

FILED

May 30, 2018

Court of Appeals  
Division III  
State of Washington

NO. 349284

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON JERALD JOHNSON,

Appellant.

DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:

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## **I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

## **II. RELIEF REQUESTED**

Respondent asserts no error occurred in the trial and sentence of the Appellant.

## **III. ISSUE**

Are the challenged community custody conditions valid under *State v. Padilla*, -- Wn.2d --, 416 P.3d 712 (Wash. 2018)?

## **IV. STATEMENT OF THE CASE**

On appeal, the Appellant/Defendant Brandon Johnson has challenged the community custody conditions 17-20 on two grounds. These conditions regard his viewing or possessing pornographic materials.

- (17) Do not possess or view material that includes of nude women, men, and/or children.
- (18) Do not possess or view material that includes images of children wearing only undergarments and/or swimsuits.
- (19) 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.

- (20) Do not attend X-rated movies, peep shows, or adult book stores.

CP 41. The first ground argued is that the conditions are not “crime-related.” Brief of Appellant (BOA) at 9-11. The second ground claims the conditions violate his right to free speech. BOA at 12.

This Court has asked for supplemental briefing related the recently published case of *State v. Padilla*, -- Wn.2d --, 416 P.3d 712 (Wash. 2018). RAP 12.1.

## **V. ARGUMENT**

THE STATE RECOMMENDS REMAND FOR AMENDMENT OF COMMUNITY CUSTODY CONDITIONS.

On May 10, 2018, the Washington Supreme Court decided “an issue of first impression.” *State v. Padilla*, -- Wn.2d --, 416 P.3d 712, 716 (Wash. 2018), which relates to our conditions 17, 18, and 19. The court held unconstitutionally vague and overbroad a prohibition against “pornographic materials” defined as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” *State v. Padilla*, 416 P.3d at 714-15. This definition of “pornographic” “would unnecessarily encompass” movies like the

*Titanic* and television like *Game of Thrones*, which are not created for the sole purpose of sexual gratification and “would not ordinarily be considered ‘pornographic material.’” *Id.* at 717.

A law must:

- Give a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited, and
- Provide explicit standards to prevent arbitrary and discriminatory application.

*Id.* at 716. A vague law encroaches on sensitive areas of basic First Amendment freedoms, because persons will steer far wider than necessary to ensure compliance. *Id.*

Our own case is distinguishable in that there is no mention of pornography. Rather, Mr. Johnson is ordered not to possess materials which depict nudity. Nudity is a term that a person of ordinary intelligence would understand. It does not include an element that the material was created for the sole purpose of sexual gratification. However, it is not narrowly tailored. A condition implicating the First Amendment “must be reasonably necessary to accomplish the essential needs of the state and public order.” *Id.* at 718-19. And it is quite clear that under the language of condition 17,

if Mr. Johnson possessed a picture of the statute of David, he would be in violation. *Id.* at 718 (citing *Farrell v. Burke*, 449 F.3d 470, 479 (2d Cir. 2006)).

As in *Padilla*, remand is appropriate to tailor conditions 17, 18, and 19 narrowly in order to accomplish the essential needs of the state and public order. *Id.* at 719. Benton and Franklin County prosecutors have recently reviewed and redrafted Appendix H. The relevant conditions have been redrafted in this way:

14. [ ] Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

See attached. The condition is narrowly tailored to accomplish the essential needs of the state and public order in supervising offenders convicted of the sexual abuse of minors. It relies on statutory definitions which are constitutionally sound. *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 759, 871 P.2d 1050, 1055 (1994) (“erotic material” under RCW 9.68.050 is constitutionally valid and not void for vagueness).

The State recommends this Court remand to tailor community conditions in light of *Padilla* and by reference to 9.68 RCW.

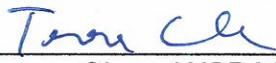
**VI. CONCLUSION**

Based upon the forgoing, the State respectfully requests remand to substitute community conditions 17, 18, and 19 as proposed.

DATED: May 30, 2018.

Respectfully submitted:

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<p>Jared Steed <a href="mailto:steedj@nwattorney.net">steedj@nwattorney.net</a> <a href="mailto:nielsene@nwattorney.net">nielsene@nwattorney.net</a></p>	<p>A copy of this brief was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 30, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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**SUPERIOR COURT OF WASHINGTON FOR FRANKLIN COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. _____.
	)	
vs.	)	<b>JUDGMENT AND SENTENCE</b>
	)	<b>APPENDIX H - SEX OFFENSES</b>
_____ ,	)	<b>COMMUNITY CUSTODY</b>
	)	
Defendant.	)	

**STANDARD CONDITIONS**

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1. Report to and be available for contact with the assigned community corrections officer as directed;
2. Work at Department of Corrections-approved education, employment, and/or community restitution;
3. Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4. Pay supervision fees as determined by the Department of Corrections;
5. Receive prior approval for living arrangements and residence location;
6. Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706);
7. Notify community corrections officer of any change in address or employment;
8. Upon request of the Department of Correction, notify the Department of court-ordered treatment; and
9. Remain within geographic boundaries, as set forth in writing by the Department of Correction Officer or as set forth with SODA order.

**SPECIAL CONDITIONS - SEX OFFENSES**

**RCW 9.94A.703 & .704**

Defendant shall:

1. Obey all municipal, county, state, tribal, and federal laws.
2. Indeterminate Sentences: Abide by any Washington State Department of Corrections (DOC) conditions imposed (RCW 9.94A.704).
3. Have no direct or indirect contact with the victim(s) of this offense.
4. Within 30 days of release from confinement (or sentencing, if no confinement is ordered) obtain a sexual deviancy evaluation with a State certified therapist approved by your Community Corrections Officer (CCO) and follow through with all recommendations of the evaluator. Should sexual deviancy treatment be recommended, enter treatment and abide by all programming rules, regulations and requirements. Attend all treatment-related appointments (unless excused); follow all requirements, conditions, and instructions related to the recommended evaluation/counseling; sign all necessary releases of information; and enter and complete the recommended programming.
5. Inform the supervising CCO and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.
6. Obtain prior permission of the supervising CCO before changing work location.
7. If a resident at a specialized housing program, comply with all rules of housing program.
8. Consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.
9. Be available for and submit to urinalysis and/or breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider.
10. Submit to and be available for polygraph examination as directed to monitor compliance with conditions of supervision.
11. Register as a Sex Offender with sheriff's office in the county of residence as required by law.

**Additional Crime-Related Prohibitions: (the condition must be related to the crime being sentenced)**

- 12. [ ] Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or address previously approved by CCO during these hours.
- 13. [ ] Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.
- 14. [ ] Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.

**Offenses Involving Minors -**

- 15. [ ] Have no direct and/or indirect contact with minors.
- 16. [ ] Do not hold any position of authority or trust involving minors.
- 17. [ ] Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or CCO.

**Offenses Involving Alcohol/Controlled Substances -**

- 18. [ ] Do not purchase or possess alcohol.
- 19. [ ] Do not enter drug areas as defined by court or CCO.
- 20. [ ] Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
- 21. [ ] Obtain [ ] alcohol [ ] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

**Offenses Involving Computers, Phones or Social Media -**

- 22. [ ] No internet access or use, including email, without the prior approval of the supervising CCO.
- 23. [ ] No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device to which the defendant has access to monitor compliance with this condition.

**Offenses Involving Mental Health Issues -**

- 24. [ ] Obtain a mental health evaluation upon referral and follow through with all recommendations of the evaluator, including taking medication as prescribed. Should mental health treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.

25. \_\_\_\_\_  
\_\_\_\_\_

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE

**May 30, 2018 - 1:56 PM**

**Transmittal Information**

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