

NO. 38215-6

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

BY
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ALLEN BOYD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner, Vicki Hogan, Katherine Stolz
and Ronald Culpepper, Judges

No. 04-1-05178-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly exclude defendant's objected to portions of the Pre-Sentence Investigation report and rely on the rest of the information contained therein?
2. Did the trial court properly place conditions on defendant's community custody?

B. STATEMENT OF THE CASE.

On November 5, 2005, the Pierce County Prosecutor's Office charged MICHAEL ALLEN BOYD, hereinafter "defendant," with one count of rape of a child in the second degree, five counts of child molestation in the first degree, three counts of sexual exploitation of a minor, and one count of possession of depictions of a minor engaged in sexually explicit conduct. CP 1-6. After an interlocutory appeal to the Supreme Court, defendant entered an *Alford* plea and pleaded guilty to a second amended information charging defendant with three counts of

child molestation in the first degree, one count of sexual exploitation of a minor, and one count of assault in the second degree. CP 132-34; 1RP¹ 3; 6RP 32.

Prior to being sentenced, the court ordered a Pre-Sentence Investigation report. CP 184-224. The report contained many facts disputed by the defendant. At the sentencing hearing, defendant filed a copy of the Pre-Sentence Investigation report, redacting the portions of the report to which he objected. *See* Appendix C; 6RP 67-72; CP 206-224. The court reviewed the original version of the Pre-Sentence Investigation report and defendant's redacted version. 6RP 67-72; *See* Appendix B, C; CP 184-224. Both the unredacted and defendant's redacted version are part of the record on review. CP 184-224. The court accepted all of defendant's redactions except for two. 6RP 67-72. The court identified these two on the record and cited them as being on pages 16 and 17 of the Pre-Sentence Investigation report. 6RP 70-71, 206-224; *See* Appendix C.

¹ The verbatim report of proceedings 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 consecutively paginated volume containing the proceedings of December 19, 2007, April 2, 2008, May 29, 2008, June 13, 2008, and July 9, 2008, as "6RP."

They following exchange took place:

DEFENSE COUNSEL: On page 16 of 19 I'm asking the Court under the section "companions" to redact the sentence "however, as mentioned previously, he also enjoys entertaining the neighborhood children." He did not say that. He absolutely did not say that.

THE COURT: Well, in his statement on page 10 he says his generosity has been characterized as grooming; "I've freely given to my friends and family and our neighbors down the street when they needed food, high-paying jobs to employees in our small community," so I think that's a fair characterizations of some of those things, so I'm not going to accept the redaction on page 16. Any others?

DEFENSE COUNSEL: Well, I want to make sure that the portion of the report that the Court cited on page 10 says: "My generosity has been characterized as have given freely to my friends and family and even neighbors down the street when they needed food."
What in that compels a reasonable inference or supports a reasonable inference that he enjoys entertaining neighborhood children? It just doesn't.

THE COURT: I think it supports a reasonable inference; it doesn't compel it.

DEFENSE COUNSEL: It doesn't even mention children.

THE COURT: Any other redactions?

DEFENSE COUNSEL? No, but I'm noting an objection to the Court's consideration on that.

THE COURT: I'll note the objection.

DEFENSE COUNSEL: And I'm asking the Court to redact the portion that says, "By not fully admitting wrongdoing, Mr. Boyd poses a danger to our community and the community's childrena (sic)" because I don't think that there's anything that warrants that conclusion. People may maintain their innocence and not be dangerous, which is exactly what my client has done in this case.

THE COURT: Well, I'm not going to redact that portion. That's the opinion of the PSI investigator and that's certainly supportable by the information and his plea. It's not compelled by it. That's his or her opinion.

6RP 70-71.

The court sentenced defendant to midrange of an indeterminate sentence of 180 months to life and community custody for life. CP 152-166; 6RP 85-86. The court imposed many conditions of community custody. CP 173-175. Defendant filed a timely notice of appeal. CP 178.

C. ARGUMENT.

1. THE COURT PROPERLY RELIED ON DEFENDANT'S OBJECTED TO PORTIONS OF THE PRE-SENTENCE INVESTIGATION REPORT IN SETTING FORTH THE CONDITIONS OF COMMUNITY CUSTODY FOR DEFENDANT.

At the time defendant in the present case was sentenced, the sentencing statute read:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing..... Acknowledgement includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

Former RCW 9.94A.530(2).

The court properly relied on the un-redacted objected to portions of the Pre-Sentence Investigation report for purposes of sentencing defendant. Everything defendant objected to was redacted except for two portions, one in defendant's own statement and the other in the opinion of the investigator. On appeal, defendant has failed to articulate why such statements were prejudicial to defendant. As such, the court did not err in relying on such statements.

2. THE COURT PROPERLY IMPOSED THREE CONDITIONS OF DEFENDANT'S COMMUNITY CUSTODY ALTHOUGH REMAND IS NECESSARY SO THAT THE COURT CAN MODIFY THE WORDING OF ONE CONDITION SO THAT IS NOT UNCONSTITUTIONALLY VAGUE.

The Sentencing Reform Act of 1981 (SRA) was created for the purposes of imposing just punishment, protecting the public, and offering the offender an opportunity for self improvement. *State v. Letourneau*,

100 Wn. App. 424, 431, 997 P.2d 436 (2000). To address the legislature's reservations about the efficacy of coerced rehabilitation, the SRA allows the offenders to be prohibited from doing things that are directly related to their crimes, labeling them "crime related prohibitions." *Letourneau*, 100 Wn. App at 431.

A 'crime related prohibition' is one which "directly relates to the circumstances of the crime." *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121, *review denied*, 165 Wn.2d 1035, 203 P.3d 381 (2008)(*quoting State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006)). Although a trial court's prohibition on "conduct ... during community custody must be directly related to the crime, it need not be causally related to the crime." *Zimmer*, 146 Wn. App. at 413. (*quoting State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000)). So long as the condition is directly related to the crime, the courts have the discretion to impose such a condition. *Letourneau*, 100 Wn. App at 432.

Courts review community custody prohibitions that are crime related for substantial supporting evidence and under an abuse of discretion standard. *Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121, *review denied*, 165 Wn.2d 1035, 203 P.3d 381 (2008).

In the present case, defendant challenged the following three of his community custody conditions:

15. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.

19. Submit to polygraph and plethysmograph testing upon direction of your community corrections officer or therapist at your expense.
25. You shall not have access to the Internet or webcams without prior approval of Community Custody Officer.

CP 173-175

- a. The court acted within its discretion in prohibiting defendant from using the internet or webcams without prior approval of his community custody officer when such a prohibition is directly related to his crime.

Defendant was sentenced for child molestation under RCW 9.94A.712. The mandatory terms of community custody under that statute were defined in RCW 9.94A.700. RCW 9.94A.700 also provides for additional optional terms of community custody that the court may impose, including “crime related prohibitions.” *See* RCW 9.94A.700(5)(e). Crime related prohibitions must be directly related to the crime, but need not be causally related. *Zimmer*, 146 Wn. App. at 413. Courts review these conditions under an abuse of discretion standard while looking for substantial supporting evidence the condition is related to the crime. *Zimmer*, 146 Wn. App. at 413.

One of defendant’s community custody prohibitions stated “you shall not have access to the internet or webcams without prior approval of

community custody officer.” CP 173-175, condition 25. The court stated that in ordering the prohibitions it had relied only on information not objected to by defendant. 6RP 89. These included defendant’s statement and the portions of the Pre-Sentence Investigation report which were not objected to by defendant. CP 206-224. In doing this, the court complied with former RCW 9.94A.530(2) and relied only on information that was properly authorized to be relied upon by the legislature. Thus, defendant’s contention that the court erroneously relied on information not authorized by former RCW 9.94A.530(2) is incorrect.

The court acted within its discretion in prohibiting the defendant from having access to the internet or webcams without prior approval from his community custody officer. Defendant was sentenced for three counts of child molestation in the first degree, one count of sexual exploitation of a minor, and one count of assault in the second degree. CP 132-34. The Pre-Sentence Investigation report was discussed at length during the sentencing. CP 184-224; 6RP 68-90. The court described the facts that defendant did not object to and the version it relied on in sentencing defendant. CP 184-224; 6RP 68-90. One fact which was relied upon read “over the weekend [defendant] took multiple pictures of S.C. and S.R. separately and together in various sexually explicit poses.” 6RP 69; CP 184-224.

The court reasoned that defendant’s guilty plea to charges of child molestation and sexual exploitation of a minor in conjunction with the use

of a camera to take sexually explicit pictures of children warranted prohibiting defendant from using the internet or webcams. 6RP 82-87. It is commonly understood that the internet is used to upload or download sexually explicit photographs. The court's prohibition on defendant's use of the internet in this case can be understood as directly related to attempting to prevent defendant from further exploitation of minor children through the dissemination of sexually explicit photos. Therefore, the prohibition on internet and webcam use without prior approval was valid given the nature of defendant's crime and the means he used to commit it.

Further, this prohibition is analogous to a prohibition which was upheld in the case of *State v. Zimmer*. 146 Wn. App. 405, 190 P.3d 121, review denied, 165 Wn.2d 1035, 203 P.3d 381 (2008). In that case, the defendant was charged and convicted of methamphetamine possession. *Zimmer*, 146 Wn. App. at 408. The court held that "because [defendant] possessed methamphetamine and drug paraphernalia, including syringes, pipes, and a bong, the trial court's prohibition on drug paraphernalia possession during community custody is directly related to her methamphetamine possession crimes." *Zimmer*, 146 Wn. App. at 413.

Similarly, in the present case, the tool used by defendant in committing his crime warranted a prohibition on all tools relating to such a crime. Like the drug paraphernalia in *Zimmer*, the internet and webcams are tools defendant in the present case can use to further perpetuate his

crimes of child molestation and sexual exploitation of a minor. Although in *Zimmer* the defendant was found with syringes, pipes and a bong, the court prevented the defendant from possessing any and all drug paraphernalia. Likewise, in the present case, although defendant took pictures of children in sexually explicit positions with a camera, the court was within its authority to prevent defendant from using the internet or webcams which are tools commonly associated with the defendant's crimes.

- b. Defendant's community custody condition number 19 requiring defendant to undergo plethysmograph testing is valid.

To offer the offender an opportunity for self improvement, the legislature authorizes courts to impose crime-related treatment on felony sex offenders during the period of community custody following their release from total confinement. *Letourneau*, 100 Wn. App at 431. Courts have the authority to require plethysmograph testing of sex offenders as a condition of mandatory community placement so long as such testing is incident to crime-related treatment for sexual deviancy. *State v. Riles*, 135 Wn.2d 326, 345, 957 P.2d 655 (1998). In the present case, defendant was ordered to "submit to polygraph and plethysmograph testing upon direction of [his] community corrections officer or therapist at [his] expense." CP 173-175, Condition No. 19. The court also ordered the defendant to "enter and complete a state approved sexual deviancy

treatment program through a certified sexual deviancy counselor if required by community custody officer.” CP 173-175, Condition No. 11.

Defendant contends that the addition of “if required by community custody officer” clause in Condition 11 does not make defendant’s treatment program mandatory, and the plethysmograph testing condition is therefore invalid as it violates the law set forth in *Riles*. An examination of the record of proceedings shows this to be an incorrect interpretation of the trial court’s sentence. The court articulates why it is interlineating “if required by community custody officer.” The court stated:

With respect to 11, I’m going to adopt that with an addition at the end of the first sentence, if required by CCO. If he completes [treatment] in prison and they don’t believe he needs any more, fine, but I have a feeling he won’t complete it in prison. That’s kind of up to him. So if required by a community custody officer.

6RP 87.

This statement makes it clear that the court is imposing a condition of sentence requiring defendant to undergo a sexual deviancy treatment.

What is unknown to the sentencing court is whether defendant will complete the requirement during his incarceration or whether it will occur during community custody. The additional statement is in case the defendant does not complete the program while in prison, the court wants to ensure that the community custody officer has the ability to require him to undergo testing once in community custody.

Because defendant was ordered by the court to undergo sexual deviancy treatment, either in prison or during community custody, the requirement that he submit to plethysmograph testing is valid under the law as set forth in *Riles*.

In the present case, it is clear that the court imposed a requirement that the defendant participate in a sexual deviancy treatment program. The additional clause just clarifies that if the treatment does not occur while in prison, the community custody officer has the right to require defendant to undergo treatment while in community custody. Therefore, the present case is not comparable to *Riles*, and the condition requiring defendant to undergo plethysmograph testing is valid.

- c. Defendant's community custody condition number 15 is worded in an unconstitutionally vague manner as it fails to define the term 'pornography'.

Courts have held that community custody provisions that delegate the job of defining pornographic materials to the community corrections officer constitute an impermissible delegation of authority as the definition of pornography is too vague to be defined by other persons. See *State v. Bahl*, 164 Wn.2d 739, 193 P.2d 678 (2008)(community custody provision which directed the community custody officer to define what falls within a condition prohibiting defendant from possessing pornography was unconstitutionally vague); *State v. Sansone*, 127 Wn. App. 630, 111 P.3d

1251 (2005)(community placement condition requiring that the term ‘pornography’ be defined by the probation officer was unconstitutionally vague).

The State concedes that provision 15 in Appendix H of the Judgment and Sentence has the same deficiencies as those found in *Bahl* and *Sansone*. Although defendant did not object to the provision at sentencing, his challenge may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

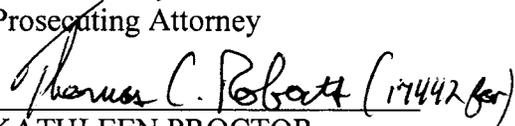
As a result, this Court should remand for re-sentencing regarding the wording of provision 15 in Appendix H of defendant’s Judgment and Sentence. The underlying premise of the condition is acceptable and valid as it directly relates to the crime for which defendant was convicted. But, the wording of the condition leaves the definition of pornography to be defined by defendant’s probation officer which is an unauthorized delegation of authority. Therefore, the court should remand for the wording of the condition to be altered to read, as an example, “do not possess or peruse depictions of unclothed minor children and/or depictions of children engaged in sexually explicit conduct.”

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence with regards to Conditions 19 and 25, but remand for clarification with regard to Condition 15.

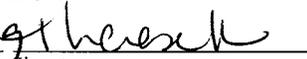
DATED: July 24, 2009.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7-24-09 
Date Signature

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STATE OF WASHINGTON
BY 
COUNTY OF PIERCE