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NO. 56812-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC G. BAHL,

Appellant.

ku

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

The Honorable Stephen J. Dwyer, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.

Snohomish County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Magarity 1-26-2006
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The trial court imposed unconstitutionally vague and overbroad conditions of community custody.

2. The trial court improperly delegated aspects of community custody to the Department of Corrections.

Issue Pertaining to Assignments of Error

As community custody conditions, the trial court prohibited the appellant from: (1) possessing or accessing "pornographic materials as directed by the supervising Community Corrections Officer[;]" (2) "frequent[ing] establishments whose primary business pertains to sexually explicit or erotic materials[;]" and (3) possess[ing] or control[ing] sexual stimulus material" for his "particular deviancy as defined by the Community Corrections Officer and therapist except as provided for therapeutic purposes." CP 22. Are these conditions unconstitutionally vague and overbroad, as well as improper delegations of the trial court's sentencing authority?

B. STATEMENT OF THE CASE

1. Procedural facts

The state charged the appellant, Eric G. Bahl, with indecent exposure, second degree rape, first degree robbery, residential burglary and

first degree criminal trespass. CP 150-51. The jury found Bahl guilty of second degree rape and first degree robbery, not guilty of residential burglary and criminal trespass, and could not reach a unanimous verdict as to indecent exposure. CP 48-52. The trial court sentenced Bahl to concurrent standard range terms of 105 months for rape and 34 months for burglary. CP 18.

2. Substantive facts

In a presentence report referred to by the parties and court at sentencing, a probation officer recommended the following conditions of community custody:

(1) Do not possess or access pornographic materials, as directed by the supervising Community Corrections Officer [CCO]. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

(2) Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes.

CP 22; RP3, 8-9.¹ Trial counsel objected to the conditions, contending there was no evidence they were related to Bahl's commission of the

¹ The record consists of nine volumes of verbatim reports covering pretrial, trial and sentencing proceedings. Because Bahl raises only sentencing issues, the only pertinent verbatim report is the report of sentencing proceedings held on July 26, 2005. That report will be referred to throughout this brief as "RP."

crimes. RP 8-9. The trial court rejected counsel's argument and imposed each condition. CP 22; RP 14.

C. ARGUMENT

THE TRIAL COURT IMPOSED COMMUNITY CUSTODY CONDITIONS THAT WERE UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AS WELL AS UNLAWFUL DELEGATIONS OF AUTHORITY.

The Fourteenth Amendment and Wash. Const. art. 1, § 3 protect citizens from impermissibly vague penal statutes. State v. Baldwin, 111 Wn. App. 631, 647, 45 P.3d 1093 (2002), aff'd on other grounds, 150 Wn.2d 448 (2003). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct they must avoid. Second, it protects them from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sullivan, 143 Wn.2d 162, 181-182, 19 P.3d 1012 (2001).

1. Pornographic materials

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held that the following condition of community placement was

unconstitutionally vague: "[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or [CCO]. Pornographic materials are to be defined by the therapist and/or [CCO]." Sansone, 127 Wn. App. at 634-35.

Here, the pornography prohibition imposed upon Bahl is similarly vague. The term has not been defined in a way that ordinary people can understand what it encompasses. This is supported by the fact that the community custody condition includes a requirement that possession or access to "pornography" be "directed" by the CCO, a requirement that would be unnecessary if "pornography" were inherently definite. The condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Were Bahl to run across pornographic materials, even inadvertently, he would be unable to ascertain whether they were pornographic without showing them to the CCO to obtain a determination, which itself exposes him to risk of violation.

Moreover, this Court held in Sansone that the sentencing court improperly delegated its authority to the Department of Corrections (DOC) to "define" pornography. Sansone, 127 Wn. App. at 642. Sentencing courts do have the power to delegate some aspects of community placement to the DOC. Sansone, 127 Wn. App. at 642. Although the judiciary's

function is to determine guilt and impose sentences, "the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the Legislature." Sansone, 127 Wn. App. at 642 (quoting State v. Mulcare, 189 Wash. 625, 628, 66 P.2d 360 (1937)).

Sentencing courts may not, however, delegate excessively. A sentencing court "may not wholesaledly 'abdicate . . . its judicial responsibility' for setting the conditions of release." Sansone, 127 Wn. App. at 642 (citing United States v. Loy, 237 F.3d 251, 266 (3rd Cir. 2001)) (quoting United States v. Mohammad, 53 F.3d 1426, 1438 (7th Cir.1995)). A sentencing court cannot cure an unconstitutionally vague condition by permitting the CCO an uncontrolled power of interpretation, as this would delegate basic policy matters to the officer for resolution on an ad hoc and subjective basis. Sansone, 127 Wn. App. at 642. Here, the delegation to Bahl's CCO to "direct" whether something Bahl possessed or accessed is pornography was improper; it was not an administrative detail that could be properly delegated to the CCO. Sansone, 127 Wn. App. at 642.

2. Sexually explicit or erotic material

The same rationale applies to the second part of Bahl's "pornography" condition, which prohibits him from visiting "establishments whose primary business pertains to sexually explicit or erotic material." CP 22. Although the terms "sexually explicit" and "erotic" have been defined for limited purposes in the Criminal Code, their definitions have no applicability here.² Moreover, the definitions are not referred to in the Conditions of Community Custody and Bahl was thus left with the unenviable and risky task of determining which establishments he was forbidden to enter.

Support for the proposition that the term "sexually explicit" is vague is found in Sansone, 127 Wn. App. at 640, n.3, where the court cites Indiana cases holding the probation condition that the defendant not possess

² RCW 9.68A.011(3) defines "sexually explicit conduct" and is limited to Chapter 9.68A, "Sexual Exploitation of Children." "Sexually explicit material" is also defined in RCW 9.68.130(2), but the definition is expressly limited to the "unlawful display" of such material. RCW 9.68A.150(3)(b) defines "erotic materials" for purposes of the statute prohibiting minors "on the premises of a commercial establishment open to the public if there is a live performance containing matter which is erotic material." RCW 9.68A.150(1). Finally, RCW 9.68.050(2), defines "erotic" for purposes of Chapter 9.68, "Obscenity and Pornography." The definition "conforms to the definition of obscenity applied to minors based on contemporary community standards and is, therefore, not void for vagueness." Soundgarden v. Eikenberry, 123 Wn.2d 750, 777, 871 P.2d 1050 (1994) (emphasis added), cert. denied, 513 U.S. 1056 (1994).

pornographic or sexually explicit materials unconstitutionally vague. Specifically, in Foster v. State, 813 N.E.2d 1236 (Ind. App. 2004), the court held that the condition of Foster's probation prohibiting his possession of sexually explicit or pornographic materials was unconstitutionally vague, despite the fact the materials were specified as "books, magazines, computer images, internet files, photographs, VCR cassettes, film or other materials." Foster, 813 N.E.2d at 1239. The court found that this purported specificity was not sufficient to define "sexually explicit" and therefore failed to inform Foster what conduct would result in a violation. Id. at 1239; Accord: Fitzgerald v. State, 805 N.E.2d 857, 866-67 (Ind. App. 2004); Smith v. State, 779 N.E.2d 111, 117-18 (Ind. App. 2002).

The term "erotic" is just as vague as "sexually explicit" and "pornographic." In a First Amendment case defining "obscene," the Supreme Court in Miller v. California explained that "pornography" was a "subgroup" of the contemporary definition of "obscene." 413 U.S. 15, 18-19 n.2, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Resorting to a dictionary, the Court defined "pornography" to mean "'1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.'" Id. (quoting Webster's Third New International

Dictionary (Unabridged 1969)) (emphasis added)). Therefore, if the unconstitutionally vague term "pornography" is defined by a portrayal of erotic behavior, the term erotic is similarly vague.

Further support for Bahl's position comes from the reasoning of United States v. Ristine, 335 F.3d 692, 695 (8th Cir. 2003). There special conditions of Ristine's supervision banned him from owning or possessing "any pornographic materials[,] the use of "any form of pornography or erotica" and his entry into "any establishment where pornography or erotica can be obtained or viewed." Ristine, 335 F.3d at 694. In determining whether these conditions were vague, the court compared the following definitions of pornography, the first of which is the same one used by the Supreme Court in Miller:

Compare Webster's Third New International Dictionary 1767 (1983) (defining "pornography" as "a description of prostitutes or prostitution" or "a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement") with The American Heritage Dictionary 1410 (3d ed.1992) (defining "pornography" as "[t]he presentation or production of ... [p]ictures, writing or other material that is sexually explicit and sometimes equates sex with power and violence") and Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 592 (proposing definition of "pornography" that includes sexual explicitness, depictions of women as enjoying or deserving physical abuse, the purpose of arousal, and the effect of arousal).

Ristine, 335 F.3d at 695, n.3 (emphasis added). Although finding "more compelling" a conclusion that the condition was unconstitutionally vague, the court felt constrained by the plain error rule to uphold it. Ristine, 335 F.3d at 695.

For our purposes, the import of Miller and Ristine is the cited dictionary definitions of "pornography:" one includes "erotic behavior;" the other "sexually explicit[.]" As such, the terms "sexually explicit" and "erotic" in Bahl's conditions of community custody provide no more definiteness than does "pornography."³ Therefore, under Sansone, they, too, are unconstitutionally vague.

Moreover, the term "erotic" is overbroad and its inclusion in the community custody condition violates the First Amendment and Wash. Const. art. 1, § 5. The purpose of overbreadth analysis is to ensure that constitutionally protected conduct, including free speech, is not prohibited. City of Tacoma v. Luvene, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). "A criminal statute that sweeps constitutionally protected free speech activities within its prohibitions may be overbroad and thus violate the First

³ The ordinary definitions of "erotic" and "erotica" illustrate the vagueness of the terms. "Erotic" means "1: a theory or doctrine of love[;]" "erotica" means "literary or artistic items having an erotic theme, esp: books treating of sexual love in a sensuous or voluptuous manner -- compare PORNOGRAPHY[.]" Webster's Third New International Dictionary 772 (1993).

Amendment." State v. Stephenson, 89 Wn. App. 794, 800, 950 P.2d 38, review denied, 136 Wn.2d 1018 (1998).

When addressing an overbreadth challenge, this court considers (1) whether the challenged prohibition reaches constitutionally protected speech or expression; and (2) whether it proscribes a real and substantial amount of speech. State v. Knowles, 91 Wn. App. 367, 372, 957 P.2d 797, review denied, 136 Wn.2d 1029 (1998). If both conditions are met, the court must strike the prohibition as overbroad unless the restriction of protected speech is constitutionally permissible or it is possible to narrow its construction so that it does not unconstitutionally interfere with protected speech. Knowles, 91 Wn. App. at 372, 957 P.2d 797. Nonetheless, criminal statutes require particular scrutiny and may be facially invalid if they proscribe a substantial amount of constitutionally protected conduct even if they also have legitimate application. State v. Slack, 113 Wn.2d 850, 854, 784 P.2d 494 (1989).

The term "erotic," without further limitation, infringes upon free expression. See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) ("we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value . . ."); Soundgarden v. Eikenberry,

123 Wn.2d 750, 761-64, 778, 871 P.2d 1050, cert. denied, 513 U.S. 1056 (1994) (erotic sound recordings statute overbroad because it reaches constitutionally protected conduct); Odle v. Decatur County, Tenn., 421 F.3d 386, 389 (6th Cir. 2005) ("while it is not preferred, erotic entertainment is firmly within the scope of expression protected under the First Amendment."); Dream Palace v. County of Maricopa, 384 F.3d 990, 1021 (9th Cir. 2004) (invalidating regulation on erotic dancers because it prevented dancers "from practicing a protected form of expression . . ."); R.V.S., L.L.C. v. City of Rockford, 361 F.3d 402, 414 (7th Cir. 2004) (invalidating ordinance banning performance of specified sexually explicit movements within sexually oriented businesses because restricting particular erotic movements and gestures of erotic dancer unconstitutionally burdens protected expression); ASF, Inc. v. City of Seattle, ___ F. Supp. ___, 2005 WL 2206909, *3 (W.D. Wash. 2005) (Seattle's 17-year moratorium on issuing adult entertainment licenses unconstitutionally limits erotic dancing, "a protected form of speech.").

Without further limitation, therefore, banning Bahl from attending all establishments whose primary business pertains to "erotic material" unconstitutionally infringes on his rights under the First Amendment and Wash. Const. art. 1, § 5.

3. Sexual stimulus material

Finally, the condition that Bahl "not . . . possess or control sexual stimulus material for [his] particular deviancy" is also controlled by the reasoning in Sansone. Without belaboring the point, "sexual stimulus material" can mean many things to many people. For some, it is apparently taking photographs of minor girls. See State v. Bohannon, 62 Wn. App. 462, 465, 814 P.2d 694 (1991) (defendant "took 19 nude photographs of [girl], instructed her how to pose and paid her one hundred dollars, telling her that he was taking the pictures to keep in his locker at work."). Others employ a more secretive approach. See State v. Mobley, 129 Wn. App. 378, 118 P.3d 413, 417 (2005) (defendant purposely sought out and downloaded images of child pornography onto his computer, then showed them to his 10-year-old stepdaughter). Further, using an object to penetrate the vagina or anus qualifies as sexual intercourse under RCW 9A.44.010(1)-(b) (emphasis added). See, State v. Clinton, 48 Wn. App. 671, 677, 741 P.2d 52 (1987) (defendant penetrated victim with carrot). Finally, more benign methods may provide sexual stimulation, such as viewing movies, attending adult dance clubs, or leering at cheerleaders at local sporting events.

Simply put, "sexual stimulus material" is limited only by the population's imaginations, proclivities, and deviancies. Without more specific definition, "sexual stimulus material" is no less vague and offers no more guidance to Bahl than does "pornography." (See Central Ave. Enterprises, Inc. v. City of Las Cruces, 845 F. Supp. 1499, 1503-04 (D.N.M.1994) (failure to define "specified sexual activities and specified anatomical areas" rendered ordinance unconstitutionally vague regarding the terms; court distinguishes cases finding same terms constitutional because terms were further defined). Under Sansone, therefore, this condition is unconstitutionally vague.

In addition, this condition shares another infirmity identified by Sansone. Here, the trial court has improperly delegated to the CCO and therapist unfettered authority to define the sexual stimulus materials Bahl may not possess or control.

Finally, no citation to authority is needed for the proposition that the First Amendment protects an adult's right to view sexually explicit movies and videos, as well as to read such magazines. Therefore, to the extent the term "sexual stimulus material" sweeps within it such protected activities, the condition prohibiting such material is unconstitutionally overbroad.

For these reasons, this court should remand Bahl's judgment and sentence and order that community custody Conditions (4) and (5) be made more specific. Sansone, 127 Wn. App. at 643.

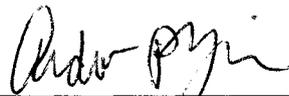
D. CONCLUSION

The trial court imposed community custody conditions that were unconstitutionally vague and overbroad, as well as unlawful delegations of authority. This court should remand to the sentencing court for imposition of conditions that contain the necessary specificity.

DATED this 26 day of January, 2006.

Respectfully submitted,

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