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

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STATE OF WASHINGTON,

Respondent,

v.

HEBER SHANE GREEN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00097-3

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 8, 2018, Port Orchard, WA   
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether conditions of supervision 15, 16, and 22 should be stricken as not crime-related?
  - a. Condition 22 should be stricken as not crime-related (Concession of Error).
2. Whether condition of supervision 19 is unconstitutionally vague?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Heber Shane Green was charged by information filed in Kitsap County Superior Court with first degree child molestation, domestic violence. CP 1. Later the state moved to dismiss without prejudice to allow more time for investigation. CP 25-26. The matter was dismissed on August 10, 2016. CP 27-28. In September of 2016, a first amended information was filed that restarted the case and charged the same crime, first degree child molestation, domestic violence. CP 29.

Green and his attorney entered into a plea agreement. CP 54-59. Among other things, the state agreed to recommend a low-end standard range sentence in exchange for Green's guilty plea. CP 55. The state agreed not to file multiple counts of first degree rape of a child, domestic violence with an ongoing pattern of abuse aggravating factor. Id.

Green accepted the agreement by entering a plea of guilty as charged to first degree child molestation, domestic violence. CP 60. The plea agreement (and judgment and sentence) indicates that Green has a prior conviction for possession of child pornography that was adjudicated in military court. CP 54. Green made no assertion of a factual basis for the plea but agreed that the trial court could review police reports or statements of probable cause in order to establish a factual basis. CP 69.

A presentence investigation (PSI) was ordered and done. CP 77. The victim information in that report make it clear that the victim, EKG, is Green's own daughter. CP 77-78. The PSI writer recommended the high end of the standard range. CP 83. The PSI writer opined that Green is a danger to the community and the children in it. CP 83.

But the trial court followed the agreement of the parties, sentencing Green low end standard range minimum term. CP 88. The judgment and sentence recited that the conditions of supervision recommended by the PSI are incorporated into the judgment. CP 91.

Green challenged some of the conditions in the PSI appendix F that the trial court incorporated into the judgment and sentence. CP 98 (appendix F); RP, 5/5/17, 8 (issue raised). The trial court had reviewed case law in anticipation of appendix F. RP, 5/5/17, 9. Green challenged condition 3 regarding possession and consumption of controlled

substances, arguing that marijuana does not fit in the controlled substance category and that controlled substance use is not crime related.<sup>1</sup> RP, 5/5/17, 9-10. The trial court amended condition 3 to prohibit “illegal” controlled substances. CP 98.

Next, Green challenged condition 15 prohibiting Green from possessing or accessing “any sexually explicit material” and frequenting places where sexual entertainment is provided. RP, 5/5/17, 12. Green argued that there were no facts in the record by which this could be a crime-related condition. RP, 5/5/17, 12-13. That provision was left in unamended by the trial court. CP 99.

Green argued that condition 16, prohibiting access to sexually explicit materials that are intended for sexual gratification, is inappropriate as not crime related. RP, 5/5/17, 13. Again, the trial court neither struck nor amended that condition. CP 99.

Green argued that condition number 18, prohibiting Green from going to places where children congregate, is unconstitutionally vague. RP, 5/5/17, 13. The trial court amended the condition by striking out “fast food outlets, libraries, theaters, shopping malls ... parks, etc.” CP 99. The trial court left in the word “playground.” Id.

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<sup>1</sup> The condition numbers are the numbers on appendix F unless otherwise noted.

Next, Green claimed that condition 22, placing a CCO determined curfew on Green, is not crime related. RP, 5/5/17, 13. The trial court left in condition 22. CP 99.

**B. FACTS**

The case did not go to trial. As indicated above, Green agreed that a factual basis for his plea may be taken from the statement of probable cause.

The statement of probable cause indicates that the victim disclosed two particular and separate occasions of abuse in Washington. CP 5. The two incidents occurred first the when victim was five years old and second when she was eight or nine years old. Id. The victim not only accused Green but also her brother, WHG (DOB 2/18/2000). Id. WHG admitted the abuse. Id. The victim also referred to an allegation of child rape by Green in the state of California that was under investigation by Naval Criminal Investigative Services. Id.

In a forensic interview, the victim said that when she and Green were sleeping together because the mother was out of town, Green put his hand inside her pajamas and underwear. CP 5. Green rubbed her private parts and inserted his fingers into her vagina. Id.

The second incident happened when the victim was lying around watching television. Id. Green began to rub he inner thigh. Id. He put his hand inside her underwear and put his fingers in her vagina. CP 5-6.

### III. ARGUMENT

#### A. THE STATE CONCEDES THAT CONDITION OF SUPERVISION 22 SHOULD BE STRICKEN BUT CONDITIONS 15, 16, AND 19 SHOULD REMAIN.

Green argues that that four conditions of sentence should be stricken because they are either not crime related or unconstitutionally vague. With regard to condition 22, curfew, the state concedes that there is no apparent authority for that provision and that it is not crime related and should be stricken. With regard to conditions 15 and 16, there is in fact statutory authority for those provisions. Based on assessment of risk, the department is allowed to establish those conditions in order to protect the community. Finally, condition 19 is not unconstitutionally vague.

Green claims that conditions numbered 15, 16 and 22 from appendix F are not crime-related. Condition 15 provides “Do not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is provided.” CP 99. Condition 16 provides “Do not access sexually explicit materials that are intended for sexual gratification.” Condition 22 provides “Abide by a curfew as set by the Community Corrections Officer.” CP 99.

Green may raise a vagueness challenge for the first time on appeal

as long as the issue is purely legal, does not require factual development, and the condition is final. *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010), citing *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

A trial court's imposition of community custody conditions is discretionary and will not be reversed unless manifestly unreasonable. *State v. Valencia*, 169 Wn.2d at 791. Conditions of sentence are not presumed to be constitutional. *Id.* at 793. Imposing an unconstitutional condition is manifestly unreasonable. *Id.* at 792. But a trial court may always impose crime-related prohibitions. RCW 9.94A.505 (8). Such conditions "prohibit conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The term "directly related" is broadly defined to include things that are "reasonably related" to the crime. *State v. Irwin*, 191 Wn.App. 644, 656, 364 P.3d 830 (2015).

The vagueness doctrine serves to give notice to a citizen of proscribed conduct and serves to protect against arbitrary enforcement. *Valencia*, 169 Wn.2d at 791. But the person upon whom the conditions are imposed need not be able to predict with absolute certainty what conduct is prohibited. *Id.* at 793. Impossible standards of specificity are not required. See *State v. Norris*, 1Wn. App.2d 87, 94, 404 P.3d 83

(2017). There must be “ascertainable standards of guilt to protect against arbitrary enforcement.” *Valencia*, 169 Wn.2d at 794, *quoting Bahl*, 164 Wn.2d at 753.

Taking the last, condition 22, first, the state agrees that there are no facts in this record that would justify such a condition. The offense of conviction involves his own daughter in his own home. Being abroad at any particular hour does not seem to be crime-related. The state concedes that condition number 22 of appendix F should be stricken. *See State v. Norris*, 1 Wn. App.2d 87, 97, 404 P.3d 83 (2017).

Conditions 15 and 16, however, should remain. RCW 9.94A.703(1) provides that the trial court is required (“mandatory conditions”) to order the offender to abide the conditions imposed by the department under RCW 9.94A.704. Subsection 704 provides the department the authority to impose many conditions that are not specifically listed. RCW 9.94A.704(2)(a) provides that “The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.” In this case, the PSI writer said “The domestic violence allegation in this case, escalation of behavior from his prior sex offense, and denial of any deviant behavior makes Mr. Green dangerous to the community and the children who reside in it.” CP 83.

Thus the department has abided the statutory command, assessed Green's risk, and found him to be dangerous in the community. Neither in the trial court nor here does Green challenge that statutorily mandated finding. Section .704(2)(a) provides statutory authority to the department to act on this finding by establishing conditions of supervision based upon the risk found. Thus the department had the authority to establish conditions 15 and 16 and those conditions should remain. *See State v. McWilliams*, 177 Wn. App. 139, 154, 311 P.3d 584 (2013) (trial court may delegate authority to establish specific conditions based on risk to community safety to the department under RCW 9.94A.704(2)(a)), *review denied*, 179 Wn.2d 1020 (2014).

Green also argues that condition number 19, which provides that Green must report to his CCO "any romantic relationship to verify there are no victim-age children involved," is unconstitutionally vague. CP 99. He claims that the words "romantic" cannot be defined in a manner that is not vague. First, Green's *seriatim* approach is problematic. The words "romantic relationship" taken alone may have some ambiguity if pushed around enough. However, the entire sentence is abundantly clear. Under circumstances where Green sexually assaulted his own daughter in the context of a romantic relationship with her mother, the provision is an unequivocal attempt to assure that that circumstance does not again arise.

Moreover, the provision does not prohibit Green from having romantic relationships, it just obligates him to tell his CCO.

In *State v. Norris*, a similar condition was upheld. 1 Wn. App.2d at 93. There the court consider a condition that obligated the offender to report “any dating relationship.” Id. at 94. The court noted that the legislature had defined the term “dating relationship” as “a social relationship of a romantic nature.” Id. at 95 (ftnt. 6), *quoting* RCW 26.50.010(2). Circularity may creep in when the state tries to prohibit a child molester from placing himself in the same or similar circumstances in which he has previously offended. But these conditions need not be able to survive a precise logical parsing by a highly educated professional. The question is would a person of ordinary intelligence understand the condition.

In a recent case, a condition actually ordering the offender “not to date women nor form relationships with families who have minor children.” *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014) (internal quotation omitted), *review denied*, 181 Wn.2d 1019 (2014). Kinzle challenged that provision as overbroad, vague, and unnecessary. It was held that since Kinzle’s crime, first degree child molestation, “involved children with whom he came into contact through a social relationship with their parents, condition 10 is reasonably crime-related

and necessary to protect the public.” Moreover, the trial court’s authority to impose this condition is found in its statutory power to order an offender to not have “direct or indirect contact with the victim of the crime or a specified class of individuals.” *Id.*, quoting RCW 9.94A.703(3)(b).

People of ordinary intelligence can easily appreciate the language and purpose of condition 19. The condition allows the CCO to perform her function in protecting the community from a dangerous sex offender by being aware of whether or not Green places himself in the same context in which he offended before. The language of condition 19 is clear and it is in fact crime related.

**B. THE STATE WILL NOT SEEK APPELLATE COSTS.**

By policy, should the state substantially prevail, it will not seek appellate costs in this case.

#### IV. CONCLUSION

For the foregoing reasons, Green's condition of sentence number 22 should be stricken as not crime related but in all other respects the sentence should be affirmed.

DATED March 8, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Tina Robinson", written in a cursive style.

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