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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL MERRILL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Were the conditions of community custody ordering Merrill to obtain a substance abuse evaluation, respect a curfew, and refrain from entering “sex-related locations” reasonably crime related?
2. Were the conditions of community custody requiring Merrill to avoid areas where minors congregate and from possessing pornography constitutional as written?

II. STATEMENT OF THE CASE

In 2009, ERB's¹ mother passed away; she went to live with her grandparents, Cindy and Michael Merrill. RP 23. Merrill orally and digitally raped ERB countless times; she was possibly as young as 5 or 6 when the first rape occurred. CP 6. Merrill raped ERB until she was a teenager; his actions were discovered when Merrill's wife Cindy obtained ERB's diary and read entries that led her to believe her husband was having sexual contact with ERB, now sixteen years old. CP 5. Upon contact with law enforcement, ERB told officers she could recall incidents of rape from approximately 7 or 8 years of age continuing until 11 or 13 years of age. CP 5. The State charged Merrill with four counts of rape of a child in the

¹ The minor victim's initials are used herein in compliance with Division III's General Order of June 18, 2012.

first degree, one count of rape of a child in the second degree, and one count of rape of a child in the third degree. CP 1-2.

On July 15, 2016, Merrill pled guilty to one count of rape of a child in the first degree and one count of rape of a child in the second degree. CP 7-17. Prior to sentencing, the Honorable Annette Plese ordered a Pre-Sentence Investigation (PSI). CP 23-25, 27-34. The PSI reported that Merrill indicated the incidents of rape began when he “was drinking and watching a porn movie on T.V.” CP 28. The PSI also noted that Merrill “has struggled with alcohol use from age 16 to the present.” CP 31.

The trial court sentenced Merrill to 140 months to life incarceration, and, upon release, ordered Merrill to comply with all conditions of community custody listed in Appendix H of the judgment and sentence. CP 42-56.

Five of the conditions in Appendix H (numbers 14, 15, 17, 19, and 20) read as follows:

(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 [CCO];

...

(17) That you do not go to areas where minors are known to congregate, as defined by your community corrections officer. That if approved to visit those places, you are

supervised by a chaperone or guardian approved by the therapist and your community corrections officer;

...

(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 bars etc.);

CP 39. Regarding condition number 17, the court placed an asterisk after the word “congregate” and hand-wrote in the lower margin of that page, “*CCO will outline those places that [are] off limits.” CP 39.

Prior to entering the order, the court reviewed the terms of the judgment and sentence with Merrill:

THE COURT: ... You’ll also, be subject to community custody. If they find that you have a chemical dependency issue, drugs or alcohol, they could, also, make you do treatment as part of your community custody. Do you understand that?

THE DEFENDANT: I understand.

RP 10-11.

In accepting the plea, the court went on to order: “You must stay away from any place that kids congregate. I did make a note ... that says that the CCO will outline those places that are off limits.... I’m guessing they’re going to say schools and parks and anything that would involve minors. In section H, it says you have to report and be available, not to

consume any controlled substances or alcohol. Based on that this case included an issue of alcohol, you're not to drink at all." RP 37.

The court continued: "You'll have to get the substance abuse evaluation, follow up on any recommended treatment. It says here all of these conditions will apply to your community custody." RP 38. Merrill did not object.

Merrill now appeals the imposition of the five conditions of community custody.

III. ARGUMENT

Merrill argues that the conditions requiring him to undergo substance abuse treatment, that he abide by a curfew, and that he not enter "sex-related locations" are unrelated to his offense. He further contends that the conditions that prohibit him from entering areas where minors congregate and instructing that he not possess or view pornography are both unconstitutionally vague.

A. THE CONDITION THAT MERRILL UNDERGO SUBSTANCE ABUSE TREATMENT MUST BE CLARIFIED ON REMAND; THE CONDITION THAT HE REFRAIN FROM ENTERING "SEX RELATED LOCATIONS" IS REASONABLY CRIME RELATED; A CURFEW IS NOT CRIME-RELATED AND MUST BE STRICKEN.

The trial court lacks authority to impose a community custody condition unless authorized by the legislature. *State v. Warnock*,

174 Wn. App. 608, 611, 299 P.3d 1173 (2013). As a part of any sentence, the court may impose and enforce crime-related prohibitions and other affirmative conditions.

“Crime-related prohibitions” may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

RCW 9.94A.505(9).

No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Williams*, 157 Wn. App. 689, 691-92, 239 P.3d 600 (2010). Additionally, the prohibited conduct must directly relate to the circumstances of the crime and a condition is not crime-related if there is no evidence linking the prohibited conduct to the offense. *State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Courts review the imposition of crime-related prohibitions for abuse of discretion. *Williams*, 157 Wn. App. at 691. A trial court abuses its discretion if its decision is manifestly unreasonable or if exercised on untenable grounds or for untenable reasons. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). This court reviews the factual bases for crime-related conditions for substantial evidence. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). Such conditions are usually

upheld if reasonably crime related. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A court does not abuse its discretion if a “reasonable relationship” between the crime of conviction and the community custody condition exists. *Irwin*, 191 Wn. App. at 658-59. The prohibited conduct need not be identical to the crime of conviction, but there must be “some basis for the connection.” *Id.* 657.

Merrill alleges the trial court exceeded its authority by ordering conditions of community custody that were neither crime related nor otherwise authorized by statute.

1. The trial court did not exceed its sentencing authority by ordering a “substance abuse evaluation” but remand may be required to narrow the substance abuse evaluation to an alcohol-only evaluation.

Merrill challenges the condition that he undergo a “substance abuse evaluation and abide by all recommendations” to the extent that it requires him to undergo treatment for substances other than alcohol. The relevant statutory provision states that a court may require an offender to “[p]articipate in crime-related treatment or counseling services.” RCW 9.94A.703(3)(c). He relies on the similarity between his case and *State v. Munoz-Rivera* for his contention that remand is necessary to narrow that condition only to an “alcohol abuse evaluation.” *State v. Munoz-Rivera*, 190 Wn. App. 870, 893-94, 361 P.3d 182 (2015).

In *Munoz-Rivera* there was no evidence that any substance other than alcohol contributed to the offense, so the condition that the offender undergo evaluation and treatment for “substance abuse” was narrowed from a “substance abuse evaluation” to an evaluation and treatment specifically for alcohol abuse. *Id.* at 894.

Though Judge Plese noted, and Merrill acknowledged, that “substance abuse” encompasses the improper use of both alcohol and other drugs, because there is no evidence that substances other than alcohol contributed to Merrill’s crimes, the State concedes that remand may be necessary to clarify that the “substance abuse evaluation” should likely be restricted to an “alcohol abuse evaluation.” *See id.* at 893-94.

2. The trial court exceeded its sentencing authority by ordering Merrill to abide by a curfew.

The State concedes that the curfew prohibition is unrelated to the circumstances of Merrill’s crime and should be stricken. *See O’Cain*, 144 Wn. App. at 775.

3. The trial court did not exceed its sentencing authority by prohibiting Merrill from entering sex-related locations.

Merrill was convicted of sex offenses; conditions limiting his access to sexually explicit materials and sex-related businesses are crime-related. RCW 9.94A.030(10). Though it appears there is no evidence that a sex-related business played a role in Merrill’s crimes, it is still reasonably crime

related and the trial court did not abuse its discretion in imposing this condition.

Our Supreme Court recently held in *State v. Nguyen*, that the condition requiring a defendant not frequent a sex-related business has more to do with a defendant's inability to control his "urges and impulsivities," and his capacity to rehabilitate from sexual deviance, than it does with the specific facts of his crimes: this condition is imposed to prohibit conduct (such as accessing sexually explicit material) that might cause the defendant to reoffend. *State v. Nguyen*, No. 94883-6, 2018 WL 4355948, at *7 (Wash. Sept. 13, 2018).

Here, though there is no evidence that Merrill frequented a "sex-related business," or that such a business contributed to his crimes, his crimes related to his inability to control his sexual urges. It is reasonable to conclude that Merrill will struggle to rehabilitate from sexual deviance if he frequents "sex-related businesses." The condition is constitutional and need not be stricken.

B. THE CONDITIONS THAT PROHIBIT MERRILL FROM AREAS WHERE MINORS CONGREGATE AND FROM POSSESSING PORNOGRAPHY ARE UNCONSTITUTIONALLY VAGUE, REQUIRING REMAND

A trial court has discretion to impose community custody conditions; it is an improper exercise of this discretion, however, to impose

an unconstitutionally vague condition. *State v. Valencia*, 169 Wn.2d 782, 791-93, 239 P.3d 1059 (2010). A defendant may assert a vagueness challenge to a condition of community custody for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

Under the Fourteenth Amendment and article I, section 3 of the Washington State Constitution, due process requires that citizens have fair warning of proscribed conduct. *Valencia*, 169 Wn.2d at 791. Thus, a community custody condition is unconstitutionally vague if it “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed” or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Bahl*, 164 Wn.2d at 752-53 (internal quotation marks omitted). If the condition fails either prong of the vagueness analysis, it is void for vagueness. *Id.* at 752-53. However, “a community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Valencia*, 169 Wn.2d at 793 (internal quotation marks omitted). Remand to the trial court to amend the community custody term or to resentence consistent with the statute is the proper remedy. *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

1. The condition prohibiting Merrill from areas where minors congregate is unconstitutionally vague as written; remand is required.

Merrill objects to the condition, “That you do not go to areas where minors are known to congregate, as defined by your community corrections officer.” Courts may impose constitutional limitations on an offender’s contact with a specific class of persons, and preventing harm to minors by a convicted sex offender is a compelling state interest that justifies limitations on the offender’s freedoms. *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

Even so, community custody conditions that require further definition from CCOs are unconstitutionally vague because when the sentence is ordered there are no ascertainable standards for enforcement and the condition is thus vulnerable to arbitrary application by the CCO. *Bahl*, 164 Wn.2d at 754-55. Without further clarifying language from the trial court, or an illustrative list of prohibited locations, the condition does not give a defendant sufficient notice to “understand what conduct is proscribed.” *Id.* at 753.

In *State v. Johnson*, this Court found a condition requiring the offender to avoid places where children under 16 years of age congregate which included, but was not limited to, parks, libraries, playgrounds, schools, school yards, daycare centers, skating rinks, and video arcades was

constitutional and not void for vagueness. *State v. Johnson*, ___ Wn. App. 2d ___, 421 P.3d 969, 971 (2018).

Here, the condition instructing Merrill “not go to areas where minors are known to congregate, as defined by your community corrections officer” is unconstitutional because it uses the vague term “areas” and it leaves discretionary enforcement to a CCO instead of listing specific locations the court is ordering Merrill avoid in the future. *See Bahl*, 164 Wn.2d at 753-55. This Court should remand this condition to the trial court for clarification on the list of prohibited places, such as was acceptable in *Johnson*, and to strike the language delegating the court’s discretion to the CCO.

2. The condition that Merrill not possess or view pornography is unconstitutionally vague as written but is sufficiently crime related; remand is required.

Merrill argues that the condition requiring he not possess or view pornography is both unconstitutionally vague and not crime related. Here, the phrase “pornography in any form” is not defined; the State concedes this is unconstitutionally vague. This condition, however, is reasonably crime related and so should not be stricken from Merrill’s judgment and sentence; but remanded for clarification. *See Irwin*, 191 Wn. App. 657.

The term “pornographic materials” is unconstitutionally vague. *Bahl*, 164 Wn.2d at 756. Nevertheless, our Supreme Court recently held that

an individual who has committed sex crimes has “established his inability to control his sexual urges, making it both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing ‘sexually explicit materials,’ the only purpose of which is to invoke sexual stimulation.” *Nguyen*, 2018 WL 4355948, at *7. Merrill admitted to the corrections officer charged with drafting the PSI that the incidents of rape began when he was drinking and watching pornography. Thus, the condition that Merrill refrain from possessing or viewing similar material is sufficiently crime related. *See id.*

Therefore, the State requests this matter be remanded with directions that the trial court strike “pornography in any form” from condition 19 and add the phrase “sexually explicit material as defined by RCW 9.68.130(2).” *See id.* at *4. Such a condition would be constitutional and sufficiently crime-related.

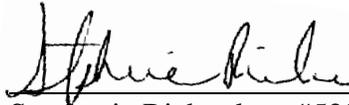
IV. CONCLUSION

On appeal, Merrill objects to the imposition of five conditions of community custody. The State concedes the curfew condition is not sufficiently crime related and should be stricken. The State requests remand for clarification of three of the otherwise constitutional and sufficiently-crime related conditions: that Merrill obtain an alcohol abuse evaluation, that he avoid a specific list of areas where minors are known to congregate,

and that he not possess or view sexually explicit materials as defined by statute. Finally, the condition that Merrill “not enter any sex-related locations (i.e. porn-shops, peep-shows, nude bars etc.)” is constitutional and reasonably crime-related and should be affirmed.

Dated this 19th day of September, 2018.

LAWRENCE H. HASKELL
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A handwritten signature in black ink, appearing to read "Stephanie Richards", is written over a horizontal line.

Stephanie Richards #52061
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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MICHAEL MERRILL,

Appellant.

NO. 35631-1-III

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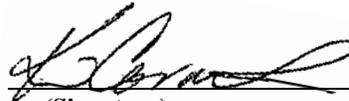
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