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Court of Appeals  
Division III  
State of Washington

NO. 34713-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

GIL VELAZQUEZ, JR.,

Appellant.

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

The Honorable David G. Estudillo, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Several of appellant's conditions of sentence are unauthorized and/or unconstitutional.

Issues Pertaining to Assignment of Error

1. Is the condition of appellant's sentence prohibiting him from purchasing, possessing, or reviewing pornography unlawful where it is not "crime related" and unconstitutionally vague?

2. Is the condition of appellant's sentence prohibiting him from frequenting places where children congregate, including parks, playgrounds, and schools unconstitutionally vague?

3. Is the condition of appellant's sentence prohibiting him from access to the internet, email, and social media unlawful where it is not "crime related"?

B. STATEMENT OF THE CASE

The Grant County Prosecutor's Office charged Gil Velazquez, Jr. with (count 1) Child Molestation in the Second Degree, (count 2) Attempted Child Molestation in the Second Degree, and (count 3) Assault in the Fourth Degree with Sexual Motivation. CP 21-23.

Evidence at trial revealed that on February 23, 2016, thirteen-year-old M.M., her mother, and her younger sister were shopping at

an Ephrata Walmart. RP 111, 134. While the three were in the deodorant aisle, M.M. felt Velazquez brush against her bottom as he walked by. RP 135. She was surprised by the contact because, although it was "pretty tight quarters," there seemed to be sufficient space for Velazquez to pass without contact, but she did not otherwise think anything of it. RP 136. M.M., her mother, and her sister continued their shopping and left for the toy aisle. RP 136, 166. M.M. saw Velazquez again in that area, but there was no contact at that location. RP 136, 166.

M.M. told her mother she needed some hair ties. She and her little sister then walked to the hair accessories aisle. When they arrived, Velazquez was one of several people already in that aisle. RP 136-137, 167-168. According to M.M., after the other people in the aisle left, Velazquez approached her and seemed to be standing right behind her. RP 137. He was pacing back and forth behind her, and she became concerned that he was following her. RP 137. According to M.M., as Velazquez reached for an item on the shelf, he placed his hand on her waist and pushed his pelvic region against her bottom. RP 138, 140, 172-173. M.M. immediately pulled away and looked at him. RP 139-140. In response, Velazquez apologized. RP 140.

M.M. and her sister walked back to their mother, where M.M. reported that someone had tried to grab her and she wanted to leave. RP 140, 174. An assistant manager was summoned, police called and, with the assistance of store security, Velazquez was located in the store. RP 205-208, 260-261. Velazquez was cooperative and spoke to officers. RP 266-267. When asked about his contact with M.M., he explained that M.M. had bumped into him when he reached for an item on the shelf. RP 264-265.

Security video revealed the contacts with M.M. and interactions between Velazquez and other female Walmart shoppers. Exhibits 6-7. Ephrata police posted an online inquiry asking anyone with information relevant to events that day to identify themselves. RP 182-183, 274-275. After reading the post, Connie Sisco contacted police. RP 274.

At trial, Sisco testified she was shopping at the Ephrata Walmart on February 23, 2016, looking at a bottle of shampoo, when Velazquez – squeezing past a cart – said “excuse me” and slid his hand across her right butt check. RP 182-184, 190, 195. Sisco was shocked by the contact but wondered if it had simply been an accident and did not look up or confront him. RP 185, 190, 195-196. By the time she did look up, she saw Velazquez walking away. RP

196. She subsequently saw Velazquez a few more times, in different aisles, as he walked by. RP 196, 199-200. This made her nervous, so she moved to a different part of the store, and Velazquez did not follow. RP 191. Sisco testified that, once she read the post indicating police were looking for shoppers from February 23, she decided the contact had probably not been accidental. RP 198.

Store videos of Velazquez, moving throughout the Walmart and interacting with customers, were played for jurors. RP 222, 233-255; exhibits 6-7. Jurors were instructed that evidence on the videos of Velazquez's contact with other women in the store (other than M.M. and Sisco) could only be used "to prove motive, opportunity, intent, preparation, plan, knowledge, identity or lack of mistake or accident." CP 33.

During closing arguments, the parties agreed the primary issue was whether there had been "sexual contact." RP 353, 377. Defense counsel argued that Velazquez's contact with M.M., and with Sisco, was accidental and not done for purposes of sexual gratification. RP 376-401.

Jurors convicted Velazquez on count 1 (Child Molestation in the Second Degree involving M.M.) and count 3 (Assault in the Fourth Degree with Sexual Motivation involving Sisco). CP 50, 52-

53. The Honorable David Estudillo imposed a standard range 48-month sentence for the molestation and a consecutive 364-day sentence for the misdemeanor assault. CP 69, 75.

As part of the felony sentence, Judge Estudillo also imposed 36 months of community custody, CP 71-72, and several "crime related prohibitions," including the following:

- "Do not purchase, possess or review any pornographic material."
- "Do not frequent places where children congregate, including but not limited to parks, playgrounds or schools."
- "No internet/email/social media access."

CP 88. Velazquez timely filed his Notice of Appeal. CP 90-91.

C. ARGUMENT

SEVERAL CONDITIONS OF SENTENCE ARE  
UNAUTHORIZED AND/OR UNCONSTITUTIONAL

An illegal or erroneous sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. State v. Sanchez Valencia, 169 Wn.2d 782, 786-790, 239 P.3d 1059 (2010). Constitutional vagueness challenges are ripe for review "if the issues raised are primarily legal, do not require further factual development, and the

challenged action is final.” Id. at 786 (quoting Bahl, 164 Wn.2d at 751).

1. Prohibition On “Pornographic Material.”

a. *Not authorized by statute*

Under RCW 9.94A.703(3)(f), the trial court may require an offender to “[c]omply with any crime-related prohibitions.” The prohibition on purchasing, possessing, or reviewing pornography does not qualify as a crime-related prohibition in this case and therefore must be stricken. There was no evidence presented that possessing or perusing pornography played any role in Velazquez’s crimes.

In State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870, review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014), Division One accepted the State’s concession that a condition ordering the defendant to refrain from possessing sexually explicit material “must be stricken because no evidence suggested that such materials were related to or contributed to his crime” of child molestation. The same holds true here. Because the prohibition on pornography is not in any way related to the crimes at issue, the trial court’s imposition of this prohibition exceeded its authority. The condition should accordingly be stricken.

*b. Unconstitutionally vague*

The prohibition on pornography suffers from a second problem – it is unconstitutionally vague.<sup>1</sup> Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens fair warning of prohibited conduct. Bahl, 164 Wn.2d at 752. This due process vagueness doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is unconstitutionally vague if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. If it fails either prong, the prohibition is unconstitutionally vague. Id. at 753.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of unconstitutionally vague conditions is manifestly unreasonable, requiring reversal. Id. at 791-92.

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<sup>1</sup> A pre-enforcement vagueness challenge to a sentencing condition banning possession or access to pornography is ripe for review. Bahl, 164 Wn.2d at 745-752.

In Bahl, the defendant challenged a sentence condition prohibiting him from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 754. As the Bahl court discussed at length, the word “pornography” is entirely subjective, and a prohibition on possessing or perusing pornography is unconstitutionally vague. 164 Wn.2d at 754-58. Because definitions of pornography can and do differ widely – they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David,” Bahl, 164 Wn.2d at 756 – the prohibition on purchasing, possessing, or reviewing pornography is not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed. Because the condition is unconstitutionally vague, it must be stricken from Velazquez’s judgment and sentence. See id. at 758, 761-762.

2. “Do Not Frequent Places Where Children Congregate”

Judge Estudillo also ordered, as a condition of Velazquez’s sentence: “Do not frequent places where children congregate, including but not limited to parks, playgrounds or schools.”

Recently, in State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015), Division One considered a condition like the one at issue

here, which read, “Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO.”<sup>2</sup> Division One struck this condition as unconstitutionally vague and remanded for resentencing. Id. at 655. The Irwin court explained, “Without some clarifying language or an illustrative list of prohibited locations . . . the condition does not give ordinary people sufficient notice to ‘understand what conduct is proscribed.’” Id. (quoting Bahl, 164 Wn.2d at 753). The court acknowledged that it “may be true that, once the CCO sets locations where ‘children are known to congregate’ for Irwin, Irwin will have sufficient notice of what conduct is proscribed.” Id. But this is not sufficient because it would still “leave the condition vulnerable to arbitrary enforcement,” thereby failing the second prong of the vagueness analysis. Id.

In State v. Riles, the Washington Supreme Court upheld the constitutionality of a community custody condition similar to the one at issue in Irwin and at issue here. 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by Sanchez Valencia, 169 Wn.2d 782. However, the Riles court’s analysis presumed the condition was constitutional, a presumption the Sanchez Valencia court later expressly repudiated. 169 Wn.2d at 792-93.

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<sup>2</sup> The Irwin court found this pre-enforcement challenge ripe for review. Id. at 650-652.

Thus, the Irwin court concluded Riles did not control and instead relied primarily on the Washington Supreme Court's more recent decision in Bahl. Irwin, 191 Wn. App. at 655. As previously addressed, the Bahl court held a condition unconstitutionally vague where it prohibited Bahl from possessing or accessing pornographic material. Bahl, 164 Wn.2d at 743. Moreover, as the Bahl court recognized, "The fact that the condition provides that Bahl's 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 it does not provide ascertainable standards for enforcement." Id. at 758.

As in Bahl and Irwin, the condition prohibiting Velazquez from going places where children congregate fails to provide sufficient definiteness. Some locations identified in the condition are more or less obvious – playgrounds, for example. But other locations are not so obvious. A park designed and intended for child's play is likely off limits. But Rainier National Park also is technically a "park," and it is unclear if Velazquez is prohibited from going to this or any other national, state, or city park. Children can be found at any of these locations. Similarly, an elementary school is likely off limits. But the University of Washington also is a "school," and it is unclear if

Velazquez is prohibited from going to this or any other college campus.<sup>3</sup> These prohibitions are not sufficiently definite to distinguish between what is prohibited and what is allowed. Children congregate almost everywhere, and Velazquez has no way of knowing his boundaries despite the court's attempt to provide some examples. Because no ordinary person would know what conduct is prohibited, the condition fails the first prong of the vagueness test.

“In addition, 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.” Bahl, 164 Wn.2d at 753 (citing Grayned v. City of Rockford, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)). Vagueness concerns “are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.” Id. (quoting United States v. Williams, 444 F.3d 1286, 1306 (11th Cir. 2006), rev'd

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<sup>3</sup> The indefiniteness of prohibitions of going to “schools” was fully recognized by our supreme court in State v. McCormick, 166 Wn.2d 689, 692-96, 213 P.3d 32 (2009), in which McCormick was held in violation of a similar condition when he went to a food bank that, unbeknownst to him, happened to be in the same building as a public school.

on other grounds, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

The condition prohibiting Velazquez from going where children congregate implicates the First Amendment. Indeed, the condition might very well subject him to exclusion from most if not all houses of worship given children's likely presence there. Because the condition has the very real effect of precluding Velazquez's free exercise of religion and assembly, to be valid it must meet a more definite, clearer standard. The vague condition, as currently written, cannot satisfy the first prong of Bahl's vagueness analysis. This court should strike the condition.

The condition also fails the vagueness test's second prong. Both Bahl and Sanchez Valencia involved delegation to a community corrections officer to define the parameters of a condition. Sanchez Valencia, 169 Wn.2d at 794; Bahl, 164 Wn.2d at 758. The Sanchez Valencia court determined that where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness. 169 Wn.2d at 795. Here, as in Sanchez Valencia, the condition does not expressly delegate its parameters to anyone, presumably leaving discretion with probation officers. See CP 88; Sanchez Valencia, 169 Wn.2d at 785. In this circumstance,

there are no ascertainable standards of guilt to protect against arbitrary enforcement; nor is there any workable mechanism for obtaining such standards.

The sentencing condition prohibiting Velazquez from going to places where children congregate is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Velazquez to arbitrary enforcement. This court should hold that the condition is void for vagueness and strike it from the judgment and sentence.

3. "No internet/email/social media access."

As noted above, under RCW 9.94A.703(3)(f), the trial court may require an offender to comply with crime-related prohibitions. But just as the prohibition on pornography is not related to Velazquez's crimes, the prohibition on internet, email, and social media is not crime related, either. There was no evidence presented in this case that either of Velazquez's crimes, which involved contact with total strangers in a public location, involved the internet, email, or social media. The only references to the internet and social media are found in the Department of Corrections Pre-Sentence Report. But those references are to *past* criminal conduct and not the current crimes. See CP 58, 60. Thus, while such a prohibition may have

been warranted and permissible at a past sentencing, it was unauthorized for Velazquez's current offenses.

As Division One concluded when it struck a similar condition restricting the defendant's internet use,

There is no evidence that [the defendant] accessed the internet before the [crime] or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the [crime].

State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

O'Cain's analysis is sound and applies here. Because nothing in the record supports the trial court's prohibition on Velazquez's use of the internet, email, or social media, it is not crime related and must be stricken.

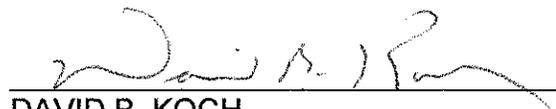
D. CONCLUSION

This Court should strike the three offending conditions of sentence from Velazquez's judgment and sentence.

DATED this 21<sup>st</sup> day of February, 2017.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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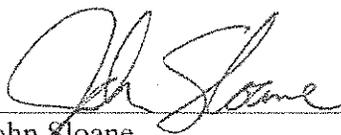
On February 21, 2017 I filed and e-served the brief of appellant directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Date  
Done in Seattle, Washington

**NIELSEN, BROMAN & KOCH, PLLC**

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