” would be improper because they were not admitted, acknowledged or proved. Talley, 134 Wn.2d at 182-83; Young, 51 Wn. App. at 521-22; see CP 1-6, 8-24, 132-35.

The prohibition on internet use and webcam access without prior approval was not a crime-related prohibition and the sentencing court was not authorized to impose that condition. This Court should so hold and should strike the condition as statutorily unauthorized.

In addition, this Court should hold that the sentencing court erred in retaining and relying on the objected-to portions of the PSI report which were not admitted, acknowledged or proved as required under former RCW 9.94A.530(2) (2004). Those portions of the PSI provided that Boyd “enjoys entertaining the neighborhood children” and the following regarding Boyd’s entry of the Alford pleas:

By not fully admitting wrongdoing, Mr. Boyd presents a danger to our community and the communities [sp] children. Mr. Boyd has displayed deviant and dangerous behaviors and will continue to pose a substantial threat to the safety of our community until he cooperates with sexual deviancy treatment.

PSI2 at 16, 17. Boyd specifically objected to these portions of the PSI below, but the sentencing court kept them in the PSI version the court then relied on and considered in entering the sentences, all of which were at the

high end. 6RP 51-56, 70-72.

In so doing, the court erred under former RCW 9.94A.530(2) (2004). Because those facts were not admitted in the plea agreement, acknowledged or proved, when Boyd disputed them, the court was not permitted to consider them unless and until it held an evidentiary hearing at which the prosecution proved the facts by a preponderance of the evidence. Former RCW 9.94A.530(2) (2004). But the court did not hold such a hearing, nor was such proof provided. And the declarations about Boyd's "dangerousness" or "risk" were improperly based upon his maintaining his innocence - something he has a Fifth Amendment right to do. See, e.g., State v. Strauss, 93 Wn. App. 691, 698-99, 969 P.2d 529 (2002).

The court's errors regarding these disputed "facts" are not trivial. As the Supreme Court has recently noted, the PSI is "sent to the Department of Corrections and accompan[ies] the offender into custody." State v. Mendoza, ___ Wn.2d ___, ___ P.3d ___ (April 16, 2009) (slip opinion at 8). Most importantly for Mr. Boyd, the Indeterminate Sentence Review Board will have that report and will be considering it at the time it decides whether to release Mr. Boyd after the completion of the mandatory minimum term for the molestation offenses. See, e.g., RCW 9.95.420. The erroneous "facts" go directly to the issue of whether Boyd is a risk to reoffend in the community, as evidenced by their inclusion in the section of the PSI entitled "RISK/NEEDS ASSESSMENT" and the introductory declaration that the information had "implications for potential risk, supervision, and intervention." PSI2 at 12.

The trial court erred and violated former RCW 9.94A.530(2) (2004) in failing to strike the improper, disputed “facts” from the PSI report before relying on that report in imposing the sentences. This Court should so hold.

3. THE PLETHYSMOGRAPH CONDITION WAS NOT AUTHORIZED BY LAW

This Court should also strike the plethysmograph testing portion of condition 19, because that portion was unauthorized as a matter of law. Again, this condition was objected to below and this Court should address it on appeal. And this Court should strike the condition as improper. The Supreme Court has recognized that plethysmograph testing, unlike polygraph testing, does not serve the purpose of monitoring compliance with conditions of community custody. Riles, 135 Wn.2d at 345-46. Instead, plethysmograph testing is a way of determining immediate sexual arousal in response to specific stimuli and is thus only relevant to treatment or evaluation for treatment. 135 Wn.2d at 344. This fact is recognized by administrative code provisions regarding such tests, which indicate that data generated by the testing is only meaningful in that context. Id.

As a result, in Riles, the Supreme Court made it clear that a sentencing court may only require a defendant to submit to plethysmograph testing as part of a treatment condition, if one is ordered. 135 Wn.2d at 345.

Here, the plethysmograph condition was not so limited. The sentencing court did *not* order treatment or limit the plethysmograph

testing for treatment purposes. Instead, the court ordered Boyd to participate in treatment only “if required by the community corrections officer” or the ISRB. CP 173-75. At the same time, the court required Boyd to submit to plethysmograph testing “upon direction of your community corrections officer *or* therapist,” not just a therapist. CP 173-75 (emphasis added). And it did not limit the authority of the CCO or state therapist to just requiring such testing only in relation to treatment.

By definition, then, condition 19 requires Boyd to submit to plethysmograph testing even if such testing is completely apart from treatment and even if Boyd is never involved in treatment after his release from prison. As a result, the condition does not limit plethysmograph testing to its valid, permissible purpose of monitoring progress in therapy. As the Supreme Court noted, however, unless the sentencing court imposes “crime-related treatment which reasonably would rely upon plethysmograph testing as a physiological assessment measure,” there is no legitimate purpose for permitting such testing. Riles, 135 Wn.2d at 345. The condition requiring Boyd to submit to plethysmograph testing at the direction of his CCO was unlawful and this Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should strike the improper conditions of community custody from Appendix H of the Judgment and Sentence and should remove the offending portions of the PSI.

DATED this 19th day of April, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Michael Boyd, DOC 317017, WCC, P.O. Box 900, Shelton,
WA. 98584.

DATED this 14th day of April, 2009.



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