

NO. 49327-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE STARR,

Appellant.

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

The Honorable Robert Lewis, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION THAT THE COMMUNITY CUSTODY CONDITION PROHIBITING SEXUALLY EXPLICIT MATERIAL IS NOT CRIME-RELATED

The State correctly concedes that “there was no evidence in the record that sexually explicit material played a direct role in Starr’s commission of his offense” and thus the community custody condition “is not ‘crime related’ and should be stricken from Starr’s judgment and sentence.” Br. of Resp’t at 7. Starr asks this court to accept this concession rather than follow Division Three’s recent contrary conclusion in State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016).

The Magana court concluded, without any attempt at analysis, “Because Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed.” Id. Division Three’s decision is not supportable because it usurps the role of the legislature. In defining a crime-related prohibition, the legislature has indicated quite plainly that the prohibition must directly relate to the circumstances of the crime. RCW 9.94A.030(10) (“‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted” (emphasis added)). The Magana

court ignored this language, purporting to exempt a set of crimes—sex crimes—from the clear statutory requirement that community custody prohibitory conditions must relate to the crime. This court should therefore not follow Magana's pittance of reasoning that contradicts the statute but remain faithful to the legislative directive.

The Magana court's cursory decision contradicts the weight of authority on this issue as well. In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), the defendant was convicted of molesting two children. The trial court imposed a community custody prohibition on possessing sexually explicit materials and Kinzle challenged this condition on appeal, asserting it was not crime-related. Id. Division One agreed with Kinzle and struck the community custody condition because no evidence suggested such materials were related to or had contributed to his crime. Id.

In several unpublished cases involving the same fact pattern, the Court of Appeals has struck down similar community custody conditions because they are not crime-related.¹ See, e.g., State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 2649834, at *3 (2016) (unpublished) (holding trial court exceeded statutory authority imposing prohibition on possessing sexually

¹ Pursuant to GR 14.1(a), Starr cites these unpublished cases as nonbinding authorities. However, given their relevance to the issue in this case, Starr asks that the cases be accorded significant persuasive value.

explicit material because “there was no evidence before the trial court that Stewart’s use or possession of sexually explicit material related to his crime of indecent liberties”); State v. Hasselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (unpublished) (prohibition on going to establishments promoting “commercialization of sex” not reasonably crime-related where no evidence suggested such establishments related to defendant’s crime of child rape); State v. Clausen, noted at 181 Wn. App. 1019, 2014 WL 2547604, at *8 (2014) (unpublished) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material in connection with crime of child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058, at *6 (2013) (unpublished) (prohibition on possessing and frequenting establishments that deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments).

This case is the same as the others. There is no evidence in the record that shows sexually explicit materials directly related to any circumstance of the crime. The State agrees. Br. of Resp’t at 7. Magana offered no explanation for contradicting RCW 9.94A.030(10) or the cases interpreting it. The community custody condition prohibiting Starr from viewing or

possessing sexually explicit materials must be stricken from Starr's judgment and sentence.

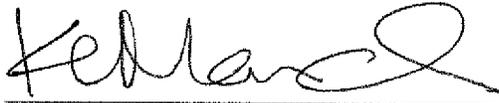
B. CONCLUSION

The community custody conditions challenged here and in Starr's opening brief should be stricken from the judgment and sentence.

DATED this 20th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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Transmittal Letter

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