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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

GEORGE CHAPA

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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A. Assignments of Error

Assignments of Error

1. The trial court abused its discretion when it denied Mr. Chapa's SSOSA application after giving "great weight" to the "impassioned" plea of the victim's biological mother.
2. Remand for correction of Appendix H is necessary to correct a scrivener's error.
3. Community Custody Condition #13 should be stricken.
4. Community Custody Condition #15 and Judgment and Sentence, page 5, line 17-20 should be stricken.
5. Community Custody Condition #16 and Judgment and Sentence, page 5, line 17-20, should be stricken.
6. Community Custody Condition #17 should be stricken.
7. Community Custody Condition #20 should be stricken.
8. Community Custody Condition #21 should be stricken.

Issues Pertaining to Assignments of Error

1. Mr. Chapa pleaded guilty to one count of Child Molestation in the First Degree for having sexual contact with his girlfriend's biological daughter. The girlfriend, who had no legal standing as a result of losing her parental rights, made an "impassioned

presentation” at sentencing in opposition to the SSOSA. Did the trial court abuse its discretion when it gave “great weight” to the objections of a woman with no legal standing?

2. Although the Court orally ordered Appendix H (with one modification) of the PSI, the Appendix was never signed or attached to the Judgment and Sentence. Is remand for correction of this scrivener’s error necessary?
3. Should this Court strike Community Custody Condition #13, related to not being where minors congregate?
4. Should this Court strike Community Custody Condition #15 and Judgment and Sentence, page 5, line 17-20, related to not entering places where sexual entertainment is provided?
5. Should this Court strike Community Custody Condition #16 and Judgment and Sentence, page 5, line 17-20, related to not possessing sexual explicit materials (as defined by the CCO)?
6. Should this Court strike Community Custody Condition #17, related to curfew requirements that are not crime-related?
7. Should this Court strike Community Custody Condition #20, related to not “pursuing” relationships that are “intimate, romantic or sexual?”

8. Should this Court strike Community Custody Condition #21, related to not forming “relationships” with individuals who have care or custody or minor children?

B. Statement of Facts

On June 15, 2015, George Chapa’s girlfriend, Marissa Blair, found a nude photo of her four-year-old biological daughter, AMW, on Mr. Chapa’s phone. CP, 4. The photo depicted an apparent male hand pulling aside AMW’s underwear and exposing her labia. CP, 4. The State charged Mr. Chapa with one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree. CP, 1.

On June 26, 2017 the State filed an Amended Information charging Mr. Chapa with one count of Child Molestation in the First Degree. CP, 10. In the guilty plea, he admitted having sexual contact with AMW, who was less than twelve years old. CP, 28. The standard range was 51 to 68 months and the State agreed to recommend a standard range sentence. CP, 13-14. The plea agreement contemplated that the defendant would petition the court for a SSOSA sentence. CP, 15.

Mr. Chapa submitted to a psychosexual evaluation with Dr. Haley Gummelt. CP, 96. Her evaluation contains a comprehensive analysis of Mr. Chapa’s life, beginning with his childhood and continuing to the

present. Dr. Gummelt's conclusion is that Mr. Chapa would benefit from the treatment of the SSOSA program. CP, 127-28. She rated him a low risk to engage in sexual violence, but recommended that he not be unsupervised with minors. CP, 127. As part of the psychosexual process, he admitted taking a photograph of the vagina of AMW. CP, 111. He denied any other sexual contact with her or any other children. CP, 112.

Mr. Chapa submitted to a polygraph on February 17, 2017 and the polygrapher opined he was being truthful on the relevant questions. CP, 113. The relevant questions were: (1) Other than AMW, since you turned 18, have you had sexual contacts with anyone under the age of 18? (2) When you said you have not had sexual contact with a minor other than AMW since 18, did you lie about that? CP, 112. Mr. Chapa answered both questions in the negative. CP, 112.

After Mr. Chapa submitted to the polygraph, an additional police report was received and provided to Dr. Gummelt. The supplemental report consists largely of a forensic electronic analysis of Mr. Chapa's computer¹. CP, 46, 114. The computer contained 234 photographs of children engaged in sexually explicit conduct, including 73 photos of

¹ It is unclear from Dr. Gummelt's report where the 234 images were located. The Defense Sentencing Memorandum clears up they were located on Mr. Chapa's computer. CP, 46.

AMW. CP, 115. “Several photos” depict AMW being touched by an adult male in the vaginal area. CP, 115.

The case was called for sentencing on August 28, 2017. At sentencing, the State asked the court to impose a standard range sentence. RP, 4.

The State also advised the court that the victim’s “mother,” Marisa Blair, was present and wished to address the Court. Ms. Blair advised the Court around the time of the incident, or soon thereafter, her kids were placed in “CPS care.” RP, 7. By the time of sentencing, Ms. Blair’s parental rights had been terminated and her kids were adopted by another family. RP, 7. The adoptive parents were apparently not present and, in any event, did not speak at the sentencing nor make any representations on behalf of AMW.

Marisa Blair spoke very passionately against the SSOSA and had difficulty expressing her thoughts without “choking up.” RP, 6. She stated it made her “sick to her stomach” that Mr. Chapa was even being considered for a SSOSA. RP, 7. She averred that it was not in the best interests of the public for him to receive a SSOSA and “on behalf of [her] kids” he should receive the maximum sentence the law will provide. RP, 8. Marisa Blair opined that she been manipulated by Mr. Chapa and, as a result, she had failed her kids. RP, 8-9. She expressed resentment that,

after becoming pregnant with Mr. Chapa's baby, she had to leave the hospital without her child and that her kids are "alive without me." RP, 9.

Diane Blair, who identified herself as the victim's grandmother and the mother of Marisa Blair, was present and spoke briefly. RP, 10. She did not make a specific sentencing recommendation, although she did state it was "unimaginable" that Mr. Chapa would do this to an innocent child. RP, 11.

In making its sentencing decision, the court began by noting it had heard a "very impassioned presentation from the victim's mother, who obviously is very opposed to a SSOSA." RP, 20. The Court continued, "I am still looking at the statute. I'm constrained by the statute. And so, first of all, I do consider the victim's opinion. And according to the statute, that holds great weight in what this Court does. So I would have to find something very, very compelling for me to overcome that." RP, 20-21. The Court then noted a variety of other factors. Mr. Chapa had passed a polygraph, but also minimized his sexual deviancy and testing, which indicated a moderate risk of re-offense. RP, 21. The Court considered the comments and sentencing memorandum of defense counsel, which the Court described as a "very valiant effort." RP, 21. But in the end the Court concluded, "So in reviewing all of the factors, I cannot find that this Court should override the victim's opinion." RP, 22. The Court denied the

SSOSA application and imposed a standard range sentence of 51 months.
CP, 73, RP, 22.

The Court orally imposed all the community custody conditions requested by the Department of Corrections in proposed Appendix H except that the proposed prohibition on 900 numbers was stricken. RP, 23. Appendix H appears in the record at the end of the Presentence Investigation Report (PSI). CP, 40-41. Normally, Appendix H, subject to any modifications, would be signed by the sentencing judge and attached to the Judgment and Sentence. In fact, there is a signature line for the judge at the bottom of the Appendix H. CP, 41. But in this case, it does not appear the judge signed Appendix H nor was attached to the Judgment and Sentence. Page 5 of the Judgment and Sentence states all conditions in the PSI are “incorporated herein as conditions of community custody.” CP, 77.

C. Argument

1. The trial court abused its discretion when it denied Mr. Chapa’s SSOSA application after giving “great weight” to the “impassioned” plea of the victim’s biological mother.

The decision to grant or deny a SSOSA is entirely at the sentencing court’s discretion, so long as the court’s decision does not rest on an

impermissible basis. *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009)

RCW 9.94A.670(4) identifies six factors sentencing courts should consider when determining whether a SSOSA is appropriate: (1) whether the offender and the community will benefit from use of the SSOSA, (2) whether a SSOSA is too lenient in light of the extent and circumstances of the offense, (3) whether the offender has victims in addition to the victim of the offense, (4) whether the offender is amenable to treatment, (5) the risk the offender would represent to the community, to the victim, or to persons of similar age and circumstances as the victim, and (6) the victim's opinion whether the offender should receive a SSOSA. Additionally, the sentencing court must give great weight to the victim's opinion whether the offender should receive a SSOSA. RCW 9.94A.670(4).

It is clear on this record that the sentencing court gave great weight to the opinions of Marisa Blair in denying Mr. Chapa a SSOSA, a factor

that would normally be appropriate. The Court began by noting the “very impassioned presentation from the victim’s mother, who obviously is very opposed to a SSOSA.” RP, 20. The Court continued, “I am still looking at the statute. I’m constrained by the statute. And so, first of all, I do consider the victim's opinion. And according to the statute, that holds great weight in what this Court does. So I would have to find something very, very compelling for me to overcome that.” RP, 20-21. The Court concluded, “So in reviewing all of the factors, I cannot find that this Court should override the victim's opinion.” RP, 22. It is clear that Marisa Blair’s impassioned plea had the desired effect of steering the Court’s discretion against the SSOSA.

The term “victim” is defined in RCW 9.94A.670(1)(c) as:

“‘Victim’ means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. ‘Victim’ also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.”

Under this definition, Marisa Blair is not a victim. Ms. Blair’s parental rights had been terminated and her children adopted by another family. Ms. Blair had no standing as a victim. For the same reason, Ms. Blair’s biological mother, Diane Blair, who spoke briefly at the sentencing

hearing but did not make a specific sentencing recommendation, also lacked standing.

Because Ms. Blair had no standing as a victim, the Court abused its discretion by giving her opinion “great weight.” Ms. Blair’s opinion of whether Mr. Chapa should receive a SSOSA sentence is no more relevant than a random person in the courtroom audience. The trial court’s decision to place “great weight” on Ms. Blair’s opinion applied the wrong legal standard and was based on an erroneous view of the law, both of which constitute an abuse of discretion.

On this record, whether Mr. Chapa should receive a SSOSA was disputed and the Court had conflicting information. The Court identified several factors that it was considering, such as his minimization of his criminal conduct and his moderate risk of re-offense. On the other hand, the Court had a psychosexual evaluation that concluded he was a good candidate for SSOSA and a “valiant” presentation by defense counsel. But, ultimately, it is clear that the Court rested its decision primarily on one factor: the wishes of Ms. Blair. Giving great weight to the wishes of Ms. Blair, a woman who had no standing as a victim, constituted manifestly unreasonable and untenable grounds. The proper remedy is to remand for a new sentencing hearing. Mr. Chapa asks that this be before a

different judge who has not prejudged the case or heard Ms. Blair's comments.

2. A scrivener's error exists that requires remand for correction.

It is clear the trial court intended to sign Appendix H of the PSI and attach it to the Judgment and Sentence with one modification. The modification was proposed Community Custody Conditions #28 and pertained to 900 numbers. Appendix H was never signed or made part of the record, with or without the specified modification. This is a clerical error that can be corrected at any time. CrR 7.8(a). Remand is required.

Additionally, although Appendix H was not signed, the Court did orally find the proposed community custody conditions from the PSI are appropriate (with one exception). An unsigned copy of Appendix H appears in the record attached to the PSI. In the interests of judicial economy, it makes sense to address the appropriateness of the conditions at this time. A community custody condition is void for vagueness if the condition either (1) does not define the prohibition with sufficient definitiveness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards that "protect against arbitrary enforcement." *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). Unless otherwise authorized by statute, community custody conditions must be crime-related. *State v. O'Cain*, 144 Wn.App. 772, 184

P.3d 1262 (2008). Several of the community custody conditions should be stricken.

3. Community Custody Condition #13 should be stricken, related to a prohibition on being where minors congregate.

A prohibition on being where “minors congregate” is unconstitutionally vague. *State v. Norris*, ___ Wn.App. ___, 404 P.3d 803 (2017), citing *State v. Irwin*, 191 Wn.App. 644, 364 P.3d 830 (2015). Additionally, the terms “malls” and “fast food restaurants” are way too broad. It is prone to arbitrary enforcement to say Mr. Chapa cannot shop at T.J. Maxx attached to a strip mall or go through a McDonald’s drive-through window and order a Big Mac.

4. Community Custody Condition #15 and Judgment and Sentence, page 5, line 17-20 should be stricken, related to a prohibition on being where sexual entertainment is provided.

A prohibition on being where sexual entertainment is provided may not be imposed unless it is crime-related. *State v. Norris*, ___ Wn.App. ___, 404 P.3d 803 (2017). There is no evidence going to adult bookstores, arcades, or topless entertainment contributed to this offense.

5. Community Custody Condition #16 and Judgment and Sentence, page 5, line 17-20, should be stricken, related to sexual explicit materials.

A prohibition on sexually explicit materials (as defined by defendant's treating therapist or CCO) is overbroad and needs to be stricken. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).

6. Community Custody Condition #17 should be stricken, related to curfews.

Curfew requirements may not be imposed unless they are crime-related. *State v. Norris*, ___ Wn.App. ___, 404 P.3d 803 (2017).

7. Community Custody Condition #20 should be stricken, related to pursuing intimate, romantic or sexual relationships.

The condition that Mr. Chapa not "pursue intimate, romantic or sexual relationships without authorization for his CCO and/or therapist" should be stricken. A recent Court of Appeals case addressed a similar restriction. *State v. Norris*, ___ Wn.App. ___, 404 P.3d 803 (2017). The Court said:

Citing *United States v. Reeves*, 591 F.3d 77 (2nd Cir. 2010), Norris argues because the term "dating relationship" does not provide notice of an adequate ascertainable standard, the condition does not prevent arbitrary enforcement. *Reeves* does not support her argument. In *Reeves*, the Second Circuit concluded a condition that required the defendant to notify the probation department "

‘when he establishes a significant romantic relationship’ ” was unconstitutionally vague. *Reeves*, 591 F.3d at 80-83.

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; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be “significant.”

Reeves, 591 F.3d at 81.

Use of the term “dating relationship” is easily distinguishable from the condition in *Reeves*. The requirement to report a “dating relationship” does not contain highly subjective qualifiers like “significant” and “romantic.” A “date” is commonly defined as “an appointment between two persons” for “the mutual enjoyment of some form of social activity,” “an occasion (as an evening) of social activity arranged in advance between two persons.” Webster's Third New International Dictionary 576 (2002). We conclude the condition is neither unconstitutionally vague nor subject to arbitrary enforcement.

Norris, 404 P.3d at 87.

The condition in Mr. Chapa’s case is closer to the restriction in *Reeves* than in *Norris*. *Norris* was prohibited from entering into a “dating relationship” while *Reeves* was prohibited from entering into a “significant romantic relationship.” Mr. Chapa is prohibited from “pursuing” relationships of an “intimate, romantic or sexual” nature. First, it is unclear what it means to “pursue” a relationship. Merriam-Webster defines “pursue” as “to find or employ measures to obtain or

accomplish.” Does having coffee after work with a member of the opposite sex constitute a “pursuit?” What about waving to them from across the street?

Additionally, whether a relationship is “intimate, romantic or sexual” is also vague and prone to arbitrary enforcement. Columnist Ann Landers might conclude that sharing with another person your deep resentment towards your deceased parent constitutes intimacy, but the law does not.

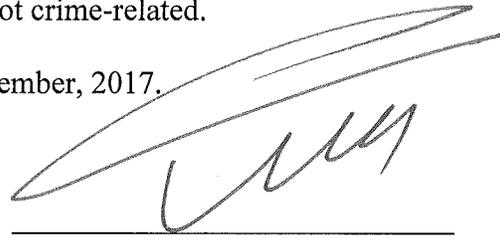
8. Community Custody Condition #21 should be stricken, related to forming relationships with individuals who have care or custody of minor children.

The Court ordered that Mr. Chapa not “form relationships with individuals who have care or custody of minor children without authorization for his CCO and/or therapist.” The term “relationship” is overbroad and the condition should be stricken. Merriam-Webster defines “relationship” as the “relation connecting or binding participants in a relationship, such as kinship.” There are many kinds of relationships. Without a modifier, it is impossible to determine if the prohibition is on dating relationships, familial relationships, work-colleague relationship, student-teacher relationships, etc. The term is overbroad and unconstitutionally vague.

D. Conclusion

This Court should reverse and remand for a new sentencing hearing before a different judge. In addition, remand is necessary to correct a scrivener's error and strike multiple community custody conditions as overbroad, vague, or not crime-related.

DATED this 19th day of December, 2017.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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

STATE OF WASHINGTON,) Court of Appeals No.: 50924-5-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE OF
) BRIEF OF APPELLANT
vs.)
)
GEORGE CHAPA,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On December 19, 2017, I e-filed the Brief of Appellant with the Washington State Court of Appeals, Division Two; and designated said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system.

On December 19, 2017, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

George Chapa, DOC #400220
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

////

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

3 DATED: December 19, 2017, at Bremerton, Washington.

4
5 

6 Alisha Freeman

THE LAW OFFICE OF THOMAS E. WEAVER

December 19, 2017 - 4:23 PM

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