

NO. 34928-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON JOHNSON,

Appellant.

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

The Honorable Alexander C. Ekstrom, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL	6
2. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING COMMUNITY CUSTODY CONDITIONS THAT ARE NOT CRIME-RELATED	8
a. <u>The appellate court reviews de novo whether the trial court exceeded its statutory authority to impose a community custody condition</u>	9
b. <u>The conditions pertaining to sex-related businesses and sexual materials are not crime-related and must be stricken.</u>	9
c. <u>The conditions pertaining to sex-related businesses and sexual materials must be stricken because they violate Johnson’s First Amendment right to free speech.</u> ..	12
3. THE COMMUNITY CUSTODY CONDITION PROHIBITING JOHNSON FROM ENTERING PLACES WHERE MINORS CONGREGATE IS UNCONSTITUTIONALLY VAGUE.....	13
4. APPEAL COSTS SHOULD NOT BE IMPOSED.....	19
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	9, 14, 15, 16, 17
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	19
<u>State v. Cannon</u> 130 Wn.2d 313, 922 P.2d 1293 (1996).....	6
<u>State v. Clausen</u> 181 Wn. App. 1019, 2014 WL 2547604 (2014).....	11
<u>State v. Combs</u> 102 Wn. App. 949, 10 P.3d 1101 (2000).....	8
<u>State v. Gabino</u> 185 Wn. App. 1025 <u>review denied</u> , 184 Wn.2d 1021, 361 P.3d 747 (2015)	13
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	14
<u>State v. Head</u> 136 Wn.2d 619, 964 P.2d 1187 (1998).....	6, 7
<u>State v. Hescoek</u> 98 Wn. App. 600, 989 P.2d 1251 (1999).....	7
<u>State v. Hesselgrave</u> 184 Wn. App. 1021, 2014 WL 5480364 (2014) <u>review denied</u> , 183 Wn.2d 1004, 349 P.3d 857 (2015)	11
<u>State v. Hillman</u> 66 Wn. App. 770, 832 P.2d 1369 (1992).....	8
<u>State v. Irwin</u> 191 Wn. App. 644, 364 P.3d 830 (2015),.....	14, 15, 16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 180 Wn. App. 318, 327 P.3d 704 (2014).....	2, 3, 4, 5, 6, 8, 9, 10, 12, 13
<u>State v. Kinzle</u> 181 Wn. App. 774, 326 P.3d 870 <u>review denied</u> , 181 Wn.2d 1019, 337 P.3d 325 (2014)	10, 11
<u>State v. Mallory</u> 69 Wn.2d 532, 419 P.2d 324 (1966).....	7
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	16
<u>State v. Mewes</u> 84 Wn. App. 620, 929 P.2d 505 (1997).....	6
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	15
<u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	12, 15, 17
<u>State v. Smith</u> 68 Wn. App. 201, 842 P.2d 494 (1992).....	7
<u>State v. Stewart</u> 196 Wn. App. 1046, 2016 WL 6459834 (filed Nov. 1, 2016).....	11
<u>State v. Whipple</u> 174 Wn. App. 1068, 2013 WL 1901058 (2013).....	11
<u>World Wide Video of Washington, Inc. v. City of Spokane</u> 125 Wn. App. 289, 103 P.3d 1265 <u>review denied</u> , 155 Wn.2d 1014, 122 P.3d 186 (2005)..	12

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Grayned v. City of Rockford
408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)..... 17

United States v. Williams
444 F.3d 1286 (11th Cir. 2006),
rev'd, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) 17

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.1 1, 2, 6, 7

GR 14.1 12, 13

RAP 14..... 19

RAP 14.2..... 19

RAP 15.2..... 19

RCW 9.94A.703 10

RCW 10.73.160 19

U.S. Const. amend. I 8, 12, 13, 17

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to enter written findings of fact and conclusions of law after a bench trial, in violation of CrR 6.1(d).

2. The court erred in imposing the following conditions of community custody:

a. "Avoid places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades." CP 41 (condition 14).

b. "Do not possess or view material that includes images of nude women, men and/or children." CP 41 (condition 17).

c. "Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits." CP 41 (condition 18).

d. "Do not possess or view mater that shows women, men and/or children engaging in sexual acts with each other, themselves, with an object, or animal." CP 41 (condition 19).

e. "Do not attend X-rated movies, peep shows, or adult book stores." CP 41 (condition 20).

Issues Pertaining to Assignments of Error

1. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. Is remand required for entry of written findings and conclusions?

2. Whether community custody conditions addressing sex-related businesses and possession of sexual material must be stricken because they are not crime-related or, in the alternative, violate appellant's constitutional right to free speech?

3. Is appellant's community custody condition prohibiting him from frequenting places where children congregate, including, but not limited to, playgrounds, parks, and schools unconstitutionally vague?

B. STATEMENT OF THE CASE

The Franklin County prosecutor charged appellant Brandon Johnson by amended information with one count of second degree child molestation for an incident that occurred on February 20, 2015. CP 1, 23-24. Following an evaluation, Johnson was found competent to stand trial. CP 5-9, 10-20, 21-22. Johnson waived his right to a jury trial. CP 25.

Testimony was taken during a bench a trial. In February 2015, Johnson moved in with his aunt and uncle, Candy and Ronald Johnson.¹

¹ To avoid confusion, this brief will refer to Candy Johnson and Ronald Johnson by their first names. No disrespect is intended.

1RP² 12-13, 35, 43-44, 52-54. Johnson paid \$300 per month towards the house rental payment. 1RP 54. Candy described Johnson's behavior as increasingly "odd" and paranoid the longer he stayed at the house. 1RP 35-39. Candy and Ronald also noticed that their daughter, G.J. (dob: 4/6/01) became more socially withdrawn. 1RP 36, 46-47.

At one point, Ronald saw Johnson in G.J.'s room looking through her clothes. Johnson saw women's underwear in Johnson's bedroom. Johnson asked Ronald for lotion for masturbation. 1RP 49-50.

Candy and Ronald moved G.J.'s bedroom upstairs to be closer to their own bedroom. 1RP 12, 16, 37. One evening, Candy twice heard Johnson try and enter G.J.'s bedroom while she was sleeping. Johnson explained that he was looking for a heater. 1RP 37.

On March 16, 2016, G.J. told Candy that several weeks earlier, Johnson had touched her breast and bottom and tried to kiss her. 1RP 15-17, 21-22, 36. G.J. described two incidents to Candy. The first occurred on Super Bowl Sunday when Johnson followed G.J. outside when she went to get something out of the car. G.J. said that Johnson touched her breast. 1RP 41-42. During the second incident, Johnson reached over the table while G.J. was doing homework and grabbed her breast. 1RP 42.

² This brief refers to the verbatim reports as follows: 1RP – August 10, 2016; 2RP -- December 1, 2016.

Ronald and Candy contacted police the same evening G.J. told Candy about the incidents. 1RP 6, 15-16, 21-22. G.J. told police that Johnson had reached across the table and grabbed her breast outside her clothing. G.J. also reported that Johnson had touched her buttocks, attempted to kiss her, and had discussed masturbation with her. 1RP 6-7.

G.J.'s trial testimony recounting the alleged incidents with Johnson, differed in certain respects from what she disclosed to Candy and police. G.J. described the incident that occurred on Super Bowl Sunday as having occurred in the family car while everyone else was also present. 1RP 11, 24-26. During that incident, Johnson reached over and "pinched" G.J.'s breast, "giving [G.J.] a purple nurple like what my brothers do to each other when they're messing around." 1RP 25. G.J.'s brother was sitting next to her in the car at the time but did not see anything. 1RP 26. G.J. did not yell out during the incident because she was "stunned". 1RP 25-26.

G.J. explained that the second alleged incident occurred on February 20 or 27 when Johnson reached across a table and "cupped" her breast while she was doing her homework. 1RP 11, 16-17, 26-29, 32. G.J. said nothing to Johnson, but went to her room and started crying. 1RP 29. G.J. testified that on other occasions Johnson would mention her breasts and masturbation. 1RP 33.

Johnson's trial testimony also differed from G.J.'s account of what occurred. Johnson explained that he was living in the Tri-Cities with a friend when Ronald called him and asked him to marry G.J. IRP 51-52. Johnson believed the phone call was strange and that Ronald was intoxicated when he made it. IRP 52.

Eventually however, Johnson accepted Ronald's invitation to stay with his family. IRP 53-54. Johnson first started sleeping on the couch at Ronald and Candy's house. IRP 55. Johnson slept in G.J.'s room on two occasions but eventually decided to move back to the couch because sleeping in the bedroom made him uncomfortable. IRP 55.

Johnson explained that his only relationship with G.J. was as a cousin. IRP 56. Johnson denied having any sexual contact with G.J. IRP 58-59.

Based on this evidence, the trial court found Johnson guilty of second degree child molestation based on the incident that occurred between Johnson and G.J. on February 20 or 27. IRP 68-70. In its oral ruling, the trial court specifically noted that Johnson's intent as to the Super Bowl Sunday incident was "ambiguous" and therefore insufficient to support a conviction for second degree child molestation. IRP 69.

The trial court concluded however, that Johnson's act of "cupping" G.J.'s breast during the table incident sufficiently demonstrated evidence of

sexual gratification. 1RP 69. The trial court also concluded that Johnson's entering of G.J.'s room, references to breasts and masturbation, and possession of women's underwear, demonstrated evidence of a sexual intention. 1RP 68-69. No written findings of fact and conclusions of law were entered.

Based on an offender score of zero, the trial court sentenced Johnson to 18 months imprisonment. The trial court also imposed 36 months of community custody. CP 43-58; 2RP 10-11.

Johnson timely appeals. CP 59.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL

CrR 6.1(d)³ requires the trial court to enter written findings of fact and conclusions of law after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The case must be remanded to the trial court for entry of written findings and conclusions.

Written findings are essential to permit meaningful and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997).

³ CrR 6.1(d) provides: "In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated."

Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992).

"A court's oral opinion is not a finding of fact." State v. Hescocock, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Head, 136 Wn.2d at 622 (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

The court's factual findings must separately address each count and adequately identify the factual basis relied upon to support each element of each count. Head, 136 Wn.2d at 623. "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Id. at 624. Remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d) is the ordinary remedy for an initial failure to make written findings. Id. at 623.

Findings and conclusions may be submitted and entered while an appeal is pending if there is no appearance of unfairness and the defendant

is not prejudiced. State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992). This case contains several potential appellate issues, including sufficiency of the evidence. Without written findings of fact and conclusions of law, it is not possible to accurately assess whether these errors exist. Johnson reserves the right to challenge any written findings and conclusions entered after the filing of this brief. Further, an amended brief may be filed in response to such findings and conclusions.

2. THE COURT EXCEEDED ITS STATUTORY
AUTHORITY IN IMPOSING COMMUNITY CUSTODY
CONDITIONS THAT ARE NOT CRIME-RELATED

"As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, ensure protection of those rights, and prevent confusion among judges, defendants and community corrections officers regarding the applicable legal standard." State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000). Pre-printed community custody conditions in the appendix to Johnson's judgment and sentence provide a textbook example of incautious attention to detail. Some are unauthorized by statute because they are not related to the crime. Yet Johnson is exposed to sanction for violating them upon supervised release. The challenged conditions, set forth below, must be stricken as unauthorized by statute or as violations of the First Amendment.

- a. The appellate court reviews de novo whether the trial court exceeded its statutory authority to impose a community custody condition.

The court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Johnson, 180 Wn. App. at 325. Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326. Defense counsel did not object to the improper community custody conditions below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

- b. The conditions pertaining to sex-related businesses and sexual materials are not crime-related and must be stricken.

As a condition of community custody, the court ordered "Do not attend X-rated movies, peep shows, or adult book stores." CP 41 (condition 20). The court also ordered, "Do not possess or view material that includes of nude women, men, and/or children. Do not possess or view material that includes images of children wearing only underarguments and/or swimsuits. Do not possess or view material that

shows women, men and/or children engaging in sexual acts with each other, themselves, with an object, or an animal." CP 41 (conditions 17-19).

None of these conditions are crime-related. There must be a nexus between the crime and the prohibition. Johnson, 180 Wn. App. 330-31. There is no evidence Johnson accessed sexually explicit materials and the like as part of the offenses. Further, there is no evidence that Johnson ever went to a sex-related business or that any such business had a connection with the crimes. The conditions are not crime-related under RCW 9.94A.703(3)(f) and should be stricken.

In State v. Kinzle, the defendant was convicted of molesting two children. State v. Kinzle, 181 Wn. App. 774, 777-78, 326 P.3d 870, review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014). On appeal, Kinzle challenged the community custody conditions that required him to refrain from possessing sexually explicit material or frequenting establishments selling sexually explicit materials because those conditions were not crime-related. Kinzle, 181 Wn. App. at 785. Division One agreed with the State's concession that the condition needed to be stricken because no evidence suggested such materials were related to or contributed to his crime. Id. Kinzle supports Johnson's argument.

This Court recently reached a different conclusion in State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016). Without citation to Kinzle, this Court held "Because Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." 197 Wn. App. at 201. That is its entire treatment of the issue. Magana assumes a connection between the two things without any evidentiary basis for it. Its simplistic premise that a sex offense justifies such conditions should be rejected, as a bevy of other courts have done in recent years.⁴

⁴ See, e.g., State v. Hesselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364 at *12 (2014), (unpublished) (prohibition against going to establishments that promote the "commercialization of sex" was not reasonably crime related where there was no evidence to suggest that such establishments were in any way related to the crime of child rape for which defendant was convicted), review denied, 183 Wn.2d 1004, 349 P.3d 857 (2015); State v. Clausen, noted at 181 Wn. App. 1019, 2014 WL 2547604 at *8 (2014) (unpublished) (conditions prohibiting possession or perusal of sexually explicit material and patronizing establishments that promote the commercialization of sex were not crime-related because no evidence suggested defendant possessed or perused sexually explicit material in connection with his crime of child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058 at *6 (2013) (unpublished) (prohibition on sexually explicit materials and frequenting establishments whose primary business involves sexually explicit materials not crime-related where nothing in the record indicated defendant's child rape offenses involved such material and establishments); State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 6459834 at *3 (slip op. filed Nov. 1, 2016) (unpublished) (State appropriately conceded there was no evidence that defendant's use or

- c. The conditions pertaining to sex-related businesses and sexual materials must be stricken because they violate Johnson's First Amendment right to free speech.

Even if the sexual material and sex-business conditions are crime-related, the court still erred in imposing them in violation of the First Amendment right to free speech under the United States Constitution. There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Imposition of an unconstitutional community custody condition is therefore manifestly unreasonable. Sanchez Valencia, 169 Wn.2d at 792.

Sexually explicit books, magazines, movies and the like are a form of speech protected by the First Amendment. World Wide Video of Washington, Inc. v. City of Spokane, 125 Wn. App. 289, 301, 103 P.3d 1265, review denied, 155 Wn.2d 1014, 122 P.3d 186 (2005). In the context of sentencing conditions, restrictions implicating First Amendment rights "must be reasonably necessary to accomplish essential state needs and public order." Bahl, 164 Wn.2d at 757-58.

possession of sexually explicit material related to his crime of indecent liberties and so condition prohibiting such material was stricken). Pursuant to GR 14.1(a), Johnson cites these unpublished cases as nonbinding, persuasive authority.

The trial court did not consider the First Amendment ramifications of imposing the prohibitions on Johnson. The State made no attempt to show the restrictions on possessing or accessing sexually explicit materials were justified under this standard. And in a case where there is no evidence that Johnson used such materials in connection with committing the crime, no such justification exists. The State failed to establish that these prohibitions are reasonably necessary to accomplish essential state needs and public order. See State v. Gabino, noted at 185 Wn. App. 1025, review denied, 184 Wn.2d 1021, 361 P.3d 747 (2015) (unpublished) (State failed to establish prohibition on sexually explicit material was reasonably related to a compelling state interest and public order).⁵

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING JOHNSON FROM ENTERING PLACES WHERE MINORS CONGREGATE IS UNCONSTITUTIONALLY VAGUE.

The court erred in imposing the following condition of community custody: "Avoid places where children congregate to include, but not limited to: parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades." CP 41 (condition 14). The condition violates due process because it is insufficiently definite to

⁵ Pursuant to GR 14.1(a), Johnson cites this unpublished case as nonbinding, persuasive authority.

apprise Johnson of prohibited conduct and does not prevent arbitrary enforcement.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

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.”⁶ 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

⁶ The Irwin court found this pre-enforcement challenge ripe for review. Id. at 650-652.

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.

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. There, the Supreme Court held a condition prohibiting Bahl from possessing or accessing pornographic material “as directed by the supervising [CCO]” was unconstitutionally vague. 164 Wn.2d at 753. “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 of enforcement.”
Id. at 758.

As in Bahl and Irwin, the condition prohibiting Johnson from going places where children congregate fails to provide sufficient definiteness. Some locations identified in the condition are more or less obvious – playgrounds and daycare centers, 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 Johnson 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 Johnson is prohibited from going to this or any other college campus.⁷ These prohibitions are not sufficiently definite to distinguish between what is prohibited and what is allowed. Children congregate almost everywhere, and Johnson 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.

⁷ The indefiniteness of prohibitions on 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.

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

The condition prohibiting Johnson 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 Johnson’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 110; 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 Johnson from going to places where children congregate is unconstitutional because it fails to provide reasonable notice as to what conduct is prohibited and exposes Johnson to arbitrary enforcement. This Court should hold that the condition is void for vagueness and strike it from the judgment and sentence.

4. APPEAL COSTS SHOULD NOT BE IMPOSED⁸

The trial court found Johnson was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 65-66. If Johnson does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by

⁸ RAP 14.2 now provides, with regard to appellate costs:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Johnson indigent for purposes of the appeal. CP 65-6. That finding remains in effect.

conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Johnson’ ability to pay must be determined before discretionary appellate costs are imposed.

The existing record establishes that any award of appellate costs would be unwarranted in this case.⁹ Even after his eventual release from prison, Johnson will still face the combined disadvantages of his present indigency, felony conviction, and mandatory registration as a sexual offender. Even assuming that Johnson is eventually able to surmount these disadvantages, and obtain gainful employment, it would almost certainly take years. During those years of struggle, Johnson’s debt to the State of Washington, the price of his constitutional right to appeal his conviction, would be accruing interest at the civil rate of 12 percent.

Without a basis to determine that Johnson has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

⁹ Pursuant to this Division’s General Order of June 10, 2016, Johnson’s Report as to Continued Indigency is filed contemporaneously with this opening brief of appellant.

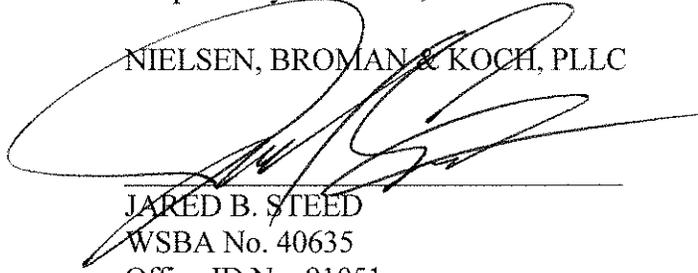
D. CONCLUSION

For the reasons set forth, Johnson requests remand for entry of written findings and conclusions. The challenged conditions of community custody should also be stricken or modified. Finally, this Court should also exercise its discretion and deny appellate costs.

DATED this 22nd day of May, 2017

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning.

JARED B. STEED
WSBA No. 40635
Office ID No. 91051

Attorney for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON
JENNIFER M. WINKLER

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI
E. RANIA RAMPERSAD

State V. Brandon Johnson

No. 34928-4-III

Certificate of Service

On May 22, 2017, I mailed and or e-served the brief of appellant directed to:

Shawn P Sant
Via Email per agreement
ssant@co.franklin.wa.us
appeals@co.franklin.wa.us

Brandon Johnson 394208
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-

Re: Johnson

Cause No. 34928-4-III, in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

05-22-2017

Date

Done in Seattle, Washington

NIELSEN, BROMAN & KOCH P.L.L.C.

May 22, 2017 - 1:10 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34928-4
Appellate Court Case Title: State of Washington v. Brandon J. Johnson
Superior Court Case Number: 15-1-50253-0

The following documents have been uploaded:

- 349284_Briefs_20170522130948D3923557_0063.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BOA 34928-4-III.pdf

A copy of the uploaded files will be sent to:

- nielsene@nwattorney.net
- ssant@co.franklin.wa.us
- appeals@co.franklin.wa.us
- steedj@nwattorney.net

Comments:

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170522130948D3923557

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

STATE OF WASHINGTON,)	No. 34928-4-III
Respondent,)	
)	STATEMENT OF ADDITIONAL
vs.)	AUTHORITY
)	
BRANDON JOHNSON,)	
Appellant.)	
_____)	

Pursuant to RAP 10.8, appellant cites the following additional authority¹ on the questions identified parenthetically:

State v. Dossantos, noted at ___ Wn. App. ___, No. 47773-4-II, slip op. at 10 (Sept. 26, 2017) (unpublished) (“[The] treatment plan does not identify use of sexually explicit materials as a crime-related activity. The treatment recommendation is specifically tailored toward ‘pornography,’ not sexually explicit materials. Further, there is no evidence that Dossantos’ use of ‘sexually explicit materials’ somehow contributed to his offenses. Thus, this [community custody] condition is not crime-related and the trial court was not authorized to impose it.”).

State v. Starr, noted at ___ Wn. App. ___, No. 49327-6-II, slip op. at 9 (Oct. 17, 2017) (unpublished) (“Because we follow established law, and because nothing in the record suggests that sexually explicit materials were related to Starr’s crime, we agree and accept the State’s concession to strike the condition.”).

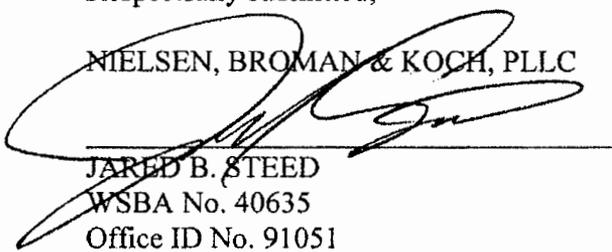
State v. Salgado Velazquez, Jr., noted at ___ Wn. App. ___, No. 34713-3-III, slip op. at 3-4 (Oct 17, 2017) (Accepting State’s concession that community custody condition “Do not purchase, possess or view pornographic material” should be stricken because it is not crime related and is unconstitutionally vague).

¹ Pursuant to GR 14.1(a), Johnson cites these unpublished cases as a nonbinding authority but, given their relevance to Johnson’s case, asks that the cases be accorded significant persuasive value.

DATED this 25TH day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

October 26, 2017 - 9:27 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34928-4
Appellate Court Case Title: State of Washington v. Brandon J. Johnson
Superior Court Case Number: 15-1-50253-0

The following documents have been uploaded:

- 349284_Briefs_20171026092706D3043730_8918.pdf
This File Contains:
Briefs - Appellants Additional Authorities
The Original File Name was SOAA 34928-4-III.pdf

A copy of the uploaded files will be sent to:

- appeals@co.franklin.wa.us
- nielsene@nwattorney.net
- ssant@co.franklin.wa.us
- tchen@co.franklin.wa.us

Comments:

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20171026092706D3043730

FILED
Court of Appeals
Division III
State of Washington
11/8/2017 1:46 PM

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

STATE OF WASHINGTON,)	No. 34928-4-III
Respondent,)	
)	STATEMENT OF ADDITIONAL
vs.)	AUTHORITY
)	
BRANDON JOHNSON,)	
Appellant.)	
_____)	

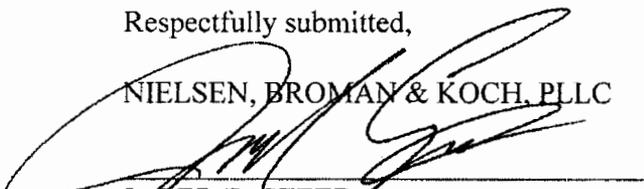
Pursuant to RAP 10.8, appellant cites the following additional authority on the questions identified parenthetically:

State v. Norris, noted at ___ Wn. App. ___, ___ P.3d ___, No. 75258-8-I, (Wash. Ct. App. Oct. 30, 2017) (condition that defendant not "enter any places where minors congregate," without illustrative list of prohibited locations, was unconstitutionally vague; condition prohibiting defendant from entering "sex-related businesses," was not reasonably crime related; condition prohibiting defendant from possessing, viewing, or accessing, any sexually explicit material unless given prior approval by sexual deviancy provider was reasonably crime related).

DATED this 8th day of November, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

November 08, 2017 - 1:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34928-4
Appellate Court Case Title: State of Washington v. Brandon J. Johnson
Superior Court Case Number: 15-1-50253-0

The following documents have been uploaded:

- 349284_Other_20171108134306D3322390_1925.pdf

This File Contains:

Other - Statement of Additional Authorities

The Original File Name was State v. Brandon Johnson 34928-4-III.Statement of Additional Authority.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- appeals@co.franklin.wa.us
- nielsene@nwattorney.net
- ssant@co.franklin.wa.us
- tchen@co.franklin.wa.us

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net

Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:

1908 E. Madison Street

Seattle, WA, 98122

Phone: (206) 623-2373

Note: The Filing Id is 20171108134306D3322390