

FILED
Court of Appeals
Division II
State of Washington
1/17/2018 3:42 PM

NO. 50434-1-II

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

STATE OF WASHINGTON, Respondent

v.

JOHN THOMAS TYLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.02-1-00419-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The State concedes that Tyler’s two juvenile convictions do not count towards his offender score, making it 46 not 47. 1
- II. The sentencing court did not err in imposing crime related prohibitions relating to viewing or possessing sexual depictions..... 1
- III. The State concedes that the crime related prohibition on certain “romantic relationships” is unconstitutionally vague..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT 3

- I. The State concedes that Tyler’s two juvenile convictions do not count towards his offender score, making his score 46 not 47.. 3
- II. The sentencing court did not err in imposing crime related prohibitions relating to viewing or possessing sexual depictions..... 3
- III. The State concedes that the crime related prohibition on certain “romantic” relationships is unconstitutionally vague..... 6

CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 684 P.2d 692 (1984).....	4
<i>In re Jones</i> , 121 Wn.App. 859, 88 P.3d 424 (2004)	3
<i>State v. Bahl</i> , 164 Wn.2d 739, 753 P.3d 678 (2008).....	4, 5
<i>State v. Magana</i> , 197 Wn. App. 189, 389 P.3d 654 (2016).....	4, 5
<i>State v. Norris</i> , 1 Wn. App. 2d 87, 404 P.3d 83 (2017).....	4, 6
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615, 624 (1995).....	4
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	4
<i>State v. Wilson</i> , 170 Wn.2d 682, 244 P.3d 950 (2010).....	3

Statutes

RCW 9.68.130(2).....	6
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Rules

GR 14.1(a).....	5
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Unpublished Opinions

<i>In re Pers. Restrant of Adams</i> , 186 Wn.App. 1041 (Div. 2 2015).....	5
<i>State v. Lyon</i> , 200 Wn.App. 1015 (Div. 3 2017)	5

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State concedes that Tyler’s two juvenile convictions do not count towards his offender score, making it 46 not 47.**
- II. The sentencing court did not err in imposing crime related prohibitions relating to viewing or possessing sexual depictions.**
- III. The State concedes that the crime related prohibition on certain “romantic relationships” is unconstitutionally vague.**

STATEMENT OF THE CASE

John Tyler (hereafter “Tyler”) was convicted after a jury trial of 11 counts of rape of a child in the first degree, 2 counts of child molestation in the first degree, and 2 counts of rape of a child in the second degree. CP 39-40. Tyler appealed his convictions, and this Court affirmed his convictions. CP 29-30. The case was remanded for resentencing, because the State did not present sufficient evidence of Tyler’s criminal history and the sentencing judge did not make an individualized inquiry into Tyler’s ability to pay discretionary LFO’s. CP 30.

On remand, the sentencing court found that the State presented sufficient evidence of Tyler’s criminal history, and that Tyler had 5 points based on prior criminal convictions. RP 55-59. The State asked for an exceptional upward sentence and presented evidence that Tyler’s offender

score was 47 based on 3 point multipliers on 14 concurrent convictions and the 5 prior points. RP 60. The sentencing court found that Tyler's offender score was 47 and sentenced him to an exceptional upward sentence of 732.5 months. CP 42-44. RP 80, 86.

A half point was awarded for a juvenile burglary in the second degree conviction from December 4, 1980 (cause no. 016074R015) committed when Tyler was 14. CP 54. Another half point was awarded for a juvenile taking a motor vehicle without permission conviction from March 21, 1983 (cause no. 016074R050) committed when Tyler was 16. CP 54. Tyler turned 15 on September 30, 1981 and he turned 23 on September 30, 1989.

The sentencing court also imposed the following restrictions as a condition of Tyler's sentence and community custody:

10. 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.

...

12. 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 55-56. This timely appeal follows.

ARGUMENT

I. The State concedes that Tyler's two juvenile convictions do not count towards his offender score, making his score 46 not 47.

Tyler argues that pursuant to *In re Jones*, 121 Wn.App. 859, 870-71, 88 P.3d 424 (2004), his two prior juvenile convictions should not have counted to his offender score. The State agrees with Tyler, in that the half points for the burglary in the second degree and the taking a motor vehicle without permission convictions should not have counted towards his offender score. Under *Jones*, those convictions do not count towards his offender score, so his offender score should have been 46, not 47.

The remedy for a miscalculated offender score is to resentence with the correct offender score. *State v. Wilson*, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). Therefore, the State respectfully requests this Court remand the case to resentence Tyler using an offender score of 46.

II. The sentencing court did not err in imposing crime related prohibitions relating to viewing or possessing sexual depictions.

Tyler argues that the sentencing court erred in prohibiting Tyler from viewing or possessing sexually explicit material. Tyler contends that this prohibition was not crime related and the sentencing court lacked the authority to impose it. However, the sentencing court did not err because

prohibiting the possession or viewing of sexually explicit material as a condition of a sex offense sentence is well within the court's lawful authority. Tyler's claim fails.

Community custody conditions are reviewed for an abuse of discretion. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016) (internal citations omitted). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615, 624 (1995) (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)). The imposition of community custody conditions is within the discretion of the sentencing court and will be reversed if the conditions are manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753 193 P.3d 678 (2008); citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In *Magana*, Division 3 of the Court of Appeals ruled that because the defendant was convicted of a sex offense, conditions relating to X-rated movies, adult bookstores, and sexually explicit materials were all crime related and properly imposed. 197 Wn. App. at 201¹. *See State v.*

¹ There is a split between Division 1 and 3 on whether or not restricting access to sexually explicit materials is in and of itself a crime related prohibition. Division 1 has held that "to the extent *Magana* stands for either a categorical approach or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree." *State v. Norris*, 1 Wn. App. 2d 87, 89, 404 P.3d 83 (2017).

Lyon, 200 Wn.App. 1015 (Div. 3 2017)² (holding that restricting access to sexually explicit materials is sufficiently crime related when convicted of a sex offense). The defendant was convicted of rape of a child in the third degree, and no sexually explicit materials were used in the commission of the crime. *Magana*, 197 Wn. App. at 201.

In *Bahl*, our State Supreme Court held that a prohibition on accessing or possessing “pornographic materials” was unconstitutionally vague. 164 Wn.2d at 758. Courts have also held that a community custody condition delegating the definition of “pornography” or “pornographic material” to a CCO is unconstitutionally vague. *See In re Pers. Restraint of Adams*, 186 Wn.App. 1041 (Div. 2 2015), slip op. at 1.³ However, no case law has found it explicitly unconstitutional to prohibit a convicted sex offender from possessing or using pornographic or obscene materials if those terms are sufficiently defined.

Here, the sentencing court imposed the following condition on Tyler regarding his ability to use or possess pornography:

This Court should follow the reasoning in *Magana* and hold that restricting access to sexually materials is sufficiently crime related when the crime is a sex offense, because it is not manifestly unreasonable to require a sex offender to have restrictions on sexually explicit materials.

² GR 14.1(a) allows for citation to unpublished opinions of the courts of Appeals that were filed after March 1, 2013. Such opinions are non-binding and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

³ GR 14.1(a) allows for citation to unpublished opinions of the courts of Appeals that were filed after March 1, 2013. Such opinions are non-binding and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

10. 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. RCW 9.68.130(2) defines sexually explicit material as:

[A]ny pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

RCW 9.68.130(2). This definition does not leave it open to the CCO or the defendant's therapist to define the term, but it specifically tells the defendant what he is not allowed to possess or use. This condition is therefore not unconstitutionally vague and its imposition was not manifestly unreasonable. Furthermore, because Tyler was convicted of sex offenses, the restriction on possessing or viewing sexually explicit material is sufficiently crime related and the sentencing court did not abuse its discretion in imposing the restriction. Tyler's claim fails.

III. The State concedes that the crime related prohibition on certain "romantic" relationships is unconstitutionally vague.

Tyler argues that the prohibition on certain romantic relationships is unconstitutionally vague. The State concedes that using the term "romantic" is unconstitutionally vague. In *Norris*, Division 1 held that the

use of the term “dating relationship” was not unconstitutionally vague, but that qualifiers such as “significant” or “romantic” were highly subjective. 1 Wn. App. 2d at 87. Here, Tyler’s condition of sentence uses the term “romantic relationship” not “dating relationship,” so the condition as it is currently written must be stricken.

CONCLUSION

The State respectfully requests this Court remand this case to resentence Tyler with an offender score of 46 and to strike the condition of the sentence prohibiting certain “romantic relationships”. However, the State respectfully requests this Court uphold the prohibition on viewing or possessing sexually explicit materials.

DATED this 17 day of January, 2018.

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January 17, 2018 - 3:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50434-1
Appellate Court Case Title: State of Washington, Respondent v John T. Tyler, Appellant
Superior Court Case Number: 02-1-00419-9

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