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Court of Appeals
Division II
State of Washington
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No. 50396-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

HEBER SHANE GREEN,

Appellant.

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

The Honorable Kevin D. Hull

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. A REMAND FOR THE TRIAL COURT TO STRIKE COMMUNITY CUSTODY CONDITIONS 15, 16, AND 22 IS REQUIRED BECAUSE THE CONDITIONS ARE NOT CRIME RELATED.

The State properly concedes that community custody condition 22, which requires Green to abide by a curfew set by the community corrections officer, is not crime-related. Brief of Respondent at 7, citing *State v. Norris*, 1 Wn. App.2d 87, 97, 404 P.3d 83 (2017). This Court should accept the State's concession.

The State does not argue that conditions 15 and 16 are crime-related but relies instead on RCW 9.94A.704(2)(a), which provides that the Department of Corrections "shall access the offender's risk of re-offense and may establish and modify additional conditions of community custody based upon the risk to community safety." Brief of Respondent at 7-8, citing to the Pre-Sentence Investigation at CP 83. Condition 15 prohibits Green from possessing or accessing "any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided" and condition 16 prohibits him from accessing "sexually explicit materials that are intended for sexually gratification." CP 99. The State's argument is misguided because the pre-sentence investigation fails to establish that the conditions are crime-related.

In *State v. Kinzle*, 181 Wn. App. 774, 326 P.3d 870 (2014), *review denied*, 181 Wn.2d 1019 (2014), Kinzle was convicted of two counts of first degree child molestation. 181 Wn. App. at 777. On appeal, he challenged a condition that prohibited from possessing sexually explicit material or frequenting establishments selling sexually explicit materials. The State conceded that the condition ”must be stricken because no evidence suggested that such materials were related to contributed to his crime.” The Court agreed and accepted the State’s concession, citing *State v. O’Cain*, 144 Wn. App. 772, 184 P.3d 1262 (2008). 181 Wn. App. at 785. In *O’Cain*, he was convicted of raping a 15-year-old girl. The trial court imposed a community custody condition that prohibited him from accessing the Internet without the prior approval from his community custody officer or treatment provider. 144 Wn. App. at 773-74. The Court held that the condition must be stricken because it is not crime-related where there is “no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime.” 144 Wn. App. at 775.

Conditions 15 and 16 must be stricken because as in *Kinzle* and *Cain*, there is no evidence that accessing sexually explicit materials or frequenting adult bookstores, arcades, or places with sexual entertainment contributed in any way to the crimes.

2. A REMAND FOR THE TRIAL COURT TO STRIKE CONDITION 19 IS REQUIRED BECAUSE THE CONDITION IS UNCONSTITUTIONALLY VAGUE.

Community custody condition 19 orders Green to inform his community corrections officer of "any romantic relationships to verify there are no victim-age children involved." CP 99. The State argues that the condition is "abundantly clear," misapprehending the Court's analysis in *State v. Norris*, 1 Wn. App.2d 87, 404 P.3d 83 (2017). Brief of Respondent at 9-10. In *Norris*, the Court recognized that the term "romantic" is "highly subjective." 1 Wn. App.2d at 87. Moreover, the fact of the term's subjectivity is apparent where the State considers Green's marital relationship with his wife a "romantic relationship." *See* Brief of Respondent at 8, where the State contends that Green "sexually assaulted his own daughter in the context of a romantic relationship with her mother." The State's reliance on *State v. Kinzle*, 181 Wn. App. 774, 326 P.3d 870 (2014), is also misplaced because the community custody condition challenged in *Kinzle* did not contain the term "romantic relationship." Brief of Respondent at 9-10.

A remand for the trial court to strike or modify condition 19 is required because it is unconstitutionally vague in violation of due process.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should remand for resentencing. In the event the State substantially prevails on appeal, this Court should not award costs given that the State has informed the Court that it will not seek costs.

DATED this 9th day of April, 2018.

Respectfully submitted,

/s/ Valerie Marushige
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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Kitsap County Prosecutor's Office.

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

DATED this 9th day of April, 2018.

/s/ Valerie Marushige
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