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Division II
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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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT</u>	1
1. WHETHER HOGAN USED THE INTERNET TO “SEEK MINORS” WAS NOT RESOLVED BY THE TRIAL COURT AND REMAINS A FACTUAL ISSUE IN DISPUTE.....	1
2. THE STATE’S SUBSTANTIVE LEGAL ARGUMENTS IN DEFENSE OF CONDITIONS 14, 15, AND 17 ARE UNPERSUASIVE.....	3
i. <u>Condition 17 is unconstitutionally vague because the requirement of prior approval admits to vagueness and invites arbitrary enforcement by permitting the CCO to define the condition.</u>	3
ii. <u>Conditions 14 and 15 are unconstitutionally overbroad because the restrictions on protected speech are not narrowly tailored.</u>	5
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES, AND OTHER AUTHORITIES</u>	
U.S. CONST., AMEND. I	5

A. ARGUMENT

In response to the State's response brief, Hogan herein incorporates by reference his arguments in his opening brief.

In addition, Hogan seeks to address one factual issue, and several substantive arguments of the State.

1. WHETHER HOGAN USED THE INTERNET TO "SEEK MINORS" WAS NOT RESOLVED BY THE TRIAL COURT AND REMAINS A FACTUAL ISSUE IN DISPUTE.

Hogan disputes an issue of fact alleged in the State's opening brief. The State asserts "Hogan used the internet to seek minors, communicated with detectives posing as a minor, and then set up a meeting with a fictional minor." Br. Resp. at 7 (emphasis added). This, however, is a disputed fact. Hogan pleaded guilty to five counts of communicating with a minor for immoral purposes. CP 22.

Hogan's statement in support of the charges asserted:

On multiple dates, to wit March 30, April 9, April 11, April 13, and April 19 of 2018 I sent electronic mail messages of a sexual nature to a correspondent that I had reason to believe was 13 years old, and I sent them from my home computer in Kelso in Cowlitz County, Washington.

CP 23.

Statements from the police support the State's assertion of the facts. CP 29 (Complaint and Affidavit for Search Warrant). In those documents, the State alleged Hogan initiated contact with the Facebook

account believing it to be used by an underaged girl and initiated sexually suggestive comments. CP 29.

However, Hogan did not agree to the veracity of police reports or the statement of probable cause. CP 24. When the trial court accepted his plea, it reviewed Hogan's statement in open court and, consistent with the plea paperwork, made no mention of reviewing the police reports or probable cause statements as a basis for the plea. RP 9.

Thus his plea itself admits to communicating with someone who he had reason to believe was a minor, not that he was generally or regularly using the internet to seek minors.

The trial court did not address the issue directly during the sentencing hearing, and made no express findings on the matter. RP 17. Rather, the trial court's only remarks on the appropriateness of the sentence were as follows:

The parties agreed to an exceptional sentence of 60 months on Count II, III, IV, and V, consecutive, Count VI of zero months with 36 months' community custody. Under the circumstances, that still seems appropriate, and I will impose that sentence."

RP 17. Thus, the matter of whether Hogan did or did not use the internet to "seek minors" remains one of factual dispute on appeal.

The State's briefing—to the extent it implies this was a settled finding of fact made by the trial court—is factually inaccurate.

2. THE STATE’S SUBSTANTIVE LEGAL ARGUMENTS IN DEFENSE OF CONDITIONS 14, 15, AND 17 ARE UNPERSUASIVE.

As raised in the appellant’s opening brief’s assignments of error, the trial court imposed the following conditions of community custody:

- Condition No. 14 restricting access to “any electronic devices that can access or record media or images,”
- Condition No. 15 restricting access to “any electronic devices that can access the internet without a monitoring system,” and
- 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; see also Br. App. at 1.

The State asserts several arguments in defense of these conditions, all of which are unpersuasive, and three of which Hogan addresses here.

- i. Condition 17 is unconstitutionally vague because the requirement of prior approval admits to vagueness and invites arbitrary enforcement by permitting the CCO to define the condition.

The State argues the requirement of “[p]rior approval is not an opportunity for arbitrary enforcement.” Br. Resp. at 5-6. Yet, in its

reasoning, the State underscored the point Hogan made in his opening brief. The State further reasons the condition “merely requires the defendant to contact his CCO, inform his CCO of his intended activity, and then for the CCO to determine whether the defendant is able to attend, likely after assessing the reasons and protections.” Br. Resp. at 5-6 (emphasis added).

As the State’s own argument illustrates, the condition gives the CCO wide discretion to define what conduct is proscribed. It also illustrates that the condition is unconstitutionally vague. If the terms of the prohibition were clear, Hogan would not need to seek input from his CCO in advance. He would, rather, have clear notice beforehand that the conduct either was or was not prohibited by the language of the condition. By requiring Hogan to seek CCO input, it either admits the condition is vague and Hogan cannot possibly know in advance what conduct is proscribed, or it allows the CCO to arbitrarily enforce the condition by enabling the CCO to define its boundaries, or, mostly likely, both.

For the reasons discussed above, and those addressed in Hogan’s opening brief, the State’s arguments that Condition 17 is constitutionally sound are not persuasive.

- ii. Conditions 14 and 15 are unconstitutionally overbroad because the restrictions on protected speech are not narrowly tailored.

The State argues Conditions 14 and 15 are reasonable because they “permit[] possession” of devices capable of accessing the internet, “so long as the device is equipped with a monitoring system, accessible by the CCO.” Br. Resp. at 9. The State further reasons these conditions “[i]n no way would interfere with Hogan’s ability to communicate freely, should he choose to do so.” Br. Resp. at 9. The State reveals its thinking further by stating, “Hogan is not prohibited from accessing the internet, he is merely required to do so when his use can be observed.” Br. Resp. at 10.

However, the State’s argument misses the point. While the State undeniably has some interest in restricting some online communications, it does not have an interest in all internet or electronic communications. As argued in his opening brief, Hogan still has many legitimate reasons to utilize the internet – to read the news, to search for a job, to navigate to a probation appointment, to communicate with his doctor ... etc. See Br. App. at 22-25. The State does not have a legitimate interest in monitoring all these communications – particularly those relevant to medical care. Also, as argued in the opening brief, the State’s argument completely ignores that the imposition of a monitoring device itself interferes with Hogan’s ability to communicate—many medical devices are not equipped

to install monitoring software, and were a CCO to insist on such installation, the condition most certainly could interfere with Hogan's ability to access prescribed medical care. See Br. App. 24.

For the reasons discussed above, and in Hogan's opening brief, the State's arguments in support of Conditions No. 14 and 15 are unpersuasive.

B. CONCLUSION

For the reasons discussed above and in the opening brief, 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 28th day of October, 2019.

Respectfully submitted,

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