



No. 29065-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TIMOTHY C. UNDERWOOD,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant



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A. ASSIGNMENT OF ERROR

The trial court erred in imposing a sentencing condition prohibiting the possession of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer.”

Issue Pertaining to Assignment of Error

Is the sentencing condition prohibiting the possession of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer,” unconstitutionally vague?

B. STATEMENT OF THE CASE

Timothy Underwood entered into a plea bargain whereby he pled guilty to two counts of second degree child molestation. CP 73. The trial court imposed a sentencing condition prohibiting the possession of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer.” CP 69.

This appeal followed. CP 90-91.

C. ARGUMENT

The sentencing condition prohibiting the possession of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer” is unconstitutionally vague.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute is unconstitutionally vague if it "(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Id. (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). If either of these requirements is not satisfied, the ordinance is unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

When a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise

of sensitive First Amendment freedoms. Id. (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). For this reason, courts have held that a stricter standard of definiteness applies if material protected by the First Amendment falls within the prohibition. Id.

"[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Accordingly vagueness challenges to conditions of community custody may be raised for the first time on appeal. Bahl, 164 Wn.2d at 745, 193 P.3d 678; State v. Jones, 118 Wn. App. 199, 204 n. 9, 207-08, 76 P.3d 258 (2003).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. Bahl, 164 Wn.2d at 753, 193 P.3d 678. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. Id.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52, 193 P.3d 678. The challenge is

also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752, 193 P.3d 678.

In Bahl, the Washington Supreme Court concluded that the restriction on accessing or possessing pornographic materials is unconstitutionally vague. Bahl, 164 Wn.2d at 758, 193 P.3d 678. The Court noted that many courts have held that sentencing conditions that prohibit access to or possession of pornography are unconstitutionally vague. Bahl, 164 Wn.2d at 754, 193 P.3d 678 (e.g., United States v. Antelope, 395 F.3d 1128, 1141-42 (9th Cir.2005); Taylor v. State, 821 So.2d 404 (Fla.Dist.Ct.App.2002); Foster v. State, 813 N.E.2d 1236, 1238-39 (Ind.Ct.App.2004); United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.2002)); see also State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005). They have noted that the term "pornography," unlike obscenity, has never been given a precise legal definition, at least insofar as adult pornography is concerned. Bahl, 164 Wn.2d at 754, 193 P.3d 678 (citing United States v. Loy, 237 F.3d 251, 263 (3d Cir.2001) ("the term 'pornography,' unmoored from any particular statute, has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code"). In Loy, the Third

Circuit said, "with regard to 'pornography' rather than 'obscenity,' we do not 'know it when we see it.' " Loy, 237 F.3d at 264.

Here, the trial court imposed a sentencing condition prohibiting the possession of pornographic materials. The fact that the trial court described these materials as “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer,” does not solve the vagueness problem.

In Fitzgerald v. State, 805 N.E.2d 857, 866-67 (Ind.App.2004) (cited in Bahl, 164 Wn.2d at 755, 193 P.3d 678) the Court held that a prohibition on possessing or viewing " 'pornographic or sexually explicit materials,' " including, but not limited to listed items such as videos, compact discs and sexual devices, " 'or any other materials related to illegal or deviant interests or behaviors' " was constitutionally vague. The prohibition in the present case of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer,” is likewise constitutionally vague.

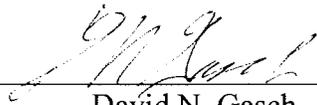
As with the term “pornography,” “any materials—printed or visual”—could include any nude depiction, whether a picture from

Playboy Magazine or a photograph of Michelangelo's sculpture of David. See Bahl, 164 Wn.2d at 756, 193 P.3d 678. Moreover, who is to decide what constitutes “adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer?” In this case the person making that determination would be Mr. Underwood’s community corrections officer. The fact that a condition provides that a community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face the condition does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758, 193 P.3d 678. Therefore, the condition herein is constitutionally vague.

D. CONCLUSION

For the reasons stated, the sentencing condition prohibiting the possession of “any materials—printed or visual—depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer” should be stricken.

Respectfully submitted November 9, 2010.



David N. Gasch
Attorney for Appellant
WSBA #18270