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NO. 51688-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NOVCASKI,

Appellant.

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

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The condition allowing appellant's community corrections officer (CCO) to direct plethysmograph examinations violates appellant's constitutional right to be free from bodily intrusions (Condition 18).

2. The condition prohibiting appellant from possessing or pursuing any sexually explicit material is not crime-related or narrowly tailored, and is unconstitutionally vague and overbroad (Condition 19).

3. The condition prohibiting appellant's access to the internet, e-mail, or any social media sites is not crime-related or narrowly tailored (Condition 20).

4. The condition prohibiting appellant from entering sex-related businesses (X-rated movies, peep shows, or adult bookstores) is not crime-related (Condition 21).

5. The condition prohibiting appellant's possession of drug paraphernalia or prescriptions except those issued by a licensed physician is not crime-related or statutorily authorized (Condition 6 and Condition 22).

6. The condition prohibiting appellant from loitering or frequenting places where children congregate is unconstitutionally vague (Condition 28).

Issues Pertaining to Assignments of Error

1. Must Condition 18, which allows appellant's CCO to direct plethysmograph examinations, be stricken because it violates appellant's constitutional right to be free from bodily intrusions?

2. Must Condition 19, which prohibits appellant from possessing or pursuing any sexually explicit material, be stricken because it is not crime-related or narrowly tailored, and is also unconstitutionally vague and overbroad?

3. Must Condition 20, which prohibits appellant from accessing the internet, e-mail, or any social media sites without prior approval, be stricken because it is not crime-related or narrowly tailored?

4. Must Condition 21, which prohibits appellant from entering sex-related businesses (X-rated movies, peep shows, or adult bookstores), be stricken because it is not crime-related?

5. Must Condition 22, which prohibits appellant from possessing drug paraphernalia or prescriptions except those issued by a licensed physician, be stricken because it is not crime-related or statutorily authorized?

6. Must Condition 28, which prohibits appellant from loitering or frequenting places where children congregate, "including, but no[t]

limited to shopping malls, schools, playgrounds and video arcades,” be stricken or modified because it is unconstitutionally vague?

B. STATEMENT OF THE CASE

On December 13, 2017, the State charged Michael Novcaski with one count of first degree child molestation. CP 1. The State alleged that, between June and September of 2013, Novcaski had sexual contact with S.B., who was less than 12 years old at the time, contrary to RCW 9A.44.083. CP 1. Novcaski pleaded guilty to the offense. CP 23-34 (plea statement); RP 7-12 (plea colloquy).

A presentence investigation performed by the Department of Corrections summarized the allegations as stated in the police report. CP 36-37. S.B. is Novcaski’s niece. CP 39. S.B. alleged that, in September of 2013, when she was six or seven years old, Novcaski pulled his pants down and had her touch his penis with her hands and feet. CP 36. S.B. was unable to disclose the allegation to a forensic interviewer and the case was never forwarded to the prosecutor’s office. CP 36. Allegations came to light again in 2017, when S.B. reported Novcaski grabbed her “crotch area” while she was planting flowers; touched her vaginal area during a “tickling game”; and made S.B. touch his penis. CP 36.

Novcaski was arrested and eventually admitted to the touching. CP 37. He told police he did it the first time out of curiosity and the second time

out of stupidity. CP 37. Novcaski later said he never touched S.B.—he only showed her his penis when he was drunk, and she grabbed it and ran away. CP 37. Novcaski explained S.B. touched his penis another time with her hand when he was intoxicated. CP 37. Few other circumstances surrounding the allegations are included in the record.

The trial court denied Novcaski's request for a special sex offender sentencing alternative, instead sentencing him to a minimum confinement term of 75 months and a maximum term of life. CP 47; RP 15-19. The court also imposed lifetime community custody, pursuant to RCW 9.94A.507(5), along with numerous conditions of community custody. CP 48-50, 52-54, 61-62. Novcaski filed a timely notice of appeal. CP 64.

C. ARGUMENT

THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED NOVCASKI'S CONSTITUTIONAL RIGHTS IN IMPOSING SEVERAL COMMUNITY CUSTODY CONDITIONS.

The trial court's authority to impose sentence in a criminal case 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). Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326.

Novcaski did not agree to the community custody conditions in pleading guilty—he agreed only that the prosecutor would recommend the conditions. CP 19-21. Regardless, “a defendant cannot agree to a sentence which the court does not have the statutory authority to impose.” State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006). Similarly, defense counsel did not object to the improper conditions below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

As a condition of community custody, sentencing courts may order offenders to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A “crime-related prohibition” must “directly relate[] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Substantial evidence must support this determination. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). Where “there is no evidence in the record linking the circumstances of the crime to the condition,” the reviewing court must strike the challenged condition. State v. Padilla, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

A sentencing condition that limits an offender’s fundamental rights must be more than just crime-related. Bahl, 164 Wn.2d at 757. A condition that touches upon constitutional rights “must be narrowly tailored and directly related to the goals of protecting the public and promoting the

defendant's rehabilitation.”¹ Id. Put another way, the condition “must be clear and must be reasonably necessary to accomplish essential state needs and public order.” Id. at 758.

A trial court also abuses its direction if it imposes an unconstitutional condition. Padilla, 190 Wn.2d at 677. A community custody condition is unconstitutionally vague if (1) it is not sufficiently definite such that ordinary people can understand what conduct is proscribed; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id.

1. The condition pertaining to plethysmograph examinations violates Novcaski's constitutional right to be free from bodily intrusions.

Condition 18 requires Novcaski to “[s]ubmit to polygraph and plethysmograph examinations as directed by the CCO and show no deception.” CP 62 (emphasis added).

The trial court may impose conditions to monitor compliance with court orders, such as polygraph testing or random urinalyses. State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). Plethysmograph testing, however, “is extremely intrusive,” and may violate the offender's constitutional right to be free from bodily intrusions. State v. Land, 172 Wn.

¹ See, e.g., In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (fundamental right to parent); Bahl, 164 Wn.2d at 757-58 (freedom of speech); State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008) (fundamental right to marriage); Riles, 135 Wn.2d at 346-50 (freedom of association); Riley, 121 Wn.2d at 37-38 (same); State v. Moultrie, 143 Wn. App. 387, 398-99, 177 P.3d 776 (2008) (freedom of speech and association).

App. 593, 605, 295 P.3d 782 (2013). As such, the testing can be ordered only “incident to crime-related treatment by a qualified provider.” Id. It may not be used “as a routine monitoring tool subject only to the discretion of a community corrections officer.” Id.

This Court has recognized “plethysmograph testing can only be used for treatment purposes.” State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014). Here, the trial court ordered Novcaski to obtain a sexual deviancy evaluation and follow all treatment recommendations. CP 54, 62. But Condition 18 does not limit the CCO’s discretion to treatment purposes. Rather, it broadly allows the CCO to direct Novcaski to submit to plethysmograph examinations.

This Court should remand for the trial court to either strike the condition or specify “the CCO’s scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.” Johnson, 184 Wn. App. at 781; accord State v. Alcocer, 2 Wn. App. 2d 918, 925, 413 P.3d 1033 (2018) (“Upon remand, the court should clarify that the plethysmograph should only be used at the direction of the sexual deviancy evaluator and/or treatment provider.”), overruled on other grounds by State v. Johnson, __ Wn. App. 2d __, 421 P.3d 969 (2018).

2. The condition pertaining to sexually explicit material is not crime-related or narrowly tailored, and is unconstitutionally vague and overbroad.

Condition 19 specifies: “Do not possess or pursue any sexually explicit material.” CP 62.

- i. *The condition is not crime-related or narrowly tailored.*

There is no evidence in this case that Novcaski used sexually explicit materials to perpetrate the offense against S.B. Rather, S.B. disclosed that Novcaski touched her “crotch area” while she was planting flowers; touched her vaginal area during a “tickling game”; and had her touch his penis with her hands and feet. CP 36. There was no allegation Novcaski groomed S.B. with pornographic images or anything of the like. The presentence investigation mentioned Novcaski watched pornography “a few times a month,” but again, did not link pornography to Novcaski’s convicted offense or allege that it contributed to his offense cycle. CP 38.

The question of whether the trial court can prohibit possession of sexually explicit materials in all sex offense cases has been evolving rapidly over the past couple years. In State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016), and Alcocer, 2 Wn. App. 2d at 924, Division Three took a categorical approach. The Alcocer court held “we believe it is not

manifestly unreasonable for trial judges to restrict access to sexually explicit materials for those convicted of sex offenses.” 2 Wn. App. 2d at 924.

Division One, on the other hand, has rejected a categorical approach in State v. Norris, 1 Wn. App.2d 87, 404 P.3d 83 (2017), review granted, 190 Wn.2d 1002 (2018). Division One emphasized “there must be some evidence supporting a nexus between the crime and the condition.” Id. at 98. In Norris, there was no evidence that frequenting sex-related businesses was reasonably related to the circumstances on Norris’s crime. Id. There was, however, evidence supporting a ban on sexually explicit materials where Norris exchanged sex-related text messages with the victim and sent him “a photo of herself in pants and a bra,” a sexually explicit image. Id. at 99.

This Court has similarly rejected the categorical approach in several unpublished cases.² The issue is currently pending before the Washington Supreme Court in Norris and State v. Nguyen, No. 74358-9-I, 2017 WL 3017516 (July 17, 2017), review granted in part, 189 Wn.2d 1030 (2018).

The supreme court has, however, already suggested the result it will reach in Norris and Nguyen. In Padilla, decided on May 10, 2018, Padilla

² See, e.g., State v. Starr, No. 49327-6-II, 2017 WL 4653443, at *5 (Oct. 17, 2017) (in child molestation case, prohibition on sexually explicit materials not crime-related because no evidence presented that such materials related to offense) State v. Dossantos, 47773-4-II, 2017 WL 4271713, at *5 (Sept. 26, 2017) (same); State v. Stewart, No. 48046-8-II, 2016 WL 6459834, at *3 (Nov. 1, 2016) (in indecent liberties case, same). Under GR 14.1, these unpublished decisions have no precedential value, are not binding on any court, and are cited only for such persuasive value as this Court deems appropriate.

was convicted of communication with a minor for immoral purposes after sending inappropriate messages to a nine-year-old girl over Facebook. 190 Wn.2d at 675-76. A community custody condition restricted Padilla's possession of pornographic materials, defined as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." Id. at 676. This definition encompassed a "broad range" of materials protected under the First Amendment. Id. at 684. The court held the condition and its accompanying definition to be unconstitutionally vague and overbroad. Id. at 681-82.

The court gave additional guidance to the trial court on remand regarding crime-relatedness and narrow tailoring. Id. at 682. The court emphasized that, because "the contested condition implicates a First Amendment right, it must be reasonably necessary to accomplish the essential needs of the state and public order." Id. at 684. The court held the condition did not meet this standard based on the record before it. Id. at 683-84. The court emphasized the condition made "no distinction between child and adult pornography," and "[t]here is currently no connection in the record between Padilla's inappropriate messaging and imagery of adult nudity or simulated intercourse." Id. at 684.

Following Padilla, Division Three reversed course and rejected its previous categorical approach. Johnson, 421 P.3d at 973. Similar to here,

Johnson was convicted of second degree child molestation based on inappropriate touching of his adolescent cousin. Id. at 971. The trial court prohibited Johnson from possessing or viewing sexually explicit images of children or adults, and from going to sex-related businesses. Id. The court held “[t]he mere fact that Mr. Johnson has been convicted of a sex offense, and thus exhibited an inability to control sexual impulses, is insufficient to provide the necessary link.” Id. at 973. The court accordingly overruled Magana and Alcocer, noting “those decisions appear to no longer be good law after Padilla,” and remanded to strike the conditions. Id.

This Court should follow the reasoning in Padilla and the result in Johnson. Again, there is no evidence Novcaski used sexually explicit materials to perpetrate the touching of his niece, nor does the record show such materials contributed to his offense. The law in Washington is becoming clear: merely being convicted of a sex offense is not enough to justify a prohibition on sexually explicit materials. This Court should strike Condition 19 as not crime-related or narrowly tailored.

- ii. *The condition is also unconstitutionally vague and overbroad.*

This Court does not need to reach the issue of whether the sexually explicit materials condition is vague or overbroad if it determines the condition is not crime-related.

The Bahl court held “the prohibition on perusing pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed” because definitions of pornography may “include any nude depiction, whether a picture from Playboy Magazine or a photograph of Michelangelo’s sculpture of David.” Bahl, 164 Wn.2d at 756. The same is true of the prohibition on all sexually explicit materials. Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Novcaski has no way to know which of these works he can possess or pursue, and which he cannot.

“[A] stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition.” Id. at 753. The condition here makes no distinction between sexually explicit materials involving adults versus children. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). The blanket ban on all sexually explicit materials fails to ensure First Amendment rights are honored. The condition impacts Novcaski’s ability to read a certain book, view a certain painting or film, or listen to a certain song.

Bahl approved of a condition that prohibited “frequenting ‘establishments whose primary business pertains to sexually explicit or erotic material.’” 164 Wn.2d at 758. The court discussed dictionary definitions of

“sexually explicit” and “erotic,” and also noted statutes provided definitions of such terms. Id. at 758-60. Bahl held that, because “[t]he challenged terms [we]re used in connection with a prohibition on frequenting business,” “[w]hen all the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like.” Id. at 759. The connection to frequenting business saved the condition in Bahl. No similar context saves the prohibition here.

The statutory definition of sexually explicit material in RCW 9.68.130(2) compounds rather than mitigates the condition’s vagueness.³ For instance, several works of art might qualify as “flagellation or torture in the context of a sexual relationship,” such as those of American photographer Robert Mapplethorpe, who extensively photographed the underground BDSM scene in 1960s and 1970s New York. RCW 9.68.130(2). Reasonable minds still differ as to whether these or other similar works qualify as “works of art or of anthropological significance.” Id. Reasonable minds would also differ as to whether an image

³ RCW 9.68.130(2) (defining “sexually explicit material” as “any 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”).

“emphasiz[ed] the depiction” of genitals. Does a simple nude emphasize genitalia? If not, what line should be drawn?

Nor is the statutory definition limited to depictions of real humans or real intercourse, instead broadly extending to “any pictorial matter.” Id. In Padilla, “the prohibition against viewing depictions of simulated sex would unnecessarily encompass movies and television shows not created for the sole purpose of sexual gratification. Films such as *Titanic* and television shows such as *Game of Thrones* depict acts of simulated intercourse, but would not ordinarily be considered ‘pornographic material.’” Padilla, 416 P.3d at 717. The Padilla court likewise held “[t]he prohibition against viewing depictions of intimate body parts impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows.” Id. That reasoning controls here.

The prohibition is unconstitutionally vague because it does not give fair notice of what is allowed and what is disallowed. Additionally, the condition makes the CCO the arbiter of what crosses the line. The condition is so broad that a CCO could apply it to almost anything sex-related. Delegating authority to determine the prohibition’s boundaries to an individual CCO creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally

finds titillating.” Padilla, 416 P.3d at 718 (quoting Bahl, 164 Wn.2d at 755) (internal quotation marks omitted).

Additionally, “[a] law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities.” City of Seattle v. Huff, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). Courts consider whether the condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

As discussed, the prohibition on all sexually explicit materials reaches a substantial amount of protected speech. The condition does not distinguish between adult and child pornography, between artwork and obscenity, or between literature and smut. The condition encompasses at least as much protected speech as it does unprotected speech.

Loy involved a conviction for possessing child pornography and a sentencing condition that prohibited possession of “all forms of pornography, including legal adult pornography.” United States v. Loy, 237 F.3d 251, 255, 261 (3d Cir. 2001). To be narrowly tailored, “the condition must not extend to all arguably pornographic materials,” but only to those directly related to the goals of protecting the public and promoting rehabilitation. Id. “[W]here a ban could apply to any art form that employs nudity,” First Amendment rights are “unconstitutionally

circumscribed or chilled.” Id. at 266. The “unusually broad condition” could “extend not only to Playboy magazine, but also to medical textbooks.” Id. “Restricting this entire range of material is simply unnecessary to protect the public, and for this reason the condition is not ‘narrowly tailored.’” Id. The condition violated the First Amendment “to the extent that the condition might apply to a wide swath of work ranging from serious art to ubiquitous advertising.” Id. at 267.

The same is true here. Novcaski was convicted of a child sex offense and the trial court prohibited access to “any sexually explicit material.” CP 62. The condition encompasses just as wide a range of protected material as in Loy. The State has not demonstrated how restricting Novcaski’s access to all materials that depict sex or sexuality involving not only minors but also adults is necessary to achieve the State’s needs or protect the public. The condition impermissibly chills Novcaski’s First Amendment rights and must be stricken as vague and overbroad.

3. The condition pertaining to internet, e-mail, and social media is not crime-related or narrowly tailored.

Condition 20 specifies: “Do not access the internet, email, or any and all social media sites without permission from CCO and treatment providers.” CP 62.

In State v. O’Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008), O’Cain was convicted of second degree rape. As a condition of community custody, the trial court prohibited O’Cain from accessing the internet without prior approval from his CCO and sex offender treatment provider. Id. The State argued the condition was appropriate “because allowing O’Cain unfettered internet access to inappropriate sexual material would increase his risk of reoffending and thus endanger the community.” Id. at 775.

The court of appeals rejected the State’s argument and struck the condition, reasoning:

There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775. Similarly, in State v. Johnson, 180 Wn. App. 318, 330-31, 327 P.3d 704 (2014), this Court struck an internet-related condition because “there [were] no findings suggesting any nexus between [the defendant’s] offense and any computer use or Internet use.”

By contrast, in State v. Riley, restriction on Riley’s computer use was crime-related because he was convicted of computer trespass and was a “self-proclaimed computer hacker.” 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). In Irwin, a prohibition on possessing a computer or computer-

related device was crime-related where the record contained evidence “that Irwin took and stored pornographic images as part of his of molesting underage females.” 191 Wn. App. at 658.

O’Cain and Johnson are on point here. The CCO who conducted a risk/needs assessment interview with Novcaski reported Novcaski played games on his cell phone and occasionally watched pornography. CP 38. Again, however, there is no evidence anywhere in the record that Novcaski used the internet, e-mail, or social media to perpetrate the convicted offense. All the evidence showed was in-person touching with Novcaski’s niece. As in O’Cain, there is no suggestion the internet contributed in any way to the crime. The condition is therefore not crime-related.

Moreover, the United States Supreme Court has held conditions restricting a sex offender’s access to all social networking sites violates the First Amendment. In Packingham v. North Carolina, __ U.S. __, 137 S. Ct. 1730, 1737, 198 L. Ed. 2d 273 (2017), the Court struck down a North Carolina statute that made it a felony for a registered sex offender to gain access to a number of websites, including common social media websites, like Facebook and Twitter. The Court held the prohibition was unconstitutional, emphasizing “the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” Id. at 1738.

Packingham demonstrates courts must take particular care in evaluating conditions, like Condition 20, that may burden sensitive First Amendment freedoms. Bahl, 164 Wn.2d at 757-58. Such conditions must be narrowly tailored. Id. at 757. Barring Novcaski's access to the internet, e-mail, and all social media fails both this heightened standard and the lower crime-relatedness standard, where there was no nexus whatsoever between Novcaski's offense and any internet, e-mail, or social media use.

Condition 20, barring Novcaski's access to "the internet, email, or any and all social media sites" without prior approval of his CCO and treatment provider, must be stricken as not crime-related or narrowly tailored.

4. The condition pertaining to sex-related businesses is not crime-related.

Condition 21 specifies: "Do not enter x-rated movies, peep shows, or adult book stores." CP 62.

This condition presents issues similar to the prohibition on sexually explicit material. In Norris, the trial court imposed a condition prohibiting entry into "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." 1 Wn. App. 2d at 97. The court of appeals held the condition must be stricken as not crime-related

because there was “no evidence in the record showing that frequenting sex-related businesses is reasonably related to the circumstances of the crime.” Id. at 98. The Johnson court likewise held a sex-related businesses condition must be stricken where it did not relate to the circumstances of the crime. 421 P.3d at 971-73 (prohibiting Johnson from “attend[ing] X-rated movies, peep shows, or adult book stores”).

Condition 21 in Novcaski’s case must meet a similar fate. Again, there is no evidence in the record that X-rated movies, peep shows, or adult bookstores played any role in his convicted offense. Simply being convicted of a sex offense is not enough. Nor was there any demonstration that Novcaski’s occasional pornography consumption led to his offense. The condition should be stricken as not crime-related.

5. The condition pertaining to drug paraphernalia and prescriptions is not crime-related or statutorily authorized.

Condition 22 specifies: “Do not purchase, possess, or use any illegal controlled substance, or drug paraphernalia without the written prescription of a licensed physician.” CP 62; see also CP 50 (“The Defendant shall not possess or consume alcohol or controlled substances, nor possess drug paraphernalia, without a valid prescription with random urinalysis to ensure compliance.” (emphasis added)); CP 53 (same condition). This condition is infirm for two reasons.

First, the prohibition on drug paraphernalia is not crime-related. “[M]ere possession of drug paraphernalia is not a crime. And prohibiting it does not serve a monitoring function like polygraph testing or random urinalysis.” Land, 172 Wn. App. at 605 (citation omitted). Any prohibition of drug paraphernalia must therefore be crime-related. Id. It is not here.

Novcaski admitted he was drunk when the touching occurred, warranting conditions restricting and monitoring his alcohol consumption. CP 36-37; see also CP 62 (Condition 25 prohibiting Novcaski from “enter[ing] any business where alcohol is the primary commodity for sale”). At the time of his arrest, Novcaski reported he was “using marijuana and methamphetamine,” and had used mushrooms and Xanax in the past. CP 38. But Novcaski was arrested in 2017, several years after the inappropriate touching in 2013. CP 36. The State did not demonstrate drug use or drug paraphernalia played any role in the convicted offense.

In Land, the court struck a similar condition where “the State presented no evidence or argument that drug use, or possession of drug paraphernalia, bore any relation to Land’s offenses.” 172 Wn. App. at 605. Similarly, in State v. Munoz-Rivera, 190 Wn. App. 870, 892, 361 P.3d 182 (2015), the court struck a drug paraphernalia condition where the record revealed “Mr. Munoz-Rivera was under the influence of alcohol and not any

other substances when the crimes were committed.” The drug paraphernalia conditions must be stricken for the same reason here.

Second, the trial court exceeded its statutory authority in limiting Novcaski’s possession of prescriptions to those written by a “licensed physician.” CP 62. Under RCW 9.94A.703(2)(c), the trial court may order an offender to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions,” as a condition of community custody. (Emphasis added.) Prescriptions can be lawfully issued by many more individuals than just physicians, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists, and dentists. RCW 69.41.030. The legislature chose to authorize possession of the much broader “lawfully issued prescriptions.” By limiting Novcaski to purchasing, possessing, or using prescriptions only issued by physicians, the trial court overrode this legislative decision and exceeded its statutory authority in imposing the condition.

This Court should remand for the trial court (1) to strike reference to drug paraphernalia from the challenged conditions and (2) to specify in Condition 22 that Novcaski may possess “lawfully issued prescriptions,” rather than just those issued by a licensed physician.

6. The condition pertaining to places where children congregate is unconstitutionally vague.

Condition 28 specifies: “Do not loiter or frequent places where children congregate; including, but no[t] limited to shopping malls, schools, playgrounds and video arcades.” CP 62 (emphasis added).

In Irwin, the trial court imposed a condition similar to the one here: “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.” 191 Wn. App. at 649. The court struck the condition as being void for vagueness and remanded to the trial court for resentencing. Id. at 652-55.

The Irwin court explained, “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.’” Id. at 655 (quoting Bahl, 164 Wn.2d at 753). The court acknowledged “[i]t may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. However, this “would leave the condition vulnerable to arbitrary enforcement,” rendering it unconstitutional under the second prong of the vagueness analysis. Id.

The condition here is slightly improved from the one in Irwin because it specifies some locations where children congregate. However, it

is still constitutionally infirm because it includes *but is not limited* to those locations. Given this open-ended caveat, Novcaski still cannot be sure of the condition's bounds and is still exposed to arbitrary enforcement by his CCO.

Recent decisions by the court of appeals demonstrate the condition remains vague despite the clarifying language. In Norris, the court imposed the following condition: "Do not enter any parks/playgrounds/schools and or any places where minors congregate." 1 Wn. App. 2d at 95. The State conceded the "any places where minors congregate" portion of the condition was unconstitutionally vague and should be stricken. Id. The court held, however, "imposition of a condition that states, 'Do not enter any parks, playgrounds, or schools where minors congregate' is not unconstitutionally vague or void for vagueness." Id. at 96. Such a condition "gives notice to ordinary persons of what is prohibited." Id.

This Court followed the reasoning of Norris in State v. Wallmuller, __ Wn. App. 2d __, 423 P.3d 282 (2018). The trial court imposed a condition very similar to the one here: "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls." Id. at 283. This Court explained "the condition contains the phrase 'such as' before its list of prohibited places, indicating that frequenting more places than just those listed would violate the condition." Id. at 285. Thus, the provided list did not cure "the inherent

vagueness of the phrase ‘places where children congregate.’” Id. This Court accordingly held the condition to be unconstitutionally vague. Id.

The Wallmuller court explained a modified condition stating, “The defendant shall not loiter in nor frequent parks, video arcades, campgrounds, and shopping malls,” would not be unconstitutionally vague. Id. But the condition in Novcaski’s case does not so state. Rather, like the infirm condition in Wallmuller, Condition 28 includes a short list of prohibited places where children congregate, including “shopping malls, schools, playgrounds and video arcades.” CP 62. But it is expressly not limited to those locations. The CCO may still select any number of random locations where children are known to congregate or are currently congregating, inviting a “completely subjective standard for interpreting ‘places where children congregate.’” Wallmuller, 423 P.3d at 285.

Consistent with Norris and Wallmuller, this Court should remand for the trial court to strike or modify the unconstitutionally vague condition.

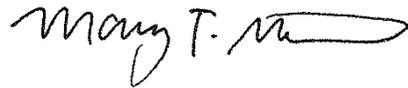
D. CONCLUSION

For the reasons discussed above, this Court should remand for the trial court strike or modify several community custody conditions.

DATED this 13th day of September, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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