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NO. 51116-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER GRAEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. The State breached a plea agreement by failing to argue for a low-end sentence and instead pointing to facts inconsistent with that bargained-for recommendation. Does the State's brief misrepresent the appellant's argument by erroneously claiming, instead, that Graen is arguing the State failed to recommend the sentence alternative?

2. Does the State's brief incorrectly assert that the challenged trial court-imposed community custody conditions were instead imposed by the Department of Corrections (DOC)?

3. Does the Supreme Court's recent decision in State v. Nguyen, ___ Wn.2d ___, 425 P.3d 847 (2018) undermine Graen's vagueness challenges?

B. ARGUMENT IN REPLY

1. THE STATE'S BRIEF MISREPRESENTS GRAEN'S ARGUMENTS ON APPEAL REGARDING THE STATE'S BREACH OF THE PLEA AGREEMENT. GRAEN DOES NOT CHALLENGE THE FAILURE TO RECOMMEND A SSOSA.

The State brief attempts to confuse the issues in this case by claiming Graen is arguing the State failed to recommend a Special Sex Offender Sentence Alternative. Brief of Respondent (BOR) at 11.

But Graen's brief only mentions the SSOSA to explain to this Court the case's procedural history. Brief of Appellant (BOA) at 4. As indicated

in Graen's opening brief, the State's plea paperwork is confusing because it seems to indicate the State will recommend a SSOSA *if* Graen is found eligible. *Id.* (citing CP 11, 13). However, as the opening brief states, the State made it clear before entry of the plea that it was not supporting a SSOSA.¹ BOA at 4.

Nowhere in Graen's brief does she argue that failure to recommend a SSOSA constituted a breach of the plea agreement. BOA at 7-13. Thus, this Court should reject the State's attempt to create a straw man.

Relatedly, the State also claims that Graen mischaracterizes the State's argument at sentencing. BOR at 11. But Graen's brief quotes the prosecutor's argument verbatim. BOA at 5-6. And each assertion in the argument section of the opening brief is supported by the record.

As part of its contract, and as inducement for Graen to plead guilty, the State promised to recommend a low-end sentence. CP 11-12.

A week before the sentencing hearing, a substitute prosecutor fervently argued the court should impose the *high end* of the standard range. 4RP 2-5. However, sentencing was continued.

¹ The brief of appellant does inadvertently omit the word "not" from the following sentence on page 5: "Addressing the court at sentencing, the prosecutor indicated she did object to withdrawal of [Graen's] SSOSA request because the State had never agreed to recommend a SSOSA." 5RP 4. The sentence should read that the prosecutor "did **not** object to withdrawal of [Graen's] SSOSA request[.]"

Then, at the sentencing hearing itself, the original prosecutor never informed the court that the State recommended a low-end sentence. Cf. 5RP 4² (“Essentially, the biggest crime [Graen is] looking at is in Count 4. That’s the lifetime sentence. It’s a class A [felony]. So 98 months is, I think, the minimum that she’s looking at.”).

Instead, the prosecutor emphasized Graen’s recalcitrance, faintly tempering the criticism with an acknowledgment that Graen had worked with law enforcement. 5RP 4-5. The prosecutor notified the court about uncharged crimes. 5RP 5. The prosecutor also characterized Graen’s crimes as serious. 5RP 5. The prosecutor highlighted B.A.’s ongoing serious behavior issues, indicating that they were likely to persist throughout her lifetime. 5RP 5. Finally, the prosecutor appeared to urge B.A.’s family members and therapist to offer the court specifics regarding B.A.’s behavior issues. 5RP 5.

The State fails to identify any inaccuracy in Graen’s summation of the facts. As the record demonstrates, the State breached its promise to recommend the low end of the standard range. CP 11-12.

² This brief refers to the verbatim reports as follows: 1RP – 1/17 and 4/7/17; 2RP – 2/1 and 5/15/17; 3RP – 8/18/17; 4RP – 9/15/17; and 5RP – 9/22/17.

2. REGARDING COMMUNITY CUSTODY, THE STATE'S BRIEF MISSES THE MARK BECAUSE GRAEN CHALLENGES CONDITIONS IMPOSED BY THE COURT, NOT THE DEPARTMENT OF CORRECTIONS.

The State's brief incorrectly asserts that several conditions were imposed by DOC, not the trial court. BOR at 15-18. This is incorrect.

RCW 9.94A.704(2)(a) authorizes the DOC to "establish and modify additional conditions of community custody based upon the risk to community safety." State v. McWilliams, 177 Wn. App. 139, 154, 311 P.3d 584 (2013).

But Graen has not challenged conditions imposed by the DOC under RCW 9.94A.704. She is, instead, challenging conditions imposed by the trial court under RCW 9.94A.703. CP 77-79. RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. A court may impose other prohibitions if they are "crime-related." RCW 9.94A.703(3)(f). A crime-related prohibition "means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted[.]" RCW 9.94A.030(10); State v. Padilla, 190 Wn.2d 672, 682, 416 P.3d 712 (2018).

This Court should reject the State’s mischaracterization of the law and the facts. The trial court, not DOC, imposed the challenged conditions in this case.

3. THE SUPREME COURT’S DECISION IN *NGUYEN* DOES NOT SAVE THE SPECIFIC CONDITIONS IN THIS CASE FROM A VAGUENESS CHALLENGE.

The State argues that the Supreme Court’s recent decision in Nguyen, 425 P.3d 847, controls as to Graen’s vagueness challenges. BOR at 18-26. This Court should reject that argument.³

First, Graen has challenged a condition related to “romantic,” not dating, relationships, the condition at issue in Nguyen. See Nguyen, 425 P.3d at 853 (“The terms ‘significant’ and ‘romantic’ are highly subjective qualifiers, while ‘dating’ is an objective standard that is easily understood by persons of ordinary intelligence.”).

As discussed in the opening brief, this Court should follow the persuasive reasoning of State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016), an unpublished decision from Division Three. There, the Court found a condition prohibiting Dickerson from “enter[ing] a romantic relationship without the prior approval of the [community

³ The State does not address Graen’s overbreadth argument. BOA at 31-34. And overbreadth was not considered by the Nguyen Court.

corrections officer] and Therapist” to be vague. Id. at *1 (alteration in original).

Second, in Nguyen, the Court upheld against a vagueness challenge a condition providing “[d]o not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.” Nguyen, 425 P.3d at 851. The Court upheld the condition in part based on the fact that it contained a statutory definition that adequately defined the terms in question. Id. at 852.

Here, in contrast the challenged condition contains no such definition, and even permits the term to be delineated by a third party. CP 78 (condition 5, prohibiting Graen from “possess[ing] or perus[ing] any sexually explicit materials, as defined by [her] therapist or Community Corrections Officer, unless given prior approval.”)

A reviewing court will not assume a trial court intended to limit a term to an unreferenced statutory definition. As argued in the opening brief, Graen’s case is like State v. Moultrie, in which the defendant challenged as unconstitutionally vague the condition of his sentence prohibiting contact with “vulnerable, ill or disabled adults.” 143 Wn. App. 387, 396, 177 P.3d 776 (2008). The State argued the terms “vulnerable” and “disabled”

provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined by statute. Id. at 397. But the appellate court rejected the State's argument: "Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court's order." Id. at 397-98.

For these reasons, the Nguyen case does not control the outcome in this case.

C. CONCLUSION

The State breached its promise to recommend a low-end sentence. This Court should remand the case so that Graen may withdraw her plea if she chooses to do so. Moreover, for the reasons explained above and in Graen's opening brief, the challenged community custody conditions should be stricken.

DATED this 31st day of October, 2018.

Respectfully submitted,

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