

FILED
Court of Appeals
Division II
State of Washington
9/28/2020 1:42 PM

COA NO. 54086-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL FORD,

Appellant.

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

The Honorable Jerry Costello, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE CYBERSTALKING STATUTE IS OVERBROAD, RENDERING IT FACIALLY UNCONSTITUTIONAL.

The State concedes Ford's two convictions for cyberstalking must be vacated because RCW 9.61.260(1)(b) is unconstitutional. Brief of Respondent (BR) at 8-11. Ford has nothing more to add.

2. ONE OF THE REASONS RELIED ON BY THE COURT TO IMPOSE AN EXCEPTIONAL SENTENCE DOES NOT JUSTIFY SUCH A SENTENCE AS A MATTER OF LAW.

The State acknowledges that its concession of error on Ford's two cyberstalking convictions will remove the basis for the trial court's exceptional sentence and require resentencing within the standard range. BR at 11-12. In light of the State's acknowledgment that Ford must be resentenced within the standard range, there is no need for additional argument on the exceptional sentence issue.

3. THE INTERNET CONDITIONS VIOLATE FORD'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

The State emphasizes appellate courts review community custody conditions for abuse of discretion. BR at 13. "A trial court necessarily abuses its discretion if it imposes an unconstitutional community custody condition, and we review constitutional questions de novo." State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019). Ultimately, then,

whether the conditions here pass constitutional scrutiny is an issue of law reviewed de novo. "The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The State argues the trial court properly restricted Ford's internet usage because it was the medium Ford used to commit his crimes. BR at 12. In support, the State cites State v. Johnson, 12 Wn. App. 2d 201, 216-17, 460 P.3d 1091, review granted, 98493-0, 2020 WL 5413701 (2020). BR at 15-16. The condition at issue in Johnson at least permitted internet access with approval from the community corrections officer (CCO). Johnson, 12 Wn. App. 2d at 207, 213 ("Do not use or access the World Wide Web unless specifically authorized by CCO through approved filters."). The Court of Appeals in Johnson held the condition was constitutional because Mr. Johnson was still able to use the internet with authorization. Id. at 213.

Condition 25 in Ford's case, which prohibits "use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes" and "access any social media sites," does not contain any provision for CCO approval. CP 118. The State does not acknowledge this constitutionally significant difference. In In re Pers. Restraint of Sickels, __ Wn App.

2d___, 469 P.3d 322, 333, 335 (2020), the Court of Appeals held an identical condition was unconstitutionally overbroad: "No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches)." Sickels, 469 P.3d at 333-35. Condition 25 is unconstitutional.

That said, Ford maintains Johnson was wrongly decided in upholding the condition at issue in that case. As noted above, the Supreme Court granted review of the issue in Johnson.¹ This is not surprising, given that Washington law on internet conditions is in a state of confusion, with different courts reaching different results. While waiting for guidance from the Supreme Court in Johnson, Ford presses his present challenge.

In contrast to Johnson, Division Three in Sickels, held this condition was unconstitutionally overbroad: "No internet access or use, including email, without the prior approval of the supervising CCO."

¹ The Supreme Court website describes the issue on review as follows: "Whether in this criminal prosecution for attempted second degree rape of a child, attempted commercial sexual abuse of a minor, and communication with a minor for immoral purposes, a community custody condition that directs the defendant to 'not use or access the World Wide Web unless specifically authorized by [his community corrections officer] through approved filters' is unconstitutionally vague or overbroad." State v. Johnson, No. 98493-0 (available at http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/).

Sickels, 469 P.3d at 333, 335. "Delegating authority to Mr. Sickels's supervising CCO to approve internet access does not solve the problem; a sentencing court may not wholesaledly abdicate its judicial responsibility for setting the conditions of release." Id. at 335.

Under Sickels, the two internet conditions in Ford's case that condition access on CCO approval must be struck down. CP 103 (condition VII); CP 118 (Condition #24). "When a total ban on Internet access cannot be justified . . . a proviso for probation-officer approval does not cure the problem." United States v. LaCoste, 821 F.3d 1187, 1192 (9th Cir. 2016). "And for good reason: If a total ban on Internet use is improper but a more narrowly tailored restriction would be justified, the solution is to have the district court itself fashion the terms of that narrower restriction." Id. Similarly, in United States v. Holena, 906 F.3d 288, 293 (3d Cir. 2018), an internet restriction conditioned on probation officer approval was overbroad in part because it "gave the probation office no guidance on the sorts of internet use that it should approve."

Division One, meanwhile, held in State v. Forler, 9 Wn. App. 2d 1020, 2019 WL 2423345, at *12-13 (unpublished),² review denied, 194 Wn.2d 1011, 452 P.3d 1235 (2019) that "No internet use unless authorized

² GR 14.1(a) permits citation to unpublished authority for its non-binding, persuasive value.

by treatment provider and Community Custody Officer" was unconstitutionally overbroad.³ In that case, Mr. Forler was convicted of attempted rape of a child by soliciting an undercover officer through a Craigslist's Casual Encounters forum. Forler, 2019 WL 2423345, at *13. Division One reasoned "The blanket restriction of 'no internet use' goes beyond tailoring Forler's internet use to a crime-related prohibition." Id. Internet use is ubiquitous, allowing people to easily accomplish many daily tasks and functions that had nothing to do with Forler's conviction. Id.

As Forler and Sickels demonstrate, such conditions are overbroad even where the defendant used the internet as the medium to commit his crime. The conditions here prohibit a much broader swath of First Amendment activity than necessary. They restrict access to everything on the internet, including websites and uses unrelated to the crimes for which Ford was convicted.

The State references Ford's 2012 convictions in arguing the conditions here are reasonably necessary to protect public safety. BR at 14. It cites no authority for the proposition that, in determining the propriety of sentencing conditions for a current conviction, it is

³ The Division Two panel in Johnson recognized its decision conflicts with Forler. Johnson, 12 Wn. App. 2d at 216, n.6.

appropriate to consider prior convictions. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). As the State cites no authority for its argument, this Court should reject it for that reason alone. State v. Bluford, 195 Wn. App. 570, 590, 379 P.3d 163 (2016), aff'd in part, rev'd in part on other grounds, 188 Wn.2d 298, 393 P.3d 1219 (2017). Even under the more relaxed statutory standard, crime related prohibitions must directly relate "to the circumstances of the crime *for which the offender has been convicted*." RCW 9.94A.030(10) (emphasis added). Prior convictions have no role to play in the analysis. In any event, the conditions here remain overbroad regardless. The prior convictions do not change the analysis.

4. THE COURT ERRED IN ORDERING PSYCHOSEXUAL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The State claims Ford's counsel waived the challenge for appeal because there was no objection to psychosexual evaluation and treatment below. BR at 18-19. The State, though, does not acknowledge cases

holding that sentencing conditions imposed without statutory authority can be raised for the first time on appeal and the reviewing court has the duty to correct such error when discovered. State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, review denied, 122 Wn.2d 1024, 866 P.2d 39 (1993)), review denied, 143 Wn.2d 1003, 20 P.3d 944 (2001).

Cases involving a trial court's imposition of mental health evaluation and treatment show the court lacks statutory authority to impose such a condition without a finding that the person is mentally ill as defined by statute and that this mental illness most likely influenced the offense. State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080); State v. Jones, 118 Wn. App. 199, 202, 209, 76 P.3d 258 (2003) (same). This condition may be challenged for the first time on appeal because the court acts without authority when it does not follow the statutory prerequisites. Jones, 118 Wn. App. at 204, n.9, 209.

The court in Ford's case did not find Ford had a statutorily defined mental illness that contributed to the offense. Ford's challenge is therefore properly before this Court. "A defendant may challenge a sentence imposed in excess of statutory authority for the first time on appeal because 'a defendant cannot agree to punishment in excess of that which

the legislature has established.'" State v. Rice, 180 Wn. App. 308, 312-13, 320 P.3d 723 (2014) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002)).

Without acknowledging the long line of cases dealing with mental health conditions, the State asserts the trial court here had authority to order psychosexual treatment because it is related to Ford's conviction for the sex offense. BR at 19. The State is mistaken. The trial court errs where, as here, it orders mental health evaluation and treatment without following the statutory prerequisites. Jones, 118 Wn. App. at 209.

The State contends "psychosexual" treatment is not "mental health" treatment as understood by RCW 9.94A.080. BR at 20. The trial court, in imposing the condition, described the psychosexual evaluation as "essentially a mental health evaluation" and was confident "an expert qualified to conduct a psychosexual evaluation would be well positioned to understand generally what mental health problems Mr. Ford might have." 2RP 38-39. That sure sounds like the court ordered mental health evaluation and treatment. The State's contrary position exalts form over substance.

5. IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IS A CLERICAL ERROR.

The State asks that this Court remand the issue of legal financial obligations (LFOs) so that the trial court can "provide clarity" on its ruling, as "the contested collection costs and supervision fees were never addressed." BR at 22. That is not the proper remedy. The proper remedy is to strike the fees as clerical errors.

The court addressed LFOs at sentencing and could not have been clearer as to its intentions, finding Ford indigent and stating: "I'm going to order only what I must." 2RP 32-33. The judgment and sentence reflects that Ford's indigency made "payment of nonmandatory legal financial obligations inappropriate." CP 92. As the collection and supervision fees are nonmandatory and the record clearly shows the court's intention not to impose nonmandatory fees, it is obvious the inclusion of those fees in the judgment and sentence is a clerical error. Clerical errors involve mechanical mistakes that do not reflect the court's intent as expressed in the record. Marchel v. Bunger, 13 Wn. App. 81, 84, 533 P.2d 406 (1975); State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009).

State v. Dillon, 12 Wn. App. 2d 133, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020) is on point. In that case, neither the parties nor the judge addressed the supervision fee at sentencing. Dillon,

12 Wn. App. 2d at 152. The remedy was to strike the fee because the record showed the trial court intended to impose only mandatory LFOs. Id. at 137, 152. As in Dillon, the court in Ford's case stated it was waiving non-mandatory financial penalties. 2RP 32-33; Dillon, 12 Wn. App. 2d at 152. The requirement to pay supervision and collections fees are boilerplate entries, like the supervision fee in Dillon. CP 93, 103, 117; Dillon, 12 Wn. App. 2d at 152. The record thus shows the trial court did not intend to impose the discretionary supervision and collection fees.

The remedy is not to remand for the trial court to "clarify" its intent. There is nothing to clarify because the court's intent is clear from the record. "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018). The remedy, then, is remand to strike the unintended fees. Dillon, 12 Wn. App. 2d at 137, 152.

B. CONCLUSION

For the reasons stated above and in the opening brief, Ford requests (1) reversal of the two cyberstalking convictions; (2) reversal of the exceptional sentence; (3) removal or modification of the challenged community custody conditions; and (4) removal of the challenged LFOs.

DATED this 28th day of September 2020 .

Respectfully Submitted,


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September 28, 2020 - 1:42 PM

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