

64648-6

64648-6

NO. 64648-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KELLY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY J. McCARTHY

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SARA L. McCULLOCH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

1. An issue is technically moot if this court can no longer provide effective relief. Kelly is appealing issues raised in a probation violation hearing. Where Kelly has served his entire jail sanction and supervision has been terminated, should this appeal be dismissed as moot?

2. The court has discretion to determine appropriate conditions of supervision. Conditions are upheld, absent an abuse of discretion. Where Kelly was an untreated homeless sex offender, falsely presenting himself as a security officer in the community, was it an abuse of discretion to prohibit him from wearing a badge, uniform and security paraphernalia?

3. A trial court determination that a probation violation has occurred will be reviewed for abuse of discretion. Where the evidence was that Kelly was wearing a uniform-style jacket and uniform-style shirt with security badges in the pocket, did the court abuse its discretion in finding that the defendant was wearing security paraphernalia, uniform and security officer style shirt?

4. A condition of supervision is presumed to be constitutional unless the party challenging it proves that it is unconstitutional beyond a reasonable doubt. Kelly was prohibited

from wearing a badge, security paraphernalia and a uniform. Kelly wore military-style clothing with security badges in the pocket, admitted that he purchased the clothing at an army supply store and that he knew his jacket looked like a security jacket. Did Kelly fail to prove that the condition to not wear security paraphernalia, badges and uniforms was unconstitutionally vague as applied to him?

B. STATEMENT OF THE CASE

1. FACTS

Michael Kelly is a 22-year-old homeless sex offender. CP 36-37. He was convicted of Child Molestation in the First Degree after he attempted to anally rape a five-year-old child in the park. CP 46; 1/22/09 RP 16. He was subsequently convicted in 2007 of Attempted Failure to Register as a Sex Offender and placed on probation by the court. CP 19-21.

While on probation supervision, Kelly had a number of violation hearings. At those hearings, Kelly was charged with violating his conditions by having a weapon on school grounds, having contact with children, viewing pornography on the library computer, masturbating in the library bathroom, impersonating a

security officer after he was in a conflict with some minors at a McDonalds restaurant, failing to live in an approved residence and failing to participate in sexual deviancy treatment. 9/29/07 RP 2; 3/12/08 RP 3, 12; 1/22/09 RP 13; 3/20/09 RP 30-31. On January 22, 2009, after an incident where Kelly got into an argument with some minors and presented himself as a security officer, the court imposed the condition of "Do not wear a badge or security paraphernalia or uniform." CP 32.

On December 1, 2009, Kelly came before the court again for violating his conditions of supervision. The allegation was that he did wear a badge, security officer-style shirt and uniform-style jacket. 12/1/09 RP 59-61. The court found that these violations were willfully committed and sentenced Kelly to 208 days in the King County Jail. CP 52-53. The court also terminated his supervision. CP 52.

C. ARGUMENT

1. THE ISSUES RAISED ARE MOOT ON APPEAL.

The matters presented in this case have become moot. A case is moot if a court can no longer provide effective relief." In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002).

Reversing the court's order would merely be a technical exercise. Kelly has completed the entire jail sanction and probation supervision has been terminated. CP 52. Further, this case does not present issues that are matters of continuing and substantial public interest. State v. Sansone, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005). Therefore, this appeal should be dismissed as moot.

2. IT WAS REASONABLE TO PROHIBIT KELLY FROM WEARING A BADGE, UNIFORM AND SECURITY PARAPHERNALIA.

RCW 9.95.200 and .210 govern the conditions of probation for misdemeanors sentenced in Superior Court. See RCW 9.95.200, .210. The court has discretion to determine appropriate conditions of supervision. See State v. LaRoque, 16 Wn. App. 808, 810, 560 P.2d 1149 (1977). The sentencing court has the authority to modify or change the conditions of probation at any time during the period of probation. RCW 9.95.230. Conditions of supervision are reviewed for abuse of discretion. See LaRoque, 16 Wn. App. at 810. The conditions imposed on probation must merely be reasonable. Id.

The relationship between the crime and a condition of probation "will always be subjective, and such issues have

traditionally been left to the discretion of the sentencing judge."

State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989).

No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. Id. at 531.

"Circumstance" is defined as "an accompanying or accessory fact." Black's Law Dictionary 259 (8th ed. 2004). Failure to register is inextricably linked to the underlying crime. The underlying sex offense is what requires an offender to register. RCW 9A.44.130(10). It is also an element of the crime of Failure to Register as a Sex Offender. RCW 9A.44.130(11). The nature of the defendant's underlying conviction is a fact properly considered by the court in defining the conditions of probation.

Kelly's behavior while on supervision for Attempted Failure to Register was concerning to the court. Kelly is a mentally ill, homeless, level 3, untreated sex offender, presenting himself as a security officer when he was not employed as one. CP 38. The Community Corrections Officer (CCO) explained why it was so concerning that Kelly would appear in public in uniform or presenting himself as a security officer:

...his current offense is a Child Molestation of First Degree. And granted Mr. Kelly committed that offense as a juvenile, but it involved him taking a five-year old boy to a public park and trying to anally rape him. The fact that he goes around portraying himself as a security officer, we've discussed it several times with him, it's not prudent for him given that he's a sex offender, given that that portrays a person of authority, at least. If he were then to encounter minors, portraying a person of authority with the lack of sexual deviancy treatment in his history, these are all great risk factors that we - - that we are concerned about and we have discussed with Mr. Kelly. 1/22/09 RP 16.

It was only after the defendant had an argument with some minors at McDonalds and was presenting himself as a security officer that the court imposed the condition prohibiting him from wearing security paraphernalia, badges and uniforms. CP 32. The court reasonably imposed this condition in order to prevent risk to the community. It was not abuse of discretion and should be affirmed.

3. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT KELLY HAD VIOLATED A CONDITION OF HIS PROBATION.

Revoking of probation rests with sound discretion of the trial court. State v. Drake, 16 Wn. App. 559, 563, 558 P.2d 828 (1976). Revocation may be accomplished when there is evidence sufficient to reasonably satisfy the court that the probationer has violated a

court-imposed condition of his probation. Id.; RCW 9.95.230. The court determination that a probation violation has occurred will be reviewed only for abuse of discretion. See Drake, 16 Wn. App. at 563.

The testimony was that Kelly had a history of pushing the limits when it came to wearing security paraphernalia. 12/1/09 RP 66. He had been previously warned by his CCO about wearing items that made him appear to be a firefighter and security officer. Id. On November 5, 2009, Kelly met with his CCO. He showed up wearing a military-style, uniform-style jacket. Id. at 61; Exhibit 1 (Jacket). Kelly's CCO asked him why he was wearing that and Kelly denied it was a uniform, but admitted he bought it at the army supply store. Id. at 61. Kelly also said, "I know it looks like a security jacket, but it's not." Id. on 76. Underneath the jacket, the defendant had a military-style, uniform-style shirt on with two security badges in the shirt pocket. Id. at 62; Exhibit 2 (Photograph); Exhibit 3 (Security Badges). He was also carrying three other badges in his pocketbook. Id. at 62. Both the jacket and the shirt had epaulets on the shoulders, an ornamental piece distinctive of military uniforms. Id. at 63. The jacket had gold buttons and an American flag on the sleeve, bearing a strong

resemblance to a Seattle Police officer uniform. Id. at 63. The two badges in his shirt pocket were from American Commercial Security Services. Id. at 64. One of the badges said "Security Officer" on it. Id. at 65. Given the overwhelming evidence, the court did not abuse its discretion in finding the defendant was willfully "wearing security paraphernalia, uniform and security officer style shirt on 11/5/09." CP 52. The court's finding should be upheld.

4. THE CONDITION THAT KELLY NOT WEAR A BADGE, SECURITY PARAPHERNALIA OR A UNIFORM WAS NOT UNCONSTITUTIONALLY VAGUE.

The due process vagueness doctrine serves two important purposes: first, to provide fair warning of what conduct one must avoid; and second, to protect from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A condition is presumed to be constitutional unless the party challenging it provides that it is unconstitutional beyond a reasonable doubt. Id. at 118. The constitution does not require "impossible standards of specificity" or "mathematical certainty" because some degree of vagueness is

inherent in the use of our language. State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

The condition that Kelly not wear security paraphernalia was a narrowly tailored condition that addressed a situation very specific to Kelly. "Wear" is a term of common understanding. Kelly clearly understood the appearance of the jacket he wore. When he saw his CCO, Kelly said, "I know it looks like a security jacket, but it's not." 12/1/09 RP 76. Kelly even admitted that he purchased it at the army surplus store. 12/1/09 RP 61. The security badges, one bearing the words "Security Officer," were contained in the front pocket of the military-style shirt he was wearing. 12/1/09 RP 65. Further, Kelly possessed more security badges in his pocketbook. 12/1/09 RP 65. Kelly's dress clearly demonstrated his intention to dress in security officer paraphernalia.

Kelly relies on Sansone and Moultrie to support his claims. The cases are both distinguishable from the present issue. In Moultrie, the court limited the defendant from contacting "vulnerable, ill or disabled adults." State v. Moultrie, 143 Wn. App. 387, 397-98, 177 P.3d 776 (2008). This prohibition was determined to be so inclusive, so vast that Moultrie would be unable to determine which people fell into this category. Id. at 398. Kelly's

probation condition is distinguishable. The prohibition was narrowly tailored to meet a specific safety concern. Kelly had a history of wearing security paraphernalia and uniforms. Mr. Kelly was capable of determining which clothing was security-related or uniform-related.

In Sansone, the defendant was prohibited from possessing or perusing pornographic materials without permission of his therapist or probation officer. State v. Sansone, 127 Wn. App. 630, 634, 111 P.3d 1251 (2005). The court found that the term pornography was insufficiently defined by the court and remanded to the trial court for further specificity. Id. at 640, 643. Kelly's condition is distinguishable as it followed a specific incident where Kelly was dressed as a security officer. It was tailored to prevent Kelly from wearing clothing or badges that placed him in a position of authority. Kelly was capable of discerning the boundaries.

There is nothing unconstitutionally vague about the condition, as applied to Kelly. Kelly was provided with fair warning of what conduct he must avoid and he was not subject to arbitrary, ad hoc, or discriminatory law enforcement. Kelly has failed to prove that the condition was unconstitutional beyond a reasonable doubt. The condition should be upheld.

D. CONCLUSION

For the foregoing reasons, this appeal should be dismissed as moot. Should the court reach the issues raised by the appellant, the probation condition and violation should be upheld.

DATED this 10th day of August, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SARAH McCULLOCH, WSBA #30335
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002