

NO. 49327-6-II

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

STATE OF WASHINGTON, Respondent

v.

LAWRENCE ALFONSO STARR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01140-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The community custody condition prohibiting Starr from areas that “cater to minor children” or “where minors congregate” is not unconstitutionally vague.**
- II. The community custody condition prohibiting Starr from possessing sexually explicit material is not crime-related and therefore should be stricken.**
- III. The State will not seek appellate costs**

STATEMENT OF THE CASE

Lawrence Starr (hereafter ‘Starr’) was accused of lying down next to a 10-year-old girl as she slept and touched her hair, asking her how old she was, where she went to school and if she wanted to touch his “private parts.” CP 5-6. From this incident, the State charged Starr with Attempted Child Molestation in the First Degree and Communication with a Minor for Immoral purposes. CP 1-2. Starr pled guilty to the communication charge and proceeded to a bench trial on the Attempted Child Molestation charge. CP 34, 38-45; RP 7-15.

The trial court found Starr guilty of Attempted Child Molestation in the First Degree and sentenced Starr pursuant to RCW 9.94A.507 to 45 months to life. CP 73-74; RP 177. As part of Starr’s sentence, the trial court imposed community custody conditions which prohibited Starr from

entering into or frequenting business establishments or areas that cater to minor children or where children congregate without being accompanied by a responsible adult approved by DOC and his sexual deviancy treatment provider. CP 83-86. The trial court also imposed a condition which prohibited Starr from viewing or possessing sexually explicit material without prior approval from his DOC officer and sexual deviancy treatment provider. CP 84.

Starr timely filed this appeal.

ARGUMENT

I. The community custody condition prohibiting Starr from areas that “cater to minor children” or “where minors congregate” is not unconstitutionally vague.

Starr argues that the community custody condition prohibiting him from being in areas that cater to minor children or where minors congregate is unconstitutionally vague.

This Court reviews the imposition of crime-related community custody conditions for an abuse of discretion. *State v. Irwin*, 191 Wn.App. 644, 656, 364 P.3d 830 (2015); *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365

(1993). The trial court’s imposition of a community custody condition will only be reversed if the condition is “manifestly unreasonable.” Any condition that is unconstitutional is “manifestly unreasonable.” *Id.*

Our constitution requires that laws provide ordinary people fair warning of proscribed conduct and have standards that are definite enough to protect against arbitrary enforcement. Art. 1, sec. 3 of the Washington State Constitution; *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). In essence, our laws must not be vague. A community custody condition can suffer from unconstitutional vagueness if it does not give fair warning of the proscribed behavior or could be subject to arbitrary enforcement. *Bahl*, 164 Wn.2d at 753. However, ““a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.”” *Sanchez Valencia*, 169 Wn.2d at 793 (quoting *State v. Sanchez Valencia*, 148 Wn.App. 302, 321, 198 P.3d 1065 (2009)).

In *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015) Division I of this Court addressed the constitutionality of a community custody condition that prohibited the defendant from “frequent[ing] areas where minor children are known to congregate, as defined by the supervising [Community Corrections Officer (CCO)].” *Irwin*, 191 Wn.App. at 649.

The Court considered whether this condition gave “ordinary people sufficient notice to ‘understand what conduct is proscribed.’” *Id.* at 654 (quoting *Bahl*, 164 Wn.2d at 753). In its discussion, the Court indicated that an illustrative list or other clarifying language would give ordinary people sufficient notice to “understand what conduct is proscribed.” *Id.* The language of the community custody condition in *Irwin* did not include clarifying language or an illustrative list of places the defendant was prohibited from entering, so the Court found it was void for vagueness. *Id.*

The solution suggested by the Court in *Irwin* was employed in Starr’s case below. The Court in *Irwin* stated, “[w]ithout some clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel), the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” *Id.* at 655 (quoting *Bahl*, 164 Wn.2d at 753). The Court in *Irwin* suggested that once the defendant’s CCO set locations of where “children are known to congregate” then the defendant would have sufficient notice of what conduct is proscribed, thus solving the vagueness issue. *Id.* This solution to the vagueness of the community custody condition is precisely what the trial court in Starr’s case did. It provided a list of locations to serve as examples of locations where Starr could not go because they are locations that cater to minor children or where children are known to congregate. CP 83-86.

The other issue Starr raises on this community custody condition is that it does not protect against arbitrary enforcement. In *Irwin, supra*, the trial court left full discretion of where the defendant could and could not go to the CCO, and had no protections in place to prevent this condition from being arbitrarily enforced. *Irwin*, 191 Wn.App. at 655. Therefore allowing the CCO to designate prohibited locations was constitutionally impermissible because it was susceptible to arbitrary enforcement. *Id.*

However, unlike the condition imposed in *Irwin*, the condition Starr challenges is not susceptible to arbitrary enforcement because it does not give unfettered authority to Starr's CCO to designate prohibited locations. CP 83-86. Instead, this condition allows Starr to enter all areas that cater to minor children as long as he is with an approved adult. *Id.* Requiring a defendant to seek permission from a CCO prior to going to a certain location is not unconstitutionally vague. In the recent unpublished case of *State v. Miller*, #3352-7-III, WL 959539, (March 3, 2017), Division 3 of this Court addressed a similar community custody condition and analyzed its constitutionality under *Irwin, supra*. There, the *Miller* Court found that a condition which required a defendant to seek permission prior to going to a certain location was not subject to arbitrary

enforcement. *Miller*, 2017 WL 959539 at 5.¹ Though the condition in *Miller* was impermissibly vague because it did not give an illustrative list as the Court in *Irwin* suggested. *Id.*

The condition the trial court imposed in Starr's case resolved both of the *Irwin* problems: the conditions set forth an illustrative list of prohibited locations, and it does not give unfettered authority to the CCO to decide, potentially arbitrarily, where Starr may or may not go. Being accompanied by another adult whom has already been approved is not an inappropriate requirement given Starr's convictions, and does not render the conditions vague.

Starr's challenge to the imposition of the community custody conditions requiring he not go unaccompanied to places where minors congregate or that cater to minors fails. This condition is not unconstitutionally vague.

II. The community custody condition prohibiting Starr from possessing sexually explicit material is not crime-related and therefore should be stricken.

A trial court has authority to enter "crime-related" prohibitions on a defendant at sentencing. RCW 9.94A.505(9). While generally it appears that treatment providers, prosecutors, and CCOs believe accessing

¹ GR 14.1 allows citation to unreported cases published after March 1, 2013. Unpublished cases are not binding authority on this Court and are only persuasive to the extent this Court chooses to find them persuasive.

sexually explicit material creates a greater risk for a sex offender to reoffend and thus endangers the community, the current statutory scheme requires that any prohibitions imposed by the court at sentencing be “crime-related.” In *State v. O’Cain*, 144 Wn.App. 772, 184 P.3d 1262 (2008), the Court found a condition that prohibited a sex offender from viewing sexually explicit material on the internet was not crime-related as there was no evidence in the record that the internet played a role in the offense. *O’Cain*, 144 Wn.App. at 775.

The same is true in Starr’s case. While it seems appropriate to prohibit a man who tried to molest a 10-year-old child from viewing sexually explicit material, there was no evidence in the record that sexually explicit material played a direct role in Starr’s commission of his offense. Therefore, the State concedes it is not “crime-related” and should be stricken from Starr’s judgment and sentence.

III. The State will not seek appellate costs.

Starr argues this Court should decline to allow the State to seek appellate costs if it substantially prevails on this appeal. However the State has no intent of seeking appellate costs in this case and therefore this issue is moot.

CONCLUSION

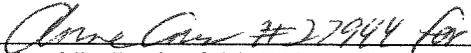
The trial court properly imposed community custody conditions that prohibit Starr from going to places that cater to minor children or where minor children congregate and this Court should affirm that condition. The State agrees the condition prohibiting Starr from viewing or possessing sexually explicit material is not “crime-related” and should be stricken.

DATED this 21st day of March 2017.

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