

FILED
Court of Appeals
Division II
State of Washington

NO. 52179-2-II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JERRY BRUCE STOCK, II,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 17-1-01534-1

BRIEF OF RESPONDENT/RESPONSE TO MOTION OF
APPELLANT'S COUNSEL TO WITHDRAW

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 7, 2019, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether counsel has correctly determined that there are no non-frivolous issues on appeal?

II. STATEMENT OF THE CASE

The State accepts the statement of the case presented in counsel's brief, as supplemented in the argument portion of this brief.

III. ARGUMENT

A. COUNSEL HAS CORRECTLY DETERMINED THAT THERE ARE NO NON-FRIVOLOUS ISSUES ON APPEAL.

Counsel has cited as potential appellate issues whether the community custody conditions of Stock's sentence are unconstitutionally vague and whether those conditions are sufficiently crime related. Counsel correctly notes that both claims lacked merit.

When a court-appointed attorney files a motion to withdraw on the ground that there is no basis for a good faith argument on review, pursuant to *State v. Theobald*, 78 Wn.2d 184, 470 P.2d 188 (1970) and *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), the motion to withdraw must:

(1) be accompanied by a brief referring to anything in the record that might arguably support the appeal. (2) A copy of counsel's brief should be furnished the indigent and (3)

time allowed him to raise any points that he chooses; (4) the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.

Theobald, 78 Wn.2d at 185, *quoting Anders*, 386 U.S. at 744.

Counsel has complied with this procedure. The State concurs counsel's assessment of the issues, as discussed below. Further, Stock has not filed a pro se brief. The Court should therefore grant counsel's motion to withdraw and affirm the ruling of the court below.

1. Whether some of the imposed community custody conditions are unconstitutionally vague or not crime-related.

Counsel suggests that potential issue arise out of the trial court's imposition of community custody conditions 6, 15, and 16. These particular conditions are the focus of the potential issues because Stock objected to them below. These claims are without merit because the conditions are not unconstitutionally vague and are crime related.

The trial court incorporated into the judgment and sentence the conditions recommended by the pre-sentence investigator. CP 45. Those are found in Judgment and Sentence (Felony) appendix H. CP 51. Under section (b) of that appendix, item 6 provides "Do not possess or access any sexually explicit material or frequent adult bookstores, arcades or places where sexual entertainment is offered." CP 52. Stock objected to this provision. RP, 6/18/18, 5.

The trial court also imposed condition 15 which is found in the same section of the appendix. CP 53. That condition provided that Stock “Shall be prohibited from joining or perusing any public social websites, i.e., Facebook, MySpace, Craigslist, Backpage, etc.” Id. Stock objected to this condition. RP, 6/18/18, 7.

The trial court imposed condition 16 from the appendix. CP 53. That condition tells Stock “do not contact (900) telephone numbers that offer sexually explicit material and provide copies of phone records to CCO [Community Corrections Officer] upon request.” CP 53 (alteration added). Stock objected to this condition. RP, 6/18/18, 8.

The Washington Supreme Court recently reviewed just these sorts of conditions in *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018). Nguyen had been convicted of first degree child molestation, first degree child rape, second degree child molestation, and second degree child rape. 191 Wn.2d at 675. Nguyen challenged a community custody condition as vague and not crime-related; that condition provides

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.

191 Wn.2d at 676.

In the joined case of *State v. Norris*, Norris had been convicted of

three counts of second degree child molestation. *Nguyen*, 191 Wn.2d at 677. The Supreme Court undertook review of a community custody condition that had been affirmed below. 191 Wn.2d at 678. That condition required Norris to inform her CCO of any dating relationship. 191 Wn.2d at 678. The Court also reviewed, on cross petition, a condition that had been reversed below prohibiting Norris from entering any sex-related business. *Id.*

The Supreme Court reviewed the imposition of community custody conditions for abuse of discretion. *Nguyen*, 191 Wn.2d at 678. Discretion is abuse if the conditions are “manifestly unreasonable” and unconstitutionally vague conditions are manifestly unreasonable. *Id.* Vagueness is found if the condition

- (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.

191 Wn.2d at 678, quoting *City of Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990).

The *Nguyen* Court set out the following principles with regard to vagueness:

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. A community custody condition “is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *City of Seattle v. Eze*, 111 Wash.2d 22, 27, 759 P.2d 366 (1988). However, a stricter standard of definiteness applies where the community custody condition prohibits material protected by the First Amendment. *Bahl*, 164 Wash.2d at 753, 193 P.3d 678.

Nguyen, 191 Wn.2d at 679 (alteration by the court).

These principles were applied to Nguyen’s claim that the term “sexually explicit material” is unconstitutionally vague. His point of departure was a previous holding that the term “pornographic materials” is unconstitutionally vague. *See State v. Bahl*, 164 Wn.2d 739, 756, 193 P.3d 678 (2008). This argument was rejected because the Court had there distinguished the phrase (used in the present case) “sexually explicit material” from the unconstitutional phrase “pornographic material.” *Nguyen*, 191 Wn.2d at 680. The Court found that the phrase “sexually explicit material” was sufficiently definite for persons of ordinary intelligence to understand it and held that it was not unconstitutionally vague. 191 Wn.2d at 680-81.

On Norris’s dating relationship issue, the Court iterated the rules that community custody conditions do not require impossible standards of specificity and that convicted persons are not entitled to expect complete certainty as to the point at which their behaviors may violate a condition. *Nguyen*, 191 Wn.2d at 681. Using a standard dictionary to discern the

plain and ordinary meaning of the term “dating relationship,” the Court found that a person of ordinary intelligence can distinguish between a dating relationship and other types of relationships. 191 Wn.2d at 682. The Court distinguished a federal case and held that the term dating relationship is not unconstitutionally vague. 191 Wn.2d at 683.

The *Nguyen* Court also considered the question of whether or not Nguyen’s prohibition from possession of “sexually explicit material” and Norris’s prohibition on entering “sex-related businesses” were crime related conditions. Such claims are reviewed for abuse of discretion. *Nguyen*, 191 Wn.2d at 683.

A sentencing court may, in its discretion, impose “any crime-related prohibitions.” RCW 9.94A.703(3)(f). A “[c]rime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). But a trial court does not abuse its discretion if the condition has a “reasonable relationship” with the crime of conviction. 191 Wn.2d at 684. There need not be identity between the crime and the condition as long as there is “some basis for the connection.” *Id.*

The *Nguyen* Court found that “Nguyen’s access to “sexually explicit material” is certainly “reasonably related” to his crime of child

rape and molestation.” 191 Wn.2d at 684. The Court held that the prohibition on the possession of “sexually explicit material” is crime related. Id.

Similarly, the Court held that Norris’s prohibition against entering “sex-related business” is crime related. 191 Wn.2d at 687. This holding followed even after the court recognized that there was no evidence that a sex-related business played a part in her offending. Id.

The Court’s reasoning with regard to crime relatedness includes the following:

However, like Nguyen’s condition discussed above, this condition has more to do with Norris’ inability to control her urges and impulsivities than it does with the specific facts of her crimes. Norris’ case is like *Kinzle*, in that it was clear that the prohibition was imposed to prohibit conduct that might cause the convict to reoffend. Here, it is unlikely that Norris will meet a minor, and potential victim, in a “sex-related business.” But, it is reasonable to conclude that Norris will struggle to rehabilitate from her sexual deviance so long as she frequents “sex-related businesses.” Norris’ crimes have as much to do with her inability to control her sexual urges as they do with her access to minors.

191 Wn.2d at 687. This reasoning provides trial court’s with expansive discretion in fashioning community custody conditions on sex offenders. The constellation of possible conditions is not limited by a direct connection to statutory elements of the crime of conviction. Conditions may include common sense prohibitions aimed at the offender’s personal attributes and aimed at the vital public policy of rehabilitation.

The present challenged conditions are amendable to the same analysis as that found in *Nguyen*. Stock was convicted of the three sex offense and of trying to provide methamphetamine to a person he believed to be 14 years old. Similar to the defendants in *Nguyen*, Stock's behavior evidences an inability to control his sexual urges. Thus keeping him away from sexualized behavior like adult bookstores or (900) phone numbers serves the interest of both society and Stock. Moreover, since Stock used a social media platform to find his victim, the condition prohibiting him from such electronic communication is clearly crime related. Had stock litigated these issues on appeal, he would have lost.

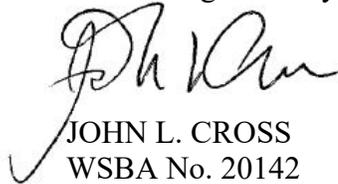
IV. CONCLUSION

For the foregoing reasons, Stock's conviction and sentence should be affirmed, and counsel should be permitted to withdraw.

DATED March 7, 2019.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name.

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