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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHAWN DEE MORGAN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-03330-1
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court exceeded its statutory authority in imposing a number of community custody conditions that are not crime-related.
2. The trial court erred in imposing community custody conditions related to “Offenses Involving Alcohol/Controlled Substances” and prohibiting the “use” of alcohol.
3. The trial court exceeded its statutory authority in imposing a number of community custody conditions that are unconstitutionally vague.
4. The community custody condition prohibiting Appellant from entering “drug areas as defined by court or CCO” is unconstitutionally vague.
5. The community custody condition requiring Appellant to “[i]nform the supervising CCO and sexual deviancy treatment provider of any dating relationship” is unconstitutionally vague.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Should community custody conditions related to “Offenses Involving Alcohol/Controlled Substances” and prohibiting the “use” of alcohol be stricken because they are not crime-

related? (Assignments of Error 1 & 2)

2. Does the community custody condition prohibiting Appellant from entering “drug areas as defined by court or CCO” violate due process because it does not provide fair warning of proscribed conduct and exposes Appellant to arbitrary enforcement? (Assignments of Error 3 & 4)
3. Does the community custody condition requiring Appellant to inform his CCO and treatment provider of any “dating relationship” violate due process because it does not provide fair warning of proscribed conduct and exposes Appellant to arbitrary enforcement? (Assignments of Error 3 & 5)

III. STATEMENT OF THE CASE

The State charged Shawn Dee Morgan with 47 counts of first degree possession of depictions of a minor engaged in sexually explicit conduct (RCW 9.68A.011(4)(a)-(e), RCW 9.68A.070(1)). (CP 4-20) The unlawful images were found on a USB drive, SD cards, CDs, and a computer belonging to Morgan. (CP 1-3, 88-89) Under separate cause numbers, the State charged Morgan with additional charges of rape of a child, child molestation, manufacture of a controlled substance, and possession of a controlled substance. (CP 32, 39-40)

Morgan subsequently agreed to plead guilty to an amended Information charging eight counts of possession of depictions of a minor engaged in sexually explicit conduct. (CP 65-68, 71-82; 12/20/17 RP 9-19)¹ Morgan stipulated that each crime was separate and distinct conduct, and stipulated to his offender score and standard range. (CP 72, 75, 83-87, 88-89; 12/20/17 RP 12-14) The State agreed to recommend the high end of Morgan's standard range on each count, 102 months each, and to recommend that the sentences run concurrent with each other and with sentences eventually imposed under the separate cause numbers. (CP 75; 12/20/17 RP 12-14) After a lengthy colloquy, the trial court accepted Morgan's plea. (12/20/17 RP 10-19)

The trial court adopted the agreed sentencing recommendation and imposed a total of 102 months of confinement concurrent with Morgan's other cases. (CP 103-04; 02/23/18 RP 3395, 3400) The court also imposed 18-36 months of community custody, and ordered a number of standard and special conditions of community custody.² (CP 104, 108, 112-13) Morgan filed a

¹ Citations to the transcripts will be to the date of the proceeding followed by the page number.

² A copy of Appendix H of the Judgment and Sentence, which lists all of the additional and special conditions of community custody, is attached in the Appendix to this brief.

timely notice of appeal. (CP 116)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING A NUMBER OF COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME-RELATED.

The trial court erred in imposing several community custody conditions relating to alcohol and controlled substances that are not crime-related. The trial court's authority to impose a sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the trial court may impose. Any conditions not expressly authorized by statute must be crime-related. RCW 9.94A.703(3)(f); see State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

The SRA defines a "crime-related prohibition" as 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). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related

conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007).³

As long as a trial court has statutory authorization to impose a condition, its decision to do so is reviewed for abuse of discretion. Johnson, 180 Wn. App. at 326; State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).⁴ RCW 9.94A.703(3)(f) authorizes a trial court to impose “crime-related” conditions. But in this case, the trial court abused its discretion when it imposed a number of conditions that were not “crime-related.”

1. The community custody conditions related to “Offenses Involving Alcohol/Controlled Substances” should be stricken because they are not crime-related.

The trial court checked the boxes for the four pre-printed “Additional Crime-Related Prohibitions” included under the sub-

³ *Overruled on other grounds*, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

⁴ Defense counsel did not object to the improper community custody conditions in the trial court below. However, a defendant may assert a pre-enforcement challenge to community custody conditions for the first time on appeal because the challenge is primarily legal, does not require further factual development, and the challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

heading “Offenses Involving Alcohol/Controlled Substances.” (CP

113) These additional prohibitions ordered Morgan not to:

- “purchase or possess alcohol” (additional prohibition 19)
- “enter drug areas as defined by court or CCO” (additional prohibition 20)
- “enter any bars/taverns/lounges or other places where alcohol is the primary source of business [including] casinos and or any location which requires you to be over 21 years of age” (additional prohibition 21)

(CP 113) The court also ordered Morgan to obtain an alcohol and chemical dependency evaluation and to “follow through with all recommendations of the evaluator” (additional prohibition 22). (CP

113) These conditions are not crime-related.

Morgan pleaded guilty, so there was no trial. But the offenses are described in the certification for determination of probable cause, and there is no mention of alcohol or controlled substances being present or consumed, or in any other way contributing to or playing a part in the commission of Morgan’s possession of child pornography offenses. (CP 1-3)

Appellate courts have struck community custody conditions under similar circumstances, when there is “no evidence” in the record that the circumstances of the crime related to the community custody condition. See Jones, 118 Wn. App. at 207-08 (reversing order to participate in alcohol counseling because “nothing in the

evidence here shows that alcohol contributed to Jones' offenses or that the trial court's requirement of alcohol counseling was 'crime-related'); Zimmer, 146 Wn. App. at 413 (reversing condition that defendant not have a cell phone after finding "no evidence in the record" that defendant used cell phones to facilitate drug possession or distribution); State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition that prohibited defendant's Internet use after finding "no evidence that [the defendant] accessed the Internet before the rape or that Internet use contributed in any way to the crime"); State v. Johnson, 180 Wn. App. at 330-31 (striking Internet related community custody condition because "there [were] no findings suggesting any nexus between [the defendant's] offense and any computer use or Internet use").

Furthermore, in most circumstances, children cannot even enter bars, taverns, or cocktail lounges. See RCW 66.44.310; WAC 314-02-037. Thus, no connection exists between the child sex offenses that Morgan was convicted of and the act of entering into bars, taverns, or cocktail lounges. It makes no sense that Morgan is prohibited from entering any place where children congregate (additional prohibition 18), but is also prohibited from

entering the one category of places that children *cannot* congregate. These conditions simply bear no relation to the circumstances of Morgan's offenses.

The trial court therefore exceeded its authority in imposing these "Offenses Involving Alcohol/Controlled Substances" prohibitions because the conditions are not crime-related. They should, therefore, be stricken. See O'Cain, 144 Wn. App. at 775 (remanding to the trial court to strike a condition of community custody that was not crime related).

2. The community custody condition prohibiting the "use" of alcohol should be stricken because it is not authorized by statute and is not crime-related.

The court ordered that Morgan "not use or consume alcohol" (special condition 11). (CP 112). But a prohibition on the "use" of alcohol is not authorized by statute. RCW 9.94A.703(3)(e) authorizes the trial court to prohibit an offender "from possessing or consuming alcohol" whether or not alcohol was related to the charged offense. Thus, the trial court had authority to prohibit the *possession or consumption* of alcohol.

However, the "[u]se' of alcohol is different from the consumption of alcohol." State v. Norris, ___ Wn. App. ___, 404 P.3d

83, 90 (2017).⁵ Likewise, the “use” of alcohol is different from the possession of alcohol. Thus, the trial court lacked authority to prohibit Morgan from *using* alcohol, a much broader range of behavior, unless the use was crime-related.

As argued above, there is no evidence that Morgan’s criminal conduct in this case was related to the use of alcohol. The condition prohibiting “use” of alcohol should therefore be stricken. See Norris, 404 P.3d at 90 (special condition prohibiting “use” of alcohol should be stricken because it exceeds the trial court’s authority and is not crime related).

B. SEVERAL COMMUNITY CUSTODY CONDITIONS MUST BE STRICKEN BECAUSE THEY ARE UNCONSTITUTIONALLY VAGUE.

The trial court imposed additional conditions requiring Morgan to inform his CCO and sexual deviancy treatment provider of any “dating relationship” (special condition 5). (CP 112) The trial court also prohibited Morgan from entering any “drug areas as defined by court or CCO” (additional prohibition 20). (CP 113) These conditions are unconstitutionally vague because they insufficiently apprise Morgan of prohibited conduct and allow for arbitrary enforcement.

⁵ *Review granted on other grounds*, 190 Wn.2d 1002, 413 P.3d 12 (2018).

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A condition 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 Wn.2d at 752-53.

1. The prohibition against entering “drug areas” is unconstitutionally vague.

Additional prohibition 20 states, “Do not enter drug areas as defined by court or CCO.” (CP 113) In Irwin, Division 1 considered a similar community custody condition which provided, “Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer].” 191 Wn. App. at 649. The court concluded that, “without some clarifying language, or an illustrative list of prohibited locations, the condition does not give ordinary people sufficient notice to

‘understand what conduct is proscribed.’” Irwin, 191 Wn. App. at 655 (quoting Bahl, 164 Wn.2d at 753).

In Bahl, the Supreme Court held that a condition prohibiting the defendant from possessing or accessing pornographic material “as directed by the supervising [CCO]” was unconstitutionally vague. 164 Wn.2d at 753. “The fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards of enforcement.” Bahl, 164 Wn.2d at 758.

As in Bahl and Irwin, the condition prohibiting Morgan from entering “drug areas” as defined by his CCO fails to provide sufficient definiteness. The condition does not tell Morgan where he can and cannot go. And the phrase “drug area” is even more vague than the phrase “area where minor children are known to congregate.” What *is* a drug area? Is there a particular amount or volume or type of drug-related activity that qualifies a geographic space or location as a “drug area?” And by what method is one meant to ascertain this information? An ordinary person could not possibly know with any degree of certainty what areas are off limits or what conduct is proscribed under this condition.

2. The condition requiring Morgan to report any “dating relationship” is unconstitutionally vague.

Special condition 5 requires Morgan to “Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship.” (CP 112) The condition does not provide Morgan with adequate notice of what he must do to avoid sanction and does not prevent arbitrary enforcement because it is not clear what constitutes a “dating relationship.”

Commonly understood, a “relationship” is “a state of affairs existing between those having relations or dealing.” WEBSTER’S THIRD NEW INT’L DICTIONARY at 1916 (2002). In the context of interaction between people, a “date” means “an appointment or engagement [usually] for a specified time . . . [especially]: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity” or “an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex.” WEBSTER’S at 576. Referring to a person, a “date” is “a person of the opposite sex with whom one enjoys such an occasion of social activity.” WEBSTER’S at 576. Such behavior conceivably covers a large range of human interaction, and leaves the dividing line between a non-dating

relationship and a dating relationship blurry.

If the phrase “dating relationship” is meant to be limited to a romantic relationship, however, the vagueness problem remains. United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation department upon entry into a “significant romantic relationship” was vague in violation of due process. 591 F.3d at 79, 81. The court observed:

We easily conclude that people 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; and for still others, all of these elements could be present yet the relationship, without a promise of exclusivity, would not be “significant.” The history of romance is replete with precisely these blurred lines and misunderstandings.

591 F.3d at 81.⁶ The condition was too vague to be enforceable because it had “no objective baseline,” as “[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement

⁶ Citing 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).

officers, or Reeves himself—with guidance as to what constitutes a ‘significant romantic relationship.’” 591 F.3d at 81.⁷

Because of the various interpretations that can be and have been given to the term “dating relationship,” a reasonable person would be left to guess at its meaning and to what behavior the condition applies. The condition does not provide a standard by which a reasonable person can understand what behavior establishes a “dating relationship.”

The average citizen has no way of knowing what conduct is included in the statute because each person’s perception of what constitutes a “dating relationship” will differ based on each person’s subjective understanding. But such “subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” Johnson, 180 Wn. App. at 327 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted).

⁷ In Norris, Division 1 found that an identical community custody condition was “neither unconstitutionally vague nor subject to arbitrary enforcement.” 404 P.3d at 87. But the Washington Supreme Court has granted review on this issue. State v. Norris, 190 Wn.2d 1002, 413 P.3d 12 (2018).

Morgan's liberty during supervised release should not hinge on the accuracy of his prediction of whether a given CCO, prosecutor, or judge would conclude that a particular relationship was a "dating relationship" and should not have been entered into without first informing the CCO or treatment provider.

The condition, as written, does not provide a standard by which a reasonable person can understand what types of interactions qualify as a "dating relationship," and what does not. This condition is arbitrary and vague, and must also be stricken.

V. CONCLUSION

For the reasons argued above, this Court should remand for removal of the challenged conditions.

DATED: August 6, 2018



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CERTIFICATE OF MAILING

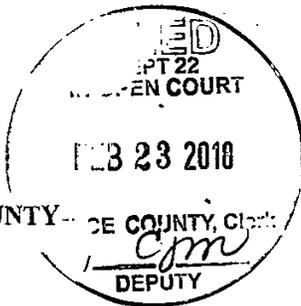
I certify that on 08/06/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Shawn D. Morgan, DOC# 880281, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

JUDGMENT AND SENTENCE APPENDIX H



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,) No. 16-1-03330-1
)
 vs.)
)
 MORGAN, SHAWN D.) JUDGMENT AND SENTENCE
 DOC# 880281) APPENDIX H - SEX OFFENSES
) COMMUNITY CUSTODY
 Defendant.)

STANDARD CONDITIONS

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1. Report to and be available for contact with the assigned community corrections officer as directed;
2. Work at Department of Corrections-approved education, employment, and/or community restitution;
3. Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4. Pay supervision fees as determined by the Department of Corrections;
5. Receive prior approval for living arrangements and residence location;
6. Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706);
7. Notify community corrections officer of any change in address or employment;
8. Upon request of the Department of Correction, notify the Department of court-ordered treatment; and
9. Remain within geographic boundaries, as set forth in writing by the Department of Correction Officer or as set forth with SODA order.

SPECIAL CONDITIONS - SEX OFFENSES

RCW 9.94A.703 & .704

Defendant shall:

1. Obey all municipal, county, state, tribal, and federal laws.
2. Indeterminate Sentences: Abide by any Washington State Department of Corrections (DOC) conditions imposed (RCW 9.94A.704).
3. Have no direct or indirect contact with the victim(s) of this offense.
4. Within 30 days of release from confinement (or sentencing, if no confinement is ordered) obtain a sexual deviancy evaluation with a State certified therapist approved by your Community Corrections Officer (CCO) and follow through with all recommendations of the evaluator. Should sexual deviancy treatment be recommended, enter treatment and abide by all programming rules, regulations and requirements. Attend all treatment-related appointments (unless excused); follow all requirements, conditions, and instructions related to the recommended evaluation/counseling; sign all necessary releases of information; and enter and complete the recommended programming.
5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.
6. Obtain prior permission of the supervising CCO before changing work location.
7. If a resident at a specialized housing program, comply with all rules of housing program.
8. Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.
9. Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.
10. Do 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.
11. Do not use or consume alcohol and/or Marijuana.

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- 12. Be available for and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider.
- 13. Submit to and be available for polygraph examination as directed to monitor compliance with conditions of supervision.
- 14. Register as a Sex Offender with sheriffs office in the county of residence as required by law.

Additional Crime-Related Prohibitions: (the condition must be related to the crime being sentenced)

- 15. Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours.

Offenses Involving Minors -

- 16. Have no direct and/or indirect contact with minors.
- 17. Do not hold any position of authority or trust involving minors.
- 18. Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

Offenses Involving Alcohol/Controlled Substances -

- 19. Do not purchase or possess alcohol.
- 20. Do not enter drug areas as defined by court or CCO.
- 21. Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
- 22. Obtain alcohol chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

Offenses Involving Computers, Phones or Social Media -

- 23. No internet access or use, including email, without the prior approval of the supervising CCO.
- 24. No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

Offenses Involving Mental Health Issues -

- 25. Obtain mental health treatment upon referral consistent with the Psychosexual Evaluations, and follow through with all recommendations of the provider, including taking medication as prescribed. Should mental health treatment be currently in progress, remain in treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 2/23/18

JUDGE: _____

John R. Hickman
DEPT 22
IN OPEN COURT

OFFENDER: _____

[Signature]

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PIERCE COUNTY Clerk
By *[Signature]*
DEPUTY

August 06, 2018 - 10:46 AM

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