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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DAVID DIORIO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-01566-9

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Christopher Gibson
1908 E Madison St
Seattle, Wa 98122
Email: gibsonc@nwattorney.net

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 left, 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 July 24, 2019, Port Orchard, WA *Elizabeth Allen*
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....2

III. ARGUMENT.....4

 A. THE STATE CHARGED TWO ALTERNATIVE METHODS BY WHICH COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES MAY BE ELEVATED TO A FELONY OFFENSE, ELECTED AND INSTRUCTED THE JURY ON THE ELECTRONIC COMMUNICATION METHOD, AND THE JURY FOUND THAT ELEMENT BEYOND A REASONABLE DOUBT.4

 B. THE CONDITION OF SENTENCE THAT ARGUABLY ALLOWS A CCO TO ORDER PLETHSYMOGRAPH TESTING FOR MONITORING PURPOSES SHOULD BE AMENDED TO MAKE CLEAR THAT SUCH TESTING MAY BE ORDERED FOR TREATMENT PURPOSES ONLY.6

IV. CONCLUSION.....7

TABLE OF AUTHORITIES

CASES

State v. Johnson,
184 Wn. App. 777, 340 P.3d 230 (2014)..... 6

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

State v. Smith,
74 Wn. App. 844, 875 P.2d 1249 (1994)..... 2

STATUTORY AUTHORITIES

RCW 9.61.260 4

RCW 9.61.260(5)..... 5

RCW 9.68A.090(2)..... 4

RCW 9.94A.525(17)..... 5

RCW 9.94A.589(1)(a) 5

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in sentencing Diorio for a felony communication of a minor for immoral purposes where there was no proof of a prior sex offense but where the state alleged and proved electronic communication between the defendant and the putative minor?

2. Whether the trial court erred by imposing a condition of sentence that allow either a community corrections officer or a treatment provider to order Diorio to submit to plethysmograph testing?
(CONCESSION IN PART)

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Anthony David Diorio was charged by information filed in Kitsap County Superior Court with attempted second degree child rape and felony communication with a minor for immoral purposes.¹ CP 1-3. Notably, the communication count alleged both statutory alternatives, which were denoted in the information as alternative (a) and alternative (b). CP 3.

The jury found Diorio guilty on both counts. CP 49.

Diorio received a standard range sentence on attempted child rape

¹ Hereinafter abbreviated to “communication.”

count of 80 months and nine months on the communication count.² CP 82. The ranges followed from an offender score of three. Id.

As conditions of sentence, the trial court, among other things, ordered that Diorio submit to a psychosexual evaluation and comply with treatment recommendations. CP 85. Another condition ordered Diorio to comply with polygraph and plethysmograph testing at the discretion of either his community corrections officer or his treatment provider. Id.

Diorio timely appealed his conviction and sentence. CP 93.

B. FACTS

The Missing and Exploited Children's Task Force (MECTF) of the Washington State Patrol is aimed at sexual exploitation of and internet crime against children. 4RP 610-11. The MECTF posted an ad in the casual encounters section of Craigslist. 4RP 620-21. This Craigslist section is used because it is designed "no strings attached sex." 4RP 625.

The ad posted in this case solicited sex with a "naughty boy." 4RP 645. The went on to indicate that a "young" person was looking for a "papa bear" to "hang with." Id. Diorio responded to this ad. 4RP 670-71.

² The Judgment and Sentence does not indicate whether or not the two counts were to be served concurrently or consecutively. See *State v. Smith*, 74 Wn. App. 844, 875 P.2d

Police began a conversation with him by electronic means. 4RP 672. Diorio indicated that he would like to “play” with the advertiser and asked for the location. 4RP 679. The police responded, telling Diorio that the person he thought he was talking to was 13 years old. 4RP 680.

Diorio expressed some concern, telling the putative boy that he should look for sex in his own age group. 4RP 682-83. But Diorio soon move forward asking what the boy wants to do and when. 4RP 683. Eventually, the putative boy says he wants to “fuck.” 4RP 684. Diorio responded “Okay.” Id. After another day or so of exchanges, police eventually ask him if he is coming and if he can bring condoms and lube. 4RP 692. Diorio drove to a 7-Eleven store for the rendezvous with the supposed boy. 4RP 692-694.

An arrest team was stationed around the 7-Eleven. 5RP 736. The arrest team blocked his car and took him into custody. 4RP 739.

1249 (1994) *review denied* 125 Wn.2d 1017 (presumed to be concurrent).

III. ARGUMENT

A. THE STATE CHARGED TWO ALTERNATIVE METHODS BY WHICH COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES MAY BE ELEVATED TO A FELONY OFFENSE, ELECTED AND INSTRUCTED THE JURY ON THE ELECTRONIC COMMUNICATION METHOD, AND THE JURY FOUND THAT ELEMENT BEYOND A REASONABLE DOUBT.

Diorio argues that the trial court erred by sentencing him to a felony level offense when he should have been sentenced to a gross misdemeanor offense. This claim is without merit because the state properly alleged and proved an alternative method of elevating the charge to a felony.

The state charged Diorio with a violation of RCW 9.68A.090(2). CP 3. Subsection (1) provides that a person who commits communication is guilty of a gross misdemeanor. But subsection (2) provides that

A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state **or** if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes, including the purchase or sale of commercial sex acts and sex trafficking, through the sending of an electronic

communication.

(emphasis added). Further, subsection 3 refers to RCW 9.61.260, the cyberstalking statute, for definition of the term “electronic communication.” RCW 9.61.260(5) provides that

“electronic communication” means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means. “Electronic communication” includes, but is not limited to, electronic mail, internet-based communications, pager service, and electronic text messaging.

This is the statutory scheme under which Diorio was charged and convicted.

The jury was so instructed. Instruction number 13, in relevant part, advised the jury that communication is committed “through the sending of an electronic communication.” CP 44. Instruction number 15, “to convict” of communication, includes as an element “(4) That the defendant sent the person an electronic communication for immoral purposes.” CP 46.

Diorio’s sentencing had nothing to do with his alleged military prior for possessing child pornography. Lacking proof of that conviction from the state, the trial court did not count the allegation in calculating Diorio’s offender score. CP 84. The three points that he did receive were the result of scoring “other current offense.” *See* RCW 9.94A.589(1)(a) (“the sentencing range for each current offense shall be determined by

using all other current and prior conviction. . .”); *see also* RCW 9.94A.525(17) (other sex offenses to be scored as three points).

Diorio was properly convicted of a felony offense and properly sentenced for that conviction. There was not error.

B. THE CONDITION OF SENTENCE THAT ARGUABLY ALLOWS A CCO TO ORDER PLETHSYMOGRAPH TESTING FOR MONITORING PURPOSES SHOULD BE AMENDED TO MAKE CLEAR THAT SUCH TESTING MAY BE ORDERED FOR TREATMENT PURPOSES ONLY.

Diorio next claims that the trial court erred in ordering that a community corrections officer may require him to take a plethysmograph test. This claim has merit insofar as the condition allows someone other than a treatment provider to require the testing in other than a treatment setting. The state concedes that the condition should be amended to make clear that only during treatment may this testing be required.

In *State v. Johnson*, 184 Wn. App. 777, 340 P.3d 230 (2014), this Division considered a challenge to a condition of sentence that read “submit to polygraph and/or plethysmograph testing upon direction of [his] Community Corrections Officer and/or therapist at [his] expense.”

Johnson, 184 Wn. App. at 779. The Court followed the command of the Washington Supreme Court that “[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.” 184 Wn. App. at 780, quoting *State v. Riles*, 135 Wn.2d 326, 352, 957 P.2d 655 (1998).

But the *Riles* Court did not consider the ability of a CCO to order the testing. *Johnson*, 184 Wn. App. at 781. This Court therefore held that “We affirm the condition at issue here but write to clarify that the CCO’s scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.” 184 Wn. App. at 781.

Although the present condition is phrased differently than the one in *Johnson*, it is to the same effect. The present matter should be remanded with order to amend the condition to make clear that a CCO may require the testing only if it is for the purposes of sexual deviancy treatment and not for the purpose of monitoring.

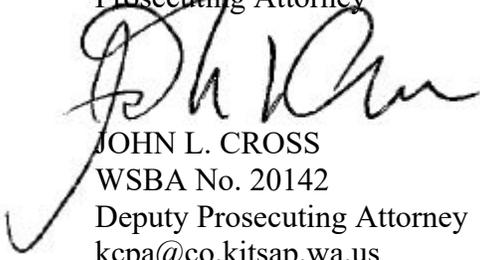
IV. CONCLUSION

For the foregoing reasons, Diorio's conviction should be affirmed but the matter should be remanded to make the plethysmograph condition clear.

DATED July 24, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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Sender Name: Elizabeth Allen - Email: erallen@co.kitsap.wa.us

Filing on Behalf of: John L. Cross - Email: jcross@co.kitsap.wa.us (Alternate Email:)

Address:
614 Division Street, MS-35
Port Orchard, WA, 98366
Phone: (360) 337-7171

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