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Division II
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No. 51242-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BENTON RAGLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a new presentence investigation report was required following remand for resentencing.
2. Whether a community custody condition that requires Ragland to “avoid places where children congregate” such as “parks, video arcades, campgrounds, water parks, and shopping malls” is unconstitutionally vague when a descriptive and illustrative list is given to Ragland?

B. STATEMENT OF THE CASE.

Following disclosures of sexual abuse from his children, the State charged Ragland with one count of Rape of a Child in the First Degree, three counts of Child Molestation in the First Degree, and two counts of Incest in the Second Degree. CP 3-4, CP 43. In July 2015, a jury convicted Ragland of the charged offenses. CP 5. The sentencing court imposed a total sentence of 318 months to life on Ragland. CP 10.

Ragland appealed his convictions. CP 40-63. This Court affirmed the three counts of Child Molestation in the First Degree, but reversed Ragland’s rape and incest convictions. CP 43. The matter was remanded for proceedings consistent with that opinion CP 62.

During a hearing on October 9, 2017, the trial court stated, “I want to be clear that if there is a request for a revised PSI, then that

needs to be made immediately so that that can be addressed before the November 6th scheduled sentencing.” 2RP 7-8.¹ On October 12, 2017, the court entered an order for a presentence investigation report for the jury’s previous finding of Ragland’s guilt of three counts of child molestation prior to resentencing. CP 64. Ragland was resentenced on November 6, 2017, for the three counts of child molestation. CP 72. During the hearing on November 6, 2017, the parties discussed the lack of an updated PSI with the Court. 3RP 4-5. The prosecutor indicated that she had seen a draft, but did not know why the Department of Corrections had not filed a final version with the court. 3RP 4. The trial court elected to go forward with sentencing without an amended PSI, stating, “The Court is prepared to go forward, so we are going to go forward to sentencing at this time.” 3RP 5. The trial court sentenced Ragland to 130 months to life. 3 RP 23.

The updated presentence investigation was dated October 18, 2017, but was not filed until two days after resentencing, the Department of Corrections provided the court with the updated presentence investigation to reflect the deletion of crimes won on

¹ For this brief, the State will use the same designation of the record as the appellant. 1 RP shall be August 27, 2015, 2RP shall be October 9, 2017, and 3 RP shall be November 6, 2017.

appeal and offender scoring due to the deletion of those crimes. CP 86. The document is essentially the same presentence investigation report ordered, completed, and filed prior to Ragland's original sentencing date in 2015. Id.

Ragland now argues that filing the updated presentence investigation report two days after the resentencing hearing violates RCW 9.94A.500 (1) and that the court imposed community custody condition prohibiting him from frequenting places where minors congregate is unconstitutionally vague.

C. ARGUMENT.

1. The trial court and the Department of Corrections complied with RCW 9.94A.500 (1) and therefore resentencing is not required.

Ragland contends that the Department of Corrections (DOC) failed to conduct an additional presentence investigation prior to resentencing which violates RCW 9.94A.500 (1). Ragland misinterprets the statute.

RCW 9.94A.500 (1) provides, in pertinent part:

[t]he court shall, *at the time of plea or conviction*, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders.

RCW 9.94A.500 (1), *emphasis added*. Indeed, the statute is mandatory and unambiguous. State v. Brown, 178 Wn. App. 70, 79, 3123 P.3d 1017 (2013). The “use of the word ‘shall’ creates an imperative obligation unless a different legislative intent can be discerned.” Brown, 178 Wn. App. at 79, *citing* State v. Bryan, 93 Wn. 2d 177, 606 P.2d 1228 (1980). The statute requires that a presentence report be ordered by the court prior to imposing a sentence on the defendant. Brown, 178 Wn. App. at 79. However, “the time of plea or conviction” does not direct the court to order an additional report on remand and re-sentencing.

Expressio unius est exclusio alterius, a common maxim of statutory construction, will channel this discussion. The maxim holds that, “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” State v. Swanson, 116 Wn. App. 67, 75, 65 P.3d 343 (2003), *citing* Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn. 2d 94, 98, 459 P.2d 633 (1969).

RCW 9.94A.500 (1) specifically designates that, “at the time of plea or conviction,” the court must order a presentence

investigation report before imposing a sentence on the defendant. The requirement that the court order an additional report on remand and resentencing is absent from the statute. The expression “at the time of plea or conviction” in 9.94A.500 (1) does not impose an additional requirement that a presentence investigation report be ordered on remand prior to resentencing and the exclusion of any reference to a resentencing hearing on remand is indicative that the legislature did not intend to require a subsequent PSI.

Recently, this Court in State v. Wallmuller held that 9.94A.500 (1) did not apply to resentencing. ___ Wn.App. ___, ___P.3d ___, 2018 Wash.App. LEXIS 1806, at 4 (Published in part, unpublished in part August 7, 2018).² In Wallmuller, the defendant claimed that the trial court erred in its statutory obligation to order a new presentence investigation as required by 9.94A.500 (1) before resentencing. Id. This Court stated that “the time of plea or conviction” was 2014, when the trial court originally sentenced Wallmuller. Id. This Court went on to add that the 2016 resentencing did not occur at the time of Wallmuller’s plea or conviction, therefore RCW 9.94A.500 (1) was not violated. Id.

² GR 14.1(a): Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. The state cites to the unpublished portions of State v. Wallmuller for its persuasive value only.

In this case, a new pre-sentence investigation report is not required because the trial court and DOC complied with RCW 9.94A.500 (1). The court entered an order for a presentence investigation report at the time of conviction in 2015 and the DOC produced the report prior to his original sentence.

Ragland relies heavily on facts of Brown; however, Brown is distinguishable from his case. In Brown, the defendant argued that the trial court erred in sentencing him without the benefit of a presentence report, in violation of former RCW 9.94A.110. 178 Wn. App. at 79. The court failed to issue the order and the DOC did not prepare the required presentence report for the court's consideration. Id. at 85. Because of the complete failure to order the presentence report and the DOC to produce a report, this Court ordered Brown's sentence to be vacated and remanded for resentencing. Id. However, this is not the case for Ragland. The court ordered the presentence investigation at his 2015 conviction and the DOC provided the report prior to his original sentencing. Therefore, Brown is inapplicable to Ragland's case.

Instead, Ragland's claim is akin to the facts of Wallmuller. Like Wallmuller, Ragland claims that the trial court erred in its statutory obligation to order a new presentence investigation prior

to resentencing. The presentence report had already been done prior to his sentence in 2015 “at the time of . . . [his] conviction.” RCW 9.94A.500 (1) does not apply to his resentencing in 2018.

Therefore, there is no reason for this Court to vacate Ragland’s sentence because the trial court complied with RCW 9.94A.500 (1).

2. The State acknowledges that this Court has found that a community custody condition that prohibits a defendant from frequenting places where children congregate is unconstitutionally vague.

Ragland challenges his community custody condition as unconstitutionally vague. The condition demands that Ragland must “shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, water parks, and shopping malls.” CP 83.

Conditions of community custody are within the discretion of the sentencing court and will be reversed only for manifest unreasonableness. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposition of an unconstitutional condition is manifestly unreasonable. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). Due process requires that citizens have fair warning of proscribed conduct, which also extends to community custody conditions. Sanchez Valencia, 169 Wn.2d at

791. A trial court abuses its discretion by imposing an unconstitutionally vague community custody condition.

A statute is unconstitutionally vague if it “(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Bahl, 164 Wash.2d at 752-53 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed. 2d 903 (1983)). If either of these requirements is not satisfied, the ordinance is unconstitutionally vague. Bahl, 164 Wash.2d at 753.

There is a split of authority between this Court and Division Three Court of Appeals regarding whether a community condition where the defendant must “avoid places where children congregate” such as “parks, video arcades, campgrounds, water parks, and shopping malls” is unconstitutionally vague.

This Court in Wallmuller held that a community condition that prohibited a defendant from frequenting places where children congregate such as parks, video arcades, campgrounds, and shopping malls was unconstitutionally vague. Wallmuller, ___ Wn.App. ___, ___P.3d ___, 2018 Wash.App. LEXIS 1806 at 6 (Published portion, 2018). The Court reasoned that the phrase

“such as” before its list of prohibited places does not cure the inherent vagueness of the phrase “places where children congregate.” Id.

However, Division Three Court of Appeals in State v. Johnson, 4 Wn.App.2d 352, 421 P. 3d 969 (2018), held quite the opposite. In Johnson, the defendant, like Ragland here, challenged the community condition as unconstitutionally vague. Id. at 355. The condition demanded that Johnson “[a]void places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades.” Division Three held:

None of the terms utilized in condition 14 make it confusing or difficult to follow. In the context of a sex offense, the term “children” refers to individuals under the age of 16. RCW 9A.44.073-.089. In addition, the word “congregate” means “to collect together into a group, crowd, or assembly.” Webster’s Third New International Dictionary 478 (1993). Given these applicable definitions, condition 14 fairly instructs Mr. Johnson about what locations are prohibited. Under the terms of his community custody, Mr. Johnson must avoid locations where individuals under 16 collect together in groups. Outside of special circumstances (such as a children’s day or event), universities, national parks, and adult areas of worship would not be covered. While the exact confines of condition 14 are not amenable to description, the condition provides Mr. Johnson sufficient notice to allow for compliance and it comports with constitutional protections.

Id. at 361.

While the State believes that the community custody condition here provides fair notice to Ragland of the places he must avoid, the State recognizes that this Court specifically found the logic of Johnson unpersuasive. Wallmuller, at 6. As Thurston County is within the jurisdictional boundary of this Division of the Court, not Division III, the State is bound to concede that the community custody condition at issue here must be amended to a more definitive list without the term “congregate” similar to that which has been approved by this Court. Id., State v. Norris, 1 Wn.App. 2d 87, 404 P.3d 83 (2017). Given the split of authority on this issue, it is clear that the State Supreme Court needs to clarify the law on this issue.

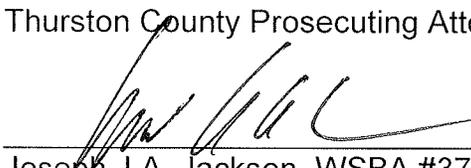
D. CONCLUSION.

RCW 9.94A.500 (1) does not require an amended presentence investigation report for resentencing following a remand from the Court of Appeals. Pursuant to the current state of law in this Division of the Court of Appeals, the State does not currently oppose an order remanding the matter to amend the community custody condition regarding places where minors

congregate so it provides constitutionally fair notice of the proscribed conduct.

Respectfully submitted this 25 day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 25th day of September, 2018, at Olympia, Washington.


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