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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

JAMES FRIEDRICH, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court's sentence exceeds the statutory 120-month maximum.
2. The trial court imposed improperly vague community custody conditions prohibiting Mr. Friedrich from the following:
 - a. Using or possessing pornographic material without CCO and/or Therapist approval
 - b. Frequenting places where minors congregate including but not limited to parks, pools, playgrounds, schools, shopping malls and video arcades without CCO and/or Therapist approval
 - c. Engaging in a romantic/sexual relationship without prior approval from CCO and Therapist.

II. ISSUES PRESENTED

1. Does the imposition of an 89-month standard range sentence combined with 36 months of community custody, totaling 125 months, exceed the statutory maximum sentence?
2. Are three of the community custody conditions imposed by the court improperly vague?

III. STATEMENT OF THE CASE

The State charged the defendant with four counts of first degree possession of depictions of minors engaged in sexually explicit conduct on

August 10, 2017. On December 13, 2017, the defendant pleaded guilty to two counts as charged, in exchange for the dismissal of counts three and four of the information and the ability to withdraw the plea if federal charges were filed. CP 3-15. The court found support for each conviction and that the defendant entered the plea knowingly, intelligently, and voluntarily, and accepted the plea. RP 12/13/17 9-10.¹

The defendant's counsel later filed a motion to withdraw the plea, questioning the defendant's competency due to a letter sent by the defendant asking the court for a reduced sentence, contrary to the plea agreement previously entered. RP1 7, 19-20; CP 18-24, 59-63. After a lengthy competency hearing, the court denied the motion to withdraw the plea. RP1 7-247; RP2 254-362; RP3 501-18; CP 146.

On January 10, 2019, the court sentenced defendant to 89 months confinement plus 36-months community custody on both counts to run concurrently, subject to conditions outlined in Appendix H attached to the judgment and sentence. CP 147-164. Defendant timely filed a notice of appeal on January 15, 2019. CP 165.

¹ The same reference to the verbatim report of proceedings used in appellant's brief will be used herein.

IV. ARGUMENT

A. A TRIAL COURT CANNOT IMPOSE A SENTENCE THAT IS GREATER THAN THE STATUTORY MAXIMUM SENTENCE.

The trial court may not impose a sentence of confinement and community custody that, when combined, exceeds the statutory maximum for the offense. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). Remand for sentencing that complies with RCW 9.94A.701(9) is required when a total sentence of confinement and community exceed the statutory maximum allowed by law. *Id.* at 473.

Possession of depictions of minors engaged in sexually explicit conduct in the first degree is a class B felony. RCW 9.68A.070(1)(b). The statutory maximum term of imprisonment cannot exceed 120 months. RCW 9A.20.021(1)(b). Here, the trial court imposed a standard range sentence of 89-months, plus an additional 36 months of community custody pursuant to RCW 9.94A.701(1), for a total of 125 months. CP 152-53. The sentence exceeds the statutory maximum by five months.

RCW 9.94A.701(9) states: “The 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.” (Emphasis added.)

This matter must be remanded to comply with RCW 9.94A.701(9), correcting the total term of community custody to 31 months. Because reducing the length of community custody will not require the judge to exercise discretion as to any of the terms or conditions of that custody, the presence of the defendant is not necessary at the hearing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (defendant's presence not required for ministerial correction).

B. THIS COURT SHOULD REMAND TO CLARIFY VAGUE COMMUNITY CUSTODY CONDITIONS.

1. Standard of review.

The court reviews community custody conditions for an abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). The abuse of discretion standard applies whether this Court is reviewing a crime-related community custody condition or reviewing a community custody condition for vagueness. *See id.* at 652, 656; *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition is always an abuse of discretion. *Irwin*, 191 Wn. App. at 652. However, where a defendant fails to object to a condition at sentencing, that objection may be waived. RAP 2.5; *State v. Peters*, No. 31755-2-III, 2019 WL 4419800 (Sept. 17, 2019) at *1. In order for such conditions to be reviewable absent an objection below, the error must be (1) a manifest constitutional error or a sentencing error that is

“illegal or erroneous” as a matter of law and (2) must be ripe. *Peters*, 2019 WL 4419800 at *2.

2. Community custody condition 12 is unconstitutionally vague, and remand is necessary for clarification.

Defendant argues that the condition that he not use or possess pornographic materials is unconstitutionally vague. The phrase “pornographic material” is not defined; the State concedes this is unconstitutionally vague. This condition, however, is reasonably crime related. It should not be stricken from defendant’s judgment and sentence; but remanded for clarification. *See Irwin*, 191 Wn. App. at 657.

The term “pornographic materials” is unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 756, 193 P.3d 678 (2008). In contrast, the term “sexually explicit material” is not vague. *Peters*, 2019 WL 4419800, at *8. Since the term “sexually explicit material” is not vague, it is not vague in a ban on possessing or using such material. *See also*, RCW 9.68.130(2) (defining “sexually explicit material”).

RCW 9.68.130(2) defines “sexually explicit material” as:

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of

anthropological significance shall not be deemed to be within the foregoing definition.

See also, Bahl, 164 Wn.2d at 758-60.

Therefore, the State requests this matter be remanded with directions that the trial court strike “pornographic material” from condition 12 and replace it with the phrase “sexually explicit material as defined by RCW 9.68.130(2).” *See State v. Hai Minh Nguyen*, 191 Wn.2d 671, 679-81, 425 P.3d 847 (2018). Such a condition would be constitutional and sufficiently crime-related.

3. Community custody condition 14 prohibiting the defendant from frequenting “places where minors congregate” is not vague pursuant to *State v. Wallmuller*. However, this Court should remand to clarify the term “minor” pursuant to *Peters*.

Although there was no objection in the trial court, defendant sought to preserve the issue in his opening brief whether the community custody condition prohibiting him from “frequent[ing] places where minors congregate, including but not limited to parks, pools, playgrounds, schools, shopping malls and video arcades without CCO and/or Therapist approval” was unconstitutionally vague, pending the outcome of our state Supreme Court’s decision in *State v. Wallmuller*, No. 96313-4.

Wallmuller has been decided. In its September 26, 2019, decision, the Supreme Court held that the challenged condition that the defendant “not loiter nor frequent places where children congregate such as parks,

video arcades, campgrounds, and shopping malls,” “puts an ordinary person on notice that they must avoid places where one can expect to encounter children, and it does not invite arbitrary enforcement,” satisfying due process. *State v. Wallmuller*, No., 96313-4, 2019 WL 4682099 (Sept. 26, 2019) at *1, 5.

However, on September 17, 2019, this Court issued its opinion in *Peters*. It reaffirmed its decision in *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969, *review denied*, 192 Wn.2d 1003 (2019), which rejected a vagueness challenge to a similar condition, but remanded to clarify the language to read “minors under 18,” reasoning that “the statutory definition might not be readily apparent to someone outside the criminal justice system.” *Peters*, 2019 WL 4419800, at *6. There is no manifest constitutional error from this language.

Although this issue has not been raised or briefed by the defendant, the State requests this matter be remanded with directions that the trial court add “under 18” after the word “minors” to community custody condition 14.

4. The word “romantic” should be replaced with “dating” in community custody condition 17.

The defendant claims that the court erred at sentencing when it ordered him: “[D]o not engage in a romantic/sexual relationship without CCO and/or Therapist approval.” CP 163. It appears that defendant takes

issue only with vague meaning of the language “engage in a romantic relationship,” apparently conceding that the court may order he obtain prior approval to engage in a “sexual relationship.” Br. at 14-16.

In *Hai Minh Nguyen*, our Supreme Court discussed the vagueness doctrine with respect to the term “significant romantic relationship,” holding that a community custody condition containing the term “significant romantic relationship” was unconstitutionally vague because the terms “significant” and “romantic” are each “highly subjective qualifiers.” 191 Wn.2d at 682-83. Because the Supreme Court has indicated that the term “romantic” is unconstitutionally vague in this context, the State concedes that it must be stricken. However, in *Hai Minh Nguyen*, the Supreme Court held that the term, “dating relationship” is not unconstitutionally vague. *Id.* at 683. In *Peters*, this Court ordered the term “romantic relationship” to be replaced with the term “dating relationship.” 2019 WL 4419800, at *6.

The remaining language contained within the same community custody provision, which requires defendant not to engage in a “sexual relationship” without prior approval is not unconstitutionally vague.²

² The meaning of a slash (/) in writing commonly signifies alternatives. *See, e.g.*, Dictionary.com, “How do you use this slippery piece of punctuation: the slash?” available at <https://www.dictionary.com/e/slash/> (last accessed 10/9/19); *see also*, “The Slash or Virgule” available at

“Sexual” is defined as “having sex” or “involving sex.” Webster’s Third New Int’l Dictionary 2082 (2002). When “sexual,” is used in conjunction with the term “relationship,” it is more analogous to another provision at issue in *Hai Minh Nguyen*, the term “dating relationships.” The Supreme Court did not find that term unconstitutionally vague. A “sexual relationship” has a common definition and an easily ascertainable time period – the persons are engaged in sex.

For that reason, this Court should grant the defendant relief by directing the lower court to replace the word “romantic” with the word “dating.”

V. CONCLUSION

This case should be remanded for the trial court to:

1. Reduce the community custody term to 31-months pursuant to RCW 9.94A.701(9) so the total combined sentence does not exceed the statutory maximum of 120 months;
2. Clarify community custody condition 12 by changing “pornographic materials” to “sexually explicit material as defined by RCW 9.68.130(2)”;
3. Clarify community custody condition 14 to read “minors under 18”;

<http://guidetogrammar.org/grammar/marks/slash.htm> (last accessed 10/9/19) (“The slash can be translated as *or* and should not be used where the word *or* could not be used in its place”). Thus, the use of the slash in the term “romantic/sexual relationship” should be understood to mean “romantic or sexual relationship.”

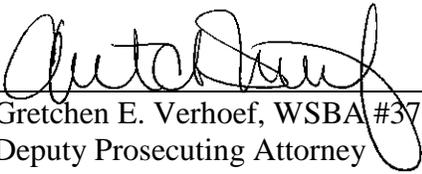
4. Replace “romantic” with “dating” in community custody condition 17.

This may be done without a resentencing. *See Ramos*, 171 Wn.2d at

48.

Dated this 14 day of October, 2019.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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JAMES FRIEDRICH,

Appellant.

NO. 36562-0-III

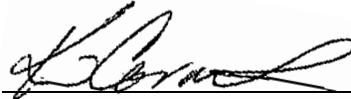
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 14, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lisa Tabbut
ltabbutlaw@gmail.com

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(Date)

Spokane, WA
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SPOKANE COUNTY PROSECUTOR

October 14, 2019 - 10:02 AM

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