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NO. 69734-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOVAL GUTIERREZ,

Appellant.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 10-1-00227-9

BRIEF OF RESPONDENT

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: David E. Carman
Deputy Prosecuting Attorney
WSBA # 39456
Attorney for Respondent

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I. STATEMENT OF THE ISSUES

- A. Whether the court should affirm the revocation of the appellant's Special Sex Offender Sentencing Alternative and imposition of a standard-range sentence when neither has been challenged by the appellant.
- B. Whether certain community custody conditions that were properly imposed as part of the appellant's Special Sex Offender Sentencing Alternative should have been stricken once the alternative sentence was revoked and a standard sentence imposed.

II. STATEMENT OF THE CASE

The appellant pled guilty to one count of indecent liberties with forcible compulsion on July 18, 2011. CP 76-83. Before imposition of the initial sentence, a pre-sentence investigation was produced by the Department of Corrections, and the appellant underwent a psycho-sexual evaluation. CP 41-55, 56-73. The court granted a Special Sex Offender Sentencing Alternative (SSOSA). CP 24-37. As part of the SSOSA sentence, the court imposed community custody for the length of the appellant's suspended sentence, or for life if the SSOSA was revoked. CP 27. The court also imposed a series of conditions of the community custody. CP 28, 35-37.

The court revoked the appellant's SSOSA after finding violations of the imposed conditions. CP 18-19. The court then imposed a standard-range sentence, including community custody for the length of the

maximum term sentenced under RCW 9.94A.507. CP 27. The court did not alter the previously imposed conditions of community custody. CP 18-19.

The appellant now timely appeals. CP 1-2.

III. ARGUMENT

A. **The revocation of the appellant's Special Sex Offender Sentencing Alternative and imposition of a standard sentence should be affirmed because neither was challenged.**

The appellant has made no challenge to the conditions imposed as part of his SSOSA, the revocation of the alternative sentence, or the sentencing court's imposition of a standard sentence. See Appellant's Brief at 1-4. In fact, the appellant specifically conceded the sentencing court's "authority to impose prohibitions as conditions of the SSOSA suspended sentence." *Id.* at 11. Similarly, the appellant appears to accept the revocation of the alternative sentence. *Id.* at 12 ("[u]pon revocation, the sentence reverted to an ordinary, non-SSOSA sentence."). Instead, this appeal focuses entirely on conditions of community custody following the revocation of the appellant's SSOSA. Because the appellant has made no challenge to the SSOSA revocation or imposition of standard-range sentence, those actions should be affirmed.

B. Some, but not all, conditions that were validly imposed as part of the appellant's SSOSA should be stricken upon imposition of the standard-range sentence.

1. Standard of Review

When imposing community custody as part of a standard-range sentence, a court may impose crime-related prohibitions and affirmative conditions. RCW 9.94A.505(8). For instance, a court may require an offender to participate in crime-related treatment or counseling services. RCW 9.94A.703(3)(c). A sentencing court may also require an offender to comply with crime-related prohibitions. RCW 9.94A.703(3)(f). Because the imposition of crime-related conditions is fact-specific, sentencing conditions are reviewed for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Imposition of an unconstitutional condition of community custody is, of course, an abuse of discretion. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The sentencing court abused its discretion in continuing the imposition of some, but not all, conditions of community custody after the revocation of the appellant's SSOSA and the imposition of a standard-range sentence.

2. Restrictions on access to computers and the internet should be stricken because they are not crime-related prohibitions.

A crime-related prohibition must be related to the circumstances of the crime for which the offender is being sentenced. *State v. Land*, 172 Wn.App. 593, 605, 295 P.3d 782 (Div. 1, 2013) (citing RCW

9.94A.030(10)). The sentencing court imposed conditions on the appellant prohibiting access to the internet, use of computer chat rooms and social networking sites, use of a false identity on a computer, and possession or maintenance of access to a computer. CP 36. Because there was no evidence that the appellant's crime involved the use of or access to a computer, those conditions should be stricken.

The court also required the appellant to allow searches or inspections of any computer equipment to which he has regular access. CP 36. A court may include community custody conditions that mandate cooperation with searches to monitor compliance with crime-related prohibitions. *See Land*, 172 Wn.App. at 605 (polygraph testing and random urinalysis serve monitoring functions). However, the computer restrictions in this case are not crime-related. Therefore, although allowing searches may, in other cases, serve a useful monitoring function, the condition should be stricken in this case.

3. *The court properly prohibited contact with the victim, but additional conditions restricting contact with minors were not crime-related.*

A sentencing court may include conditions of community custody restricting an offender from direct or indirect contact with the victim of the crime or a specified class of individuals. RCW 9.94A.703(3)(b). The court

in this case imposed a condition that the appellant have no contact with the victim. CP 35. The appellant correctly does not challenge that condition.

The court also entered additional conditions that ordered the appellant to not initiate or prolong contact with minor children, not seek employment that places him in contact with minor children, not enter areas where minor children are known to congregate, not form relationships with families who have minor children, and not remain overnight in residences where minor children live. CP 35-36. Conditions that limit an offender's access to children are appropriate when the facts of the case show that children are at risk and require special protection. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)). Because there were no allegations that the appellant's case was related to children, and the victim was, "a peer aged female," the conditions restricting contact with minors should be stricken.

4. *The court did not abuse its discretion in prohibiting the appellant from frequenting establishments whose primary business pertains to sexually explicit or erotic material.*

The sentencing court imposed conditions that the appellant not possess or access pornographic materials, as directed by a Community Corrections Officer and not frequent establishments whose primary business pertains to sexually explicit or erotic material. CP 35. The court

also ordered the appellant not to possess or control sexual stimulus material for his particular deviancy as defined by a Community Corrections Officer and therapist. CP 36. While the conditions restricting possession of pornography and sexual stimulus material are unconstitutionally vague, the court was within its discretion to order the appellant not to frequent erotic businesses.

A restriction on accessing or possessing pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. Similarly, a condition prohibiting possession or control of sexual stimulus material for an offender's particular deviancy is not supportable when no deviancy has been identified. *Id.* at 761. However, a condition that an offender not frequent establishments whose primary business pertains to sexually explicit or erotic material is sufficiently defined to allow the offender to understand the activities that are being proscribed. *Id.* at 758-60. Thus, while the court should strike the condition prohibiting possession or control of sexual stimulus material and the condition prohibiting pornographic materials, the restriction on frequenting erotic businesses should be affirmed.

5. *The condition prohibiting possession of drug paraphernalia was not crime-related.*

When it imposed the standard-range sentence, the court continued a SSOSA community custody condition that the appellant “not possess drug paraphernalia.” CP 36. While a court has discretion to impose crime-related prohibitions as conditions of community custody, such conditions must be related to the circumstances of the crime for which the offender is being sentenced. *See* RCW 9.94A.030(10) (a crime-related prohibition “directly relates to the circumstances of the crime for which the offender has been convicted”). Where no evidence or argument is presented that drug use or possession of drug paraphernalia was related to a defendant’s offenses, prohibition of possession of paraphernalia is not crime related. *Land*, 172 Wn.App. at 605. Similarly, prohibiting possession of drug paraphernalia does not serve a monitoring function. *Id.* at 605. Because no evidence or argument was presented in this case that the appellant’s crimes were related to drug use or possession of drug paraphernalia, the condition should be stricken.

6. *The condition to not possess items used to lure children is unconstitutionally vague.*

The court imposed a condition that the appellant “not possess or control any item designated or used to entertain, attract or lure children unless approved in advance by a Community Corrections Officer.” CP 36.

Such a condition is unconstitutionally vague if the record contains no evidence that the defendant used particular items to attract or entertain children. *Land*, 172 Wn.App. at 604-05. As in *Land*, there was no evidence in this case that the appellant used items to lure children; therefore, the condition should be stricken.

7. *Although the costs of the victim's counseling and medical treatment may be ordered as restitution, repayment cannot be ordered as a condition of community counseling.*

The condition to repay the costs of crime-related counseling should have been stricken upon revocation of the appellant's SSOSA. When imposing a SOSSA, a court may require an offender to reimburse the victim for the cost of any counseling required as a result of the crime. RCW 9.94A.670(6)(g). On the other hand, repayment of those costs is outside the scope of the conditions of community custody on standard-range sentences. See RCW 9.94A.703. The court may, however, require repayment of those costs through restitution. RCW 9.94A.505(7). While the appellant correctly notes that no restitution order has been entered in this case, Appellant's Brief at 24, restitution is not necessarily precluded at this time. Regardless, the condition of community custody requiring repayment of counseling and medical costs should be stricken.

8. *The court validly ordered the appellant to participate in urinalysis, breathalyzer, and polygraph examinations, but plethysmograph examinations should be stricken.*

A court may order affirmative acts necessary to monitor compliance with community custody conditions, including polygraph examinations and tests for consumption of controlled substances. *State v. Castro*, 141 Wn.App. 485, 494, 170 P.3d 78 (Div. 3, 2007) (citing *State v. Riles*, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1998)). However, because plethysmograph testing is extremely intrusive, it can only properly be ordered incident to crime-related treatment by a qualified provider. *Land*, 172 Wn.App. at 605. The condition imposed in this case was not for plethysmograph examinations at direction of qualified provider; instead, it is imposed “as directed by a Community Corrections Officer.” CP 37. Therefore, while the condition ordering monitoring examinations should be affirmed, the reference to plethysmograph examinations should be stricken.

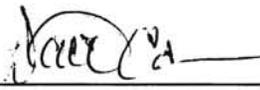
IV. CONCLUSION

The appellant has not challenged the conditions of his SSOSA, the revocation of that alternative sentence, or the imposition of a standard-range sentence. The court should, therefore, affirm those actions. The court should similarly affirm the conditions of community custody that have not been challenged by the appellant. The court should, however,

strike the challenged conditions of community custody with the exception of the prohibition of frequenting establishments whose primary business pertains to sexually explicit or erotic material.

Respectfully submitted this 28th day of June, 2013.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

DAVID E. CARMAN
DEPUTY PROSECUTING ATTORNEY
WSBA # 39456

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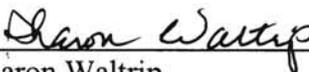
DECLARATION OF SERVICE

I, Sharon Waltrip, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 1st day of July, 2013, a copy of the Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

Signed in Coupeville, Washington, this 1st day of July, 2013.


Sharon Waltrip