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NO. 52616-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD HOGAN,

Appellant.

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

The Honorable Stephan M. Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing on Appellant Donald Hogan the statutory maximum of 60 months of incarceration, in addition to 36 months of community custody, on counts II-V. CP 67-68.

2. The trial court erred by imposing community custody condition No. 17 banning access to “places where children tend to congregate, including but not limited to shopping malls, schools, playgrounds, public pools, skating rinks, and video arcades without prior permission from [community corrections officer].” CP 76.

3. The trial court erred by imposing community custody condition No. 14 restricting access to “any electronic devices that can access or record media or images.” CP 76.

4. The trial court erred by imposing community custody condition No. 15 restricting access to “any electronic devices that can access the internet without a monitoring system.” CP 76.

Issues Pertaining to Assignments of Error.

1. Did the trial court exceed its statutory authority by imposing 60 months of incarceration plus 36 months of community custody on counts II-V? Did the court intend to impose the community custody term only on count VI as requested by the parties, and merely

commit a scrivener's error by imposing the community custody term on all counts instead?

2. Is the condition banning Hogan from visiting "places where children congregate" unconstitutionally vague?

3. Are the conditions restricting Hogan's possession of electronic devices capable of accessing media and the internet unconstitutionally overbroad?

B. STATEMENT OF FACTS

The Cowlitz County Prosecutor's Office charged Hogan with one count of attempted second-degree rape of a child and eight counts of communicating with a minor for immoral purposes. CP 4-7.

The State alleged the following. Hogan used his Facebook account to contact another Facebook account owned by La Luch. CP 1. La Luch was an adult male, but his Facebook profile picture was a photo of his six-year-old daughter. CP 1. Hogan contacted La Luch believing he was communicating with a thirteen-year-old girl. CP 1. Over several weeks, Hogan sent sexual messages to the Facebook profile and continued the conversation electronically with two detectives posing as the thirteen-year-old girl. CP 1-2. Hogan sent digital pornographic images of himself and others and instructional sex videos, some of which showed sex toys. CP 2. He also requested pornographic photos of La Luch, asked to engage in

various sexual acts with her, asked her to run away to another country with him, and instructed her via a detailed itinerary to take a bus from Oregon to a transit center in Washington to meet him. CP 2. Hogan arrived at the transit center at the appointed time and was arrested. CP 3. A search of his residence yielded instructional sex videos, sex toys, lingerie, recording equipment, cell phones, and computers. CP 3.

Hogan pleaded guilty to five counts of communicating with a minor for immoral purposes (counts II-VI) in exchange for dismissal of the remaining charges. RP 7, 9; CP 67. In a statement underlying the plea, he admitted to sending “electronic mail of a sexual nature” from his home computer to a person he believed was thirteen years old. RP 9.

The parties requested the statutory maximum of 60 months incarceration for each of counts II-V to run concurrent with one another. RP 14. The parties also asked the court to impose an exceptional sentence on count VI, and for this count alone, asked for zero months of incarceration and 36 months of community custody to run consecutive to the other counts. RP 14. The court verbally imposed the requested sentence, but in the written order, imposed the community custody term on all five counts, rather than just count VI. RP 17; CP 68.

The court also ordered Hogan to comply with various conditions of community custody. CP 69. These conditions included limitations on

possessing electronic devices capable of accessing images or videos, on possessing electronic devices capable of accessing the internet without a monitoring device, and on visiting “places where children tend to congregate.” CP 76 (Nos. 14, 15, 17).

C. ARGUMENT

1. THE TRIAL COURT’S TERM OF INCARCERATION AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM FOR COUNTS II-V.

The trial court appears to have committed a scrivener’s error by imposing community custody on all five counts, rather than just on count VI as requested by the parties. The sentence exceeds statutory authority, and remand with instructions to correct the error is the appropriate remedy.

Hogan’s offender score exceeded nine points and his standard range was 51-60 months for each count of communicating with a minor for immoral purposes. CP 64-66.

RCW 9.94A.701(1)(a) provides that for sex offenses such as Hogan’s, “the court shall, in addition to the other terms of the sentence,” impose three years of community custody. However, subsection (9) further clarifies “[t]he term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody

exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” RCW 9.94A.701(9).

Where a trial court imposes a term of incarceration and community custody that together exceed the statutory maximum, it is the trial court’s responsibility to reduce the term of community custody accordingly. State v. Boyd, 174 Wn.2d 470, 473, 75 P.3d 321 (2012) (citing RCW 9.94A.701(9)). The failure to do so means the sentence is in excess of statutory authority. Id. The proper remedy is to remand to the trial court to amend the community custody condition or resentence in accordance with 9.94A.701(9).

Here, the statutory maximum authorized is 60 months (5 years). RCW 9.68A.090(2) (class C felony), 9A.20.021(1)(c) (5 year maximum); CP 66. The trial court’s sentence of 60 months incarceration plus 36 months of community custody exceeds this authority. See CP 68. The error could be fixed by either remanding to resentence or to amend the term of community custody. Boyd, 174 Wn.2d at 473. However, given the parties’ joint recommendation that the court impose community custody only on count VI, and the court’s stated intent to follow this recommendation, this appears to be merely a scrivener’s error. RP 14, 17. Thus, in this case, remand with instructions to amend the term of community custody to apply only to count VI is the appropriate remedy.

2. THE CONDITION PROHIBITING HOGAN FROM FREQUENTING PLACES WHERE MINORS TEND TO CONGREGATE UNLESS APPROVED IN ADVANCE BY HIS CCO IS UNCONSTITUTIONALLY VAGUE.

The trial court imposed restrictions on Hogan restricting his access to places where children tend to congregate. CP 76. The condition is unconstitutionally vague and so cannot stand.

The due process vagueness doctrine under both the federal and State constitutions “requires that citizens have fair warning of proscribed conduct.” State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008) (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A community custody condition is unconstitutionally vague if (1) it fails to state “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 752-52 (quoting Douglass, 115 Wn.2d at 178 (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))). A condition is unconstitutionally vague if it fails under either prong of the analysis. Id. However, “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.” State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal citations and quotations omitted).

Conditions infringing upon a fundamental right demand “a greater degree of specificity” and “must be sensitively imposed.” Bahl, 164 Wn.2d at 757 (citing State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (quoting Malone v. United States, 502 F.2d 554, 556 (9th Cir.1974))). In particular, “a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms” and so “a stricter standard of definiteness applies.” Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)) (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir.2006), rev’d on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

A community custody condition, unlike a statute or administrative regulation, is not entitled to a presumption of constitutional validity. Sanchez Valencia, 69 Wn.2d at 793. Thus, although such a condition is reviewed for an abuse of discretion, “if the condition is unconstitutionally vague, it will be manifestly unreasonable.” Id. (citing Bahl, 164 Wn.2d at 753). Moreover, “vagueness challenges to community custody conditions may be raised for the first time on appeal.” State v. Wallmuller, 4 Wn. App. 2d 698, 701, 423 P.3d 282 (Div. II.2018) (citing State v. Padilla, 190

Wn.2d 672, 677, 416 P.3d 712 (2018)), rev. granted, 192 Wn.2d 1009, 432 P.3d 794 (2019). Where a community custody condition is vague, the appropriate remedy is to remand for resentencing or to amend the offending condition. Boyd, 174 Wn.2d at 473.

Here, the court imposed the following community custody condition on Hogan: “Do not loiter or frequent places where children tend to congregate, including but not limited to shopping malls, schools, playgrounds, public pools, skating rinks, and video arcades without prior permission from CCO.” CP 76 (No. 17).

This condition suffers from several defects. As an initial matter, the Washington Supreme Court has twice held the term “frequent” in the context of community custody conditions is a complete ban. Bahl, 164 Wn.2d at 758; State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated on other grounds by Sanchez Valencia, 69 Wn.2d at 793. Also, as discussed more below, the terms “children” and “tend to congregate” are impermissibly vague, the inclusion of a non-exclusive illustrative list does not cure the defect, and the requirement of prior permission from the CCO provides unfettered discretion to define the terms of the condition.

In State v. Irwin, Division One considered a similar condition that stated, “Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer

(CCO)].” 191 Wn. App. 644, 649, 364 P.3d 830 (Div. I.2015). The court concluded this condition was unconstitutionally vague, struck it, and remanded for resentencing. Id. at 655. 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. (quoting Bahl, 164 Wn.2d at 753). The court acknowledged that it “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, the Irwin court concluded such clarifications would still not be sufficient because they would “leave the condition vulnerable to arbitrary enforcement,” thereby failing the second prong of the Bahl vagueness analysis. Irwin, 191 Wn. App. at 655 (citing see Bahl, 164 Wn.2d at 753; State v. Sansone, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005)); see Sanchez Valencia, 169 Wn.2d at 795 (where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness).

In keeping with this reasoning, Division One also struck down a condition with an illustrative list because it still provided too much discretion to the CCO. State v. Norris, 1 Wn. App. 2d 87, 404 P.3d 83 (Div. I.2017), affirmed in part and reversed in part on other grounds by

State v. Nguyen, 191 Wn.2d 671, 677-83, 425 P.3d 847 (2018) (discussing “sexually explicit materials” and “dating relationship” conditions). The condition stated, “Do not enter any parks/playgrounds/schools and or any places where minors congregate.” Norris, 1 Wn. App. at 95. At oral argument the State conceded and Division One agreed, the second part of the condition prohibiting Norris from entering “any places where minors congregate” was unconstitutionally void for vagueness. Id. at 95 (State citing to Irwin, 191 Wn. App. at 650-55). Division One observed that like the condition in Irwin, Norris’s condition “was subject to definition by the CCO” and so “[le]ft the condition subject to arbitrary enforcement.” Norris, 1 Wn. App. at 95 (quoting Irwin, 191 Wn. App. at 655). In *dicta*, Division One observed that if the language “as defined by the supervising CCO” were deleted, and the condition read, “Do not enter any parks, playgrounds, or schools where minors congregate” it would be constitutional. Id. at 96.

In State v. Magana, Division Three also considered a similar condition with an illustrative list. 197 Wn. App. 189, 389 P.3d 654 (Div. III.2016), abrogated in part on other grounds by Padilla, 190 Wn.2d at 719.¹ The condition stated, “Do not frequent parks, schools, malls, family

¹ Division Three’s vagueness analysis in Magana remains good law. However, in Magana, Division Three upheld another condition against a challenge that it was not crime related. Magana, 197 Wn. App. at 201. Padilla abrogated this part of the Magana

missions or establishments where children are known to congregate or other areas as defined by supervising CCO [community corrections officer], treatment providers.” Id., 197 Wn. App. at 200. Division Three agreed the condition was unconstitutionally vague “because it affords too much discretion to Mr. Magana’s CCO.” Id. at 200 (defense vagueness challenge), 201 (quote).

The Court explained “a community custody condition that empowers a CCO to designate prohibited spaces is constitutionally impermissible because it is susceptible to arbitrary enforcement.” Id. at 201 (citing Irwin, 191 Wn. App. at 654-55). The fact that the list contained both an explanatory statement and illustrative examples did not save the condition because the language “does not place any limits on the ability of Mr. Magana’s CCO to designate prohibited locations.” Id. at 201. The Court further explained, “While the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO’s designation authority is not tied to either the list or the explanatory statement.” Id. at 201 (emphasis added). Thus, the condition as written conferred “boundless” discretion to the

analysis, and held such conditions were not sufficiently connected and must be stricken. State v. Johnson, 4 Wn. App. 2d 352, 359-360 421 P.3d 969 (Div. III.2018) (citing Padilla, 416 P.3d at 719).

CCO and failed under the second prong of the vagueness analysis. Id. at 201.

Most recently, Division Two of this Court addressed a similar condition and held “a community custody condition prohibiting Wallmuller from frequenting ‘places where children congregate such as parks, video arcades, campgrounds, and shopping malls,’ is unconstitutionally vague.” Wallmuller, 4 Wn. App. 2d at 699-700 (internal citations omitted) (review pending).

Regarding the first prong of the analysis, the Wallmuller Court considered the word “congregate” problematic. Id. at 702-03. The Court noted the dictionary definition “‘to come together, collect, or concentrate in a particular locality or group,’” was most appropriate, though there were other definitions. Id. at 703 (quoting Webster’s Third New International Dictionary 478 (2002)). However, this definition “creates uncertainty and gives rise to several questions” including, “Must the children join together in a formal group to ‘congregate,’ ... must the children intend to join together, ... How many children are required, ... How often must children congregate ... Is once enough, ... [and] how recently must they have congregated there” to trigger the condition? Id. at 703. The fact that so many questions remained unanswered showed the conduct was not sufficiently defined. Id.

In addition, the Wallmuller Court also reasoned the condition was less vague than the condition in Irwin because Wallmuller’s condition contained an illustrative list. Id. However, because Wallmuller’s condition also contained the phrase “such as,” the list was not exclusive, and suffered from the same flaw as in Norris: “it invites a completely subjective standard for interpreting ‘places where children congregate’” and so fails under the second prong of the analysis. Wallmuller, 4 Wn. App. at 703 (citing Norris, 1 Wn. App.2d 87).

The Wallmuller Court noted Division Three had recently reached the opposite result in a split decision, but found that reasoning unpersuasive. Wallmuller, 4 Wn. App. at 704 (citing State v. Johnson, 4 Wn. App. 2d 352, 360-62, 421 P.3d 969 (Div. III.2018)).² The Wallmuller Court also considered the reasoning of several unpublished decisions in

² In Johnson, Division Three considered a condition demanding Johnson “[a]void places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades,” and held it was not unconstitutionally vague. Johnson, 4 Wn. App. at 360. Division Three reasoned “the first clause—places where children congregate—modifies the clause that provides the illustrative list” and so provided reasonable notice to Johnson regarding prohibited areas, and was “not susceptible to arbitrary enforcement.” Id. Division Three also reasoned the fact the illustrative list was “not exhaustive” did not render it unconstitutionally vague. Id. at 360-61 (quoting Sanchez Valencia, 169 Wn.2d at 793 (“[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.’”)) (internal quotation marks and citations omitted)).

The Washington Supreme Court has rejected the doctrine of horizontal *stare decisis*. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018) (“one division of the Court of Appeals should give respectful consideration to the decisions of other divisions of the same Court of Appeals but one division is not bound by the decision of another division”).

accord with Johnson, and found them equally unpersuasive. Wallmuller, 4 Wn. App. at 704 n.2.

However, one aspect of Division Three's reasoning in Johnson is persuasive. "In the context of a sex offense, the term 'children' refers to individuals under the age of 16." Johnson, 4 Wn. App. at 361 (citing RCW 9A.44.073-.089). "[T]his definition may not be readily apparent to someone outside the criminal justice system" and so remand is appropriate to replace the term "children" with the phrase "children under 16." Johnson, 4 Wn. App. 2d at 361 n.3.

The condition imposed on Hogan suffers from several flaws identified by the cases above. First, it uses the phrase, "children" rather than "children under 16" and should be remanded for clarification on this point alone. Johnson, 4 Wn. App. 2d at 361.

Even more problematic, it uses the phrase "tend to congregate." CP 76. As noted in Irwin, Norris, and Wallmuller, the phrase "known to congregate" and even the word "congregate" alone are both unconstitutionally vague. Irwin, 191 Wn. App. at 649; Norris, 1 Wn. App. at 95; Wallmuller, 4 Wn. App. 2d at 699-700, 703. Here, the addition of the phrase "tend to" modifying the word "congregate" makes the condition even more ambiguous. CP 76. Just as the word "congregate" in Wallmuller left unanswered questions, so too does the phrase "tend to

congregate.” Does “tend to” mean often congregates? Sometimes congregates? Occasionally congregates? Or something else? It is entirely unclear and so should be held unconstitutionally vague.

This vagueness problem is not solved by the illustrative list. This is because Hogan’s condition also contains the phrase “including but not limited to.” CP 76. Similar to the conditions in Norris and Wallmuller, the list of examples is not exclusive and so the ambiguity remains. Norris, 1 Wn. App. at 95; Wallmuller, 4 Wn. App. at 703.

Hogan’s condition also invites arbitrary enforcement for two interrelated reasons. First, the vague language is, by default, subject to interpretation by the CCO. Second, the requirement of prior CCO approval is functionally equivalent to the phrase “as defined by the CCO.” First, Division One has concluded that even without an explicit phrase authorizing the CCO to define the terms of the condition, a vague term in a condition will be left open to definition by the CCO by default, and thus such conditions invite arbitrary enforcement. C.f. Norris, 1 Wn. App. at 95 (noting Norris’s condition “was subject to definition by the CCO” and so “[le]ft the condition subject to arbitrary enforcement” (quoting Irwin, 191 Wn. App. at 655)). Where, as here, the list of examples is not exclusive, this vagueness “invites a completely subjective standard for interpreting” the condition to be applied by the CCO. Wallmuller, 4 Wn.

App. at 703 (citing Norris, 1 Wn. App. at 95)). Thus, even where Hogan's condition lacks the phrase "as defined by the CCO," the condition will be subject to interpretation by the CCO without guidance or restriction, and thus invites arbitrary enforcement.

Second, the problem of arbitrary enforcement is exacerbated where Hogan's condition requires him to obtain "prior permission" from his CCO. CP 76. This phrase ensures that regardless of Hogan's or anyone else's interpretation, in practice, the CCO is the final authority on defining the condition. Even if a location is just beyond the scope of the condition, Hogan remains at risk of being found in violation if he travels there without prior permission from his CCO. Thus, the phrase grants authority to the CCO to define the boundaries of the condition. This Court should find the requirement of "prior permission by CCO" is functionally equivalent to the phrase "as defined by the ... CCO" struck down in Irwin and Magana. CP 76; Irwin, 191 Wn. App. at 649, 665; Magana, 197 Wn. App. at 200.

Hogan's condition authorizes the CCO to grant or withhold prior approval, and so provides explicit and boundless authority to interpret vague language. This Court should hold the condition fails under the second prong of the vagueness analysis.

For the reasons discussed above, condition No. 17 is unconstitutionally vague under both the first and second prong of the analysis. Because the condition suffers from several defects, this Court should remand to strike the condition or amend to strike or modify the offending language. Boyd, 174 Wn.2d at 473.

3. THE CONDITIONS RESTRICTING HOGAN’S ACCESS TO THE INTERNET AND ELECTRONIC DEVICES ARE BOTH UNCONSTITUTIONALLY OVERBROAD.

The trial court also imposed Condition Nos. 14 and 15 restricting Hogan’s use of devices capable of accessing media and the internet. These conditions are overbroad.

The First Amendment prohibits the government from proscribing speech or expressive conduct. U.S. CONST., AMEND. I; State v. Halstein, 122 Wn.2d 109, 121, 857 P.2d 270 (1993). “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.” Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002). First Amendment principles also ensure “that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). In particular, the U.S. Supreme Court has recognized the “vast democratic forums of the Internet” in general, ... and social

media in particular” as “the most important spaces ... for the exchange of views.” Packingham, 137 S. Ct. at 1735 (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997)). In our modern age, these cyberspaces are equivalent to the street or park, traditionally recognized as “a quintessential forum for the exercise of First Amendment rights.” Id.

Where a sentencing condition interferes with a fundamental constitutional right, the condition “must be sensitively imposed” and “must be reasonably necessary to accomplish the essential needs of the State and public order.” State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A restriction on First Amendment rights “must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Bahl, 164 Wn.2d at 757. Courts consider whether a statutorily-based sentencing condition prohibits a real and substantial amount of constitutionally protected speech relative to its legitimate sweep. Riles, 135 Wn.2d at 346.

The United States Supreme Court recently addressed a sweeping internet restriction in Packingham, 137 S. Ct. 1730. At issue there was a North Carolina statute making it a felony for any registered sex offender to “access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create

or maintain personal Web pages.” *Id.*, 137 S. Ct. at 1733. Recognizing “the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that presages a sexual crime, like contacting a minor or using a website to gather information about a minor,” *id.* at 1737, the Supreme Court nonetheless warned that any prohibition “must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Id.* at 1736 (quoting McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 2534, 189 L. Ed. 2d 502 (2014)).

While Packingham’s sexual abuse of a 13-year-old girl was an extremely serious crime, North Carolina’s prohibition was vast in its breadth, clearly barring access to such sites as Facebook, LinkedIn, and Twitter, and arguably barring access “to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com.” *Id.* at 1736.

After describing North Carolina’s restriction as “unprecedented in the scope of First Amendment speech it burdens,” the Court reasoned:

By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. . . .

Id. at 1737. The Court continued:

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals – and in some instances especially convicted criminals – might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

Id.

Because the State could not meet its burden to show the sweeping prohibition was necessary or legitimate to serve its purpose of keeping sex offenders away from vulnerable victims, it was held invalid.³ Id. at 1737-1738.

Here, the trial court imposed the following conditions restricting access to electronic devices:

- “Do not possess any electronic devices that can access or record media images or videos, unless authorized by CCO and treatment provider. Your CCO has access to any device.” CP 76 (No. 14).

³ Recently, Packingham resulted in remand in two Washington cases to strike or narrow prohibitions aimed at internet use. See State v. Jabs, 4 Wn. App. 2d 1040, at *6, *12 (2018) (multiple counts of child rape; State concedes sentencing condition prohibiting access to social websites violates First Amendment), review denied, ___ Wn.2d ___, 435 P.3d 277 (2019); State v. Hammerquist, 3 Wn. App. 2d 1042, at 3*-4 (two counts of first degree child rape; remanded for reconsideration of bar on possessing or maintaining access to a computer unless authorized by CCO), review denied, 191 Wn.2d 1013, 426 P.3d 750 (2018). Under GR 14.1, Hogan does not cite these unpublished decisions as binding authority; he cites them for whatever persuasive value this Court deems appropriate.

- “Do not possess any electronic devices that can access the internet without a monitoring system. Your CCO has access to any device.” CP 76 (No. 15).

Although the government has a legitimate interest in protecting the public, these conditions are sweeping in scope and prohibit a large amount of constitutionally protected speech, including both expressive conduct and access to information. Under the standards articulated in Packingham and other cases discussed below, these conditions are overbroad for three interrelated reasons. First, Condition 15 is overbroad because it requires “a monitoring system” on any device capable of accessing the internet. Second, both conditions are overbroad because they apply to any device within Hogan’s “possession.” Third, both are overbroad because they grant the CCO access to any device capable of accessing the internet or media images. Because these conditions involve significant overlap, they are discussed together below.

Hogan accepts there will be some reasonable restrictions on his activities as part of community placement. To preserve the State’s legitimate interests, a court order can lawfully prohibit Hogan from “contacting a minor or using a website to gather information about a minor.” Packingham, 137 S. Ct. at 1737. Hogan can similarly be prohibited from accessing and viewing “sexually explicit material.”

Nguyen, 191 Wn.2d at 680 (citing RCW 9.68.130(2) (defining term to exclude “works of art or of anthropological significance”). Such restrictions have been approved as sufficiently specific and narrowly tailored. However, Conditions 14 and 15 imposed on Hogan restrict access to all materials and communications on the internet, not merely those involving minors or sexually explicit material. They are not narrowly tailored and cannot stand.

The State may argue Hogan is not faced with a complete ban on internet usage, or even on access to social media websites, such as the restriction at issue in Packingham. This argument is unpersuasive in the face of the expanding number of electronic devices capable of recording media and accessing the internet, and where such devices are increasingly integrated into daily life.

In an unpublished decision, Division One approved of a trial court’s order modifying a sentencing alternative condition “to order Miller to purchase ‘monitoring software’ and ‘take all of his Internet-capable devices to 5/03/16 appointment with CCO for installation.’” State v. Miller, ___ Wn. App. ___, 2019 WL 1902709 at *3 (Div. I.2019) (unpublished).⁴ The trial court’s obvious intent in imposing such a condition was to restrict Miller’s ability to access and view sexually

⁴ Hogan cites Miller as a non-binding unpublished case pursuant to GR 14.1.

explicit images and videos from the internet on his personal computer or cell phone. See id. (condition No. 4 referencing “cell phone”). However, as the U.S. Supreme Court has noted, “The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.” Packingham, 137 S. Ct. at 1736.

Even if, without conceding, the Miller Court’s requirement to install monitoring software on “all... Internet-capable devices” was reasonable in 2016, an identical restriction would be overbroad today. Id. This is because at present, the range of devices capable of accessing the internet has greatly expanded. Devices as varied as refrigerators, injectable glucose monitors, key-finders, breast pumps, home security systems, and automobiles are now capable of automatically recording data and independently accessing the internet. These devices regularly scan their domains to take video, images, and other measurements, and access the internet in order to transmit this data to users and others. These devices also often provide users with access to historical and real-time data for use in decision-making from the mundane—whether to purchase groceries—to the critical—whether to seek emergency medical treatment.

For example, new refrigerators contain built-in video recording devices and internet access, enabling users to remotely view the contents

of their fridge and determine if they are almost out of milk or the antibiotic prescription needs to be refilled. Wearable glucose monitors for diabetics track blood sugar levels, automatically configure this data into visual graphs, and transmit this data over the internet to medical providers. Many of these devices have proprietary software, making it impractical if not impossible to install internet-monitoring systems—at least without voiding warranties, rendering service inaccessible, or interfering with necessary medical approvals.

Thus, the conditions requiring prior CCO approval and access, and requiring monitoring systems essentially cut off Hogan's access to many such devices. This is especially problematic in the area of medical technologies that have advanced to provide personal monitoring devices that detect changes in heart rate, blood sugar, respiratory rate, blood pressure ... etc. for the purposes of monitoring conditions related to seizures, heart disease, diabetes, and for general fitness. But the conditions could also affect Hogan's ability to engage in simple tasks such as using a scanning device (capable of both recording images and transmitting them via the internet) to pay for grapes in the self-check-out line of a grocery store.

More relevant to the analysis here, the monitoring restriction is vastly overbroad, particularly when coupled with the requirement of

granting CCO access to all such devices. The government can have no legitimate interest in knowing whether Hogan's refrigerator contains beets or cabbages, whether the birthday cake he ate yesterday spiked his blood sugar, or whether his new medication is keeping his blood pressure down. Yet this is the granularity information a CCO can demand with access to all internet- and media-capable devices. Conditions 14 and 15 also grant the CCO the ability to arbitrarily interfere with medical decisions. Where a doctor prescribes such a device as medically necessary, a CCO could prevent Hogan from using it if it was incompatible with monitoring systems.

Given the widely expanded scope of devices that access media and the internet, this Court should find Conditions 14 and 15 burden substantially more First Amendment activities than necessary to further the State's legitimate interests.

D. CONCLUSION

The trial court appears to have unintentionally imposed a term of community custody on all five counts, rather than just count VI. Condition No. 17 on "places where children tend to congregate" is also unconstitutionally vague. Condition Nos. 14 and 15 restricting media and internet devices are both unconstitutionally overbroad.

For the reasons discussed above, Hogan respectfully requests that this Court remand to amend the term of community custody to apply only to Count VI, and to strike Condition Nos. 14, 15 and 17, or amend them to correct constitutional defects.

DATED this 12th day of July, 2019.

Respectfully submitted,

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