68321-7 68321-7

COA NO. 68321-7-I

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

VLADIK BYKOV,

Appellant,

v.

JUDGE STEVEN ROSEN AND CITY OF SEATTLE,

Respondents.

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

The Honorable Monica J. Benton, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE CATEGORICAL BAN ON INTERNET ACCESS AS A CONDITION OF THE SUSPENDED SENTENCE IS UNCONSTITUTIONAL.

a. The City's "Statement Of The Case" Is Flawed.

Bykov was charged with multiple counts of harassment and cyberstalking. CP 28-32. A jury, however, convicted Bykov on only one count: harassment under count 2, based on an email sent on October 25, 2010. CP 28, 59, 172-75.

In its "Statement of the Case," the City cites to a transcript of a probable cause hearing and a pre-trial interview with Fresonke, neither one of which was evidence in this case. Brief of Respondent (BOR) at 2 (citing CP 20, 47); CP 150-53. The allegations made at the probable cause hearing and in the pre-trial interview do not establish them as an evidentiary basis for the sole conviction under count 2.

b. The Unconditional Ban On Internet Access Constitutes A Prior Restraint On Speech In Violation Of Article I, Section 5 Of The Washington Constitution.

Article I, section 5 of the Washington constitution "categorically prohibits prior restraints on constitutionally protected speech." Bradburn v. North Cent. Regional Library Dist., 168 Wn.2d 789, 801, 231 P.3d 166 (2010) (citing Voters Educ. Comm. v. Wash. State Pub. Disclosure

Comm'n, 161 Wn.2d 470, 493–94, 166 P.3d 1174 (2007)). Prior restraints on protected speech are "per se" unconstitutional under article I section 5 and unacceptable under "any circumstances." JJR Inc. v. City of Seattle, 126 Wn.2d 1, 6, 891 P.2d 720 (1995); O'Day v. King County, 109 Wn.2d 796, 804, 749 P.2d 142 (1988).

It is therefore understandable that the City does not want this Court to think of the Internet ban as a prior restraint on speech. According to the City, only "[a] governmental attempt to restrict the *content* of future speech is a prior restraint." BOR at 5. Under the City's theory, a restriction on all speech conducted over the Internet encompassing both its reception and transmission does not amount to a prior restraint, but restriction on a particular communication would qualify as a prior restraint. BOR at 5. That result is counter-intuitive because it shields broad restrictions on speech while striking down more limited ones. That does not make sense. The City's theory finds no sanctuary in law or logic.

"A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech." Soundgarden v. Eikenberry, 123 Wn.2d 750, 764, 871 P.2d 1050 (1994). The Supreme Court has consistently cleaved to this definition of prior

restraint in its jurisprudence. See, e.g., Bradburn, 168 Wn.2d at 802; Voters Educ. Comm., 161 Wn.2d at 494.

The Internet ban at issue here falls squarely into the prior restraint category. The sentencing order prohibits Bykov from engaging in speech over the Internet and receiving speech over the Internet in the future. The court's order forbids Internet communications before they take place.

Whether a prior restraint exists does not turn on whether the restraint discriminates based on the content of speech. In this regard, the City confuses the prior restraint analysis with the distinct time, place, manner analysis. Restrictions "that do not ban expression but instead impose valid temporal, geographic, or manner of speech limitations are analyzed as time, place and manner restrictions." Sanders v. City of Seattle, 160 Wn.2d 198, 225, 156 P.3d 874 (2007). To be lawful, a time, place and manner restriction in a non-public forum must be content neutral. Sanders, 160 Wn.2d at 225.

But whether a prior restraint exists does not turn on whether the restraint is content neutral. A prior restraint is always unlawful if the speech being restrained is protected. Bradburn, 168 Wn.2d at 801; Voters Educ. Comm.,161 Wn.2d at 493–94, JJR, 126 Wn.2d at 6; O'Day, 109 Wn.2d at 804.

The City cites two cases for the proposition that a restriction on future speech does not constitute a prior restraint unless it is based on the content of the speech: World Wide Video of Washington, Inc. v. City of Spokane, 125 Wn. App. 289, 103 P.3d 1265, review denied, 155 Wn.2d 1014, 122 P.3d 186 (2005) and DCR, Inc. v. Pierce County, 92 Wn. App. 660, 670, 964 P.2d 380 (1998), review denied, 137 Wn.2d 1030, 980 P.2d 1283 (1999), cert. denied, 529 U.S. 1053, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000). BOR at 5. Neither case holds what the City would like it to hold.

Before holding an ordinance that restricted only the place and manner of erotic dancing met the time, place, and manner test,[1] the court in DCR stated "A governmental attempt to restrict the content of future speech, deemed 'prior restraint,' bears 'a heavy presumption against its constitutional validity' under the First Amendment to the federal constitution, and unconstitutional per se under Article I, Section 5, of the state constitution." DCR, 92 Wn. App. at 670 (citing JJR, 126 Wn.2d at 6 n. 4 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963)).

DCR cites JJR for the proposition, but JJR nowhere mentions a requirement that a speech restriction must be content-based to qualify as a

[1] DCR, 92 Wn. App. at 683.

prior restraint. "Prior restraints are 'official restrictions imposed upon speech or other forms of expression in advance of actual publication.'" JJR, 126 Wn.2d at 6 (quoting Seattle v. Bittner, 81 Wn.2d 747, 756, 505 P.2d 126 (1973)).

Citing DCR, the court in World Wide Video stated "It is true that a governmental attempt to restrict the content of future speech is unconstitutional per se under article I, section 5." World Wide Video, 125 Wn. App. at 304. It then went on to hold an ordinance that did not completely ban the sale of sexually explicit materials did not qualify as a prior restraint because it merely restricted the time, place, or manner of expression. Id.

The reference to "content of future speech" in DCR and World Wide Video is best construed as loose language that crept into the opinions without justification. Alternatively, it is a shorthand way of recognizing a future restraint on speech invariably restricts the content of that speech, regardless of what that content is, because the speech is restricted altogether. Indeed, the court in DCR correctly recognized later in its decision that "Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech." DCR, 92 Wn. App. at 675 (quoting Soundgarden, 123 Wn.2d at 764). The prior restraint doctrine does not

incorporate a content-based restriction requirement as the necessary trigger for when a prior restraint will be found.

No doubt a prior restraint on speech could be content-based and unlawful for that reason. Under federal law, the presence or absence of a content-based restriction determines the level of scrutiny applied to the prior restraint. CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1280 (11th Cir. 2006). But the level of scrutiny is irrelevant under the Washington Constitution because prior restraints are per se unconstitutional. Bradburn, 168 Wn.2d at 801. Under Washington law, the time, place and manner test is applied only if the restriction does not qualify as a prior restraint. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 126, 937 P.2d 154 (1997). No case holds a prior restraint will not be found where the restriction on future speech is so broad as to cover all speech regardless of its content.

The City nonetheless contends the Internet ban is not a prior restraint on speech but rather a permissible time, place and manner restriction because it "merely restricts the manner in which he communicates with his attorney and conducts his legal research." BOR at 7. As set forth in the opening brief, the restriction does far more than prevent Bykov from communicating with his attorney or conducting legal

research over the Internet. See Amended Brief of Appellant (BOA) at 5-9. It restricts a tremendous, nearly limitless range of speech over the Internet.

Curiously, the City makes no reference to the Supreme Court's decision in Bradburn, which deals with Internet restrictions and is therefore particularly relevant to Bykov's prior restraint argument. In Bradburn, the Supreme Court concluded a library's filtering policy governing patron access to the Internet did not constitute a prior restraint on speech only because the "policy does not prevent any speech and in particular it does not ban or attempt to ban online speech before it occurs." Bradburn, 168 Wn.2d at 803.

The court's order here prevents Bykov from engaging in any protected speech over the Internet and in particular bans his speech before it occurs. Under the reasoning in Bradburn, that restriction is a prior restraint on speech.

Assuming the Internet ban does not constitute a prior restraint of speech, it still does not pass constitutional muster. The City argues the ban is a permissible time, place and manner restriction. BOR at 6-7. One of the requirements for the time, place and manner test is that the restriction must be "narrowly tailored" to serve a compelling state interest. Bering v. SHARE, 106 Wn.2d 212, 234, 721 P.2d 918 (1986). The "narrowly tailored" requirement naturally leads to application of the legal

standard for when a sentencing condition affects a fundamental right and will be therefore addressed in the next section of this brief.

c. The Internet Ban Does Not Survive Strict Scrutiny.

"The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Sentencing conditions that interfere with fundamental rights must be narrowly drawn. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). "There must be no reasonable alternative way to achieve the State's interest." Warren, 165 Wn.2d at 34-35.

The Internet ban is unconstitutional because it is not narrowly tailored to protect the victim in this case from further harassment. Protecting citizens from harassment is a compelling state interest and the imposition of a no contact order is a valid means of achieving that interest. State v. Noah, 103 Wn. App. 29, 41, 9 P.3d 858 (2000), review denied, 143 Wn.2d 1014, 22 P.3d 802 (2001). The court ordered Bykov to have no contact with the victim as part of the sentence. CP 60. The no contact provision of the sentence is narrowly drawn. Its existence shows there are reasonable alternative ways to achieve the state's interest short of a complete ban on Internet use. The Internet ban is redundant.

The no-contact order in Noah was "narrowly tailored" because it focused on the victim and a no contact zone around the victim. Noah, 103 Wn. App. at 41-42. Similarly, a no contact order imposed as part of a criminal sentence that forbids contact with the victim or a class of individuals similarly situated to the victim is not overbroad. State v. Riles, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998) (where defendant convicted of raping child, rejecting overbreadth challenge to sentencing order prohibiting contact with minor children).

There is no evidence that Bykov harassed other people in the past by any means, nor is there a basis to suggest Bykov is prone to harassing others in the future. Bykov had a problem with one particular person: Fresonke, the victim in this case. The City offers no argument as to why the no contact order in this case, which is narrowly drawn to prevent further harassment, is insufficient to achieve the state's interest. The Internet ban is overkill. It is as if the sentencing court assumed Bykov will violate the court's order even though there is nothing in the record to suggest he will. Cf. United States v. Tome, 611 F.3d 1371, 1377 (11th Cir. 2010) (Internet ban was not greater deprivation of liberty than reasonably necessary where offender violated condition of supervised release: "Tome has shown his unwillingness to conform his behavior to more-lenient restrictions.").

"[I]n a time where the daily necessities of life and work demand not only internet access but internet fluency, sentencing courts need to select the least restrictive alternative for achieving their sentencing purposes." United States v. Albertson, 645 F.3d 191, 200 (3d Cir. 2011). In addition to imposing a no contact order, there are other ways short of an absolute ban on Internet access to achieve the state's interest in preventing further victimization. See United States v. Rearden, 349 F.3d 608, 621 (9th Cir. 2003) (upholding internet restriction condition as not plainly involving greater deprivation of liberty than reasonably necessary because it was not absolute: it allowed for approval of appropriate online access by the Probation Office); Albertson, 645 F.3d at 199 (a computer monitoring condition requiring computer inspections and installation of monitoring or filtering software is generally acceptable if the internet restriction to which it applies is narrowly tailored and reasonable).

The opening brief cites to a number of federal cases holding a ban on Internet use to be an invalid condition of supervised release. See BOA at 18-25. The City cites some cases upholding such bans. BOR at 9-10. The case law goes both ways on the issue and varies with the facts of a particular case.

It is telling, however, that the cases cited by the City involve offenders who were convicted of either child pornography or a sex offense

involving children. See, e.g., Tome, 611 F.3d at 1376 (Tome's conviction involved child pornography downloaded from the Internet to his personal computer, he violated first supervised release by having inappropriate Internet contact with other convicted sex offenders, and he had prior criminal history of sexually abusing children); United States v. Brigham, 569 F.3d 220, 233-34 (5th Cir. 2009) (offense conduct involved posting child pornography to Internet website); United States v. Locke, 482 F.3d 764, 766, 768 (5th Cir. 2007) (possession of child pornography); Commonwealth v. Hartman, 908 A.2d 316, 320-21 (Pa. Super. 2006) (sexual abuse of children arose from use of computer to download from the Internet sexually explicit photographs of young girls).

The distinction between sex offenders and other kinds of offenders cannot be overlooked. The highest court of this land recognizes the "high rate of recidivism among convicted sex offenders and their dangerousness as a class." Smith v. Doe, 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (citing McKune v. Lile, 536 U.S. 24, 34, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) (risk of recidivism posed by sex offenders is "frightening and high.")); see also United States v. Pugh, 515 F.3d 1179, 1201 (11th Cir. 2008) ("child sex offenders have appalling rates of recidivism and their crimes are under-reported").

Courts upholding restrictions reason that there is a "strong link between child pornography and the Internet, and the need to protect the public, particularly children, from sex offenders." Rearden, 349 F.3d at 621 (quoting United States v. Zinn, 321 F.3d 1084, 1092 (11th Cir. 2003)). One study found an exponential increase in recidivism rates for sex offenders who viewed Internet pornography. United States v. Cunningham, 680 F. Supp.2d 844, 855-56 (N.D. Ohio 2010), aff'd, 669 F.3d 723 (6th Cir. 2012), cert. denied, 133 S. Ct. 366 (2012).

Bykov does not belong in a special class of offender. Unlike sex offenders who use the Internet, there is no evidence that Bykov poses a high risk of reoffense or that the crime of harassment is intrinsically linked to Internet usage. Cf. Brigham, 569 F.3d at 233-34 (Internet ban upheld given reprehensibility of child pornography, the harm to children that results therefrom, and the undisputed likelihood of recidivism in that case). Bykov's Internet use was incidental to the crime of harassment committed against Fresonke, just as the use of a telephone or pen and paper to harass someone is incidental to the criminal act itself. This Court should strike down the Internet ban as an unconstitutional infringement of Bykov's fundamental free speech rights.

B. CONCLUSION

Bykov requests that this Court strike the sentencing condition prohibiting him from using any device connected to the Internet from his judgment and sentence.

DATED this 14th day of December, 2012

Respectfully Submitted,

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DIVISION ONE

VLADIK BYKOV,	)	
	)	
Petitioner,	)	
	)	
vs.	)	COA NO. 68321-7-I
	)	
HONORABLE STEVEN ROSEN,	)	
	)	
Respondent.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VLADIK BYKOV
14156 91ST CT NE
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SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER 2012.

X Patrick Mayovsky