

No. 50434-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Tyler,

Appellant.

Clark County Superior Court Cause No. 02-1-00419-9

The Honorable Judge Derek Vanderwood

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court failed to properly determine Mr. Tyler's criminal history and offender score.
2. The trial court erred by including in Mr. Tyler's criminal history juvenile convictions that previously washed out and have not been revived.
3. The trial court erred by sentencing Mr. Tyler with an offender score of 47.
4. The trial court erred by adopting Finding of Fact No. 2.2 (and Appendix 2.2).
5. The trial court erred by adopting Finding of Fact No. 2.3.

ISSUE 1: Under the Sentencing Reform Act, most juvenile convictions entered prior to 1997 are not included in the offender score for current offenses committed before June 13, 2002. Did the sentencing court err by including Mr. Tyler's two washed-out and un-revived juvenile convictions in his offender score?

6. The sentencing court exceeded its authority by imposing a sentencing condition that is not crime-related.
7. The sentencing court should not have ordered Mr. Tyler to refrain from viewing or possessing sexually explicit material without prior approval.

ISSUE 2: Unless specifically authorized by statute, sentencing conditions must directly relate to the circumstances of the crime. Did the sentencing judge err by ordering Mr. Tyler not to view or possess sexually explicit material without prior approval, since none of his offenses involved such material?

8. The sentencing court imposed an unconstitutionally vague condition as part of Mr. Tyler's sentence.
9. The condition prohibiting Mr. Tyler from "enter[ing] into a romantic relationship" with a person who has minor children violates his Fourteenth Amendment right to due process.

10. The prohibition on certain romantic relationships infringes Mr. Tyler's rights to privacy and to free association (including intimate association) under U.S. Const. Amend. I, XIV and Wash. Const. art. I, §§3, 7.

ISSUE 3: A sentencing condition must provide fair warning of proscribed conduct, and is subject to careful review if it implicates an offender's fundamental rights. Does the condition prohibiting Mr. Tyler from "enter[ing] into a romantic relationship" with certain others violate due process because it implicates fundamental rights and yet is unconstitutionally vague?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The Court of Appeals affirmed John Tyler's sex offense convictions, but remanded his case for a new sentencing hearing. CP 3. At resentencing, the court found that Mr. Tyler had two prior juvenile felony convictions.¹ CP 54. These were a second-degree burglary conviction committed when he was 14, and a conviction for taking a motor vehicle, committed when he was 16. CP 54. Mr. Tyler turned 23 in September of 1989.² CP 54.

His current offenses all occurred prior to June 13, 2002.³ CP 39-40. Some of the offenses took place prior to July 1, 1997.⁴ CP 39-40. Others had a charging period that straddled that date. CP 39-40.⁵ Three counts took place after July 1, 1997 but before June 13, 2002. CP 39-40.

The court included the two prior juvenile offenses in Mr. Tyler's criminal history, and added ½ point to his offender score for each. CP 42, 54.

¹ The court also found he had four prior adult felony convictions. CP 54.

² The rules for scoring Mr. Tyler's prior juvenile offenses hinge (in part) on when he turned 23, as explained in the argument section.

³ This was the effective date for SRA amendments that changed the scoring rules for prior juvenile convictions.

⁴ This, too, was the effective date for an SRA amendment that changed the scoring rules for prior juvenile convictions.

⁵ Jurors returned general verdicts that did not specify whether the offenses occurred before or after July 1, 1997.

The court found that Mr. Tyler had 47 points (due mainly to the tripling rule for his current offenses), and sentenced him to an exceptional term of 732.5 months. CP 44.⁶

None of Mr. Tyler's offenses involved the use of pornography. *See* Declaration of Probable Cause, filed 3/1/02, Supp. CP. Despite this, the court imposed the following as a condition of sentence: "You shall not view or possess sexually explicit material as defined in RCW 9.68.130(2) without prior approval of DOC and your sexual deviancy treatment provider." CP 56.

The court imposed another limitation as well: "You shall not enter into a romantic relationship with another person who has minor children in their care or custody without prior approval of DOC and your sexual deviancy treatment provider." CP 56.

Mr. Tyler appealed. CP 194.

ARGUMENT

I. THE SENTENCING COURT ERRED BY INCLUDING MR. TYLER'S JUVENILE CONVICTIONS IN HIS OFFENDER SCORE.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous

⁶ For two counts, he was sentenced under the determinate plus sentencing scheme set forth in RCW 9.94A.507. The court imposed a maximum of life in prison, with minimum terms of 280 and 279 months. CP 44.

sentence may be challenged for the first time on review. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

Here, the sentencing court included two juvenile convictions in Mr. Tyler's criminal history. CP 54. This added one point to his offender score. CP 54. The two offenses were a second-degree burglary committed in 1980 when Mr. Tyler was 14, and a charge of taking a motor vehicle, committed when he was 16.⁷ CP 54; Ex. 3, 5.

The complex rules that apply to Mr. Tyler's prior juvenile convictions are summarized in *In re Jones*, 121 Wn. App. 859, 870–71, 88 P.3d 424 (2004). The *Jones* court analyzed cases interpreting SRA amendments enacted in 1997 and 2002, and concluded as follows:

1. If the current adult offense occurred on or after June 13, 2002, the prior juvenile adjudication counts.
2. If the current adult offense occurred before July 1, 1997, and the prior juvenile offense is not a sex offense, serious violent offense, or Class A felony committed while 15 or older, the prior juvenile adjudication does not count.
3. If the current adult offense occurred on or after July 1, 1997 but before June 13, 2002, and the prior juvenile offense is not a sex offense, serious violent offense, or Class A felony committed while 15 or older:

⁷ Mr. Tyler's date of birth is September 30, 1966. CP 54.

- a. The prior juvenile adjudication does not count if the defendant committed the underlying juvenile offense before age 15, provided that he or she attained age 15 before July 1, 1997.
- b. The prior juvenile adjudication does not count if the defendant committed the underlying juvenile offense while age 15 or older, provided that he or she attained age 23 before July 1, 1997.
- c. Otherwise, the prior juvenile adjudication counts.

Id.

A straightforward application of these principles results in exclusion of Mr. Tyler's juvenile felonies.

Initially, Mr. Tyler's current offenses all occurred prior to June 13, 2002, so the first *Jones* rule does not apply. CP 39-40.

Next, counts 1-3 all occurred prior to 1997, implicating the second *Jones* rule. CP 39. Counts 4, 6, 8, 11, and 16-20 also implicate the second rule, because the charging periods for those counts included time before 1997. CP 39-40. Jurors were instructed on that timeframe, and returned general verdicts. *See* Court's Instructions to the Jury filed 8/22/02, Verdict Forms filed 8/22/02, Supp. CP. Under these circumstances, principles of lenity require that the verdicts be interpreted in Mr. Tyler's favor, resulting in offense dates prior to 1997.⁸ *See, e.g., State v. Whittaker*, 192

⁸ Furthermore, even if some current offenses occurred after 1997, the third *Jones* rule forbids inclusion of Mr. Tyler's prior juvenile offenses, as outlined below.

Wn. App. 395, 415, 367 P.3d 1092 (2016); *State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998). Neither the juvenile burglary nor the juvenile motor vehicle charge qualify as “a sex offense, serious violent offense, or Class A felony committed while [Mr. Tyler was] 15 or older.” *Jones*, 121 Wn. App. at 870–71. Accordingly, neither of the juvenile offenses should have scored against Mr. Tyler for counts 1-3, 4, 6, 8, 11, and 16-20. *Id.*

Finally, the remaining adult convictions (counts 10, 14, and 15) occurred “on or after July 1, 1997 but before June 13, 2002.” CP 39-40.⁹ Neither prior juvenile conviction was “a sex offense, serious violent offense, or Class A felony committed while 15 or older.” *Id.* Mr. Tyler committed the prior burglary before age 15 (and he turned 15 before July 1, 1997). CP 54. The burglary is therefore excluded under *Jones* rule 3(a). *Id.*

The motor vehicle charge is excluded under *Jones* rule 3(b). *Id.* Mr. Tyler committed the offense while age 16, but turned 23 before July 1, 1997. CP 54. The juvenile conviction for taking a motor vehicle should not have been included in the offender score. *Id.*

⁹ Similarly, even if the ambiguous verdicts discussed in the preceding paragraphs were not construed in Mr. Tyler’s favor, the prior juvenile convictions would not count for the reasons described in the third *Jones* rule.

Accordingly, the trial court erred by including the juvenile convictions in Mr. Tyler's offender score. *Id.* Although the "free crimes" aggravator still applies, it is not clear that the judge would have imposed the same sentence knowing that Mr. Tyler had only four points from his prior convictions. Therefore, the sentences must be vacated and the case remanded for a new sentencing hearing.

II. THE SENTENCING COURT ERRED BY IMPOSING SENTENCE CONDITIONS THAT ARE NEITHER CRIME-RELATED NOR SPECIFICALLY AUTHORIZED BY STATUTE.

Unless explicitly authorized by statute, conditions of sentence must be crime-related. *See* RCW 9.94A.703(3)(f); RCW 9.94A.505(9).¹⁰ A crime-related prohibition is one that "directly relates to the circumstances of the crime." RCW 9.94A.030(10).¹¹ It cannot require affirmative conduct, except as necessary to monitor compliance. RCW 9.94A.030(10).

Any sentencing condition that interferes with a fundamental constitutional right must be carefully reviewed. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such conditions "must be reasonably

¹⁰ This requirement has remained consistent since the earliest offenses charged here. *See, e.g.,* former RCW 9.94A.120(8)(c)(vi) (1992).

¹¹ The definition has remained consistent since the beginning of the earliest charging period in Mr. Tyler's case. *See, e.g.,* former RCW 9.94A.030(11) (1992).

necessary to accomplish the essential needs of the State and public order,” and must also be “sensitively imposed.” *Id.*¹²

A. The court should not have restricted Mr. Tyler’s possession of sexually explicit materials.

Here, the trial court prohibited Mr. Tyler from possessing sexually explicit materials without prior approval. CP 55. Nothing suggests that the offenses involved sexually explicit material. *See* Declaration of Probable Cause filed 3/1/02, Supp. CP. The prohibition is thus not crime-related: it does not “directly relate[] to the circumstances of the crime[s].” RCW 9.94A.030(10).¹³

Furthermore, even prison inmates retain some protections of the First Amendment.¹⁴ U.S. Const. Amend. I, XIV; *In re Arseneau*, 98 Wn. App. 368, 372, 989 P.2d 1197 (1999). The condition infringes Mr. Tyler’s first-amendment rights: sexually explicit materials that are not obscene and do not constitute child pornography are protected by the constitution.

¹² Thus, for example, a court may not prohibit a parent from having contact with his children, even though they witnessed his acts of domestic violence against their mother. *State v. Ancira*, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). Nor may a court prohibit a mother from unsupervised visits with her own children based on her conviction for child rape. *State v. Letourneau*, 100 Wn. App. 424, 442, 997 P.2d 436 (2000), *as amended* (June 8, 2000).

¹³ *But see State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016) (suggesting that a prohibition on possessing sexually explicit material is always crime-related for sex offenders).

¹⁴ Unless inconsistent with their status as inmates or with legitimate penological objectives of the corrections system.

See Bahl, 164 Wn.2d at 757. Accordingly, any restrictions “must be reasonably necessary to accomplish essential state needs and public order.” *Id.*, at 758.

In Mr. Tyler’s case, the restriction serves no essential state need. Where a condition of sentence is improper, the remedy is to delete the provision from the order. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). The prohibition on possession of sexually explicit material must be stricken. *Letourneau*, 100 Wn. App. at 442.

B. The prohibition against certain romantic relationships is unconstitutionally vague.

Due process requires that sentencing conditions provide fair warning of proscribed conduct. U.S. Const. Amend. XIV; *Bahl*, 164 Wn.2d at 752-53. No presumption of constitutionality applies. *Id.* Words in a sentencing provision are considered in context and given their ordinary meaning. *Id.*, at 754.

The sentencing court prohibited Mr. Tyler from “enter[ing] into a *romantic relationship* with another person who has minor children in their care or custody without prior approval.” CP 56 (emphasis added). The

judge did not clarify what actions would amount to “enter[ing] into a romantic relationship.” CP 56.

This condition implicates Mr. Tyler’s right to freedom of association (including his right to intimate association) and his right to privacy. U.S. Const. Amend. I, XIV; Wash. Const. art. I, §§3, 7; *see State v. Clinkenbeard*, 130 Wn. App. 552, 563, 123 P.3d 872 (2005); *see also Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 596-605, 192 P.3d 306 (2008). Accordingly, the condition must be reviewed with extra care. *Warren*, 165 Wn.2d at 32.

The word “romantic” can relate to love or strong affection, but it can also mean fanciful, impractical, unrealistic, or glamorous. *See Dictionary.com Unabridged*. Random House, Inc. (2017);¹⁵ *Roget’s 21st Century Thesaurus, Third Edition*, Philip Lief Group (2009).¹⁶ The word “relationship” can mean any kind of connection, association, or involvement. *Dictionary.com*.¹⁷ It is not limited to sexual involvement, but

¹⁵ Available at <http://www.dictionary.com/browse/romantic> (accessed: October 13, 2017).

¹⁶ Available at <http://www.thesaurus.com/browse/romantic> (accessed: October 13, 2017).

¹⁷ Available at <http://www.dictionary.com/browse/relationship> (accessed: October 13, 2017).

can mean an emotional connection or some other kind of rapport or bond.

Dictionary.com; ¹⁸ *Roget's Thesaurus*.¹⁹

The phrase “romantic relationship” is unconstitutionally vague. As one federal court put it, addressing a similar prohibition:

[P]eople of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a “significant romantic relationship.” What makes a relationship “romantic,” let alone “significant” in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy... The history of romance is replete with precisely these blurred lines and misunderstandings. *See, e.g.,* Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austen, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met Sally* (Columbia Pictures 1989); *He's Just Not That Into You* (Flower Films 2009).

United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010).

Nor is it clear what marks *entry* into a romantic relationship. One person might believe the exchange of letters commences a romantic relationship; another person might draw the line at meeting face to face, or engaging in “acts of physical intimacy.” *Id.* Here, as in *Reeves*, the sentencing condition “has no objective baseline.” *Id.*

¹⁸ Available at <http://www.dictionary.com/browse/relationship> (accessed: October 13, 2017).

¹⁹ Available at <http://www.thesaurus.com/browse/relationship> (accessed: October 13, 2017).

There are no statutory definitions or other external sources providing guidance as to what it means to enter a romantic relationship. Mr. Tyler’s freedom “should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude” that he’d entered into a romantic relationship. *Id.*

The relationship provision must be stricken. *Riles*, 135 Wn.2d at 350.

CONCLUSION

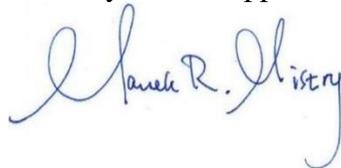
For the foregoing reasons, Mr. Tyler’s sentence must be vacated and the case remanded for a new sentencing hearing. In the alternative, the sentence conditions relating to sexually explicit materials and romantic relationships must be stricken.

Respectfully submitted on October 26, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 26, 2017.



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