

FILED
Court of Appeals
Division III
State of Washington
10/24/2019 9:33 AM
36592-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN BERNARD PALLETT, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 4

 A. MR. PALLETT HAS WAIVED THIS CHALLENGE,
 AND THE CONDITION IS REASONABLY CRIME
 RELATED 4

 1. Mr. Pallett waived this challenge..... 4

 2. The condition is reasonably crime related 6

 B. THIS COURT SHOULD DECLINE TO REVIEW
 WHETHER THE CONDITION IS VAGUE 8

V. CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Emmerson v. Weilep, 126 Wn. App. 930, 110 P.3d 214 (2005)..... 8

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 9

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 4

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012)..... 9

State v. Casimiro, 8 Wn. App. 2d 245, 438 P.3d 137,
review denied, 193 Wn.2d 1029 (2019)..... 5

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 5

State v. Hai Minh Nguyen, 191 Wn.2d 671,
425 P.3d 847 (2018)..... 5, 7, 9

State v. Padilla, 90 Wn.2d 672, 416 P.3d 712 (2018) 6, 9

State v. Peters, No. 31755-2-III, 2019 WL 4419800
(Sept. 17, 2019)..... 4, 5, 6

State v. Sandoval, 123 Wn. App. 1, 94 P.3d 323 (2004) 9

State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010)..... 9

State v. Zimmer, 146 Wn. App. 405, 190 P.3d 121 (2008)..... 7, 8

Statutes

RCW 9.94A.703..... 6, 8

RCW 9A.88.110..... 10

RCW 9.94A.030..... 7

Rules

RAP 10.3..... 8

Other Authorities

Merriam-Webster.com available at <https://www.merriam-webster.com/dictionary/business> (last accessed Oct. 23, 2019) 10

I. APPELLANT'S ASSIGNMENT OF ERROR

Mr. Pallett assigns error to Condition 13 of his community custody conditions, which requires that he does not engage in the business of prostitution.

II. ISSUES PRESENTED

1. Did Mr. Pallett waive a crime-related challenge to Condition 13 by failing to challenge the condition below and, if not, is the condition reasonably crime related where Mr. Pallett targeted a prostitute to rape at gunpoint?
2. Is Condition 13 unconstitutionally vague where an ordinary person could understand the conduct the condition prohibits?

III. STATEMENT OF THE CASE¹

Steven Bernard Pallett appeals his conviction for first degree rape with a firearm enhancement. CP 392-93.

On March 18, 2017, T.B. decided to prostitute herself in order to make money. RP 482. She drove to downtown Spokane, Washington, parked her truck, and she walked alone Sprague Avenue, a street known for prostitution. RP 483. Mr. Pallett, a frequent patron of prostitutes who is familiar with prostitution practices in Spokane, drove down Sprague that same night. RP 669-70. He drove near T.B. as she walked along Sprague, then pulled over and flashed his car headlights at her to get her attention.

¹ Because the issue on appeal is narrow and to protect T.B.'s privacy, only a brief recitation of the facts is necessary.

RP 576. She walked over and entered his vehicle. RP 576. Mr. Pallett knew any “alone woman in Sprague between Division and K-Mart would have in fact been a prostitute.” RP 672.

Once T.B. entered Mr. Pallett’s car, he began issuing her commands to remove her clothing, call him “sir,” and took her cell phone away by throwing it in the back seat. RP 412-13, 491-93, 735. He then drove T.B. to a secluded area with which he was familiar. RP 492-93, 679-80. The two left the vehicle, and T.B. asked Mr. Pallett about payment. RP 493-94. Mr. Pallett informed her that he would not pay her because she was a whore and a slut. RP 494, 760. Instead, Mr. Pallett retrieved a handgun and pointed it at her, and directed her into a nearby shack. RP 494-95.

Once she entered the shack, Mr. Pallett placed the handgun to T.B.’s head and ordered her to undress. RP 495-97. T.B. begged him to stop and not to hurt her. RP 509, 571-72. While still pointing the firearm at her head, he forced her to perform oral sex on him and refused to use a condom. RP 503-04, 777. After he had finished raping her, Mr. Pallett retreated to his vehicle and fled the scene. RP 504. T.B. ran to nearby Interstate 90, flagged down a vehicle for help, and soon after contacted law enforcement to report the crime. RP 505-8. A lengthy investigation, including phone records and a DNA profile, eventually linked Mr. Pallett to the crime. *See* CP 2-12.

The State charged Mr. Pallett with first degree rape with a firearm enhancement and first degree kidnapping. CP 1. The case proceeded to trial. Relevant to the one issue on appeal, during trial and outside the presence of the jury the parties discussed the State's intention to elicit ER 404(b) evidence. RP 587. The evidence was based on Mr. Pallett's past associations with prostitutes and showed that he had a pattern of frequently being a customer of prostitutes and was known to have refused payment or abused prostitutes, which demonstrated "his knowledge, his motive, lack of mistake, opportunity, plan, intent." RP 587-91, 629-32. The trial court agreed with the State and permitted that line of testimony, and also crafted an appropriate limiting instruction for the jury. RP 621-32.

The jury found Mr. Pallett guilty of first degree rape with a firearm enhancement but acquitted him of kidnapping. CP 351-53. The court ordered a Presentencing Investigation Report (PSI), which summarized the facts determined at trial and included Mr. Pallett's lengthy history of patronizing and abusing prostitutes. CP 361-69.² Mr. Pallett objected to the court considering unproven allegations generally but did not lodge any

² Police reports filed with the court also contain this information, as law enforcement consulted cell phone records and "bad date" lists reported by prostitutes in order to identify Mr. Pallett as a suspect. *See* CP 14-23. Part of the PSI also includes an allegation that Mr. Pallett ran a prostitution ring out of one of his homes. CP 365.

objections as to his actual sentence, including the community custody conditions. CP 374; RP 974-80. The court sentenced Mr. Pallett to an indeterminate sentence within the standard range of 153 to 183 months to life imprisonment, as a sex offender. CP 393-95. One condition of community custody prohibits Mr. Pallett from “engaging in the business of prostitution.” CP 410. Mr. Pallett appeals. CP 415.

IV. ARGUMENT

A. MR. PALLETT HAS WAIVED THIS CHALLENGE, AND THE CONDITION IS REASONABLY CRIME RELATED

Mr. Pallett contends that community custody 13 must be stricken because it is not crime related and not otherwise authorized by statute. Community custody condition 13 reads: “[t]hat you do not engage in the business of prostitution.” CP 410. Mr. Pallett has waived a crime-relatedness challenge by failing to object. Additionally, the condition is clearly crime related.

1. Mr. Pallett waived this challenge

This Court recently clarified that a defendant may waive a crime-relatedness challenge to a community custody condition if not raised at the trial court. *State v. Peters*, No. 31755-2-III, 2019 WL 4419800 at *1-2 (Sept. 17, 2019). After reviewing the interplay of RAP 2.5, *Blazina*,³ and

³ *State v. Blazina*, 182 Wn.2d 827, 833-34, 344 P.3d 680 (2015).

Ford,⁴ this Court summarized which challenges are reviewable: “for an objection to a community custody condition to be entitled to review for the first time on appeal, it must (1) be manifest constitutional error or a sentencing condition that, as *Blazina* explains, is ‘illegal or erroneous’ as a matter of law, and (2) it must be ripe. If it is ineligible for review for one reason, we need not consider the other.” *Peters*, 2019 WL 4419800 at *2.

Concerning crime-related challenges, this Court stated:

The crime relatedness of the condition is not eligible for review. The Supreme Court emphasized in *Hai Minh Nguyen*⁵ that we review sentencing conditions for an abuse of discretion, and “[a] court does not abuse its discretion if a ‘reasonable relationship’ between the crime of conviction and the community custody condition exists”; stated differently, “there must be ‘some basis for the connection.’” 191 Wn.2d at 684 (quoting *Irwin*, 191 Wn. App. [644] at 658-59, 657[, 364 P.3d 830 (2015)]). We review the factual basis for a trial court’s implicit finding that a condition is crime related using a “substantial evidence” standard. *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

As this court recently pointed out in *Casimiro*,⁶ where there is no objection to community custody conditions in the trial court, there is no reason for the parties or the court to create a record on the relationship between the crime and the conditions imposed. 8 Wn. App. 2d at 249. We are not required to consider an argument that a sentencing condition is not crime related when the offender had the opportunity to

⁴ *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).

⁵ *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018).

⁶ *State v. Casimiro*, 8 Wn. App. 2d 245, 438 P.3d 137, *review denied*, 193 Wn.2d 1029 (2019).

raise the contention in the trial court, creating a record, and failed to do so.

Peters, 2019 WL 4419800 at *7.

This is a similar factually based challenge that Mr. Pallett waived at sentencing by failing to object. *See* RP 981-83 (trial court imposes community custody conditions). Without an objection, the State had no reason to further develop the record. This Court should resolve this challenge on this ground by declining to review this issue.

2. *The condition is reasonably crime related*

If this Court does review this issue, the condition is clearly crime related. This Court reviews conditions of community custody for abuse of discretion, reversing such conditions only if they are manifestly unreasonable. *Padilla*, 190 Wn.2d at 677. The Sentencing Reform Act of 1981 (SRA) provides that when a court sentences a person to a term of community custody, the court shall impose conditions of community custody. RCW 9.94A.703. The act identifies certain conditions as mandatory, others as waivable, and others as discretionary. *Id.* Among discretionary conditions that the court is authorized to impose are orders that an offender “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f).

“Crime-related prohibitions” are orders “prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). A condition need not be causally related to the crime. *State v. Zimmer*, 146 Wn. App, 405, 413, 190 P.3d 121 (2008). A court does not abuse its discretion if there is a “reasonable relationship” between the crime of conviction and community custody condition. *Hai Minh Nguyen*, 191 Wn.2d at 684.

The trial court outlined the reasonable relationship between prostitution and Mr. Pallett’s conviction succinctly during sentencing:

So as I consider what to do with this, the nature of the offense is what [weighs] heaviest on me, the [e]ffect to this victim who had a gun pointed to her temple while she was forced to perform an act that it appeared, from my take on the testimony, you thought you were entitled to because of the fact that she was a prostitute and that’s what prostitutes do, which is obviously not really what prostitutes do, but those are the facts that concern this Court.

RP 978.

The record supports the trial court’s analysis. Mr. Pallett flashed his headlights to get T.B. to approach him; she did not initiate the contact. When she entered his vehicle, he was gruff and demanding of her. He acted as if he owned her, and he forcibly raped her at gunpoint after driving her to a secluded location. Mr. Pallett admitted to Detective Armstrong during a police interview that he was a “John,” or customer of prostitutes. RP 715.

The State elicited, with the trial court's permission and an appropriate limiting instruction, evidence that: Mr. Pallett was a frequent customer of prostitutes; that he went to a location known for prostitution; that he targeted a woman he suspected to be a prostitute. RP 635, 669-72. Regarding the facts of the case, Mr. Pallett did not *actually* patronize a prostitute the evening he raped T.B. He simply went to a location he knew to be a high prostitution area, to get the attention of a woman he reasonably knew to be a prostitute, in order to rape her because he felt he did not need consent from a prostitute.⁷ The prohibition has a reasonable relationship to the crime.

B. THIS COURT SHOULD DECLINE TO REVIEW WHETHER THE CONDITION IS VAGUE

Mr. Pallett argues the condition is not crime related but conflates the issue of vagueness with crime relatedness. *See Zimmer*, 146 Wn. App. at 412. Mr. Pallett did not assign error to the challenged condition's constitutionality; he claims only that it is not authorized by statute and not crime related. This Court should decline to review any vagueness challenge for this reason. RAP 10.3(a)(4); *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005). Regardless, the condition is not vague.

⁷ RCW 9.94A.703(3)(b) permits the trial court to exclude contact with a specific class of individuals. So even if not crime-related, this condition is still authorized by statute.

The due process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3, of the Washington Constitution “requires that citizens have fair warning of proscribed conduct.” *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). “A legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *Padilla*, 190 Wn.2d at 677.

Because violations of community custody conditions subject a person to arrest and incarceration, vagueness prohibitions extend to community custody provisions. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). If persons of ordinary intelligence and understand what the law proscribes, notwithstanding possible areas of disagreement, the law is sufficiently definite. *Bahl*, 164 Wn.2d at 754. Some level of ambiguity will always remain in community custody conditions. *Hai Minh Nguyen*, 191 Wn.2d at 681. 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). Review is de novo. *State v. Sandoval*, 123 Wn. App. 1, 4, 94 P.3d 323 (2004).

A reasonable person would understand that a prohibition on engaging in the business of prostitution would mean do not hire prostitutes. Mr. Pallett was repeatedly involved in the business of prostitution by frequently patronizing and being the customer of prostitutes. His lengthy history of involvement in prostitution is how detectives linked Mr. Pallett with the crime, and the State utilized this evidence for permissible ER 404(b) purposes at trial. A reasonable person would understand the prohibited conduct.

There is no danger of arbitrary enforcement because the condition narrows the prohibited activity only to the business of prostitution. Mr. Pallett argues that the phrase means that Mr. Pallett cannot create a criminal business enterprise focused on selling prostitutes or himself become a prostitute, but these hypotheticals are simply “possible area[s] of disagreement.” Business is also defined as: a dealing or transaction, field of endeavor, or matter. Merriam-Webster.com available at <https://www.merriam-webster.com/dictionary/business> (last accessed Oct. 23, 2019).

An ordinary person would understand the condition to mean do not deal with or be a customer of prostitutes. If anything, the condition is redundant because another condition provides that Mr. Pallett must also obey all laws, and patronizing a prostitute is a crime. RCW 9A.88.110. But

a redundant condition does not equate with a vague condition. If this Court reaches vagueness and determines the condition is unconstitutional, it should strike the condition without remand.⁸

V. CONCLUSION

Mr. Pallett waived this challenge by failing to object below. The condition forbids him from engaging in the business of prostitution, which is reasonably related to the circumstances of his crime. Mr. Pallett conflates vagueness with crime relatedness; however, even if this court addresses vagueness, the condition does not offend due process. This Court should affirm.

Dated this 24 day of October, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

⁸ Although remand for clarification is the remedy identified by case law, other community custody conditions prohibit Mr. Pallett from contacting prostitutes or go to places known for prostitution, which protect Mr. Pallett's class of victims. CP 410.

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN PALLETT,

Appellant.

NO. 36592-1-III

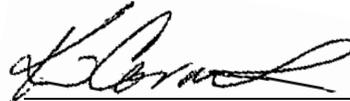
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on October 24, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Gasch
gaschlaw@msn.com

10/24/2019
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

October 24, 2019 - 9:33 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36592-1
Appellate Court Case Title: State of Washington v. Steven Bernard Pallett
Superior Court Case Number: 17-1-03799-1

The following documents have been uploaded:

- 365921_Briefs_20191024093214D3407589_7531.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Pallett Steven - 365921 - Resp Br - BBP.pdf

A copy of the uploaded files will be sent to:

- gaschlaw@msn.com
- lsteinmetz@spokanecounty.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Brett Ballock Pearce - Email: bpearce@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20191024093214D3407589