102385-5

Supreme Court No. (to be set)
Court of Appeals No. 56915-9-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Michael Angel Amaro, Appellant

Kitsap County Superior Court

Cause No. 21-1-00752-18

The Honorable Judge Jennifer Forbes

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

A search warrant authorized police to search Michael Amaro's entire smartphone for any data. The warrant was not supported by probable cause and did not particularly describe the areas of the phone to be searched and the information that could be sought. This violated the Fourth Amendment and Wash. Const. art. I, §7. Mr. Amaro's convictions must be vacated.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Michael Amaro asks the Court to review the Court of Appeals Opinion entered on August 15, 2023.[1] This case presents four issues:

1. Did the search warrant permit police to search Mr. Amaro's cell phone and seize data for which the affidavit did not supply probable cause?
2. Did the warrant qualify as an unconstitutional general warrant because it allowed police to rummage through every part of Mr. Amaro's phone to seek unlimited information?

[1] A copy of the opinion is attached.

STATEMENT OF THE CASE

Michael Amaro is a civilian who worked at the Puget Sound Naval Shipyard in Bremerton. CP 118. The shipyard is not open to the public, and it has several areas that require specific security clearances. RP (2/22/22) 15, 38; CP 117. Signs indicate "Authorized entry into this restricted area constitutes consent to search of personnel and the property under their control." RP (2/22/22) 20. In addition, those who enter are notified that cameras are prohibited and may be confiscated. RP (2/22/22) 19-21, 39; CP 117, 138.

In September of 2021, Mr. Amaro sat at a table in a drydock area, looking at his phone. RP (2/22/22) 45; CP 118. Shipyard security came by and looked at his phone, which had a camera on it. RP (2/22/22) 44-45; CP 118, 138. The security officer took the phone. RP (2/22/22) 45-46; CP 118.

The officer later spent time in her office reviewing the phone, looking at photos and over a dozen text streams. RP (2/22/22) 47-48. The phone was then given to the Washington

State Patrol, which obtained a search warrant. RP (2/22/22) 60; CP 119, 138. The affidavit indicated that officers were seeking evidence of Communication with a Minor for Immoral Purposes (CMIP) and first-degree child rape. CP 18, 119.

The specific data from the phone that supported the warrant request consisted of a single text thread. CP 22. Included in the text thread was an "image of a nude Caucasian female from the rear who was bent over facing away from the camera." CP 22, 119; RP (2/22/22) 48, 52. The warrant application did not suggest that the image was of a person under the age of 18. CP 22.

The text thread also included a message from an unknown sender. The message indicated that the sender was 11 years old and that they "wouldn't tell [their] mother they had sex." CP 22, 118-119. Although the affidavit referred to the sender using female pronouns, the text thread does not specify the sender's gender. CP 22, 118-119.

Based on this text thread, the court issued a warrant authorizing police to search for evidence of "Rape of a Child in the First Degree and… Communicating with a Minor for Immoral Purposes." CP 31. The warrant set forth 11 categories of information to be sought. CP 32-33. These categories included broad authority to search several areas in a cell phone; specific information about each category is included in the Argument section below.

Although the warrant was based on a text exchange between Mr. Amaro and an unknown user, police did not describe any effort to identify that user. CP 21-23.

In their search of the phone, police found photos of minors engaged in sexually explicit conduct. CP 120, 139. The State charged Mr. Amaro with three counts of possessing a depiction of a minor engaged in sexually explicit conduct. CP 1-3. His attorney moved to suppress evidence from the phone, and the court held a hearing on the motion. CP 9-33, 95-102; RP (2/22/22) 3-90; RP (3/3/22) 4-27.

At the suppression hearing, the State called a witness to testify about security procedures in general at the shipyard. RP (2/22/22) 11-34. He said that he "assume[s]" every employee gets a copy of the employee handbook, which contains in-phone cameras on the list of prohibited items. RP (2/22/22) 23-25. He also said that when phones are seized, his staff uses their own discretion to look for photos or videos relating to classified or sensitive information. RP (2/22/22) 29-30. The security person who seized and searched the phone also testified. RP (2/22/22) 37-56.

Mr. Amaro's counsel made several arguments in favor of suppression, including that the initial review of the phone exceeded its justifiable scope, that the text conversation could have been a part of a role-play and so did not amount to probable cause, and that the warrant was overbroad. RP (2/22/22) 64-69, 83; CP 9-17, 95-102.

The trial judge denied suppression in an oral ruling. RP (3/3/22) 4-29. The defense later provided supplemental

authority supporting its motion to suppress, and the court again denied the motion. RP (4/11/22) 34-58. The court entered findings and conclusions in a written order. CP 116-126.

The court ruled that there was sufficient probable cause for the warrant, and that it was sufficiently focused on evidence of the crimes listed. CP 124-125.

The court also held that the warrant sufficiently defined the offense of communicating with minors for immoral purposes (CMIP), even though it did not include any reference explaining that "immoral" communications related to sex. CP 125. Furthermore, the court decided that the authorization to search for evidence of CMIP could be severed if it were overbroad, so the remainder of the warrant would be valid. CP 125.

The state withdrew one of the counts of possessing child pornography. RP (4/11/22) 63; CP 127-129. Mr. Amaro waived his right to trial and the case was submitted to the court based on a stipulation signed by Mr. Amaro. RP (4/11/22) 63-71; CP

137-143. The court found Mr. Amaro guilty of two counts of possession of child pornography. RP (4/11/22) 71; CP 137-143.

Mr. Amaro had no criminal history, and he was sentenced within the standard range to 30 months incarceration. RP (5/9/22) 76; CP 144-145. Mr. Amaro timely appealed. CP 157. The Court of Appeals affirmed, finding that Mr. Amaro had "waived any privacy interest he had in the contents of the cell phone" by entering the shipyard. Opinion, p. 9.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. BASED ON A SINGLE TEXT THREAD, AN OVERBROAD WARRANT AUTHORIZED POLICE TO SEARCH MR. AMARO'S ENTIRE SMARTPHONE FOR ANY DATA.

Based on a single text exchange, police were granted authority to search Mr. Amaro's entire cell phone. The brief text thread did not provide probable cause. Furthermore, the warrant failed to particularly describe the information sought and the "places" where it might be found on the phone. Mr. Amaro's convictions must be vacated.

A. A search warrant must rest on probable cause and must particularly describe the information sought.

A search warrant can be overbroad "either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist." *State v. Gudgell*, 20 Wn. App. 2d 162, 180, 499 P.3d 229, 239 (2021) .

The probable cause and particularity requirements are "closely intertwined." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Together, they prohibit the "unbridled authority of a general warrant." *See Stanford v. State of Tex.*, 379 U.S. 476, 486, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545. In such cases, the particularity requirement must "'be accorded the most scrupulous

exactitude.'" *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485).

The need for heightened standards is especially acute where police seek authorization to search a cell phone. *See State v. Fairley*, 12 Wn.App.2d 315, 320, 457 P.3d 1150 *review denied*, 195 Wn.2d 1027, 466 P.3d 777 (2020). Cell phone searches "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) .

Cell phones "contain information touching on 'nearly every aspect' of a person's life 'from the mundane to the intimate.'" *Fairley*, 12 Wn.App.2d at 321 (quoting *Riley*, 573 U.S. at 393). Accordingly, "[a] cell phone search will 'typically expose to the government far *more* than the most exhaustive search of a house.'" *Id.* (quoting *Riley*, 573 U.S. at 396) (emphasis in original).

As the U.S. Supreme Court has observed, the vast

quantity of data contained on a cell phone can expose all aspects of a person's private life to government scrutiny. *Riley*, 573 U.S. at 393-398. First Amendment concerns demand a close examination of cell phone warrants to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

Furthermore, cell phones contain "intermingled information, raising the risks inherent in over-seizing data." *United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013). Accordingly, "law enforcement and judicial officers must be especially cognizant of privacy risks when drafting and executing search warrants for electronic evidence." *Id.*

The search warrant in this case authorized a search for materials protected by the First Amendment. *Fairley*, 12 Wn.App.2d at 323. The warrant is therefore subject to close scrutiny to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*,

379 U.S. at 485; *Perrone,* 119 Wn.2d at 545. The warrant does not survive such an examination. *Perrone,* 119 Wn.2d at 545, 551-552. It permitted the officers to rummage through and seize almost any data contained on the phone despite the absence of probable cause. In addition, the warrant failed to describe with particularity the information sought or the places on the phone where it might be found.

B. The single text exchange between Mr. Amaro and an unidentified party did not supply probable cause for police to search his entire phone.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone,* 119 Wn.2d at 551-552.

To establish probable cause, the warrant application "must set forth sufficient facts to convince a reasonable person of the probability… that evidence of criminal activity can be

found at the place to be searched." *Lyons*, 174 Wn.2d at 359. By itself, an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64.

In addition, a search warrant must particularly describe the place to be searched and the things to be seized. U.S. Const. Amend. IV; Wash. Const. art. I, §7; *Perrone*, 119 Wn.2d at 545. In general, "a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits." *Id.*, at 547. Thus "a generic or general description may be sufficient, if probable cause is shown and a more specific description is *impossible*." *Id.* (emphasis added).

One purpose of the particularity requirement is to limit the discretion of executing officers. It "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Id.*, at 546. Specific descriptions ensure that officers search only for items supported by probable cause. *Id*.

Here, police purportedly sought evidence of first-degree child rape[2] and communication with a minor for immoral purposes (CMIP).[3] CP 18. The warrant rested on a brief text exchange referencing sex with a person who claimed to be an 11-year-old. CP 21-22. Included in the message thread was "an image of a nude Caucasian female from the rear who was bent over facing away from the camera." CP 22. Nothing in the warrant application suggested that the photo was of a person under the age of 18. CP 21-22. The police did not describe any attempt to contact or identify the other party in the message thread. CP 21-22.

Based on this information, police sought and obtained permission to search the entire phone and seize information protected by the First Amendment. The warrant was overbroad: it allowed a search for information for which there was no probable cause.

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[2] RCW 9A.44.073.

[3] RCW 9.68A.090.

It was also insufficiently particular in its descriptions of the data. It permitted police too much discretion in executing the warrant, allowing them to search for and seize information wholly unrelated to evidence of any crime.

Evidence of other accounts. The single text exchange between Mr. Amaro and another person did not provide probable cause to believe that someone other than Mr. Amaro possessed or used the phone. Nothing in the affidavit suggested that anyone else had access to it. CP 21-22. Police did not conduct any investigation to determine if others could use the phone.

Despite this, the warrant authorized police to search for any "email addresses, social media accounts, messaging 'app' accounts, and other accounts that may be accessed… that will aid in determining the possessor/user of the device." AP 32.

This provision is unsupported by probable cause and is insufficiently particular. All the material described is protected by the First Amendment. The list is overly expansive: it

permitted police to conduct a broad-ranging search with little or no restrictions.

The provision did not accord "'the most scrupulous exactitude'" to the particularity and probable cause requirements. *Perrone*, 119 Wn.2d at 548 (quoting *Stanford*, 379 U.S. at 485). It is unconstitutionally overbroad.

Communications. The single message thread between Mr. Amaro and another unidentified person did not provide probable cause to search for communications with third parties. CP 21-22. Despite this, the warrant authorized police to search for evidence showing "communicat[ions] with others with a sexualized interest in minors or others about the above-listed crime(s)…" CP 32.

In the absence of any information suggesting that Mr. Amaro communicated with others, the affidavit does not provide probable cause to search for evidence of such communications.

The same provision also directs police to search for "digital communications with minors that are for immoral purposes as defined by RCW 9.68A.090." CP 32. This provision is insufficiently particular because of the reference to "immoral purposes" without further elaboration.

The warrant's language does not limit the search to communications of a sexual nature, which is the essence of the offense.[4] *See State v. Schimmelpfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979) (discussing former RCW 9A.88.020). Absent such a limitation, the warrant was overbroad. It permitted police to search for communications between Mr. Amaro and any minor, based on the officers' belief that the conversation related to "immoral" subjects.

[4] A statutory reference does not cure an overbreadth problem. *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). Furthermore, even if such a reference could cure the problem, it does not in this case because the statutory language does not define "immoral purposes," or limit the phrase to sexual matters.

Evidence of identity. The warrant authorized police to search for evidence of the user's identity at the time that "items of evidentiary value…located pursuant to this warrant" were created, modified, accessed, or manipulated. CP 32.

This description is insufficiently particular. It granted the executing officers too much discretion. The reference to evidence "located pursuant to this warrant" impermissibly bootstraps this provision to cover information located during the execution of the warrant. CP 32. It described broad categories of data, including "electronically stored information from the digital device(s) necessary to understand how the digital device was used, the purpose of its use, who used it, and when." CP 32.

It also gave the officers the unfettered freedom to determine what qualifies as an "item[] of evidentiary value." CP 32. An expansive interpretation of this phrase could cover any information on the phone. Even a restrictive interpretation

would cover information seized pursuant to the other overbroad provisions of the warrant.

Electronically stored information. The warrant permits a search for any "electronically stored information[5]… necessary to understand how the digital device was used, the purpose of its use, who used it, and when." CP 32. This provision appears twice in the warrant. It is also broad enough to cover another provision permitting a search for "[e]vidence of times the [phone] was used." CP 32 (*see* items 3, 8, and 9).

The affidavit does not supply probable cause to search for all evidence of how, why, when, and by whom the phone was used. CP 32. The authorization is broad enough to cover any use of the phone. It cannot rest on the brief text exchange outlined in the affidavit. CP 21-22.

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[5] The provision also lists subcategories subsumed by this phrase, including "communications, photos and videos and associated metadata, documents, [and] social media activity." CP 32.

In addition to the lack of probable cause, the provision is insufficiently particular. No attempt was made to limit the scope of any search. The language covers more than the communications, social media data, and similar items outlined elsewhere in the warrant. It also extends to such things as internet searches, navigation data, news consumption, purchase history, and any other use to which a smartphone can be put.

Child pornography. Nothing in the warrant application suggests that Mr. Amaro possessed child pornography.[6] The only potentially relevant image described by police was of a nude "female," with no allegation that she was underage. CP 21-22.

Accordingly, the affidavit did not supply probable cause to search for "[v]isual depiction(s) of minor(s) engaged in

[6] Warrants targeting child pornography fall within the constitutional mandate against overbreadth. *Perrone*, 119 Wn.2d at 550. Even if ultimately determined to be illegal, the objects of such a search are presumptively protected by the First Amendment, and heightened standards apply. *Id.*, at 547, 550.

sexually explicit conduct…" CP 32. In the absence of probable cause, the warrant was overbroad.

Malware and security software. The text exchange outlined in the affidavit does not provide probable cause to search the phone for "the presence or absence of security software designed to detect malware." CP 32. Nor was there any basis to search for "malware that would allow others to control the digital devices… [or] the lack of such malware." CP 32.

Furthermore, the warrant is insufficiently particular. It does not restrict the place to be searched for such evidence. Nor was there any limitation in the authorization to search for the presence or absence of security software and malware.

Such items would likely be found in a limited number of other places on a smartphone – places such as the operating system and security applications. As written, the authorization permitted police to search through any data on the phone to find

malware, the absence of malware, security software, and the absence of security software.

Connection to other devices. The police sought evidence that the phone was attached to "other storage devices or similar containers for electronic evidence." CP 32. Nothing in the warrant application suggested that evidence of any crime could be revealed by showing that the phone had been attached to other devices. A single text with an unidentified person does not provide probable cause. Accordingly, the warrant was overbroad.

Counter-forensic programs. There was no suggestion in the affidavit that anyone had tried to "eliminate data" from the phone. CP 32. The data giving rise to the warrant consisted of a single text thread between Mr. Amaro and another person. The warrant application did not provide probable cause to search for "counter-forensic programs" that could be used to delete other data. Nor did the warrant particularly describe the places where such programs might be found on the phone. It permitted police

to look anywhere on the phone under the guise of searching for counter-forensic programs. The warrant was overbroad.

Location data. The warrant permitted officers to search for information establishing the phone's position from August 7 through September 16, 2021. CP 33. This would allow police to track every movement made by Mr. Amaro, without any limitation, during a period that exceeded a month.

Nothing in the affidavit supplied probable cause for this information. Furthermore, the authorization is extraordinarily overbroad; it lacks any degree of particularity other than the lengthy date range. CP 33. It imposes no requirement that the location data be linked to any evidence of criminal activity.

All images and their metadata. Nothing in the affidavit provides probable cause to search for "images [with metadata] created, accessed or modified" during the specified date range. CP 33. The affidavit did not outline any information suggesting that photographs and associated metadata would provide evidence of any criminal activity.

Furthermore, even if the affidavit established that photographic evidence might exist, the description here was insufficiently particular. It placed no constraints on the authorization to search for images. The warrant would cover all photos and associated metadata, whether or not they were related to any criminal activity.

Summary. The warrant was overbroad. It was not supported by probable cause. It did not particularly describe the information sought or the places on the smartphone where such information might be found.

C. The warrant can't be saved under the severability doctrine.

Evidence may not be seized "by officers acting under the unbridled authority of a general warrant." *Stanford*, 379 U.S. at 481. The problem with a general warrant is that it permits "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *modified on other grounds by Horton*

v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

The warrant here qualified as a general warrant. It permitted police to rummage through the entire phone without any restrictions. It allowed officers to search for any information, including data wholly unrelated to the crimes under investigation. It did not provide guidance to limit the discretion of the executing officers.

The trial court analyzed only one provision to determine if it could be severed from the remainder. CP 125. Specifically, the court found that language permitting a search for evidence of "communications with minors that are for immoral purposes" could be stricken without invalidating the remainder of the warrant. CP 32, 125. The court did not consider severing other parts of the warrant.

The warrant is not severable.

Under limited circumstances, courts may excise invalid parts of a warrant, allowing use of evidence seized under valid

portions of the warrant. *Perrone*, 119 Wn.2d at 556. The doctrine may not be applied "where to do so would render meaningless the standards of particularity. *Id.*, at 558.

Furthermore, "where materials presumptively protected by the First Amendment are concerned, the severance doctrine should only be applied where discrete parts of the warrant may be severed, and should not be applied where extensive 'editing' throughout the clauses of the warrant is required to obtain potentially valid parts." *Id.*, at 560. Here, all the materials sought by police were protected by the First Amendment.

Severance cannot apply when the valid portion of the warrant is relatively insignificant. *Id.*, at 557. In this case, no part of the warrant is valid, as outlined above. If any portion were deemed valid, that portion would be relatively insignificant compared to the other provisions. This is so because each of the provisions, standing alone, would permit a search through the entire phone for a broad swath of data. *Id.*

In addition, severance cannot apply unless "a meaningful separation [can] be made of the language in the warrant." *Id,* at 560. In other words, "there must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability." *Id.*

Here, there is no meaningful, logical, or reasonable basis to divide paragraphs of the warrant that outline multiple types of information to be sought. For example, paragraph two authorizes a search for communications involving people who have "a sexualized interest in minors." CP 32. It also covers "communications with minors that are for immoral purposes." CP 32.

Similarly, paragraph three covers digital evidence of the user's identity. CP 32. It also covers any information "necessary to understand how the [phone] was used, the purpose of its use, who used it, and when." CP 32.

Paragraph five covers evidence of both malware and the absence of malware. CP 32. It also covers "evidence of the

presence or absence of security software." CP 32. These provisions are not severable. For example, if the search for the *presence* of malware or security software is valid, the paragraph cannot be separated to excise the portions authorizing a search for the *absence* of those items.

Paragraph 10 covers information that can be used to determine the location of the phone within a specified date range. CP 33. However, it also permits officers to search for and seize any "images created, accessed, or modified" during that timeframe. CP 33.

Such paragraphs are not discrete parts that can be severed from the warrant as a whole. Rather, each of these paragraphs targets more than one type of information. As in *Perrone*, dividing this warrant would be "strictly a pick and choose endeavor." *Id.*

The warrant is not severable. It is an overbroad general warrant. It cannot support the search of Mr. Amaro's smartphone.

D. Mr. Amaro did not "waive[ ] any privacy interest he had in the contents of the cell phone."

Instead of addressing the validity of the warrant, the Court of Appeals decided the case on grounds that had not been briefed by either party. According to the court, Mr. Amaro "waived any privacy interest he had in the contents of the cell phone." Opinion, p. 9.

The court found a waiver based on "the unique facts of this case." Opinion, p. 9. The court referenced a sign advising that cameras were prohibited and subject to confiscation if used in a restricted area. Opinion, p. 9. The court also referred to the sign indicating that entry into the shipyard amounted to "consent to the search of… person and property." Opinion, p. 9.

These warnings do not allow police to dispense with the warrant requirement.

The state and federal constitutions differentiate between cell phones and their contents. *See Fairley*, 12 Wn. App. 2d at 321 (2020) (warrant to search for and seize cell phone does not authorize search of the cell phone); *Riley*, 573 U.S. at 401

(warrantless seizure of cell phone incident to arrest does not permit warrantless search of its contents.)

Notice that a phone could be confiscated does not authorize law enforcement to search all data on the phone. Nor does implied consent to search "personnel and the property under their control" permit a search of all data on the phone. RP (2/22/22) 20.

Under the approach adopted by the Court of Appeals, simply posting signs allows the police to search all cell phone data without a warrant. The Fourth Amendment and Wash. Const. art. I, §7 prohibit this.

E. The illegally seized evidence must be suppressed.

A conviction based on illegally seized evidence must be vacated. *State v. McKee*, 193 Wn.2d 271, 279, 438 P.3d 528 (2019). The remedy is to "remand to the trial court with an order to suppress." *Id.*

Mr. Amaro's conviction must be vacated. The case must be remanded with instructions to suppress the evidence. *Id.*

II. THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THIS CASE INVOLVES A SIGNIFICANT CONSTITUTIONAL ISSUE THAT IS OF SUBSTANTIAL PUBLIC INTEREST.

The Supreme Court will accept review "[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved," or "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3) and (4).

This case satisfies both criteria. The validity of the extremely broad search warrant presents a significant question of constitutional law. The same is true for the Court of Appeals' decision that a warning sign can strip a person of all rights to privacy in the contents of their cell phone.

The issues are also of substantial public interest. The vast majority of Washington citizens use cell phones. Phones are repositories of huge amounts of personal data. Because of this, the public has a strong interest in the validity of cell phone

warrants that permit police to rummage through private data with no meaningful restrictions.

The public also has a strong interest in the propriety of warrantless cell-phone searches based on notices posted by the government. The Supreme Court should grant review under RAP 13.4(b)(3) and (4).

CONCLUSION

The evidence against Mr. Amaro was illegally obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7. His convictions must be vacated, and the evidence suppressed.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, that the font is size 14, and that the word count (excluding materials listed in RAP 18.17(b)) is 4869 words, as calculated by our word processing software.

Respectfully submitted September 14, 2023.

BACKLUND AND MISTRY

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Michael Amaro
561 B Perry Ave. N.
Port Orchard, WA
98366

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

Signed at Olympia Washington on September 14, 2023.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

August 15, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANGEL AMARO, Appellant.	No. 56915-9-II UNPUBLISHED OPINION

LEE, J. — Michael A. Amaro appeals his convictions and sentence for two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct—suspect 18 years or older. Amaro argues that the trial court erred by denying his motion to suppress, imposing three community custody conditions, and imposing community custody supervision fees.

We hold that the trial court did not err by denying Amaro's motion to suppress. We also hold that the trial court did not err by imposing the challenged community custody condition relating to sexually exploitive materials. However, the trial court erred by imposing the challenged community custody conditions relating to sexually explicit materials and use of internet/social media, but the remedy of striking the conditions is not necessary for both challenged community custody conditions. Finally, the community custody supervision fees should stricken.

Accordingly, we affirm Amaro's convictions and the community custody condition prohibiting the possession or access to sexually exploitive materials. However, we remand for the trial court to (1) provide proper definition and clarification for the community custody condition prohibiting the possession or access to sexually explicit materials and/or information pertaining to

minors via computer and (2) modify and state the factual basis for the community custody condition prohibiting the use of internet or social media without approval, and (3) strike the community custody supervision fees.

FACTS

A. EVENTS AT PUGET SOUND NAVAL SHIPYARD

Amaro worked at the Puget Sound Naval Shipyard (PSNS). PSNS is a military establishment that employs civilians and maintains classified military information related to national defense.

PSNS prohibits camera capable cell phones and routinely performs security sweeps. When entering PSNS, employees pass the following warning signs: (1) a sign stating that all devices with cameras are prohibited and featuring photos of a cell phone, camera, and iPad with a red line through them; (2) a sign stating that authorized personnel who enter the restricted area consent to the search of personnel and property under their control; and (3) a sign stating that photography in the industrial area is prohibited and violation of that policy is subject to criminal prosecution and/or confiscation of film, media and camera.

PSNS has established procedures and protocols for when security finds camera capable cell phones. PSNS policy states that PSNS will review any photographs that may contain classified material, along with any transmission of classified materials via text messaging or other electronic communication. If PSNS finds classified material on a camera capable cell phone, PSNS will apply a higher level of scrutiny in its review of the cell phone.

On September 16, 2021, security personnel entered Amaro's work building and announced they were conducting a security sweep. Security personnel saw Amaro frantically trying to put a cell phone into his backpack. Security personnel asked Amaro to remove the cell phone from his backpack and tell them if it was a camera capable cell phone. Amaro handed the cell phone to security personnel and told them it was a camera capable cell phone.

One security employee, Jennifer Young, told Amaro she was taking custody of his cell phone because it was a violation of PSNS policy to be in possession of a camera capable cell phone. Amaro provided Young with the swipe pattern or password for accessing the phone. Young wrote the swipe pattern or password on an evidence property receipt for storage and review of the phone. Amaro then signed the evidence property custody receipt.

Young reviewed the contents of the cell phone for any contraband related to PSNS security. Young found two photos of classified shipyard documents in the photo section of the phone, which triggered a heightened degree of scrutiny for her review of the phone.

Young then reviewed the text messages on the phone and found a conversation that appeared to be between Amaro and an 11-year-old girl that occurred on September 7, 2021. In the text conversation, the girl said she was happy Amaro wanted to spend time with her even though she is 11 years old. The girl also stated that she would not tell her mother that she and Amaro had sex. Amaro responded in the conversation that he could not believe she was only 11 years old and that he had a good time with her. The text conversation also included a photo of a nude female from the rear who was bent over facing away from the camera. Young did not know the age of the female in the photo.

Young immediately notified her supervisor of the text conversation. PSNS transferred the phone to the Naval Criminal Investigative Service, who then transferred the phone to Washington State Patrol (WSP).

B. WSP SEARCH WARRANT

WSP Detective Sergeant Jason Greer applied for a search warrant for Amaro's cell phone. The warrant application stated that WSP had probable cause to believe that the cell phone contained evidence of first degree rape of a child and communication with a minor for immoral purposes. The warrant application included a description of the text conversation with the 11-year-old girl, including the nude photo, that Young had found on the cell phone.

A judge granted the search warrant application. The warrant authorized WSP to search the phone for evidence of first degree rape of a child and communication with a minor for immoral purposes.

Detective Sergeant Greer searched Amaro's cell phone pursuant to the warrant and located the text messages with the 11-year-old girl. Detective Sergeant Greer also found dozens of images of minors engaged in sexually explicit conduct, along with hundreds of similar images that had been deleted.

C. CHARGES AND MOTION TO SUPPRESS

The State charged Amaro with three counts of first degree possession of depictions of a minor engaged in sexually explicit conduct—suspect 18 years or older.

Amaro moved to suppress the evidence found on his cell phone, arguing that Young had unlawfully searched his cell phone, the search warrant application did not establish probable cause

for a search, and the search warrant did not specify with particularity the items to be searched. The State opposed the motion, arguing that the PSNS search was lawful, that there was sufficient probable cause for the warrant, and that the warrant was sufficiently particular.

The trial court heard argument and orally denied Amaro's motion to suppress. Amaro provided supplemental briefing and argument on the motion to suppress, and the trial court again denied the motion. The trial court made the following relevant written ruling to support its denial of Amaro's motion to suppress:

> That under the totality of the circumstances, defendant impliedly consented to a search of his cellphone when he entered a level II restricted facility, passed barbed-wire fencing, passed access-controlled points of entry, and passed multiple warning signs that clearly stated that camera capable devices are prohibited, and that authorized entry constituted consent to search of personnel and their property.

Clerk's Papers (CP) at 122. The trial court also ruled that the warrant was properly authorized and that Detective Sergeant Greer properly seized the contested evidence pursuant to the warrant.

D. STIPULATED TRIAL, VERDICT, AND SENTENCING

The State filed an amended information removing one of the three counts of first degree possession of depictions of a minor engaged in sexually explicit conduct—suspect 18 years or older and charging only two counts of first degree possession of depictions of a minor engaged in sexually explicit conduct—suspect 18 years or older. Amaro declined a jury trial and elected a stipulated trial to the bench.

The stipulated facts stated that WSP found dozens of images of minors engaged in sexually explicit conduct on Amaro's cell phone and the secure digital card inserted in the phone. WSP also found hundreds of deleted images containing similar content. The stipulated facts described

two specific images of minors engaged in sexually explicit conduct but did not provide details about how the images ended up on Amaro's cell phone. Based on these stipulated facts, the trial court found Amaro guilty of both counts of first degree possession of depictions of a minor engaged in sexually explicit conduct—suspect 18 years or older.

The trial court sentenced Amaro to 30 months of total confinement. The trial court also ordered 36 months of community custody. In an appendix to the judgment and sentence, the trial court ordered Amaro to comply with the following community custody conditions:

> 7. Possess/access no sexually exploitive materials (as defined by treatment therapist or [community corrections officer (CCO)]
>
> . . . .
>
> 9. Possess/access no sexually explicit materials and/or information pertaining to minors (under 16) via computer (i.e. internet)
>
> . . . .
>
> 12. Have no use of internet or Social Media without [sex offender treatment provider (SOTP)] and CCO's written approval.

CP at 163.

The transcript from the sentencing hearing does not show that the trial court inquired into Amaro's financial circumstances. The trial court orally stated that it would impose the "standard financial obligations." Verbatim Rep. of Proc. (May 9, 2022) at 94. On the judgment and sentence, the trial court checked a box under the financial obligations section that "[a]fter an individualized inquiry on the record, the Court finds that the Defendant has the current or future ability to pay legal financial obligations; therefore the Court imposes [a $100.00 DNA (deoxyribonucleic acid) collection fee]." CP at 150. The trial court did not impose any other discretionary legal financial

obligations in this section. However, the trial court left two boilerplate provisions in place requiring Amaro to "[p]ay DOC monthly supervision assessment" and "[p]ay supervision fees as determined by the [DOC]." CP at 149, 163.

Amaro appeals.

ANALYSIS

A. MOTION TO SUPPRESS

Amaro argues that the trial court erred by denying his motion to suppress,[1] contending that the evidence on his cell phone was illegally obtained in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. Specifically, Amaro takes issue with portions of the warrant authorizing WSP to search his cell phone. We hold that, under the facts of this case, the trial court did not err by denying Amaro's motion to suppress because Amaro had waived any and all privacy interests in his camera capable cell phone by taking the cell phone into a restricted military facility; therefore, no warrant was required.

Under the Washington Constitution, "[n]o person shall be disturbed in his private affairs . . . without authority of law." WASH. CONST. art. I, § 7. "Article I, section 7 encompasses the privacy expectations protected by the Fourth Amendment to the United States Constitution and, in some cases, may provide greater protection than the Fourth Amendment because its protections

[1] Amaro's briefing does not frame the issue as the trial court erring by denying his motion to suppress. However, the substance of Amaro's arguments, along with Amaro's assignments of error to several conclusions of law in the denial of the motion to suppress, make clear that Amaro is arguing that the trial court erred by denying his motion to suppress.

are not confined to the subjective privacy expectations of citizens." *State v. Samalia*, 186 Wn.2d 262, 268, 375 P.3d 1082 (2016).[2]

The "private affairs" protected by article I, section 7 are "'those privacy interests which citizens of this state *have held, and should be entitled to hold*, safe from governmental trespass absent a warrant.'" *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). Cell phones and the data they contain are private affairs under article I, section 7. *Samalia*, 186 Wn.2d at 272.

A person may lose a constitutionally protected privacy interest. *Id.* at 273. For example, a person loses their privacy interest in their cell phone when they voluntarily abandon the cell phone. *See id.* at 276 (defendant voluntarily abandoned cell phone when defendant left cell phone behind in stolen vehicle to elude police). Additionally, a person can waive their privacy interest by voluntarily exposing an item to the public or voluntarily disclosing information to a stranger. *Hinton*, 179 Wn.2d at 875. In such situations, no warrant is required for the government to conduct a search of the item. *See Samalia*, 186 Wn.2d at 272-73, 279.

Here, Amaro agreed to work at PSNS, which prohibits camera capable cell phones in the restricted areas, and PSNS has a policy of reviewing any camera capable cell phones that security finds in the restricted areas, with extra scrutiny if security finds classified material on the cell phone. When entering PSNS, Amaro passed several signs warning him that camera capable cell

[2] Amaro mentions the Fourth Amendment but makes no Fourth Amendment argument separate from his article I, section 7 challenge. We do not reach any Fourth Amendment argument because we resolve the issue by applying article I, section 7's more protective standards. *See Samalia*, 186 Wn.2d at 270 n.2 (we need not address Fourth Amendment arguments where article I, section 7 provides independent and adequate state grounds to resolve an issue).

phones are prohibited; Amaro entered an area that was clearly marked as any entry constituted a consent to the search of his person and property; and the area Amaro entered clearly warned that photography of the restricted industrial area could result in confiscation of his film, media, and camera. Despite these policies and warning signs, Amaro brought a camera capable cell phone into the restricted premises, apparently took photos of classified documents, then got caught trying to put his cell phone back into his backpack during a security sweep. Amaro admitted that his cell phone was camera capable, handed the cell phone to security personnel, provided security personnel with the swipe pattern or password for accessing the phone, then signed the evidence property custody receipt for storage and review of the cell phone where the swipe pattern or password to access the cell phone was documented. Also, Amaro does not challenge the trial court's conclusion

> [t]hat under the totality of the circumstances, defendant impliedly consented to a search of his cellphone when he entered a level II restricted facility, passed barbed-wire fencing, passed access-controlled points of entry, and passed multiple warning signs that clearly stated that camera capable devices are prohibited, and that authorized entry constituted consent to search of personnel and their property.

CP at 122.

Under the unique facts of this case, no warrant was required because Amaro, by his conduct, had waived any privacy interest he had in the contents of the cell phone; thus, no warrant was necessary. Because the warrant was unnecessary, Amaro's challenges to the warrant fail.[3]

[3] The State also argues that no warrant was required because the silver platter doctrine applies. Because we affirm on other grounds, we decline to address this argument.

B. COMMUNITY CUSTODY CONDITIONS

Amaro argues that the trial court erred by imposing three community custody conditions.[4] We hold that the trial court erred by imposing two of the three challenged community custody conditions.

We review a trial court's statutory authority to impose community custody conditions de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Any condition imposed in excess of [the court's] statutory grant of power is void." *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). If the trial court acted within its statutory authority, we review the community custody conditions for an abuse of discretion. *Id.* at 326. We reverse such community custody conditions if the conditions are manifestly unreasonable. *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018). Unconstitutional conditions are manifestly unreasonable. *Id.*

Trial courts are authorized by statute to order offenders to comply with crime-related prohibitions. RCW 9.94A.703(3)(f). A crime-related prohibition is one that is related to the circumstances of the crime for which the offender is sentenced. RCW 9.94A.030(10). "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for the connection.'" *Nguyen*, 191 Wn.2d at 684 (quoting *State v. Irwin*, 191 Wn. App. 644, 657, 364 P.3d 830 (2015)).

[4] Amaro challenges these community custody conditions for the first time on appeal. Generally, we may refuse to review any claim that was not raised below. *See* RAP 2.5(a). However, a defendant may challenge an illegal or erroneous sentence, including community custody conditions, for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). Therefore, we address Amaro's challenges to his community custody conditions.

A community custody condition is unconstitutionally vague if it (1) does not give an ordinary person sufficient notice to understand what conduct is proscribed or (2) "'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *Id.* at 678-79 (quoting *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)). Disputed terms are considered in context, and if persons of ordinary intelligence can understand what is prohibited, notwithstanding some possible disagreement, the condition is constitutionally sufficient. *Id.* at 679.

"However, a stricter standard of definiteness applies where the community custody condition prohibits material protected by the First Amendment." *Id.* Additionally, community custody conditions that impinge on free speech rights must be "sensitively imposed in a manner that is 'reasonably necessary to accomplish essential state needs and public order.'" *State v. Johnson*, 4 Wn. App. 2d 352, 358, 421 P.3d 969 (internal quotation marks omitted) (quoting *Bahl*, 164 Wn.2d at 757-58), *review denied*, 192 Wn.2d 1003 (2018).

1. Sexually Exploitive Materials as Defined by Treatment Therapist or CCO

Amaro argues that the trial court erred by ordering Amaro to "[p]ossess/access no sexually exploitive materials (as defined by treatment therapist or CCO)." CP at 163. Specifically, Amaro contends that the condition is unconstitutionally vague, allowing the CCO to define "sexually exploitative materials" invites arbitrary enforcement, and the condition violates Amaro's First Amendment rights.

Amaro's challenge rests on the assertion that the condition is not defined in the judgment and sentence and there is no statutory definition upon which Amaro can rely. There are two

statutes that, together, provide a sufficient definition for "sexually exploitive materials." The first statute provides that a person is guilty of sexual exploitation of a minor if they compel a minor to engage in sexually explicit conduct knowing that the conduct will be photographed or part of a live performance; or if they aid, invite, employ, authorize, or cause a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance. RCW 9.68A.040(1)(a), (b). The second statute defines "sexually explicit conduct" as actual or simulated:

> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> (b) Penetration of the vagina or rectum by any object;
> (c) Masturbation;
> (d) Sadomasochistic abuse;
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer;
> (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer . . .; and
> (g) Touching of a person's clothed or unclothed genitals, pubic area, buttocks, or breast area for the purpose of sexual stimulation of the viewer.

RCW 9.68A.011(4).

Amaro contends that he is unable to rely on these statutory definitions because the plain language of the community custody condition does not use these definitions and instead allows the term to be defined by Amaro's CCO.[5] We disagree.

[5] The community custody condition also allows Amaro's treatment therapist to define "sexually exploitive materials," but Amaro does not challenge the treatment therapist's discretion.

Together, the two statutes provide sufficient notice of what "sexually exploitive materials" are prohibited and do not require persons of ordinary intelligence to guess at what is meant by the condition prohibiting access to or possession of "sexually exploitive materials." A term is not unconstitutionally vague, even when undefined, when citizens may seek clarification through statements of law in statutes and court rulings that are presumptively available to all citizens. *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990).

Further, the definitions provided by the two statutes prevent arbitrary enforcement and show that the condition was sensitively imposed and limited to restrictions reasonably necessary for public order or safety. Therefore, we hold that the condition does not invite arbitrary enforcement or violate Amaro's First Amendment rights. Accordingly, we hold that the condition ordering Amaro to "[p]ossess/access no sexually exploitive materials (as defined by treatment therapist or CCO)" is not unconstitutionally vague. CP at 163.

2. Sexually Explicit Materials and/or Information Pertaining to Minors via Computer

Amaro argues that the trial court erred by ordering Amaro to "[p]ossess/access no sexually explicit materials and/or information pertaining to minors (under 16) via computer (i.e. internet)." CP at 163. Specifically, Amaro contends that the condition's language relating to "sexually explicit materials" is unconstitutionally overbroad and unrelated to Amaro's crimes.[6] Amaro separately contends that the condition's language relating to "information pertaining to minors" is

[6] Amaro does not argue that this part of the community custody condition is unconstitutionally vague. Additionally, Amaro states in his reply brief that the State "is likely correct that the prohibition against 'sexually explicit materials' is valid." Reply Br. of Appellant at 13 n.6. It is unclear if this statement is a concession and/or withdrawal of Amaro's arguments related to "sexually explicit materials."

unconstitutionally vague, overbroad, and not sufficiently related to Amaro's crime. As discussed below, to properly address Amaro's argument regarding unconstitutional vagueness, the community custody condition cannot be viewed piecemeal; rather, the text of the whole community custody condition must be considered. Therefore, we consider the community custody condition as a whole.

The full community custody condition orders Amaro to "[p]ossess/access no sexually explicit materials and/or information pertaining to minors (under 16) via computer (i.e. internet)." CP at 163. The condition's plain language does not indicate whether the descriptor "sexually explicit" applies only to "materials" or also to "information pertaining to minors." Similarly, it is unclear whether "pertaining to minors (under 16)" modifies "sexually explicit materials" or just "information." It is also unclear whether "via computer (i.e. internet)" applies to the whole condition or only to "information pertaining to minors (under 16)."

The community custody condition as written could prohibit Amaro from "possessing/accessing sexually explicit materials" and separately prohibit Amaro from "possessing/accessing information pertaining to minors (under 16) via computer (i.e. internet)." The condition could also prohibit Amaro from "possessing/accessing sexually explicit materials pertaining to minors (under 16) via computer (i.e. internet)" and from "possessing/accessing sexually explicit information pertaining to minors (under 16) via computer (i.e. internet)." Or the condition could prohibit Amaro from "possessing/accessing sexually explicit materials via computer (i.e. internet)" and from "possessing/accessing information pertaining to minors via computer (i.e. internet)." It is anyone's guess as to which interpretation is correct. Based solely

on this ambiguity, this community custody condition does not provide notice to ordinary people of what conduct is proscribed and is therefore unconstitutionally vague.

Additionally, there is no well-accepted definition for "information pertaining to minors," either in statutes or in the dictionary. The community custody condition as written could arguably cover news related to birth rates, articles about teacher strikes, global positioning system directions that happen to include school zones, or even individuals mentioning they are parents of children. This condition does not provide notice to ordinary people of what conduct is proscribed, nor does it provide ascertainable standards of guilt to protect against arbitrary enforcement. Therefore, we hold that part of the condition ordering Amaro to "[p]ossess/access no . . . information pertaining to minors (under 16) via computer (i.e. internet)" is unconstitutionally vague.

The proper remedy for an unconstitutionally vague condition is to remand to the trial court for further definition of the term. *State v. Padilla*, 190 Wn.2d 672, 684, 416 P.3d 712 (2018). Therefore, we reverse the condition and remand to the trial court for clarification and definition.

3. No Use of Internet/Social Media "Without SOTP and CCO's Written Approval"

Amaro argues that the trial court erred by ordering Amaro to "[h]ave no use of internet or Social Media without SOTP and CCO's written approval." CP at 163. Specifically, Amaro contends that the condition is unconstitutionally overbroad and not related to Amaro's crime. We hold that the condition is unconstitutionally overbroad and that the record is insufficient for us to determine whether the condition is crime related.

Community custody conditions that limit fundamental rights must be imposed sensitively to avoid overbreadth. *State v. Johnson*, 197 Wn.2d 740, 744, 487 P.3d 893 (2021). Conditions

that restrict internet access implicate both due process and the First Amendment. *Id.* "Judges may restrict a convicted defendant's access to the Internet, but those restrictions must be narrowly tailored to the dangers posed by the specific defendant." *Id.* at 745.

In *Johnson*, our Supreme Court considered a community custody condition prohibiting an offender with internet-related child sex crime convictions from using or accessing the internet unless specifically authorized by his CCO through approved filters. *Id.* at 744. The *Johnson* court held that the condition was not overbroad because a proper filter would restrict the offender's ability to solicit children or commercial sexual activity. *Id.* at 745, 747. The *Johnson* court reasoned that "[w]hile a blanket ban might well reduce his ability to improve himself, a properly chosen filter should not." *Id.* at 746. The *Johnson* court distinguished the community custody condition from a community custody condition in another case that did not mention filters and instead broadly prohibited the offender from using internet unless authorized by the offender's treatment provider and CCO. *Id.* at 745 n.1. The *Johnson* court acknowledged that Division One of the Court of Appeals had previously held in an unpublished decision that such a condition is unconstitutionally overbroad. *Id.* Our Supreme Court noted that the community custody condition at issue in *Johnson* was "substantively different" due to its use of filters. *Id.*

Since *Johnson*, the Court of Appeals has held that community custody conditions prohibiting internet use without authorization from the offender's CCO are unconstitutionally overbroad unless they incorporate use of a filter that is tailored to the offender's risk to the community. *See State v. Geyer*, 19 Wn. App. 2d 321, 330, 496 P.3d 322 (2021).

Here, the community custody condition at issue broadly prohibits Amaro from using the internet without written permission from his treatment provider and CCO. The community custody condition makes no mention of filters. Thus, the community custody condition is overbroad as written. Therefore, we remand to the trial court to modify this community custody condition, and we note that the use of a filter tailored to Amaro's risk to the community would be a sufficiently narrow way to fulfill the State's goals. *See id.* at 330, 332.

Additionally, courts may not prohibit an offender from using the internet if his crime lacks a nexus to internet use. *Johnson*, 180 Wn. App. at 330. Here, the stipulated facts serving as the basis for Amaro's convictions state that he had images on his phone of minors engaged in sexually explicit conduct. The stipulated facts do not provide details about the images' sources or how they came to be on Amaro's phone. Therefore, on remand, the trial court should also state the factual basis for the modified condition.

C. COMMUNITY CUSTODY SUPERVISION FEES

Amaro argues that the trial court erred by ordering Amaro to pay community custody supervision fees. The State concedes that the community custody supervision fees were improperly imposed. It is unclear from our record whether the trial court intended to impose community custody supervision fees.

In such situations, we have previously remanded for the trial court to consider the imposition of community custody supervision fees. *See State v. Spaulding*, 15 Wn. App. 2d 526, 537, 476 P.3d 205 (2020) (remanding for trial court to reevaluate imposition of supervision fees where trial court's intentions were unclear). However, the legislature recently amended RCW

9.94A.703 and removed courts' authority to impose community custody supervision fees. *See* LAWS OF 2022, ch. 29 § 7. Although the amendment became effective on July 1, 2022, we hold that the amendment applies here because Amaro's case was still pending review on the effective date. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018) (new statute applies if a precipitating event occurs after the effective date of the statute). Thus, in light of the amendment to RCW 9.94A.703, we remand for the trial court to strike the community custody supervision fees.

CONCLUSION

We hold that the trial court did not err by denying Amaro's motion to suppress. We also hold that the trial court did not err by imposing the challenged community custody condition related to "sexually exploitive materials." However, the trial court erred by imposing the two other challenged community custody conditions relating to sexually explicit materials and use of internet/social media, but the remedy of striking the conditions is not necessary for both challenged community custody conditions. Finally, the community custody supervision fees should be stricken.

Accordingly, we affirm Amaro's convictions and the community custody condition related to "sexually exploitive materials." We remand for the trial court to provide proper definition and clarification for the community custody condition related to possessing or accessing "sexually explicit materials and/or information pertaining to minors (under 16) via computer (i.e. internet)," modify and state the factual basis for the community custody condition related to social media/internet use, and strike the community custody supervision fees. CP at 163.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, A.C.J.

Price, J.

BACKLUND & MISTRY

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