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No. 50263-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KRIS KEITH BENNETT,  
Appellant.

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

The Honorable Mary Sue Wilson  
Cause No. 16-1-01649-34

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 3

    1. Condition 6 is a crime related prohibition ..... 3

    2. The State concedes that Condition 6, as currently worded, is void for vagueness and this court should remand for clarification consistent with recent case law... ..... 5

D. CONCLUSION..... 8

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008) .....	5-6
<u>State v. McCormick</u> 166 Wn.2d 689, 702, 213 P.3d 32 (2009) .....	5
<u>State v. Riles</u> 135 Wn.2d 326, 957, P.2d 626 (1998) .....	5-8
<u>State v. Riley</u> 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) .....	3-4
<u>State v. Roggenkamp</u> 153 Wn.2d 614, 621, 106 P.3d 196 (2005) .....	3
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) .....	3,5,6,8

### **Decisions Of The Court Of Appeals**

<u>State v. Irwin</u> 191 Wn. App 644, 364 P.3d 830 (2015) .....	6-8
<u>State v. Jones</u> 118 Wn. App 199, 207-08, 76 P.3d 258 (2003) .....	4
<u>State v. Letourneau</u> 100 Wn. App 424, 432, 997 p.2d 436 (2000) .....	4
<u>State v. Llamas-Villa</u> 67 Wn. App 448, 456, 836 P.2d 239 (1992) .....	4
<u>State v. Norris</u> 1 Wn. App 2d 87 (2017) .....	7

<u>State v. O’Cain</u> 144 Wn. App 772, 775, 184 P.3d 1262 (2008).....	3
<u>State v. Parramore</u> 53 Wn. App [527] at 531 [768 P.2d 530 (1989)].....	4
<u>State v. Warnock</u> 174 Wn. App 608, 611, 299 P.3d 1173 (2013).....	3

**Statutes and Rules**

RCW 9.94A.505(8).....	3
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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a community custody condition that states, "Do not frequent places where children congregate," is crime-related when the Defendant has entered pleas of guilty based on conduct that amounts to possessing depictions and using the internet to arrange a meeting with children to teach them about sexual activity.

2. Whether under current case law, such a condition requires further clarification so that an ordinary person would be on notice of the proscribed conduct.

B. STATEMENT OF THE CASE.

The appellant, Kris Keith Bennett, was charged in King County with two counts of possession of depictions of minor engaged in sexually explicit conduct in the first degree. CP 15-16. By agreement, the King County charges were dismissed with a plea in Thurston County Superior Court to charges of Attempted Rape of a Child in the Second Degree and Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 22, 26. Bennett pled guilty to those offenses on February 27, 2017. CP 22-34. A pre-sentence investigation report was prepared and considered by the trial court at sentencing. CP 38-51; Verbatim Report of Proceedings: Sentencing Hearing (2 RP), April 24, 2017, at 13.

The pre-sentence investigation report contained details of the investigations leading to Bennett's arrest and ultimate

convictions. Bennett responded to a Craigslist ad posted online by a Detective of the Washington State Patrol, that advertised, "Mommy/daughter; Daddy/daughter; Daddy/son; Mommy/son...you get the drift." CP 38. Bennett then engaged in internet correspondence with a detective who put themselves out as a single mom with 3 kids ages 6, 11, and 13, looking for a man to teach them about sex." CP 39. The conversation continued with graphic discussions of how Bennett would "teach the children." CP 39-40. Ultimately Bennett made arrangements to meet in person on September 16, 2016, and was arrested when he arrived. CP 41.

In the King County case, which was added as Count II in the plea agreement, King County officers discovered 596 images of minors engaged in sexually explicit conduct on Bennett's media storage devices, a review of which identified 65 children. CP 42.

Bennett was sentenced to a term of 76.5 months to life for count I and 34 months concurrent for count II. CP 91. The trial court ordered that Bennett have no contact with any minors for life and adopted the conditions recommended in the presentence investigation report, "Appendix F." CP 91, 98-99. This appeal follows.

### C. ARGUMENT.

The sole issue raised by Bennett in his opening brief is that the court erred in imposing condition 6 of "Appendix F," which reads, "Do not frequent places where children congregate." CP 98. The appellate courts review the imposition of a community custody condition for abuse of discretion. State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). A trial court may impose a sentence condition that is required or permitted by law. State v. O'Cain, 144 Wn.App. 772, 775, 184 P.3d 1262 (2008). The trial court's authority to impose a condition of community custody is derived solely from the statute. State v. Warnock, 174 Wn.App. 608, 611, 299 P.3d 1173 (2013). Whether the trial court has authority to impose a community custody condition is reviewed de novo. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

#### 1. Condition 6 is a crime related prohibition.

A court may impose "crime-related prohibitions" as conditions of a sentence. RCW 9.94A.505(8). An appellate court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. State v.

Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition may be manifestly unreasonable if the court has no authority to impose it. State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003)

Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). For example, this court affirmed a crime-related prohibition requiring a person who was convicted of delivery of marijuana to undergo urinalysis to monitor his use of marijuana, even though his crime did not involve the use of marijuana. [State v.] Parramore, 53 Wn. App. [527] at 531 [768 P.2d 530 (1989)]. But in the same case, we struck a condition prohibiting that person from consuming alcohol because the State failed to show any connection between his use of alcohol and his delivery of marijuana conviction. *Id.*

State v. Letourneau, 100 Wn. App. at 424, 432, 997 p.2d 436 (2000)

Here, Bennett collected depictions of minors engaged in sexually explicit conduct and actively pursued setting up a meeting where the expressed purpose was to engage in “teaching” children about sexual behavior. While he was not trolling general places where children congregate, the facts show that he was trolling the internet for the purpose of engaging in sexual activity with children. The purpose of a condition prohibiting frequenting areas where children are often present is to prevent a convicted offender from

being in a situation where he would have an opportunity to harm a child. State v. McCormick, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). This case involved fictional victims as young as six and numerous depictions of young children engaged in explicit conduct. A prohibition designed to prohibit Bennett's access to children is clearly crime related.

**2. The State concedes that Condition 6, as currently worded, is void for vagueness and this court should remand for clarification consistent with recent case law.**

The crime related prohibition to avoid places where minors congregate is not new in Washington State jurisprudence. A similar prohibition was addressed in State v. Riles, 135 Wn.2d 326, 957 P.2d 626 (1998). In Riles, the Washington Supreme Court held that the condition applied only to places where children commonly assemble or congregate, and found that it was not unconstitutionally vague. As part of its ruling, the Court stated that the "challenger has the burden of overcoming the presumption of constitutionality." Id. at 348.

Then, in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), the Court stated, "in challenging a condition as opposed to a statute or ordinance, the challenger does not have to overcome a

presumption of constitutionality.” Id. at 753. In State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), the court recognized that it has “not always been clear on this point,” and took the opportunity to resolve it. Id. at 792.

The Court noted that the standard utilized in Riles was incorrect and held that there was no presumption of constitutionality in a challenged condition. Id. While not dealing with the specific condition involving places where minors congregate, the Sanchez Valencia Court stated, “a condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.” Id. 795.

Following the Sanchez Valencia ruling, conditions involving prohibitions against frequenting places where minors congregate were once again scrutinized for vagueness. In State v. Irwin, 191 Wn.App. 644, 364 P.3d 830 (2015), Division I of the Court of Appeals addressed a condition that read “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” Id. at 652. The Court noted the test that was discussed in State v. Bahl, “laws must (1) provide ordinary people fair warning of proscribed conduct and (2) have standards that are definite enough to “protect against arbitrary enforcement.” State v.

Irwin, 191 Wn.App. at 653; State v. Bahl, 164 Wn.2d at 752-53. Noting that the condition at issue was almost identical to the condition in Riles, the Court found that, “without some clarifying language or an illustrative list of prohibited locations, the condition does not give ordinary people sufficient notice to understand what conduct is proscribed. Irwin, at 655. Further, because the condition was also subject to definition by the CCO, the court also concluded that “it would leave the condition vulnerable to arbitrary enforcement.” Id.

Most recently, Division I considered the issue in State v. Norris, 1 Wn.App. 2d 87 (2017). In that case, the challenged condition stated, “Do not enter any parks/playgrounds/schools and or any places where minors congregate.” Id. at 95. The Court accepted the State’s concession that the condition prohibiting Norris from entering “any places where minors congregate” was unconstitutionally vague, and approved a modification of the language to read “Do not enter any parks/playgrounds/schools where minors congregate.” Id. at 95-96.

Here, the recommended condition 6 included an illustrative list much like that which was discussed favorably in State v. Irwin. However, in response to Bennett’s objection to the list, the trial

court left the statement, “do not frequent places where children congregate,” and struck the parenthetical list. 2 RP 38, CP 98.

While the language utilized by the trial court is very similar to that which was constitutionally permissible in Riles, and certainly does not vest discretion in a community corrections officer, as did the conditions in Sanchez Valencia and Irwin, the language used has, in recent decisions, consistently been held insufficient to give ordinary people sufficient notice to understand what conduct is proscribed. Therefore, based on the current state of the law, the State concedes that this Court should remand for clarification of the condition such that an ordinary person would have sufficient notice to understand what conduct is proscribed. An example could be drawn from the prosecutor’s argument at sentencing, “where children congregate would be things of the nature of schools, parks, playgrounds, skate parks, a restaurant of the nature of a Chuck E. Cheese.” 2 RP 17. Had such a list been included, the condition at issue would likely pass constitutional scrutiny.

#### D. CONCLUSION.

The community custody condition requiring that Bennet not frequent places where minors congregate is crime related given the nature of the offenses that Bennett pled guilty to, based on his

conduct focused on sexual activity with children. Under recent case law, similar conditions have been found to be unconstitutionally vague and the State concedes that the matter should be remanded to the trial court for clarification such that an ordinary person would have sufficient notice of what conduct is proscribed.

Respectfully submitted this 11 day of January, 2017.



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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 11<sup>th</sup> day of January, 2018, at Olympia, Washington.

  
\_\_\_\_\_  
JENA GREEN, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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