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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL NOVCASKI,
Appellant.

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

THE HONORABLE DAVID EDWARDS, JUDGE

BRIEF OF RESPONDENT

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TABLE

Table of Contents

I. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

1) Constitutionality of Community Custody Conditions Claim 1

 a) Conditions Not Crime-Relation Claim..... 2

 b) Conditions Unconstitutional/Unconstitutionally Vague Claim.... 6

 i) “Polygraph & Plethysmograph Examinations” Condition..... 7

 ii) " Loitering/Frequently Places Where Children Congregate"
 Condition.....10

II. CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

City of Spokane v. Douglass, 115 Wash.2d 171, 178, 795 P.2d 693 (1990)
..... 6, 7

*In the Matter of the Personal Restraint Petition of George Golden,
Petitioner*, Court of Appeals, Division 3, 172 Wn.App. 426, 290 P.3d
168 (2012).....2-3, 3, 4, 5

State v. Armendariz, 160 Wn.2d 106, 118-19, 156 P.3d 201 (2007)..... 1

State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)..... 6, 7, 10, 11

State v. Corbett, 158 Wn.App. 576, 597, 242 P.3d 52 (2010)..... 1

State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015).....10, 11

State v. Johnson, 184 Wash.App. 777, 340 P.3d 230 (2014).....7, 8, 8-9

State v. Jones, 118 Wn.App. 199, 208, 76 P.3d 258 (2003) 1

State v. Mason, 2 Wash.App.2d 504, 410 P.3d 1173 (2018).....7, 8

State v. Norris by the Supreme Court of Washington, __ P.3d __, 2018 WL
43559948 (September 13, 2018)..... 10, 11

State v. Nguyen, — Wn.2d —, 425 P.3d 847 (2018).....10

State v. Ramos-Ramirez, 2018 WL 5014248, No. 50911-3-II (2018).10, 11

State v. Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998).....7-8, 9

State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)..... 1

<i>State v. Sanchez Valencia</i> , 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).....	6, 7
<i>State v. Sanchez Valencia</i> , 148 Wn.App. 302, 321, 198 P.3d 1065 (2009)	7
<i>State v. Snedden</i> , 166 Wn.App. 541, 543, 271 P.3d 298 (2012).....	1
<i>State v. Warren</i> , 165 Wash.2d 17, 32, 195 P.3d 940 (2008)	6

Statutes

RCW 9.94A.030.....	1, 4
RCW 9.94A.704.....	1, 2, 4
RCW 9.94A.715.....	4

Other Authorities

14 th Amendment of the United State Constitution.....	6
Article I Section 3 of the Washington State Constitution.....	6

I. RESPONSE TO ASSIGNMENTS OF ERROR

1) Constitutionality of Community Custody Conditions Claim

Decisions imposing supervision conditions are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *State v. Snedden*, 166 Wn.App. 541, 543, 271 P.3d 298 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable, meaning it is beyond the court's authority to impose, or if exercised on untenable grounds or for untenable reasons. *Riley*, 121 Wn.2d at 37; *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010); *see State v. Jones*, 118 Wn.App. 199, 208, 76 P.3d 258 (2003).

Sentencing courts may impose crime-related prohibitions for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 118–19, 156 P.3d 201 (2007). Crime-related prohibitions directly relate to the circumstances of the crime. RCW 9.94A.030(10). The Court stated that it typically upholds sentencing conditions if reasonably crime related. *Riley*, 121 Wn.2d at 36–37.

RCW 9.94A.704 governs community custody supervision by the Department of Corrections and conditions set by the department. Under RCW 9.94A.704, the Department shall assess the offender's risk of re-

offense and may establish and modify additional conditions of community custody based upon the risk to community safety. RCW 9.94A.704(2)(a). The Department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. RCW 9.94A.704(6). The Department shall notify the offender in writing of any additional conditions or modification and an offender may request administrative review of a condition imposed or modified by the Department under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community. RCW 9.94A.704(7)(a) and (b).

The Appellant is arguing that the conditions 6, 19, 20, 21, and 22, set by the Department of Corrections (DOC), which were incorporated into the judgment and sentence under Appendix F, are not crime-related. The Appellant further argues that condition 18 is unconstitutional and that condition 28 is unconstitutional vague.

a) Conditions Not Crime-Relation Claim

The issue of conditions set by DOC needing to be crime-related was directly addressed in *In the Matter of the Personal Restraint Petition*

of George Golden, Petitioner, Court of Appeals, Division 3, 172 Wn.App. 426, 290 P.3d 168 (2012). *In re Golden*, the Petitioner, who was previously convicted of Rape in the Second Degree and Unlawful Imprisonment, then convicted of Robbery in the Second Degree while still on community custody, challenged 13 conditions imposed by the Department of Corrections, including:

- No gambling casinos
- Curfew from 5:00 p.m. to 6:00 a.m.
- No sexual contact with anyone without his or her explicit consent and not before informing DOC.
- No contact with areas and facilities where minors are known to congregate, for example, but not limited to video arcades, malls, playgrounds, fairs, carnivals, parks, schools, or other children play areas. When in doubt, always contact DOC for clarification.
- No residing on premises where minors are also residing and do not stay the night on premises where minors might spend the night without permission of CCO/DOC.
- No dating women or men with minor children or form any relationships with families who have minor children without approval of CCO or treatment provider (if applicable).
- No romantic relationships with anyone without full disclosure to that person and not without permission of the Department of Corrections.
- Obtain mental health evaluation if directed by DOC and follow all requirements, including taking prescribed medication as directed.
- If participating in the Housing Voucher program, must remain violation free and successfully complete the 120 day Community Justice Center Program.
- If homeless, may only reside at House of Charity or Truth Ministries.
- Must participate and successfully complete the 120 day program at the Community Justice Center.
- Do not operate any motor vehicle.
- No STA [Spokane Transit Authority] plaza.

Id. at 431-432.

The Court of Appeals found that the DOC conditions did not conflict with the standard judgment and sentence conditions set by the Court. Similarly to the case at hand, Mr. Golden argued that the department's conditions violated various constitutional rights and were not crime-related so could not be imposed. *Id.* at 432. The Court stated that this argument missed the mark. *Id.* A "crime-related prohibition" is defined as "an order of a *court* prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted," Former RCW 9.94A.030(13) (2006) (emphasis added). This definition does not apply to DOC, which is an agency and not a court. Instead, DOC's authority to impose conditions of community custody on Mr. Golden came from former RCW 9.94A.715(2)(b) (2006), which directed the Department to perform a risk assessment and then impose "additional conditions of the offender's community custody based upon the risk to community safety." *Id.* at 433.

Nothing in the text of former RCW 9.94A.715, or its successor statute, RCW 9.94A.704, limits DOC's supervisory conditions to those that are "crime-related." *Id.* Instead, the Department must perform a risk assessment and then impose conditions with public safety in mind. The statute grants DOC broader authority than that given the trial courts in

order to follow up on the Department's duty to conduct an individualized risk assessment. While the trial court must focus generally on the defendant's crime, the Department focuses on the risks posed by the defendant. It thus can, as here, impose conditions related to the defendant's history as a sex offender even though he is not being supervised for a sex offense. *Id.*

The challenged conditions set in Appendix H do not conflict with the standard judgment and sentence conditions set by the Court and the Department conducted a pre-sentencing evaluation, determining these conditions to be appropriate based on a risk-assessment of the Appellant, which included a review of his statement regarding the offense, his criminal history, and a risk/needs assessment. The Department concluded that the Defendant continued to pose a risk to his victim and the community at large due to his unwillingness to be truthful with law enforcement and the Department and his continued minimization of his actions and denial of his crime, despite pleading guilty. The Department accordingly set these conditions and it was not an abuse of discretion for the trial court to impose them. It should be further noted that neither the Appellant nor his counsel objected to the inclusion of the conditions at the time the appendix was entered as part of the judgment and sentence.

b) Conditions Unconstitutional/Unconstitutionally Vague Claim

As a general rule, the imposition of community custody conditions are within the discretion of the court and will be reversed only if manifestly unreasonable. *State v. Bahl*, 164 Wash.2d 739, 753, 193 P.3d 678 (2008). The imposition of an unconstitutional condition is manifestly unreasonable. *State v. Sanchez Valencia*, 169 Wash.2d 782, 792, 239 P.3d 1059 (2010). There is no presumption that a community custody condition is constitutional. *Id.* at 793. A sentencing condition that interferes with a constitutional right must be “sensitively imposed” and “reasonably necessary to accomplish the essential needs of the State and public order.” *State v. Warren*, 165 Wash.2d 17, 32, 195 P.3d 940 (2008).

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require fair warning of proscribed conduct. *Bahl*, 164 Wash.2d at 752, 193 P.3d 678. A 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.’ ” *Id.* at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990)). If either requirement is not met, the condition is

unconstitutional. *Id.* at 753. However, a community custody condition is not unconstitutionally vague “ ‘merely because a person cannot predict with complete certainty the exact point at which [her] actions would be classified as prohibited conduct.’ ” *Sanchez Valencia*, 169 Wash.2d at 793, 239 P.3d 1059 (quoting *State v. Sanchez Valencia*, 148 Wash.App. 302, 321, 198 P.3d 1065 (2009)). Importantly, the disputed terms are considered in the context in which they are used, and “[i]f persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” *Douglass*, 115 Wash.2d at 179, 795 P.2d 693.

In the case at hand, the Appellant is challenging the condition that requires the Appellant to “(18) Submit to polygraph and plethysmograph examinations as directed by the CCO and show no deception” as unconstitutional and “(28) “Do not loiter or frequent places where children congregate, including, but not limited to shopping malls, schools, playgrounds and video arcades” as unconstitutionally vague.

i) “Polygraph & Plethysmograph Examinations” Condition

The issue of conditions related to polygraph and plethysmograph examinations was most recently addressed in *State v. Mason*, citing to *State v. Johnson*, 184 Wash.App. 777, 340 P.3d 230 (2014) and *State v.*

Riles, 135 Wn.2d 326, 345, 957 P.2d 655 (1998). *State v. Mason*, 2 Wash.App.2d 504, 410 P.3d 1173 (2018). In *Johnson*, the Court of Appeals, Division I, outlined the determinations of the Supreme Court in *Riles* regarding the use of plethysmograph testing. *Johnson*, 184 Wash.App. at 780.

The Supreme Court has recognized that plethysmograph testing, unlike polygraph testing, does not serve a monitoring purpose. *State v. Riles*, 135 Wash.2d 326, 345, 957 P.2d 655 (1998), *abrogated on other grounds, Valencia*, 169 Wash.2d 782, 239 P.3d 1059. “It is a gauge for determining immediate sexual arousal level in response to various stimuli used as part of a treatment program for sex offenders.” *Riles*, 135 Wash.2d at 345, 957 P.2d 655.

The trial court has authority to order a defendant to submit to plethysmograph testing only if the court also orders a crime-related treatment regimen for sexual deviancy. *Riles*, 135 Wash.2d at 352, 957 P.2d 655. In *Riles*, the sentencing courts required two convicted sex offenders, as conditions of community placement, to “submit to polygraph and plethysmograph testing upon the request of [their] therapist and/or Community Correction Officer.” *Riles*, 135 Wash.2d at 333, 337, 957 P.2d 655.

Because one of the offenders was not ordered to enter into treatment or therapy, the Supreme Court struck the plethysmograph testing provision from his judgment and sentence. *Riles*, 135 Wash.2d at 353, 957 P.2d 655. However, because the other offender was required to participate in sexual deviancy treatment as a condition of community custody, the Supreme Court upheld the plethysmograph condition. *Riles*, 135 Wash.2d at 353, 957 P.2d 655.

“[A] sentencing court may not order plethysmograph testing unless it also requires crime-related treatment for sexual deviancy.... [Plethysmograph testing] is only useful, within the context of a

comprehensive evaluation or treatment process.” *Riles*, 135 Wash.2d at 352, 957 P.2d 655; *see also State v. Land*, 172 Wash.App. 593, 605–06, 295 P.3d 782 (striking condition requiring defendant to submit to CCO-ordered plethysmograph testing without any accompanying treatment requirement), *review denied*, 177 Wash.2d 1016, 304 P.3d 114 (2013).

Johnson, 184 Wash.App. at 780.

Here, both the trial court and the Department ordered the Appellant to obtain a sexual deviancy evaluation and follow all treatment recommendations from a State-certified/approved therapist. *See* order number 7 on pages 7 and 11 of the judgment and sentence and condition 15 on Appendix H of the judgment and sentence. Therefore, because the Appellant was also ordered to complete accompanying sexual deviancy treatment, the condition that the Appellant submit to plethysmograph testing was not improper or unconstitutional on its face. However, the State concedes that the language of the condition may not properly address that the plethysmograph testing should be used for the purposes of treatment only. As such, the State would agree to having the case remanded to correct that portion of the conditions to clarify that plethysmograph testing is to be utilized only with regard to treatment, including to measure the Appellant’s progress in treatment, and not as a monitoring device. With regard to polygraph testing, because polygraph testing serves a monitoring purpose, this condition was not improper or

unconstitutional and should remain intact even if the portion regarding the plethysmograph testing is remanded for correction.

ii) “Loitering/Frequently Places Where Children Congregate” Condition

The issue of conditions related to loitering/frequenting places where children congregate was most recently addressed in *State v. Ramos-Ramirez*, an unpublished opinion, but one which addresses essentially exactly the language in the challenged condition utilized in the Appellant’s case. *State v. Ramos-Ramirez*, 2018 WL 5014248, No. 50911-3-II (2018). In *Ramos-Ramirez*, the Defendant challenged his community custody condition number 15, which stated that, “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, and shopping malls.” *Ramos-Ramirez*, 2018 WL 5014248 at 2. In that case, the Court of Appeals, Division II, found:

Ramos-Ramirez asserts that the community custody condition is void for vagueness and without argument relies on *State v. Norris*, 1 Wn. App. 2d 87, 404 P.3d 83 (2017), *aff’d in part and rev’d in part by State v. Nguyen*, — Wn.2d —, 425 P.3d 847 (2018), and *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015). These cases are distinguishable because the wording in the conditions at issue in each case failed to provide an illustrative list of prohibited locations, which rendered the conditions void for vagueness. *Irwin*, 191 Wn. App. at 655, 364 P.3d 830 (“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.’” (quoting *Bahl*, 164 Wn.2d at 753, 193 P.3d 678)); *Norris*, 1 Wn. App. 2d at 95-96

(accepting the State's concession that a condition prohibiting the defendant “from entering ‘any places where minors congregate’ ” was unconstitutionally vague.)

In contrast, the condition imposed on Ramos-Ramirez provides an illustrative list of examples of prohibited locations, identifying “parks, video arcades, and shopping malls” as examples. CP at 22. As such, the provision includes an illustrative list of prohibited locations, which means it is not unconstitutionally vague under *Irwin* and *Norris*. *Irwin*, 191 Wn. App. at 655, 364 P.3d 830; *Norris*, 1 Wn. App. 2d at 95-96. The sentencing court did not err when it imposed the condition. *See Bahl*, 164 Wn.2d at 752-53, 193 P.3d 678; *Irwin*, 191 Wn. App. at 655, 364 P.3d 830.

Ramos-Ramirez, 2018 WL 5014248 at 4.

Here then, as in *Ramos-Ramirez*, the Department provided an illustrative list of prohibited locations – “including, but not limited to shopping malls, schools, playgrounds and video arcades” – so that there is sufficient notice to the Appellant for him to ‘understand what conduct is proscribed.’” As such, the condition is not unconstitutionally vague.

III CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the conviction and uphold the conditions of the judgment and sentence in this case as indicated.

DATED this 4th day of November, 2018.

Respectfully Submitted,

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