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Division III
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NO. 36562-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES FRIEDRICH,

Appellant.

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

The Honorable Michelle D. Szambelan, Judge
The Honorable Kevin M. Korsmo (Pro Tem), Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's sentence exceeds the statutory 120 month maximum.

2. The trial court imposed improperly vague community custody conditions prohibiting Mr. Friedrich from the following:

- using or possessing pornographic material without CCO and/or Therapist approval
- frequenting places where minors congregate including but not limited to parks, pools, playgrounds, schools, shopping malls and video arcades without CCO and/or Therapist approval
- engaging in a romantic/sexual relationship without prior approval from CCO and Therapist

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's imposition of an 89 month standard range sentence combined with 36 months of community custody, totaling 125 months, improperly exceeds the 120 month maximum sentence?

2. Whether the trial court imposed three improperly vague community custody conditions when requiring Mr. Friedrich (i) not use or possess pornographic material, (ii) not frequent places where minors

congregate, or (iii) engage in a romantic relationship without prior approval from his CCO or Therapist?

C. STATEMENT OF THE CASE

1. Plea and competency

James Friedrich pleaded guilty to two counts of first degree possession of depictions of minors engaged in sexually explicit conduct, class B felonies. RP¹ 12/13/17 3-12; CP 1-2, 3-15. By agreement, the court reviewed the arresting officer's affidavit of facts for a factual basis to support the plea. RP 12/13/17 9; Supplemental Designation of Clerk's Papers, Affidavit of Facts. After reviewing the affidavit, the court found sufficient facts to support each conviction. RP 12/13/17 9. In exchange for the plea, the state motioned the court to dismiss Mr. Friedrich's other two charges, counts 3 and 4. RP 12/13/17 6; CP 7. The court granted the motion. RP 12/13/17 6.

After the plea, but before sentencing, Mr. Friedrich's counsel questioned whether Mr. Friedrich was legally competent when entering

¹ The verbatim report of proceeding (RP) is identified in the brief as follows: "RP 12/13/17" (guilty plea); "RP1," "RP2," and "RP3" for the three separate volumes identified on their face sheets as 1, 2, and 3; and "RP 1/10/19" for the sentencing hearing.

his guilty plea. RP Vol 1 7, 19-20; CP 19-24. Mr. Friedrich filed a motion to withdraw his guilty plea. CP 18.

A letter from Mr. Friedrich to the court triggered the competency concern. RP1 20; CP 59-63. Even though the parties entered the plea by agreement, Mr. Friedrich's letter asked the court to give him a lesser sentence than agreed to during the guilty plea. RP1 20; CP 59-63. In his letter, Mr. Friedrich worried about serving a prison sentence and possibly being taken advantage of by other inmates. CP 59-63.

The court heard a lengthy competency motion. RP1 7-247; RP2 254-362. The state's expert testified Mr. Friedrich was competent at his plea. RP1 206. Mr. Friedrich's expert denied Friedrich's competency. RP1 101.

The experts agreed Mr. Friedrich's IQ was about 70-72. RP1 91-92; RP2 394. Both described his mental abilities as borderline intellectual functioning. RP1 98; RP2 397.

In a detailed oral ruling, the court found Mr. Friedrich did not "overcome the presumption of competency" and denied his motion to withdraw his guilty plea RP3 501-18; See also CP 146.

2. Sentencing

The parties moved on to sentencing. RP 1/10/19 3-9. The court imposed a sentence of 89 months on a standard arrange of 77-102 months. RP 1/10/19 7; CP 150, 152. The court also ordered Mr. Friedrich serve 36 months of community custody and to abide by the terms and conditions in Appendix H of the judgment and sentence. RP 1/10/19 7-8; CP 152-53, 163-64. Appendix H included three community custody conditions Mr. Friedrich challenges for the first time on appeal: (1) no use/possession of pornography, (2) not to frequent places where children congregate without CCO and Therapist approval, and (3) not to engage in a romantic/sexual relationship without CCO and Therapist approval. CP 164.

The aggregate total of Mr. Friedrich's sentence, 125 months, exceeds the statutory maximum for his class B felonies by five months. No one seemed to notice the error as no one objected. RP 1/10/19 7-10.

Mr. Friedrich appeals the judgment and sentence. CP 165.

D. ARGUMENT

Issue 1: Mr. Friedrich must be returned to the trial court for resentencing because his sentence exceeds the statutory 120 month maximum sentence.

a. Mr. Friedrich's sentence of 89 months of incarceration plus 36 months of community custody exceeds the statutory maximum sentence.

Erroneous sentences on appeal receive de novo review. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

When someone is convicted of a felony, a court must impose a sentence as provided in the Sentencing Reform Act (SRA). RCW 9.94A.505(2)(a). As it relates to community custody, a court cannot impose an aggregate term of confinement and community custody beyond the statutory maximum of the offense. *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012) (interpreting RCW 9.94A.701(9)).

Mr. Friedrich pleaded guilty to two counts of possession of depictions of minors engaged in sexually explicit conduct in the first degree, both class B felonies. CP 3-15; RP 12/13/19 3-6. RCW 9.68A.070(1). Class B felonies carry a maximum allowable sentence of 120 months. RCW 9A.20.021(1)(b). The convictions also require Mr. Friedrich serve 36 months of community custody. RCW 9.94A.701(1)(a). The standard range

sentence plus any term of community custody cannot exceed a combined term of greater than 120 months. RCW 9.94A.701(9).

The court sentenced Mr. Friedrich to 89 concurrent months on each of the felony offenses, plus obligated him to serve 36 months of community custody. RP 1/10/19 7; CP 152-53. The combine term is 125 months, thereby exceeding Mr. Friedrich's maximum sentence.

b. The sentence must be reversed.

A sentencing court errs "when it impos[es] a term of confinement plus a term of community custody exceeding the statutory maximum." *State v. Hernandez*, 185 Wn. App. 680, 688, 342 P.3d 820 (2015), *review denied*, 185 Wn.2d 1002 (2016). In *Boyd*, our Supreme Court reasoned that "the trial court, not the Department of Corrections, [is] required to reduce [the defendant's] term of community custody to avoid a sentence in excess of the statutory maximum." *Boyd*, 174 Wn.2d at 473; *see also State v. Land*, 172 Wn. App. 593, 603, 295 P.3d 782 (2013); RCW 9.94A.505(5); *see Brooks*, 166 Wn.2d at 674.

The remedy on the sentencing error is to remand for resentencing. *Boyd*, 174 Wn.2d at 472-73. On remand, an option available to the trial court is to reduce Mr. Friedrich's standard range sentence from 89 months to 84 months. CP 150, 152. Such a sentence is in keeping with the 77-102

month standard range. CP 150. In this way, the court could maintain the 36 months of community custody as the maximum oversight available once Mr. Friedrich finishes his term of incarceration.

Issue 2: Three vague community custody conditions must be stricken from Mr. Friedrich's judgment and sentence.

An illegal or erroneous sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Appellate courts routinely consider pre-enforcement challenges to sentencing conditions. *State v. Sanchez Valencia*, 169 Wn.2d 782, 786-90, 239 P.3d 1059 (2010). Pre-enforcement constitutional challenges to sentencing conditions are ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Id.* at 786 (quoting *Bahl*, 164 Wn.2d at 751).

A sentencing court lacks authority to impose a community custody condition unless it is authorized by the legislature. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). Any condition imposed in excess of a court's statutory authority is void. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

Under RCW 9.94A.703(3)(f), the trial court is authorized to require an offender to “[c]omply with any crime-related prohibitions.” “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). Directly related community custody conditions must be “reasonably crime-related” to the underlying offense. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (*citing State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn. App. at 207-08.

The court erred in imposing three vague community custody conditions concerning pornography possession, frequenting places where minorities congregate, and engaging in a romantic relationship. As each condition is vague, it must be stricken from Mr. Friedrich's community custody obligation.

a. The court's requirement that Mr. Friedrich not use/possess pornographic material without CCO or Therapist approval is unconstitutionally vague.

The condition prohibiting Mr. Friedrich from possessing pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn. 2d. at 761–62.

The guarantee of due process contained in the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that laws not be vague. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016). Because a violation of a community custody condition can subject a person to arrest and incarceration, vagueness prohibitions extend to community custody conditions. *See Sanchez Valencia*, 169 Wn.2d at 791-92. A community custody condition is not unconstitutionally vague so long as it (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards that are definite enough to “protect against arbitrary

enforcement.” *Magana*, 197 Wn. App. at 200-01 (internal quotation marks omitted) (*quoting Bahl*, 164 Wn.2d at 753). “Unless a statute or rule defines its terms, the words have their ordinary meaning.” *State v. Autrey*, 136 Wn. App. 460, 468, 150 P.3d 580 (2006).

The trial court imposed a community custody condition prohibiting Mr. Friedrich from using or possessing “pornographic material without CCO and/or Therapist approval.” CP 164.

In *Bahl*, the court held that a similarly worded condition was unconstitutionally vague. *Bahl*, 164 Wn. 2d at 758. Eric Bahl was convicted of second degree rape and first degree burglary. *Id.* at 743. In addition to prison time, the court imposed a mandatory life term of community custody on the rape. One of the community custody conditions prohibited Bahl from “possess[ing] or access[ing] pornographic materials, as directed by the supervising [CCO].” *Id.* Because the condition granted sole authority to Bahl’s CCO in determining what material was prohibited, this court found the condition did not sufficiently provide Bahl with notice of which materials were prohibited or provide ascertainable enforcement standards. *Id.* at 758.

Our supreme court recently affirmed *Bahl* in *State v. Padilla*, 190 Wn.2d 672, 416 P.3d 712 (2018).

In *Padilla*, the court found Padilla's pornography community custody condition unconstitutionally vague. The trial court imposed community custody conditions on a conviction for communicating with a minor for immoral purposes. *Padilla*, 190 Wn.2d at 681-82. Unlike Mr. Friedrich's case, the *Padilla* trial court provided a specific definition of "pornographic" material as "images of sexual intercourse, simulated or real, masturbation, or the display of intimate body parts." *Id.* at 681. As in Mr. Friedrich's case, the *Padilla* trial court left it up to the CCO to determine what "pornography" was, or, was not. *Id.* at 676.

Per *Padilla*, there are three overarching instances when a court will declare a legal provision, such as a community custody condition, unconstitutionally vague. First, the statute must "give the person of ordinary intelligence a reasonable opportunity to know what [behavior] is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 107, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Second, the law must provide explicit standards to those charged with enforcing the law in order to prevent "arbitrary and discriminatory" application. *Id.* Finally, a vague law that encroaches on " 'sensitive areas of basic First Amendment freedoms' " naturally inhibits the exercise of those freedoms because individuals who are uncertain of the meaning of a statute will steer " 'far wider' " than necessary in order to

ensure compliance. *Id.* at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed. 2d 377 (1964)).

The condition does not put Mr. Friedrich on notice of what specific items he is prohibited from using or possessing. The vagueness doctrine requires the State to provide citizens with fair warning of proscribed conduct; thus, the overbroad definition of “pornographic materials” may similarly cause a “chilling effect on the exercise of sensitive First Amendment freedoms.” *Bahl*, 164 Wn.2d at 752-53. When First Amendment speech is prohibited, “a stricter standard of definiteness applies.” *Id.*; *State v. K.H.-H.*, 185 Wn.2d 745, 750-54, 374 P.3d 1141 (2016) (acknowledging more specificity is required when vague conditions implicate First Amendment rights).

The “pornographic materials” definition is unconstitutionally vague. On its face, the plain language of the pornography condition and its relevant definition is ambiguous. In application, the definition does not provide adequate notice of what behaviors Mr. Friedrich is prohibited from committing and also encompasses the prohibition of constitutionally protected speech. But also, delegating the authority to determine the prohibition boundaries to an individual CCO creates “ ‘a real danger that the prohibition on pornography may ultimately translate to a prohibition

on whatever the officer personally finds titillating.” *Bahl*, 164 Wn.2d at 755 (quoting *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002)).

In the present case, Mr. Friedrich’s sentencing condition and its definition similarly fails to adequately put him on notice of which materials are prohibited and leaves him vulnerable to arbitrary enforcement. Therefore, the condition is unconstitutionally vague as applied to Mr. Friedrich’s case. Mr. Friedrich is entitled have the condition stricken from his judgment and sentence.

b. The prohibition from being where minors congregate is unconstitutionally vague.

This issue is pending before the state supreme court in *State v. Frank Wallmuller*, No. 96313-4. The court heard oral argument on May 14, 2019. The court’s opinion will be determinative of the issue before this court.

The court of appeals held in the published portion of its opinion that a community custody condition prohibiting Wallmuller from frequenting “places where children congregate such as parks, video arcades, campgrounds, and shopping malls,” is unconstitutionally vague. *State v. Wallmuller*, 4 Wn. App. 2d 269, 423 P.3d 282, 283 (Wash. Ct. App.

2018), *review granted*, 192 Wn.2d 1009, 432 P.3d 794 (2019). This court reached an opinion contrary to *Wallmuller* in *State v. Johnson*, 4 Wn. App. 2d 352, 421 P.3d 969, 970–71, *review denied*, 192 Wn. 2d 1003 (2018) (Johnson II).

Mr. Friedrich raises this sentencing challenge herein to preserve the issue should our Supreme Court affirm the Court of Appeals and find such a community custody issue unconstitutionally vague.

c. The prohibition against engaging in romantic relationships is unconstitutionally vague.

Due process requires that sentencing conditions provide fair warning of proscribed conduct. U.S. Const. Amend. XIV; *Bahl*, 164 Wn.2d at 752-53. No presumption of constitutionality applies. *Id.* Words in a sentencing provision are considered in context and given their ordinary meaning. *Id.*, at 754.

The sentencing court prohibited Mr. Friedrich from “engag[ing] in a romantic/sexual relationship without prior approval from [his] CCO and Therapist.” CP 164. At sentencing, the judge did not clarify what actions would amount to “engage in a romantic/sexual relationship.” RP 1/10/19 at 2-10.

This condition implicates Mr. Friedrich’s right to freedom of association (including his right to intimate association) and his right to privacy. U.S. Const. Amends. I, XIV; Wash. Const. art. I, §§ 3, 7; see *State v. Clinkenbeard*, 130 Wn. App. 552, 563, 123 P.3d 872 (2005); see also *Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 596-605, 192 P.3d 306 (2008). Accordingly, the condition must be reviewed with extra care. *State v. Warren*, 165 Wn. 2d 17, 32, 195 P.3d 940 (2008).

The word “romantic” can relate to love or strong affection, but it can also mean fanciful, impractical, unrealistic, or glamorous. See Dictionary.com Unabridged. Random House, Inc. (2017); Roget's 21st Century Thesaurus, Third Edition, Philip Lief Group (2009). The word “relationship” can mean any kind of connection, association, or involvement. Dictionary.com. It is not limited to sexual involvement, but can mean an emotional connection or some other kind of rapport or bond. Dictionary.com; Roget's Thesaurus.

The phrase “romantic relationship” is unconstitutionally vague. As one federal court put it, addressing a similar prohibition:

[P]eople of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a “significant romantic relationship.” What makes a relationship “romantic,” let alone “significant” in its romantic depth, can be the

subject of endless debate that varies across generations, regions, and genders. For some, it would involve the exchange of gifts such as flowers or chocolates; for others, it would depend on acts of physical intimacy...The history of romance is replete with precisely these blurred lines and misunderstandings. See, e.g., Wolfgang Amadeus Mozart, *The Marriage of Figaro* (1786); Jane Austen, *Mansfield Park* (Thomas Egerton, 1814); *When Harry Met Sally* (Columbia Pictures 1989); *He's Just Not That Into You* (Flower Films 2009).

United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010).

Nor is it clear what marks engaging in a romantic relationship. One person might believe the exchange of letters commences a romantic relationship; another person might draw the line at meeting face to face, or engaging in “acts of physical intimacy.” *Reeves*, 591 F.3d at 81. Here, as in *Reeves*, the sentencing condition “has no objective baseline.” *Id.*

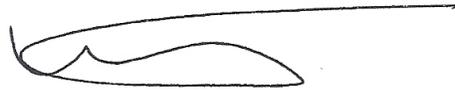
There are no statutory definitions or other external sources providing guidance as to what it means to enter a romantic relationship. Mr. Friedrich’s freedom “should not hinge on the accuracy of his prediction of whether a given probation officer, prosecutor, or judge would conclude” that he’d entered into a romantic relationship. *Reeves*, 591 F.3d at 81.

The romantic relationship provision must be stricken. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998).

E. CONCLUSION

Mr. Friedrich's case must be remanded to the trial court for resentencing within the standard range. At resentencing, the court should strike the three vague community custody conditions.

Respectfully submitted August 15, 2019.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', with a long horizontal line extending to the right from the end of the signature.

LISA E. TABBUT/WSBA 21344
Attorney for James Friedrich

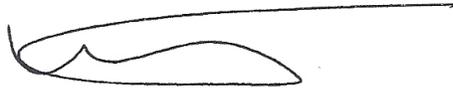
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Spokane County Prosecutor's Office, at SCPAAppeals@spokanecounty.org; (2) the Court of Appeals, Division III; and (3) I mailed it to Jim Friedrich/DOC# Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 15, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for James Friedrich, Appellant

LAW OFFICE OF LISA E TABBUT

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