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NO. 50221-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDALL BLACKMAN,

Appellant.

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

The Honorable Sally F. Olsen, Judge  
The Honorable Jennifer A. Forbes, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The community custody conditions, “Possess/access no sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet)” (CP 90), “Do not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided” (CP 98, condition 15), and “Do not access sexually explicit material that are intended for sexual gratification” (CP 98, condition 16), are not crime-related and exceed the trial court’s authority.

2. The community custody conditions, “Frequent no adult bookstores, arcades, or places providing sexual entertainment” (CP 90) and “Contact no “900” telephone numbers that offer sexually explicit material” (CP 90, CP 98, condition 26), are not crime-related and exceed the trial court’s authority.

3. The community custody conditions, “Shall be prohibited from joining or perusing any public social websites, i.e. Facebook, My Space, Craigslist, Backpage, etc.” (CP 98, condition 25) and “Possess/access no sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet)” (CP 90), are not crime-related and exceed the trial court’s authority.

4. The community custody condition that requires appellant to “Abide by curfew set by Community Corrections Officer” is not crime-related and exceeds the trial court’s authority. CP 90, CP 98 (condition 22).

5. The community custody condition that requires appellant “not hitchhike or pick up hitchhikers” is not crime-related and exceeds the trial court’s authority. CP 90.

6. The community custody condition that prohibits appellant from entering “any location where alcohol is the primary product, such as taverns bars and/or liquor stores” is not crime-related and exceeds the trial court’s authority. CP 97 (condition 5).

7. The community custody condition that requires appellant to “Obtain a substance abuse evaluation and successfully complete any and all recommended treatment” is not crime-related and the trial court did not make a finding that substance abuse contributed to the offenses, thus it exceeds the trial court’s authority. CP 97 (condition 12).

8. The court erred in imposing the conflicting community custody conditions that prohibit appellant from loitering or frequenting “places where children congregate including, but not limited to, shopping malls, schools, playgrounds, and video arcades” (CP 90) and that only prohibit appellant from frequenting places “where children congregate,

including but not limited to any business where the primary purpose is entertainment or congregation of children, unless otherwise approved by the Court” (CP 98, condition 27).

9. The court erred in imposing the conflicting community custody conditions that prohibit appellant from “purchasing, possessing or consuming alcohol” (CP 97, condition 4) and prohibit appellant from consuming alcohol but only “if directed by the CCO” (CP 90).

Issues Pertaining to Assignments of Error

1. Where conditions of community custody are not related to or have no nexus with appellant’s crime do the imposition of the conditions exceed the trial court’s sentencing authority?

2. Where conditions of community custody conflict with each other or create an ambiguity should the case be remanded to the trial court for clarification?

B. STATEMENT OF THE CASE

The State charged Randall Blackman with first degree child molestation (Count 1) and second degree rape of a child (Count 11). CP 1-7. Both charges included a domestic violence allegation. CP 1-3.

Blackman and the State entered into a plea agreement. CP 8-15. Blackman pleaded guilty as charged. CP 16-25; RP 1-6 (10/3/2016).<sup>1</sup> In his statement on plea of guilty Blackman stated that, “During time period of 9/6/2005 & 9/5/2006 I had sexual contact w/a family member (TJL) and during time period of 9/30/08 & 9/29/10 I had sexual contact w/ CWL also a family member to include sexual intercourse.” CP 24.

At the sentencing hearing the State recommended a standard range sentence of 89 months on Count 1 and 120 months on Count 11. RP 5-6 (11/14/2016). Blackman requested a Special Sex Offender Sentencing Alternative (SSOSA) sentence. CP 39-85; RP 7-11 (11/14/2016). The State did not object to Blackman’s request. RP 6 (11/14/2016).

The court considered but denied Blackman’s request for a SSOSA sentence. RP 15-21 (11/14/2016). The court sentenced Blackman to concurrent minimum terms of 89 months on Count 1, 120 months on Count 11, and a maximum term of life. CP 87-88; RP 22 (11/14/2016).

The trial court also imposed community custody conditions in both the judgment and sentence and Appendix F to the judgment and sentence. CP 90 (judgment and sentence); CP 97-98 (Appendix F). In the judgment and sentence the court checked the boxes imposing the following pre-printed sentencing conditions:

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<sup>1</sup> RP refers to the verbatim report of proceedings.

Abide by a curfew set by CCO.

Do not loiter or frequent places where children congregate including, but not limited to, shopping malls, schools, playgrounds, and video arcades.

Do not hitchhike or pick up hitchhikers.

Frequent no adult bookstores, arcades, or places providing sexual entertainment.

Possess/access no sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet).

Consume no alcohol, if so directed by the CCO.

Contact no "900" telephone numbers that offer sexually explicit material. Provide copies of phone records to CCO.

CP 90.

In Appendix F to the judgment and sentence the court imposed the following sentencing conditions:

4. Do not purchase, possess or consume alcohol.
5. Do not enter any location where alcohol is the primary product, such as taverns bars and/or liquor stores.
12. Obtain a substance abuse evaluation and successfully complete any and all recommended treatment.
15. Do not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided.
16. Do not access sexually explicit material that are intended for sexual gratification.
22. Abide by curfew as set by the Community Corrections Officer.
25. Shall be prohibited from joining or pursuing any public social websites, i.e., Facebook, MySpace, Craigslist, Backpage, etc.
26. Do not contact (900) telephone numbers that offer sexually explicit material and provides copies of phone records to CCO upon request.
27. Do not go to or frequent where children congregate, including but not limited to any business where the primary purpose is entertainment or congregation of children, unless approved by the Court.

CP 97-98.

The trial court waived all nonmandatory legal financial obligations.

CP 91; RP 22 (11/14/2016).

C. ARGUMENTS

1. SEVERAL COMMUNITY CUSTODY CONDITIONS ARE NOT CRIME-RELATED AND/OR CONFLICT WITH EACH OTHER.

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. State v. Sanchez Valencia, 169 Wn.2d 782, 786-790, 239 P.3d 1059 (2010). Challenges to sentencing conditions are ripe for review “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

A sentencing court lacks authority to impose a community custody condition unless it is authorized by the legislature. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). Any condition imposed in excess of a court's statutory authority is void. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

Under RCW 9.94A.703(3)(f), the trial court is authorized to require an offender to “[c]omply with any crime-related prohibitions.” “‘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, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(13). Directly related community custody conditions must be “reasonably crime-related” to the underlying offense. State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870, review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014).

This court reviews a trial court's imposition of crime-related community custody conditions for abuse of discretion. Johnson, 180 Wn. App. at 326; State v. Irwin, 191 Wn. App. 655, 656, 364 P.3d 830 (2015) (citing State v. Cordero, 170 Wn. App. 351, 373, 284 P.3d 773 (2012)). The factual basis supporting a crime-related condition is reviewed for substantial evidence. Irwin, 191 Wn. App. at 656.

1. Possessing/Accessing Sexually Explicit Material.

The community custody condition prohibiting possessing or accessing sexually explicit material does not qualify as a crime-related prohibition in this case. CP 90 (checked box), CP 98 (conditions 15 and

16). In Kinzle, Division One accepted the State's concession that a condition ordering the defendant to refrain from possessing sexually explicit material "must be stricken because no evidence suggested that such materials were related to or contributed to his crime" of child molestation. Kinzle, 181 Wn. App. at 785. The same holds true here. There was no evidence presented that possessing or perusing sexually explicit material played any role in Blackman's crimes.

Because the prohibition on sexually explicit material is not in any way related to Blackman's crimes, the trial court's imposition of this prohibition in the judgment and sentence ("Possess/access no sexually explicit materials") and in Appendix F (conditions 15 and 16) exceeded its authority. The conditions should be stricken.

2. Frequenting Adult Bookstores, Arcades Or Places Where Sexual Entertainment Is Provided/Contacting "900" Telephone Numbers That Offer Sexually Explicit Material.

The court checked the boxes in the judgment and sentence that orders as sentencing conditions "Frequent no adult bookstores, arcades, or places providing sexual entertainment" and "Contact no "900" telephone numbers that offer sexually explicit material. Provide copies of phone records to CCO." CP 90. In Appendix F to the judgment and sentence the court ordered as sentencing conditions "Do not possess or access any

sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided” and “Do not contact (900) telephone numbers that offer sexually explicit material and provides copies of phone records to CCO upon request.” CP 98 (conditions 15 and 26).

The crimes here are child molestation and second degree rape of a child. There is no evidence in the record that connects the circumstances of the crimes to establishments that deal in sexually explicit material, provide sexual entertainment or with “900” telephone numbers. In similar cases the Court of Appeals has struck down community custody conditions related to patronizing places that promote or deal in sexually explicit material or “900” telephone numbers because they are not crime-related. 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 crime 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). State v. Dossantos, noted at \_\_ Wn. App. \_\_ 2017 WL 4271713, at \*5 (2017) (unpublished) (this Court agreed that the community custody condition preventing Dossantos from joining or perusing public social media websites, Skype, or calling sexually-oriented 900 numbers is not crime-related).<sup>2</sup>

Blackman acknowledges Division Three's opinion that reaches a contrary conclusion. State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). There, the court concluded, without any 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. This does not represent valid legal reasoning and relies on an overreaching assumption that the commission of a sex crime renders an offender incapable of responsibly possessing sexually explicit materials, even where such materials played absolutely no role in the

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<sup>2</sup> Pursuant to GR 14.1(a), Blackman cites these unpublished cases as nonbinding authorities, but given their relevance he asks that the cases be accorded significant persuasive value.

crime. The decision also usurps the legislature’s role by exempting a set of crimes—sex crimes—from the clear statutory requirement that a community custody condition must be related to the circumstances of the crime. This court should not follow the Magana court’s reasoning but remain faithful to the legislative directive. See State v. Bruno, noted at \_\_\_ Wn. App. \_\_\_ 2017 WL 5127781, at \*10 (2017) (unpublished) (Division One declines to follow “Magana’s cursory reasoning” because the court “did not provide any citation to supporting facts in the record demonstrating that the offender’s engagement with X-rated movies, adult book stores, or sexually explicit materials was related to the circumstances of his offense”).<sup>3</sup>

Because adult bookstores, adult entertainment and “900” telephone numbers were not related to Blackman’s crimes, the trial court’s imposition of these sentencing conditions in the judgment and sentence and in Appendix F (conditions 15 and 26) exceeded its authority. The conditions must be stricken.

### 3. Joining or Pursuing Public Social Websites

A court may not prohibit the use of public social websites if the crime lacks a nexus to such websites. State v. Johnson, 180 Wn. App. at 330 (court exceeded authority in prohibiting access to computers, internet, and public social websites where there was no nexus between condition

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<sup>3</sup> Pursuant to GR 14.1(a), Blackman cites this unpublished case as nonbinding authority but asks that the case be accorded significant persuasive value.

and offense); State v. O'Cain, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008) (condition prohibiting Internet use stricken where there was no evidence Internet use contributed to defendant's crime of second degree rape). In Appendix F, the court ordered that Blackman "Shall be prohibited from joining or perusing any public social websites, i.e. Facebook, My Space, Craigslist, Backpage, etc." CP 98 (condition 25). The court also checked the box in the judgment and sentence that reads: "Possess/access no sexually explicit materials, and/or information pertaining to minors via computer (i.e. internet)." CP 90.

Blackman's crimes involved family members. There is no evidence in the record that the Internet, email, or social media played any part in the crimes. As in Johnson and O'Cain, there is simply no nexus between Blackman's crimes and the prohibition of social media use. The court's condition 25 in Appendix F and condition that prohibits Blackman from using the Internet to obtain information pertaining to minors in the judgment and sentence exceeded its authority and should be stricken.

#### 4. Hitchhiking/Curfew

In the judgment and sentence the court checked the box that prohibited Blackman from hitchhiking or picking up hitchhikers. CP 90. It also ordered that he "Abide by curfew set by Community Corrections

Officer” in both the judgment and sentence (checked box) and Appendix F to the judgment and sentence (condition 22). CP 90, CP 98.

As discussed, under RCW 9.94A.703(3)(f), the trial court may require an offender to “[c]omply with any crime-related prohibitions.” There is no evidence in the record that Blackman’s crimes were related in any way to hitchhiking. The crimes were committed against family members over a long period of time. The court’s imposition of this condition exceeded its authority and must be stricken.

The sentencing court may also order an offender to participate in rehabilitative programs or perform affirmative conduct reasonably related to the circumstances of the offense. RCW 9.94A.703(3)(d). There is no evidence in the record that remotely suggests that Blackman would not have been able to commit the crimes if he had been confined to some sort of curfew. Regardless of whether the condition that Blackman abide by a curfew is treated as a prohibition or as affirmative conduct under RCW 9.94A.703, it too is not crime-related.

Because no evidence in the record supports the curfew as a community custody condition, the court’s imposition of this condition exceeded its authority. The condition imposing a curfew must also be stricken.

5. Enter Locations Where Alcohol is Primary Product

A trial court may prohibit any defendant from “possessing or consuming alcohol” as a condition of community custody. RCW 9.94A.703(3)(e); see State v. Jones, 118 Wn. App. 199, 206–07, 76 P.3d 258 (2003). Here, the court not only prohibited Blackman from possessing or consuming alcohol, it also prohibited him from entering “any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores.” CP 97 (condition 5). There is no evidence in the record that alcohol was directly related to the circumstances of Blackman’s crimes. Because the condition prohibiting Blackman from entering locations where alcohol is the primary product is not crime related its imposition exceeded the court’s authority. This condition must be stricken.

Moreover, the community custody condition in Appendix F that prohibits Blackman from purchasing, possessing or consuming alcohol without qualification (CP 97, condition 4)<sup>4</sup> conflicts with the community custody condition in the judgment and sentence that only prohibits Blackman from consuming alcohol if directed by the CCO. CP 90 (checked box “Consume no alcohol, if so directed by the CCO”). Because of the conflict it is not clear what condition covers Blackman’s consumption of alcohol. At a minimum the case should be remanded and

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<sup>4</sup> “Do not purchase, possess or consume alcohol.”

the court instructed to either strike one of the conflicting conditions or clarify its intent. See State v. France, 176 Wn. App. 463, 474, 308 P.3d 812 (2013), rev. denied, 179 Wn.2d 2015, 318 P.3d 280 (2014) (remand to the trial court to correct the erroneous reference to community custody conditions); see also State v. Jones, 93 Wn. App. 14, 19, 968 P.2d 2 (1998) (remand to the trial court to specify period of community placement where the language in appendix H to the judgment and sentence was at odds with the language in the judgment and sentence).

6. Substance Abuse Evaluation and Treatment

The court may require a defendant to participate in crime-related treatment, counseling services, rehabilitative programs, or other “affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(c)–(d). RCW 9.94A.607(1) authorizes the court to order a defendant to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense. “If the court fails to make the required finding, it lacks statutory authority to impose the condition.” State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, the trial court ordered Blackman to obtain a substance abuse evaluation and to successfully complete any and all recommended treatment. CP 97 (condition 12). In the judgment and sentence there is a box the court can check if it finds that “the defendant has a chemical dependency that has contributed to the offense(s).” CP 87. The box is not checked. Moreover, there was no evidence that substance abuse or chemical dependency played a role in Blackman’s crimes. In the absence of evidence and a finding that substance abuse was directly related to the circumstances of the crimes, the court lacked authority to require substance abuse treatment as a community custody condition. Warnock, 174 Wn. App. at 612. This condition must be stricken.

7. Places Where Children Congregate

In the judgment and sentence the court checked the box “Do not loiter or frequent places where children congregate including, but not limited to, shopping malls, schools, playgrounds, and video arcades.” CP 90.<sup>5</sup> At sentencing the court reviewed condition 18 in the proposed Appendix F to the judgment and sentence, which contained similar language, and found it was too broad. RP 13-14 (11/14/2016).<sup>6</sup> The court

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<sup>5</sup> It has been held that a substantially similar community custody prohibition is unconstitutionally vague. Irwin, 191 Wn. App. at 655.

struck condition 18 and instead imposed the following condition: “Do not go to or frequent where children congregate, including but not limited to any business where the primary purpose is entertainment or congregation of children, unless otherwise approved by the Court.” CP 98 (condition 27); RP 22 (11/14/2016).

The prohibition in the judgment and sentence conflicts with condition 27 in Appendix F because the judgment and sentence lists places that are not businesses where the primary purpose is to entertain children. In striking condition 18 and replacing it with the more limited condition 27 in Appendix F, it appears the court did not intend to impose the broader prohibition in the judgment and sentence. Even if the court intent is unclear, the two provisions conflict creating an ambiguity in the community custody conditions of Blackman’s sentence. Thus, the case must be remanded to the trial court to resolve the conflict. France, 176 Wn. App. at 474; Jones, 93 Wn. App. at 19.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” This Court has

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<sup>6</sup> Condition 18 read: “Do not go to or frequent places where children congregate, included but not limited to: i.e. fast food outlets, libraries, theaters, shopping malls, playgrounds, parks, etc., unless otherwise approved by the Court.” CP 98.

discretion to direct that costs not be awarded to the State. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).

The trial court determined Blackman is indigent. CP 103-106. Because of his indigency and the length of his sentence the court waived the nonmandatory legal financial obligations. The finding of indigency made in the trial court is presumed to continue throughout the review. RAP 15.2. Under RAP 14.2, when the trial court has entered an order that an offender is indigent for purposes of appeal, that finding remains effective unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. Short of new evidence that Blackman's financial circumstances have significantly improved he is presumed indigent, and assuming he does not prevail on appeal he should not be ordered to pay the costs of appeal.

D. CONCLUSION

This Court should strike the offending community custody conditions from Blackman's judgment and sentence and Appendix F of the judgment and sentence and remand to the trial court to clarify the conflicting and ambiguous community custody conditions.

DATED this 30 day of November 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

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

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