

FILED
Court of Appeals
Division III
State of Washington
4/23/2020 11:18 AM

NO. 36975-7-III

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

STATE OF WASHINGTON,
Respondent,

v.

ANDREW SANDERS,
Appellant.

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

The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENT OF ERROR.....	1
The sentencing court erred in imposing a broad community custody condition prohibiting Sanders from having sexual contact within a relationship without prior approval from a sexual treatment provider as the condition interfered with Sanders’ marital relationship.....	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	1
Whether the sentencing court erred in imposing a broad community custody condition prohibiting Sanders from having sexual contact within a relationship without prior approval as it interfered with Sanders’ marital relationship with his wife?.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT.....	4
Issue: The trial court erred by imposing an overly broad and vague community custody condition prohibiting Sanders from sexual contact with his wife unless approved by a treatment provider.....	4
E. CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	9

TABLE OF AUTHORITIES

	Page
Washington Supreme Court Cases	
<i>Bering v. Share</i> , 106 Wn.2d 212, 721 P.2d 918 (1986)	6
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008)	5, 6
<i>State v. Padilla</i> , 190 Wn.2d 672, 416 P.3d 712 (2018).....	5, 6
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998)	5
<i>State v. Sanchez Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010)	5
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008)	5, 7
Washington Court of Appeals Cases	
<i>State v. Irwin</i> , 191 Wn. App. 644, 364 P.3d 830 (2015)	6
Constitutional Provisions	
U.S. Const. Amend. XIV	6
Wash. Const. art. I, § 3	6
Statutes	
RCW 9.94A.....	4
RCW 9.94A.030.....	4
RCW 9.94A.505.....	4
RCW 9.94A.703.....	4
Other Authorities	
Sentencing Reform Act of 1981	4

A. ASSIGNMENT OF ERROR

The sentencing court erred in imposing a broad community custody condition prohibiting Sanders from having sexual contact within a relationship without prior approval from a sexual treatment provider as the condition interfered with Sanders' marital relationship.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the sentencing court erred in imposing a broad community custody condition prohibiting Sanders from having sexual contact within a relationship without prior approval as it interfered with Sanders' marital relationship with his wife?

C. STATEMENT OF THE CASE

Andrew Sanders pleaded guilty to a single count of attempted rape of a child in the second degree. RP 5/29/19¹ at 3-7. Sanders wrote the following in his plea statement:

¹ The appeal verbatim consists of the transcripts for five separate hearings. The report of proceedings ("RP") cites to hearings using the following format: RP, date of hearing, specific page(s) where cite is found.

On July 6, 2017, in Benton County, Washington, I took a substantial step towards the commission of the crime of rape of a child in the second degree by agreeing to meet a fictitious 13-year-old to engage in sexual intercourse and arriving at the predetermined location. I am more than 36 months older than someone who would have been 13 years old. I believed the person to be 13 years old and had the intent to have sexual intercourse with that purported 13 year old.

CP 14.

The purported 13-year-old was a fictitious boy invented by the Benton County Sheriff's Office on Craigslist to draw in adults interested in sexual contact with children or younger teens. CP 5; RP 5/29/19 4-5; RP 7/17/18 8.

Once Sanders pled guilty, the state dismissed a second count charging attempted communication with a minor for immoral purposes. CP 3-4; RP 5/29/19 3.

The Department of Corrections prepared a pre-sentence investigation (PSI). CP 19-26. The PSI noted Sanders was married and had been since 2009. CP 21

Sanders' supportive wife and two young children attended Sanders' sentencing and expressed ongoing support for him. RP 7/17/19 4-5, 9, 13-14; CP 21.

The court sentenced Sanders to a standard range of 58.5 months to life, plus community custody for any time in which Sanders is not in actual custody. CP 40; RP 7/17/19 14-15.

The court also imposed a multitude of community custody conditions to include that sexual contact in any relationship was prohibited unless a treatment provider approved of such. CP 49-50.

Sanders did not object to any of the community custody conditions. RP 7/17/19 10.

Sanders filed a timely notice of appeal. CP 53-54.

D. ARGUMENT

Issue: The trial court erred by imposing an overly broad and vague community custody condition prohibiting Sanders from sexual contact with his wife unless approved by a treatment provider.

Under the Sentencing Reform Act of 1981, RCW 9.94A, a court has the authority to impose “crime-related prohibitions and affirmative conditions” as part of a felony sentence. RCW 9.94A.505(9). RCW 9.94A.703(3)(f) currently allows a court to order, as a condition of community custody, compliance with any “crime-related prohibition”.

“‘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.” RCW 9.94A.030(10). To determine whether a condition is directly related, a court reviews the factual basis for the condition for “substantial evidence” and “will strike the challenged condition if there is no evidence in the record linking the circumstances of

the crime to the condition.” *State v. Padilla*, 190 Wn.2d 672, 683, 416 P.3d 712 (2018).

While review of most conditions of community custody is for “abuse of discretion,” *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010), a “[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). “Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). While a convicted person's rights can be restricted as a result of a criminal conviction, the restrictions must be “only to the extent it is reasonably necessary to accomplish the essential needs of the state and the public order.” *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez Valencia*, 169 Wn.2d at 792. This is in line with the general principle that the restriction of

fundamental freedoms, including freedom of speech, can only be justified by “compelling” state interests with narrowly drawn restrictions. *See Bering v. Share*, 106 Wn.2d 212, 237-45, 721 P.2d 918 (1986).

Community custody conditions can also be unconstitutionally vague in violation of the guaranty of due process contained in the Fourteenth Amendment to the United States Constitution and art. I, § 3 of the Washington Constitution if the conditions do not provide fair warning of the proscribed conduct and are not definite enough to prevent arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53; *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). A community custody condition is unconstitutionally vague if either “(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.

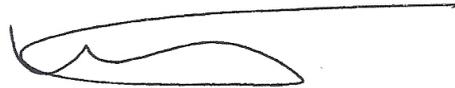
The condition that sexual contact in any relationship is prohibited until a treatment provider approves of such is too broad and must be tailored. Sanders is married. His wife evidenced her support for her husband at sentencing. To require Sanders to seek approval for intimate sexual contact with his wife is too broad and impinges on the constitutional right to marry and have a marital relationship. The right to marry is a fundamental constitutional right. *Warren*, 165 Wn.2d at 34.

On remand, the sexual contact condition should specifically be redrafted to clarify it does not apply to Sanders' wife.

E. CONCLUSION

This court should remand Sanders' case to the trial court to correct the sexual contact community custody condition.

Respectfully submitted April 23, 2020.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is written in a cursive style with a long horizontal stroke at the end.

LISA E. TABBUT/WSBA 21344
Attorney for Andrew Sanders

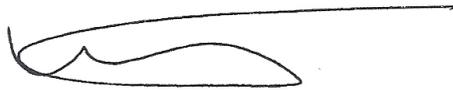
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Benton County Prosecutor's Office, at prosecuting@co.benton.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Andrew Sanders, DOC#416679, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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

Signed April 23, 2020, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Andrew Sanders, Appellant

LAW OFFICE OF LISA E TABBUT

April 23, 2020 - 11:18 AM

Transmittal Information

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