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Court of Appeals  
Division III  
State of Washington

No. 33838-0-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEVEN RUIZ-SIBAJA,

Defendant/Appellant.

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Appellant's Brief  
(Amended)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking the SSOSA sentence.
2. The trial court erred in using possession of pornography as a basis for revocation of the SSOSA sentence.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is the term "pornography" unconstitutionally vague in the context of a condition of community placement?
2. Did the sex treatment counselor have the authority to define what constitutes pornography?

C. STATEMENT OF THE CASE

Steven Ruiz-Sibaja pled guilty to one count of 1st degree rape of a child in June 2012. (CP 4-12) He was sentenced under the special sex offender sentencing alternative (SSOSA) to a sentence of 93 months with all except 12 months suspended. (CP 13-27, 75) The Court imposed community custody conditions that included not consuming alcohol or possessing or perusing any pornography. (CP 26)

On September 11, 2015, The Court revoked the SSOSA sentenced and imposed the balance of the suspended sentence. CP 75-76 The basis for the SSOSA revocation was consuming alcohol on two occasions in

December 2014, and possessing and viewing pornographic images he received on his cell phone. Id.

The sex treatment counselor testified Mr. Ruiz-Sibaja passed all his UA tests and did not solicit the nude photographs of a 21-year-old woman who was interested in him sexually. Mr. Ruiz-Sibaja was 15 years old at that time and not interested in any sexual relations with the woman who sent the nude photographs of herself to him. RP 21-23, 48, 99.

The counselor said “pornography” was defined by her. RP 20.

Sheila Perkins, Mr. Ruiz-Sibaja’s DOC supervisor for approximately five months, testified the alcohol consumption by itself would not necessarily be a basis to recommend revocation of SSOSA, although every case is different. RP 87.

This appeal followed. CP 77-80.

#### D. ARGUMENT

1. Since the term "pornography" is unconstitutionally vague, it cannot be a basis for revocation of the SSOSA sentence.

The issue whether the community custody condition prohibiting an offender from possessing pornography is unconstitutionally vague, was addressed in State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005). Relying on the reasoning of two federal cases, United States v. Guagliardo,

278 F.3d 868 (9th Cir.2002) and United States v. Loy, 237 F.3d 251 (3rd Cir.2001), the Sansone court found the term "pornography" to be unconstitutionally vague in the context of a condition of community placement. 127 Wn. App. at 639-40.

The due process vagueness doctrine "serves two important purposes: first, to provide citizens with fair warning of what conduct they must avoid; and second, to protect them from arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). Under the due process clause, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). However, a statute or condition is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt. Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). In addition, "the constitution does not require 'impossible standards of specificity' or 'mathematical certainty' because some degree of vagueness is inherent in

the use of our language." State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

The term "pornography" is unconstitutionally vague. Sansone, 127 Wn. App. at 639. The term has not been defined with sufficient definiteness such that ordinary people can understand what it encompasses. Id. The Sansone court noted that this was supported by the fact that the community placement condition includes a requirement that "pornography" be defined by the probation officer, a requirement that would be unnecessary if "pornography" was inherently definite. Id.

The same is true in the present case. Based on the Court's general prohibition against possessing or perusing any pornography, the sex treatment counselor decided "pornography" would be defined by her and included nude photographs of a 21-year-old woman. This condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Sansone, 127 Wn. App. at 639.

The reasoning of the federal courts in Loy and Guagliardo is also persuasive. In Loy, the defendant was convicted of receiving and possessing child pornography. Loy, 237 F.3d at 253. He challenged the condition of his supervised release that prohibited him from possessing all forms of pornography, including legal adult pornography. Loy, 237 F.3d

at 253. The court noted that the term "pornography" had never been given a precise legal definition. Loy, 237 F.3d at 263. Finding that the defendant could "hardly be expected to be able to discern, in advance, which materials are prohibited," the court held that the prohibition ran "afoul of the due process values that the vagueness doctrine is meant to protect." Loy, 237 F.3d at 264, 265.

In Guagliardo, the defendant was also convicted of possession of child pornography. Guagliardo, 278 F.3d at 870. The defendant challenged a condition of his supervised release that he not possess any pornography, including legal adult pornography. Guagliardo, 278 F.3d at 872. The court noted that a probationer has a due process right to conditions sufficiently clear to inform of what conduct will return him to prison. Guagliardo, 278 F.3d at 872. The court also noted that unlike the term "obscenity, which has a legal definition, the term "pornography" is completely subjective. Guagliardo, 278 F.3d at 872. The court concluded by holding that "[r]easonable minds can differ greatly about what is encompassed by 'pornography.'" Given this inherent vagueness, Guagliardo cannot determine how broadly his condition will extend.... We remand for the district court to impose a condition with greater specificity." Guagliardo, 278 F.3d at 872.

The Guagliardo court also addressed the danger of allowing the probation officer to interpret what material is pornographic:

The government asserts that any vagueness is cured by the probation officer's authority to interpret the restriction. This delegation, however, creates "a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating." A probation officer could well interpret the term more strictly than intended by the court or understood by Guagliardo.

Guagliardo, 278 F.3d at 872 (internal citations omitted).

Thus, for the reasons noted in the above-cited cases, the community placement condition to not possess or use pornography is unconstitutionally vague. Therefore, any alleged violation of that condition must fail and it cannot be a basis for revocation of the SSOSA sentence.

2. The sex treatment counselor had no authority to define what constitutes pornography.

Sentencing courts have the power to delegate some aspects of community placement to the DOC. While it is the function of the judiciary to determine guilt and impose sentences, "the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according

to the manner prescribed by the Legislature." State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937).

However, sentencing courts may not delegate excessively. A sentencing court "may not wholesaledly 'abdicate [ ] its judicial responsibility' for setting the conditions of release ." Sansone, 127 Wn. App. at 641-42; Loy, 237 F.3d at 266, *quoting* United States v. Mohammad, 53 F.3d 1426, 1438 (7th Cir.1995). In Sansone, the Court held any delegation to the correction officer to define pornography was improper because the definition of pornography was not an administrative detail that could be properly delegated to the corrections officer. Sansone, 127 Wn. App. at 642-43.

The Sansone court noted that a delegation would not necessarily be improper if an offender was in treatment and the sentencing court had delegated to the therapist to decide what types of materials he or she could have. Sansone, 127 Wn. App. at 643. However, no such delegation or any other delegation was given to the therapist in the present case.

Since there was no delegation of authority given by the sentencing court for the sex-treatment counselor to define pornography to include nude photographs of a 21-year-old woman, any alleged violations for

possessing pornography must fail and it cannot be a basis for revocation of the SSOSA sentence.

4. Appeal costs should not be imposed.

Mr. Ruiz-Sibaja was sentenced to the balance of 93 months following his SSOSA revocation. CP 76. The trial court found him indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 81-84. If Mr. Ruiz-Sibaja does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. See General Court Order of Court of Appeals, Division III (filed June 10, 2016); see also State v. Sinclair, \_\_\_ P.3d \_\_\_, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs). Appellate counsel anticipates filing a report as to Mr. Ruiz-Sibaja's continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief, as required by the General Court Order.

RCW 10.73.160(1) states the "court of appeals ... *may* require an adult ... to pay appellate costs." (Emphasis added) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d

757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case" analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Mr. Ruiz-Sibaja's ability to pay must be determined before appellate costs are imposed.

E. CONCLUSION

For the reasons stated, the trial court's decision revoking the defendant's SSOSA status should be reversed and the case remanded to determine if the remaining basis of consuming alcohol on two occasions is sufficient to justify revocation of the SSOSA sentence. If Mr. Ruiz-Sibaja is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs if the State requests them.

Respectfully submitted July 7, 2016,

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s/David N. Gasch  
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on July 7, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the amended brief of appellant:

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