

FILED  
Court of Appeals  
Division II  
State of Washington  
9/5/2019 12:12 PM

NO. 52616-6-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DONALD L. HOGAN,

Appellant.

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BRIEF OF RESPONDENT

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RYAN JURVAKAINEN  
Prosecuting Attorney

JASON LAURINE/WSBA 36871  
Deputy Prosecuting Attorney  
Representing Respondent

HALL OF JUSTICE  
312 SW FIRST  
KELSO, WA 98626  
(360) 577-3080

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## I. FACTS

Ronald Hogan pled guilty to five counts of felony communication with a minor for immoral purposes, for multiple conversations he held with a fictitious minor on April 9, 2018, April 11, 2018, April 13, 2018, and April 20, 2018. RP 3-4, 9. Each of these conversations were through electronic means. RP 3-4, 9.

Hogan's standard range on each count was 51-60 months. RP 5. The defendant agreed to an exceptional sentence that would run a single count consecutive to the other four, permitting the imposition of an additional 36 months of community custody. RP 6, 11, 14.

The trial court followed the agreed recommendation. RP 17. It also imposed several conditions of release, standard and crime related, including the following:

Condition 14: 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.

Condition 15: Do not possess any electronic devices that can access the internet without a monitoring system. Your CCO has access to any device.

Condition 17: 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.

## **II. ISSUES**

- A. Did the trial court's term of incarceration and community custody exceed the statutory maximum of five years for Counts II through V?**
- B. Was it error for the trial court to impose a crime-related condition prohibiting Hogan from frequenting places where minors congregate, when it contain an illustrative list of those places, and required prior DOC permission?**
- C. Was the condition requiring Hogan to have a monitoring system on any electronic device capable of accessing the internet an unconstitutional infringement on his First Amendment rights?**

## **III. SHORT ANSWER**

- A. Yes. However this was a scrivener's error and this Court should remand for the trial court to address.**
- B. No. The prohibition did not create an opportunity for arbitrary enforcement.**
- C. No. The caveat set in Condition 15 is not a blanket prohibition. However, The State concedes Condition 14 is not crime-related—the record does not reflect a use of digital devices used to record media images. Moreover, the purpose of that condition can be better accomplished through Condition 15.**

#### IV. ARGUMENT

Laws must provide ordinary people fair warning of prohibited conduct and have standards that are definite enough to protect against arbitrary enforcement. *State v. Bahl*, 164 Wash.2d 739, 752-53, 193 P.3d 678 (2008). A community custody condition is unconstitutionally vague if it fails to do either. *Bahl*, 164 Wash.2d at 753, 193 P.3d 678.

Where a condition explicitly requires CCO interpretation, the condition is more likely to be arbitrarily enforced and thus vague under the second prong. *State v. Sansone*, 127 Wash.App. 630, 639, 111 P.3d 1251 (2005).

**1. Conditions that include illustrative lists sufficiently inform a defendant of the areas he is unable to frequent without prior DOC approval.**

Hogan asserts Condition 17 offends his constitutional rights for several reasons. First, he claims the illustrative list of prohibited places is also vague. Second, he contends the terms “children” and “congregate” are vague. However, *State v. Johnson* clearly addressed this issue. 4 Wash.App.2d 352, 361, 421 P.3d 969 (2018). Third, he claims the term “frequent” is vague and impermissible. This issue was resolved by the Supreme Court in *State v. Bahl*. 164 Wash.2d at 754, 193 P.3d 678 (2008) (if a term is undefined, the court may consider the plain and ordinary

meaning as set forth in a standard dictionary). Finally, he argues, without providing relevant authority, that requiring prior permission creates an opportunity for arbitrary enforcement.

## **2. Illustrative lists are valid and appropriate.**

The fact the condition provides an illustrative list rather than an exhaustive list does not render it invalid. *Johnson*, 4 Wash.App.2d at 360, 421 P.3d 969, citing *United States v. Paul*, 274 F.3d 155, 165-66 (5<sup>th</sup> Cir.2001). 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. *Johnson*, 4Wash.App.2d at 361, 421 P.3d 969; *State v. Padilla*, 190 Wash.2d 672, 677, 416 P.3d 712 (2018) (quoting *State v. Sanchez Valencia*, 169 Wash.2d 782, 793, 239 P.3d 1059 (2010)).

In *Johnson*, the Court upheld a similar condition as Hogan's, finding the condition provided the defendant sufficient notice to allow compliance. 4 Wash.App.2d at 361. There the condition instructed the defendant to

“Avoid places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades.” *Id* at 360.

The only difference between the list of prohibited places in that case and the current case is the use of the word “avoid” in place of “do not loiter or frequent.”

Hogan relies on *State v. Irwin* to convince the court of the vague nature of his condition. The *Irwin* Court found the condition did not provide sufficient notice to understand what conducted was proscribed because it did not include an illustrative list of prohibited locations. 191 Wash.App. at 655. The offending condition proscribed the defendant from frequenting “areas where minor children are known to congregate, as defined by the supervising CCO.” *Id* at 649. Hogan argues the court found the word “congregate” to be problematic, but that argument ignores the overall offensiveness of the condition and the Court’s ruling. The *Irwin* condition was problematic because it did not include the clarification of an illustrative list of prohibited locations, and therefore did not provide sufficient notice to understand what was meant by the locations where children are known to congregate. *Id* at 655. Here, an illustrative list was provided, but more importantly, an outright ban was not proscribed.

**3. The terms in conditions may be defined by their dictionary definition.**

**a. The terms “children” and “congregate” are adequately certain.**

Hogan argues the *Johnson* court held the terms “children” and “congregate” were vague, and thus remand to replace these terms is appropriate. However, that is not what the Court ruled.

In *Johnson*, the Court was tasked to determine whether or not a condition that the defendant “avoid places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades” was impermissibly vague. *Johnson* 4 Wash.App.2d at 360, 421 P.3d 969. The defendant argued the terms utilized in the condition were confusing. The Court disagreed. It found the terms “children,” which refers to individuals under the age of 16, and “congregate,” which means “to collect together in a group, crowd, or assembly,” fairly instructed the defendant on the locations from which he was prohibited. 4 Wash.App.2d at 361, citing RCW 9A.44.073; Webster’s Third New International Dictionary 478 (1993).

Similarly, Hogan is fairly instructed on the types of locations from which he is prohibited. Ultimately, the use of those terms was to describe the types of places he could not attend without permission, not an opportunity for DOC interpretation.

Hogan refers the Court to *State v. Magana*, 197 Wash.App. 189, 389 P.3d 654 (2016) *abrogated in part on other grounds*, *Padilla*, 190 Wash.2d at 719, arguing his condition provides DOC boundless discretion. However,

the condition in *Magana* permitted arbitrary enforcement through the language “or other areas as defined by supervising CCO, treatment providers,” not through the terms “children” and “congregate.” 197 Wash.App. at 200, 389 P.3d 654. Hogan’s condition does not similarly empower DOC to define the areas Hogan may or may not frequent. Consequently, the comparison is inapposite.

**4. The word “frequent” sufficiently informs the defendant he is banned from the illustrative places.**

Hogan claims the use of the word “frequent” permits DOC interpretation. However, the use of that word in similar conditions was determined permissible because it did not describe the types of prohibited places, but a ban on movement. *Bahl*, 164 Wash.2d at 758. As is always the case, terms must be considered in the context in which they are used. *Id.* “Frequent” is a verb, meaning to “associate with, be in, or resort to often or habitually: visit often.” *Id.* citing Webster’s Third New International Dictionary 909 (2002). The same term used in Hogan’s prohibition was sufficiently clear, and not open to interpretation. *Id.* at 759.

**5. Prior approval is not an opportunity for arbitrary enforcement.**

Without permission from CCO does not permit arbitrary interpretation of the proscribed conduct. It 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. Consequently, “prior permission” does not create an opportunity for interpretation, or arbitrary enforcement. Bahl, 164 Wash.2d at 752-53.

**6. Condition 15 is a crime-related condition that permits internet access under specific and reasonable circumstances.**

As part of any sentence, a trial court may impose and enforce prohibitions and affirmative conditions. RCW 9.94A.505(9). A crime related prohibition prohibits conduct that directly relates to the circumstances of the crimes for which the offender has been convicted. RCW 9.94A.030(10). Directly related includes conditions that are reasonably related to the crime. *State v. Kinzle*, 181 Wash.App. 774, 785, 326 P.3d 870, *review denied*, 181 Wash.2d 1019, 337 P.3d 325 (2014).

Courts review crime related community custody conditions for abuse of discretion. *State v. Cordero*, 170 Wash.App. 351, 373, 284 P.3d 773 (2012). A sentencing court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wash.2d 22, 37, 846 P.2d 1365 (1993). Courts review the factual basis for crime-related conditions under a

substantial evidence standard. *State v. Motter*, 139 Wash.App. 797, 801, 162 P.3d 1190 (2007).

Courts strike crime-related conditions when there is no evidence in the record that the circumstances of the crime related to the community custody condition. *State v. Zimmer*, 146 Wash.App. 405, 413, 190 P.3d 121 (2008). However, courts uphold crime-related custody conditions when there is some basis for the connection. *Irwin*, 191 Wash.App. at 657, 364 P.3d 830.

The court in *Irwin* held a condition prohibiting the possession of computers, computer parts, or other devices was reasonably related to the crimes of child molestation for which the defendant was convicted, because he used these devices to record his crimes. 191 Wash.App. at 659.

Similarly, Hogan used the internet to seek minors, communicated with detectives posing as a minor, and then set up a meeting with the fictional minor. Internet access was crucial to the commission of the crimes for which he was convicted.

A regulation implicating First Amendment speech must be narrowly tailored to further the State's legitimate interests. *Padilla*, 190 Wash.2d at 679, 416 P.3d 712 citing *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). It must be sensitively imposed and reasonably necessary to accomplish essential needs of the state and public

order. *Bahl*, 164 Wash.2d at 757. However, an offender's constitutional rights during community custody are subject to SRA-authorized infringements, including crime related prohibitions. *State v. McKee*, 141 Wash.App. 22, 37, 167 P.3d 575 (2007) *review denied* 163 Wash.2d 1049 (2008).

Hogan argues the restriction on his use and possession of devices capable of accessing the internet are overbroad. In making this claim, he relies on the United States Supreme Court's decision in *Packingham v. North Carolina*, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017).

In *Packingham*, the Court ruled a North Carolina criminal statute prohibiting access to any internet site by any person previously convicted of a sex offense was too broad in scope because there were ways the State could be more narrowly tailored to accomplish the same goals. 137 S.Ct. at 1736-37, 198 L.Ed.2d 273.

The issue here is different than a statute that criminalizes internet by *any* sex offender. Here, the issue is a prohibition during his period of community custody. The trial court imposed two conditions:

Condition 14: 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.

Condition 15: Do not possess any electronic devices that can access the internet without a monitoring system. Your CCO has access to any device.

Condition 15 clearly does not prohibit the defendant from possessing electronic devices capable of accessing the internet. It permits the possession, so long as the device is equipped with a monitoring system, accessible by the CCO. In no way would this interfere with Hogan's ability to communicate freely, if he so chose to do so.

In *State v. Talbot*, an unreported case determined following the *Packingham* decision, this Court ruled the prohibition of the defendant's internet access without prior permission was both reasonably necessary to accomplish essential needs and sensitively imposed because it permitted access once DOC and the defendant's treatment provider assented, permitting him to become a lawful citizen. 1Wash.App.2d 1029 (2017). There the defendant was convicted of attempted second degree molestation for a series of events and electronic communications strikingly similar to the events for which Hogan pled guilty.

Similarly, Condition 15 is crime-related. The defendant pled guilty to multiple counts of felony communication with a minor for immoral purposes, all involved contact via the internet. The condition restricts internet access to only those devices that maintain the presence of a

monitoring system. Hogan is not prohibited from accessing the internet, he is merely required to do so when his use can be observed.

However, Hogan argues his conditions are akin to those imposed in the unreported cases, *State v. Jabs*, 4 Wash.App.2d 1040 (2018) (the trial court prohibited the defendant from joining or perusing any public social websites), and *State v. Hammerquist*, 3 Wash.App.2d 1042 (2018) (the conditions prohibiting possession of or access to a computer unless authorized by his CCO might limit the defendant's First Amendment Rights).

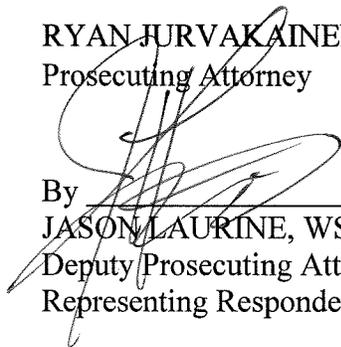
Had the trial court prohibited Hogan from joining or perusing any public social website, *Jabs* might be persuasive. However, the imposed condition did not. *Hammerquist* referred the condition back to the trial court in an abundance of caution, not because it found the conditions actually impact the defendant First Amendment rights. Consequently, Condition 15 should remain.

**IV. CONCLUSION**

This Court should follow its prior decisions, and hold that Condition 15 is both reasonably related to the crimes of conviction and is not a blanket prohibition on internet access. It should also remand to the trial court to address both the scrivener's error and the removal of condition 14.

Respectfully submitted this 5<sup>th</sup> day of September, 2019.

RYAN JURVAKAINEN  
Prosecuting Attorney

By   
JASON LAURINE, WSBA #36871  
Deputy Prosecuting Attorney  
Representing Respondent

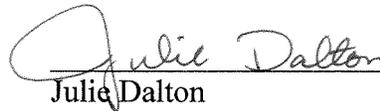
**CERTIFICATE OF SERVICE**

I, Julie Dalton, certify that opposing counsel was served electronically via the Division II portal:

E. Rania Rampersad  
Attorney at Law  
Nielsen Broman & Koch, PLLC  
1908 E. Madison St  
Seattle, WA 98122-2842  
[rampersadr@nwattorney.net](mailto:rampersadr@nwattorney.net)  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 5, 2019.

  
\_\_\_\_\_  
Julie Dalton

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**September 05, 2019 - 12:12 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Donald L. Hogan, Appellant  
**Superior Court Case Number:** 18-1-00604-7

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