

34928-4-III

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 BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

Franklin County Prosecuting Attorney's Office
1016 North 4th Avenue
Pasco, WA 99301
(509) 545-3543

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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. ISSUES

1. Did the court abuse its discretion in imposing community custody conditions related to the particular offense?
2. Is the community custody condition compliant with *State v. Irwin*, passing constitutional muster?
3. Where the defendant is in the typical financial posture for a man of his age and capable of returning to employment upon his imminent release are appellate costs appropriate if the State substantially prevails?

IV. STATEMENT OF THE CASE

The Appellant/ Defendant Brandon Johnson was convicted at a

bench trial of child molestation in the second degree and sentenced on December 1, 2016. CP 43-58.

The Defendant molested his cousin while he was living with his aunt and uncle. 1RP 12-17, 35, 43-44, 52-54. There was testimony that the Defendant kept women's underwear in his bedroom and requested lotion for use in masturbation. 1RP 49-50. This escalated to discussing masturbation with his minor-aged cousin and then molesting her. 1 RP 6-7, 15-17, 33.

On appeal, he challenges certain community custody conditions and the absence of findings and conclusion for the bench trial. The Brief of Appellant (BOA) was the defense's first communication to the prosecutor regarding the dearth of findings. On June 27, the Clerk advised that the trial court should sign findings, but not enter the findings formally until the Court of Appeals grants permission under RAP 7.2(e). On July 20, the Clerk advised that entry of findings might establish whether additional assignments of error and briefing are necessary. The parties are arranging for transport of the Defendant in order to hold a hearing on the findings.

V. ARGUMENT

A. THE STATE HAS NO OBJECTION TO ADDITIONAL BRIEFING FOLLOWING THE ENTRY OF FINDINGS AND CONCLUSIONS.

The Defendant properly notes the absence of necessary findings and conclusions of the bench trial. Earlier notice would have prevented delay in the appeal. The State is working on transporting the Defendant for hearing, coordinated with the schedules of the trial judge and trial counsel, and will keep the Court apprised of the progress on this matter. The State has no objection to subsequent briefing if findings suggest additional assignments of error.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING CRIME-RELATED COMMUNITY CUSTODY CONDITIONS.

The Defendant objects to community custody conditions number 17, 18, 19, and 20.

- (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. He claims the conditions 17-20 are not crime-related and that the prohibition violates his right to free speech. BOA at 9, 12.

The court's authority for imposing community conditions comes from RCW 9.94A.703. The court "shall require the offender to comply with any conditions imposed by the department under RCW 9.94A.704." RCW 9.94A.703(1)(b). In setting conditions, the department performs a quasi-judicial function. RCW 9.94A.704(11). Conditions must be in writing. RCW 9.94A.704(7)(a). "The department shall assess the offender's risk of reoffense and may establish ... additional conditions of community custody based upon the risk to community safety." RCW 9.94A.704(2)(a).

The court "may order an offender to ... comply with any crime-related prohibition." RCW 9.94A.703(3)(f).

"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10).

Crime-related conditions are reviewed for abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830, 837 (2015). An abuse of discretion is a decision that is “manifestly unreasonable” or exercised “on untenable grounds or for untenable reasons.” *State v. Irwin*, 191 Wn. App. at 656.

There need only be “some basis” connecting the offense to the condition. *State v. Irwin*, 191 Wn. App. at 657. Under this lax standard, where a defendant was found to have molested the children of a platonic male friend, the court properly prohibited him from dating women with minor children or forming new relationships with families with minor aged children. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014). A defendant who committed computer trespass can be prohibited from possessing a computer of his own even though it does not connect to the internet or any other computer. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In this crime, the Defendant used masturbation and conversations about masturbation as a stepping stone to molestation. The challenged conditions restrict the Defendant’s use and possession of masturbatory materials. This is properly crime-related

and within the court's discretion.

The Defendant cites *State v. Kinzle*, 181 Wn. App. at 785, in support of his argument. BOA at 10. There, the matter was not argued or analyzed. In consideration of a different crime, where there was no discussion of masturbation or masturbatory materials, the parties agreed that that there was no relation between the crime and condition. The facts of the crime are different here. The condition is related to this crime, not Kinzle's.

The Defendant disagrees with *State v. Magana*, 197 Wn. App. 189, 389 P.3d 654 (2016) which upheld the same conditions. BOA at 11. He objects that *Magana* gave only passing treatment of the issue, yet he fails to observe that *Kinzle* gave it no treatment at all. Insofar as he claims the case states that any "sex offense justifies such conditions," the Defendant can be forgiven. BOA at 11. All relevant facts are not represented in the opinion. Magana recorded the child rape, a fact which would be prosecuted separately in federal court.¹ Magana's offense included the creation of (child) pornography.

The Defendant claims that the conditions violate his right to

¹ Kristin M. Kraemer, [Pasco Rapist met girls on Facebook, now going to federal prison for child porn](http://www.tri-cityherald.com/news/local/crime/article138808093.html), Tri-City Herald, March 15, 2017. <http://www.tri-cityherald.com/news/local/crime/article138808093.html>

free speech. BOA at 12 (citing *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 (2006)). In fact, he does not demonstrate the premise, i.e. that the materials are his speech and are being restricted. Neither is true. The materials are not his speech. They are someone else's speech. Those parties' speech is not restrained. It is his possession or attendance of it that is.

C. **CONDITION 14 HAS BEEN WRITTEN WITH AN EYE TO SCHOLARLY TREATMENT OF VAGUENESS CHALLENGES AND PASSES CONSTITUTIONALLY MUSTER.**

The Defendant objects to community custody condition number 14 as being is unconstitutionally vague and restrictive of his exercise of religion. BOA at 13, 17.

- (14) 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 number 14 has been adapted to be responsive to the concerns in *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015). There the condition was: "Do not frequent areas where minor children are known to congregate, as defined by the supervision [Community

Corrections Officer].” *State v. Irwin*, 191 Wn. App. at 649.

An offender is due fair warning of standards definite enough to protect against arbitrary enforcement. *Id.* at 653. The court noted that this does not require that the offender be able to “predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Id.*, (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)).

The opinion noted that listing those areas “where children are known to congregate” would provide definite enough standards. *Id.* at 655. However, leaving a CCO to decide what is “frequent” still leaves the condition vulnerable to arbitrary enforcement. *Id.* Condition number 14 corrects both infirmities.

The Defendant argues that a “park” could mean a state or national park. BOA at 16. This is not a reasonable interpretation of the straightforward prohibition. Here a park is listed as an example of a place where children may congregate. It is clear from the context that this would not include a hiking trail. In the same way, a school where children congregate cannot reasonably be interpreted to mean a college campus.

The Defendant’s claim that “children congregate almost

everywhere,” is unpersuasive hyperbole and contrary to law. BOA at 16. 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).

Insofar as the Defendant claims the condition impermissibly restricts his exercise of religion, this again is hyperbolic and unpersuasive. The condition cannot reasonably be interpreted to prevent his attendance at a religious assembly.

D. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, APPELLATE COSTS WOULD BE APPROPRIATE TO THIS DEFENDANT'S CIRCUMSTANCES.

The Defendant requests that, if the State substantially prevails in this appeal, appellate costs not be imposed against him, because he qualified for appointment of counsel and because he is a convicted sex offender.

That he qualified for criminal counsel is unremarkable. And no authority, including RAP 14.2, has held this fact to be determinative of imposition of appellate costs.

Insofar as the Defendant catastrophizes over the possibility of

interest, upon satisfaction of the principal and at the Defendant's request, the Franklin County Clerk will close collection of LFO's.

The Defendant argues that his conviction and sex offender registration will disadvantage him in seeking employment. This may be true for certain work. It is unlikely to affect him in the work he recently held.

In support of his request, he has filed a Report as to Continued Indigency. Mr. Johnson is 26 years old and currently incarcerated. As one might expect from a man his age, he has not acquired significant property assets. As one might expect of an incarcerated person, he is unemployed. However, he has his GED and was recently employed. He had been paying rent. 1RP 54. The report notes that he receives a \$1000 settlement. Presumably this is monthly, although it is not clear. He has some small debt, which includes his LFO's, but no children to support. Notwithstanding the Defendant's claim of plantar fasciitis, the sentencing judge found the defendant to not be disabled. CP 46.

In other words, Mr. Johnson is in a situation typical of his age group. He is employable. He has the future ability to pay upon his release, which should be very soon.

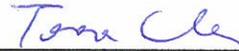
VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the community custody conditions and conviction.

DATED: July 20, 2017.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Jared Steed
steedj@nwattorney.net
nielsene@nwattorney.net

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 July 20, 2017, Pasco, WA



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