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NO. 35631-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MERRILL,

Appellant.

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

The Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing the community custody condition requiring appellant to “obtain a substance abuse evaluation and abide by all recommendations” where there was no evidence any substance other than alcohol contributed to the offenses. CP 39 (appendix H, condition 14).

2. The court erred in imposing the community custody condition that requires appellant to “abide by a curfew imposed by your community corrections officer.” CP 39 (appendix H, condition 15).

3. The court erred in imposing the community custody condition that appellant “not go to areas where minors are known to congregate, as defined by your community corrections officer.” CP 39 (appendix H, condition 17).

4. The court erred in imposing the community custody condition that appellant “not possess or view pornography in any form.” CP 39 (appendix H, condition 19).

5. The court erred in imposing the community custody condition prohibiting appellant from entering “any sex-related locations (i.e. porn-shops, peep-shows, nude bars, etc.)” CP 39 (appendix H, condition 20).

Issues Pertaining to Assignments of Error

1. Should the community custody conditions requiring appellant to obtain a substance abuse evaluation and abide by any

recommended treatment be narrowed to only alcohol treatment where there is no evidence that any other substance or drug was related to the circumstances of the offenses?

2. Do the community custody conditions that require appellant to abide by a curfew, and that prohibit appellant from frequenting areas where minors are known to congregate, sex-related locations, and from viewing pornography exceed the court's sentencing authority because those conditions are not crime-related?

3. Is the community custody condition prohibiting appellant from possessing or viewing pornography void for vagueness?

4. Is the community custody condition prohibiting appellant from going to places where minors congregate as defined by the community custody officer void for vagueness?

B. STATEMENT OF THE CASE

The State charged Michael Merrill with four counts of first degree rape of child (counts I, II, II, and IV), one count of second degree rape of a child (count V) and one count of third degree rape of child (count VI). CP 1-2. The named victim in all counts was E.R.B. Id.

Mr. Merrill and the State entered into a plea agreement that provided that in exchange for a guilty plea to counts I and V, and no request for a special sex offender sentencing alternative (SSOSA), the State would dismiss the

other counts. CP 18. Pursuant to that agreement Mr. Merrill entered a guilty plea to counts I and V on July 15, 2016. RP 3-12¹; CP 7-20. Count I alleged the crime occurred on or about April 29, 2006 and April 28, 2006. CP 1. Count V alleged the crime occurred on or about April 29, 2011 and April 28, 2013. CP 2. Mr. Merrill agreed the court could use police reports and the statement of probable cause to establish a factual basis for his plea. CP 16.

Prior to sentencing the court was provided with a Department of Corrections pre-sentence report. The report identified E.R.B. as Mr. Merrill's step-granddaughter. CP 20. At sentencing Mr. Merrill admitted he was drunk or drinking when the offenses occurred. RP 34-35. Mr. Merrill also expressed sorrow, shame and remorse for his actions. RP 34-36.

Mr. Merrill was sentenced to a standard range sentence of 140 months to life for count I and 136 months to life for count V. CP 47. The trial court imposed the following community custody conditions:

14. That you obtain a substance abuse evaluation and abide by all recommendations.
15. That you abide by any curfew imposed by your community corrections officer.
17. That you do not go to areas where minors are known to congregate, as defined by your community corrections officer (CCO will outline those places that are off limits). That if approved to visit those places, you are supervised by a chaperone or guardian approved by the therapist and your community corrections officer.

¹ RP refers to the verbatim report of proceedings of the July 15, 2016 plea hearing and September 9, 2018 sentencing hearing, which are sequentially paginated.

19. That you do not possess or view pornography in any form.

20. That you do not enter any sex-related locations (i.e. porn-shops, peep-shows, nude bar, etc.).

CP 39 (appendix H).

C. ARGUMENTS

1. THE COURT EXCEEDED ITS AUTHORITY BY IMPOSING CONDITIONS OF COMMUNITY CUSTODY THAT WERE UNRELATED TO THE OFFENSE.

A trial court may impose only a sentence that is authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). “When a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to correct the erroneous sentence, when the error is discovered.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P. 2d 848 (1955)).

Because it is solely the legislature’s province to fix legal punishments, the legislature must authorize community custody conditions. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)). A sentence is determined by the sentencing statutes in effect at the time a crime was

committed. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004); RCW 9.94A.345.²

Under former RCW 9.94A.505(8) a court can impose “crime-related prohibitions” as conditions of a sentence. A sentencing court has authority to require an offender to comply with “any crime-related prohibitions.” 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.” RCW 9.94A.030(10). Substantial evidence must support a determination that a condition is crime-related. State v. Padilla, __ Wn. 2d __, 416 P.3d 712, 718 (2018) (citing State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) and State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007)). A condition must be stricken if there is no evidence in the record linking the circumstances of the crime to the condition. Padilla, 416 P.3d at 718.

- a. The substance abuse condition must be confined to alcohol treatment

² Count I was committed between April 2006 and April 2008 and Count V between April 2011 and April 2013. CP 1-2.

RCW 9.94A.703(3)(d) authorizes the court to order an offender to “Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Alcohol and drugs are not interchangeable terms in the sentencing context. See State v. Warnock, 174 Wn. App. 608, 613-614, 299 P.3d 1173 (2013) (recognizing a difference between controlled substances and alcohol in holding alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense); see also State v. Motter, 139 Wn. App. at 801 (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody).

The court ordered Mr. Merrill to “obtain a substance abuse evaluation and abide by all recommendations.” (condition 14). In State v. Munoz-Rivera, Wn. App. 190 Wn. App. 870, 893, 361 P.3d 182 (2015) this Court held that the community custody condition requiring Munoz-Rivera to undergo and evaluation and treatment for substance abuse other than alcohol was statutorily unauthorized because there was no evidence in the record that that any substance other than alcohol contributed to the offense. The court made no finding that substance abuse contributed to the offenses.

Mr. Merrill admitted he was under the influence of alcohol when the crimes were committed. RP 35. There is no evidence that any substance or drugs other than alcohol were related to the circumstances of Mr. Merrill's offenses or contributed to those offenses, and the court did not find otherwise. See CP 27-37. Like in Munoz-Rivera, remand is necessary to narrow that condition to only alcohol. Id. at 190 Wn. App. 872; see State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003) (court erred in ordering alcohol treatment where the evidence did not support alcohol contributed to the offense).

b. The condition that Mr. Merrill abide by a curfew is not crime-related

Another condition of community custody required Mr. Merrill to "abide by any curfew imposed by your community corrections officer." (condition 15). Regardless of whether this condition is treated as a prohibition or as affirmative conduct under RCW 9.94A.703, it must be stricken because it is not crime-related and therefore exceeds the trial court's authority.

There is no evidence when the offenses occurred or that the offenses occurred outside Mr. Merrill's residence. See CP 27-37. There is no evidence in the record that remotely indicates that Mr. Merrill would not have been able to commit the crimes if he had to be in his home at certain times of the day or night. Because no evidence in the record supports a

curfew as a community custody condition, the condition is not crime-related. The curfew condition must be stricken.

c. The condition that prohibits Mr. Merrill from entering sex-related locations is not crime-related

In yet another community custody condition, Mr. Merrill is prohibited from entering sex related locations (“That you do not enter any sex-related locations (i.e. porn-shops, peep-shows, nude bars, etc.).” (condition 20). This condition too is not crime-related. Recently, this Court struck a similar condition finding it was not crime-related. State v. Johnson, ___ Wn. App. 2d, ___ P.3d ___, 2018 WL 3432685 (July 17, 2018). In that case, Johnson was convicted of second degree child molestation. A condition of community custody prohibited Johnson from attending “X-rated movies, peep shows, or adult book stores.” Johnson, 2018 WL 3432685 at *2. This Court reversed finding there was no connection between those places and Johnson’s offense. 2018 WL 3432685 at *3.

In State v. Norris, 1 Wn. App. 2d. 87, 404 P.3d 83 (2017), *review granted*, 190 Wn.2d 1002 (2018), the court also struck a similar condition. Norris was convicted of two counts of second degree rape of a 13 year old boy. The community custody condition at issue prohibited Norris from entering “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.”
Norris, 1 Wash. App. 2d. at 97. The Norris court reasoned that because
“there is no evidence in the record showing that frequenting sex-related
businesses is reasonably related to the circumstances of the crime....” the
condition was statutorily unauthorized and must be stricken. Id. at 98.³

As in Johnson and Norris, there is no evidence that frequenting sex-
related locations is reasonably related to the circumstances of Mr. Merrill’s
crimes. The condition should be stricken from the judgment and sentence.

³ Other unpublished Division One and Two cases are in accord but are not cited as binding authority (GR 14.1(a)). See e.g., In re Tillman, noted at ___ Wn. App. 2d ___, 2018 WL 2684541 (2018), at *1 (prohibition on entering 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 not crime-related where there was no evidence frequenting these types of businesses reasonable related to the crime of first degree child rape); State v. Johnson, noted at 1 Wn. App.2d 1055, 2017 WL 6594803 (2017) at *6 (same where crime was second degree child rape); State v. Hasselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (prohibition on going to establishments promoting “commercialization of sex” not reasonably crime-related where no evidence suggested such establishments related to defendant’s crime of child rape).

2. THE COMMUNITY CUSTODY CONDITIONS PROHIBITING MR. MERRIL FROM GOING TO AREAS WHERE MINORS CONGREGATE, AND FROM POSSESSING OR VIEWING PORNOGRAPHY ARE UNCONSTITUTIONALLY VAGUE AND NOT CRIME-RELATED

Under the due process clauses of the Fourteenth Amendment and article I, section 3, the State must provide citizens with fair warning of prohibited conduct. Bahl, 164 Wn. 2d at 752. The vagueness doctrine also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstein, 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 proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Padilla, 416 P.3d at 715 (citing Bahl, 164 Wn.2d at 752-53). If a community custody prohibition fails either prong, it is unconstitutionally vague. Bahl, 164 Wn.2d at 753. If a community custody is unconstitutionally vague, it is manifestly unreasonable and requires reversal. Padilla, 416 P.3d at 715 (citing State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010)).

- a. The condition prohibiting Mr. Merrill from areas where minors congregate is unconstitutionally vague and not crime related

The trial court ordered that Mr. Merrill not to go to areas outlined by the community corrections officer where minors congregate. (condition 17).⁴ This condition is unconstitutionally vague because it does not sufficiently apprise Mr. Merrill of prohibited conduct and allows for arbitrary enforcement.

In State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), the court reconsidered a condition like the one at issue here (“Do not frequent areas where minor children are known to congregate as defined by the supervising” community corrections officer). The court concluded this condition was unconstitutionally vague, struck it, 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

⁴ Defense counsel argued that this condition was vague. RP 33.

notice of what conduct is proscribed.” Id. However, the Irwin court concluded that such clarifications would still not be sufficient because they would “leave the condition vulnerable to arbitrary enforcement,” thereby failing the second prong of the Bahl vagueness analysis. Irwin, 191 Wn. App. at 655;⁵ see Sanchez Valencia, 169 Wn.2d at 795 (where a condition leaves so much discretion to an individual corrections officer, it suffers from unconstitutional vagueness).

In State v. Magana, 197 Wn App. 189, 389 P.3d 654 (2016), this Court also held a similar condition was unconstitutionally vague. Magana was convicted of third degree rape of a child. One of his community custody conditions was “Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO [community corrections officer], treatment providers.” Magana, 197 Wn. App. At 200. The Magana court ruled, “While the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO's designation authority is not tied to either the list or the explanatory

⁵ See State v. Bruno, noted at 1 Wn. App.2d 1010, 2017 WL 5127781 at *7 (2017) (same). This unpublished opinion is not cited as binding authority (GR 14.1(a)).

statement.” Id. at 201. This Court held that because the discretion conferred on the CCO was “boundless” the condition was unconstitutionally vague. Id.

As in Bahl, Irwin, and Magana, the condition prohibiting Mr. Merrill from going to places where minors congregate as defined by the community corrections officer fails to provide sufficient definiteness and invites arbitrary enforcement.

The offense involved Mr. Merrill’s step-granddaughter. There is no evidence Merrill trolled places outside his home for unrelated minor victims. The condition is not crime-related.

The condition should be stricken from the judgment and sentence.

- b. The condition that Mr. Merrill not possess or view pornography is unconstitutionally vague and is not crime related

The court imposed a community custody condition that prohibits Mr. Merrill from possessing or viewing pornography in any form. (condition 19). That condition is likewise unconstitutionally vague.

In Bahl, *supra*, the sentencing court imposed a similar condition that Bahl “not possess or access pornographic materials, as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 743. The Bahl Court held the condition was unconstitutionally vague. Id. at 758. More recently, in Padilla, *supra*, the community custody condition

prohibited the possession of pornographic material but included a definition of the term pornographic materials as “images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts.” Padilla, 416 P.3d at 716. Despite defining pornographic material, the Padilla Court nonetheless held the condition unconstitutionally vague because, like in Bahl, the term pornography “and its definition similarly fails to adequately put him [Padilla] on notice of which materials are prohibited and leaves him vulnerable to arbitrary enforcement.” Id. at 718.

Furthermore, the condition is not crime-related. In Padilla, the Court also found the record did not establish a connection between Padilla’s offense (communicating with a minor for immoral purposes) and the condition prohibiting him from viewing “adult nudity or simulated intercourse.” Padilla, 416 P.3d at 719. Here too, the record is devoid of any connection between Mr. Merrill’s offenses and viewing pornography. See Johnson, 2018 WL 3432685 at * 3 (Johnson’s community custody conditions prohibited him viewing nude images of women, men and children and children wearing only undergarments and swimsuits but “[t]he mere fact that Mr. Johnson has been convicted of a sex offense, and thus exhibited an inability to control sexual impulses, is insufficient to provide the necessary link” between the offense (child molestation) and

nude images and images of children wearing only undergarments and/or swimsuits).

As in Bahl and Padilla, the condition prohibiting Mr. Merrill from possessing or viewing pornography fails to put Mr. Merrill “on notice of which materials are prohibited and leaves him vulnerable to arbitrary enforcement.” Padilla, 416 P.3d at 718.

In addition, the record does not show a connection between the offenses and pornography. The condition is not crime-related.

The condition should be stricken from the judgment and sentence.

D. CONCLUSION

For the above reasons, this Court should remand and direct the trial court to narrow community custody condition 14 to only alcohol treatment, and strike conditions 15, 17, 19, and 20 from the judgment and sentence.

DATED this 27th day of July 2018.

Respectfully submitted,

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