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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.

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

The Honorable Stephen J. Dwyer, Judge

REPLY BRIEF OF APPELLANT

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[Handwritten signature]

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 Mayorsky 5-9-2006
Name Date in Seattle, WA Date

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A. ARGUMENT IN REPLY¹

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

Sexually explicit or erotic material

1. Vagueness

The trial court imposed the following community custody condition as part of appellant Eric G. Bahl's sentence: "Do not frequent establishments whose primary business pertains to sexually explicit or erotic material." CP 22. The state claims the terms "sexually explicit" and "erotic" are "sufficiently definite to apprise [Bahl] of what is prohibited." Brief of Respondent at 6. Bahl disagrees.

The state relies on definitions set forth in statutory sections dealing with sexual exploitation of children, RCW Ch. 9.68A, and obscenity and pornography, RCW Ch. 9.68. It further cites Soundgarden v. Eikenberry, 123 Wn.2d 750, 777, 871 P.2d 1050 (1994) (emphasis added), cert. denied,

¹ Bahl stands on his Opening Brief with respect to the condition prohibiting "pornographic materials," and neither contests the state's concession that the condition is vague nor its request that this Court remand for further clarification of the term. Bahl also stands on his Opening Brief with respect to the condition that he "not possess or control sexual stimulus material for [his] particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes." CP 22.

513 U.S. 1056 (1994), correctly noting that as applied to minors, the term "erotic" is not unconstitutionally vague.

However, as contended in his opening brief, Bahl maintains reliance on these definitions is inapposite here. Bahl was convicted of raping an adult woman. Different rules exist when applying sexual terminology to offenses against children. As our Supreme Court observed years ago, "[t]he State may legitimately prohibit speech of a harmful sexual nature to minors, even where that speech is protected by the First Amendment with regard to adults." State v. Schimmelpfennig, 92 Wn.2d 95, 101, 594 P.2d 442 (1979); see Ginsberg v. New York, 390 U.S. 629, 638, 88 S. Ct. 1274, 20 L. Ed. 2d. 195 (1968)(regulation adjusting definition of obscenity to minors does not invade minor's constitutionally protected rights because authority to exercise control over children exceeds that of adults). Therefore, the definitions that exist in these inapposite statutes do not save the vague terminology used by the trial court here.

Furthermore, the state's discussion of United States v. Ristine, 335 F.3d 692 (8th Cir. 2003), misses the point raised in Bahl's opening brief: that by including the terms "erotic" and "sexually explicit" within commonly held definitions of "pornography," the terms provide no more

definiteness than does "pornography" and should be treated as this Court did in State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005).

In addition, the state's use of State v. Phipps, 319 F.3d 177 (5th Cir. 2003), does not bolster its position. Brief of Respondent at 9-10. Phipps acknowledged that the terms at issue there, "sexually oriented or sexually stimulating materials," were "somewhat vague," but were saved by the more precise "prohibition on patronizing sexually oriented establishments," which referred specifically to "places such as strip clubs and adult theaters or bookstores." Phipps, 319 F.3d at 193.

The court provided Bahl no such guiding language here. In fact, simply prohibiting "establishments whose primary business pertains to sexually explicit or erotic materials," without specifying what types of establishments were prohibited, highlights the distinction between the vague condition here and the more precise prohibition in Phipps. Phipps, then, provides the state no refuge, and the terms "sexually explicit" and "erotic" as applied here are unconstitutionally vague.

2. Overbreadth

The state claims the condition is not overbroad because an offender's constitutional rights while in the community are subject to infringements authorized by the Sentencing Reform Act (SRA). Brief of Respondent at

10-11. The state goes on to assert the prohibition at issue here is an SRA-authorized order to comply with crime-related prohibitions and to stay outside of specific geographical boundaries. RCW 9.94A.700(5)(a), (e). Bahl disagrees.

Under RCW 9.94A.030(12) a "crime-related prohibition" is an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. "Since the only prohibitions that may be ordered are those that directly relate to the crime for which the offender was convicted, only a relatively narrow range of conduct may be prohibited as a condition of sentence[.]" State v. Parramore, 53 Wn. App. 527, 532, 768 P.2d 530 (1989) (quoting D. Boerner, Sentencing in Washington § 4.5 (1985)). A crime-related prohibition may only prohibit conduct directly related to the circumstances of the crime. State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). Although a causal link need not be established between the condition imposed and the crime committed, the condition must relate to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Bahl's condition prohibiting him from "establishments whose primary business pertains to sexually explicit or erotic material" is not

related to the circumstances of his crimes. There was no evidence Bahl frequented such establishments or that he had been at such an establishment before committing the offenses here. Further, there was no evidence showing that attending these establishments aroused him such that he felt it necessary to sexually assault women. Indeed, Bahl had no criminal history before the current offenses. To justify this condition as "crime-related" would permit its imposition in every case involving a sex offender, thereby defeating the rule that such conditions be narrowly applied. See State v. Jones, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003)(trial court had no authority to condition community custody on participation in alcohol counseling because there was no evidence alcohol contributed to the offenses or that court's requirement was "crime-related.") For these reasons, the state's reliance on the "crime-related prohibition" provision of RCW 9.94A.700(5)(e) is misplaced.

The state's reliance on the "specific geographical boundaries" prohibition is an even bigger stretch. Courts may impose geographic restrictions, but these are limited to ordering an offender to "remain within, or outside of, a specified geographical boundary." RCW 9.94A.700(5)(a). The restriction imposed on Bahl, to refrain from "frequent[ing] establishments whose primary business pertains to sexually explicit or erotic

materials" is not a specified geographic boundary. Rather, it is a restriction that could not be imposed because it was not related to Bahl's crime.

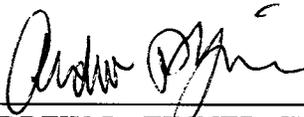
B. CONCLUSION

For the reasons cited herein and in his opening brief, Bahl requests this Court to remand his case for clarification of the aforesaid vague terms.

DATED this 9 day of May, 2006.

Respectfully submitted,

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