NO. 42786-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVAN VANSYCKLE,

Appellant.

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

The Honorable Susan Serko, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory sentencing authority by prohibiting appellant from accessing the Internet or using a computer without approval from the court as a condition of community custody. CP 116-18 (condition 25).[1]

Issue Pertaining to Assignment of Error

Appellant was convicted of three counts of first degree child molestation. The sentencing court imposed a community custody condition prohibiting appellant from "hav[ing] access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You are also prohibited from joining or perusing any public social websites (Facebook, Myspace, etc.)." CP 116-18 (condition 25). Where use of computers and the Internet did not facilitate or directly contribute to the crime, did the sentencing court exceed its statutory sentencing authority by imposing the condition?

B. STATEMENT OF THE CASE

The Pierce County prosecutor charged appellant Kevan Vansyckle with three counts of child molestation in the first degree and one count of

[1] The Judgment and Sentence "Appendix H" is attached to this brief as an appendix.

first-degree rape of a child, and in the alternative, a fourth count of child molestation in the first degree. CP 59-61.

Vansyckle waived his right to a jury trial. CP 10; 1RP 10-12.[2] The court found Vansyckle guilty of three counts of first degree child molestation and not guilty of one count of first degree child molestation following a bench trial. CP 238-40. The trial court imposed concurrent standard range indeterminate sentences of 198 months to life for each child molestation conviction. CP 100-15; 1RP 1324-25. The trial court also imposed community custody conditions for life for each child molestation conviction. CP 100-18. Vansyckle timely appeals. CP 121.

C. ARGUMENT

THE TRIAL COURT ERRED BY PROHIBITING INTERNET ACCESS AS A CONDITION OF COMMUNITY CUSTODY BECAUSE IT WAS NOT REASONABLY RELATED TO THE CIRCUMSTANCES OF THE OFFENSE.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143

[2] This brief refers to the verbatim report of proceedings as follows: 1RP – September 6, 7, 8, 12, 13, 15, 20, and 21, 2011 and November 8, 2011; 2RP – September 14, 2011; 3RP – September 19, 2011.

Wn.2d 1003 (2001). An accused has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998); see Bahl, 164 Wn.2d at 750-52 (accused may bring pre-enforcement challenge to vague sentencing condition).

At the time of Vansyckle's alleged offense, first-degree child molestation offenders were sentenced according to Former RCW 9.94A.712.[3] That statute authorized a trial court to impose a term of community custody. RCW 9.94A.712 (5). Here the court imposed an indeterminate community custody term.

Under Former RCW 9.94A.712 (6)(a)(i), the following conditions, unless waived by the court, were required under Former RCW 9.94A.700(4):[4]

> (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

---

[3] The provision was recodified as RCW 9.94A.507 by Laws 2008, ch. 231, § 56, effective August 1, 2009. It applies to Vansyckle, who committed the alleged offense between June 15, 2007 and June 3, 2009, by operation of the saving statute, RCW 10.01.040. CP 59-61. See also RCW 9.94A.345 (Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed).

[4] Former RCW 9.94A.700 was re-codified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

> (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;
>
> (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
>
> (d) The offender shall pay supervision fees as directed by the department; and
>
> (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

Former RCW 9.94A.700(5) permitted a sentencing court to impose any or all of the following conditions of community custody:

> (a) The offender shall remain within, or outside of, a specified geographical boundary;
>
> (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
>
> (c) The offender shall participate in crime-related treatment or counseling services;
>
> (d) The offender shall not consume alcohol; or
>
> (e) The offender shall comply with any crime-related prohibitions.

In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community. Former RCW 9.94A.712 (6)(a)(i).

As a condition of community custody the trial prohibited Vansyckle from using computers or accessing the Internet without prior

approval from the court. CP 116-18 (condition 25). Prohibiting computer and Internet access is not included in former RCW 9.94A.700. The trial court therefore, had no authority to impose the restrictive conditions unless computers or Internet use reasonably related to the circumstances of the offense. Because computers and the Internet did not facilitate Vansyckle's offense, the trial court lacked authority to prohibit his access.

"A crime-related prohibition is an order prohibiting conduct that *directly relates to the circumstances of the crime.*" State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008), rev. denied, 165 Wn.2d 1035 (2009) (emphasis added in original); State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). See Zimmer, 146 Wn. App. at 413-14 (finding prohibition on possession of cell phones and electronic storage devices was unlawful where no evidence and no findings showed Zimmer used such items in committing her crime); Compare State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (restriction on Riley's computer use and communication with other hackers was crime-related where he was convicted of computer trespass).

State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), is analogous to Vansyckle's case. O'Cain was convicted of second-degree rape. As a condition of community custody, the trial court prohibited O'Cain from accessing the Internet without prior approval from his

supervising community corrections officer and sex offender treatment provider. O'Cain, 144 Wn. App. at 774.

Rejecting the State's argument the condition was necessary to prevent access to sexual material that would increase O'Cain's risk of reoffending, the Court held access prohibition cannot be upheld where no evidence shows Internet use contributed to the crime. The Court concluded:

> There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

O'Cain, 144 Wn. App. at 775.

Like in O'Cain, the evidence does not show Vansyckle used a computer or the Internet to contact or lure M.D. into a sexual encounter. There are also no findings by the trial court that use of computers or the Internet facilitated or directly contributed to Vansyckle's alleged offenses.

The only mention of computers or the Internet relates to M.D.'s allegations regarding the first alleged incident. M.D. testified Vansyckle went to a computer in his father's home and accessed the website "Myspace." While at the computer Vansyckle asked M.D. to come sit on the arm of the chair he was sitting in. M.D. alleged that after sitting on the

arm of the chair, Vansyckle unzipped her pants and "touched me in the wrong places," with his hand. 1RP 199-203; CP 228-30. M.D.'s written "trauma narrative" describing the first alleged incident is consistent with her trial testimony. 1RP 1279-82; CP 63-64.

There is no evidence Vansyckle stated he wanted to show M.D. something on the computer or asked M.D. to come show him how the computer worked in an effort to entice her into a sexual encounter. Rather, M.D.'s allegations demonstrate the computer room was simply where the first alleged incident occurred.

In short, the evidence shows Vansyckle's use of the computer to access "Myspace" is, at best, merely incidental to the alleged incident. State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000), is instructive by way of contrast. Combs was convicted of two counts of child molestation. Combs, 102 Wn. App. at 951. He used a computer to show pornographic images to his female victims and then required the young girls to pose with him in the same positions they had just viewed on the computer. Id. at 953. Under these circumstances, Division Three concluded the prohibition on using computers as a condition of community placement "appears to be a reasonable means to accomplish the needs of the state and public order." Id.

Unlike Combs, here there is no evidence Vansyckle used the computer or website to desensitize or entice M.D. into a sexual encounter. Because there is no evidence and no findings that computers or the Internet facilitated Vansyckle's alleged offense, the prohibition is not crime-related, and should be stricken from the judgment and sentence.

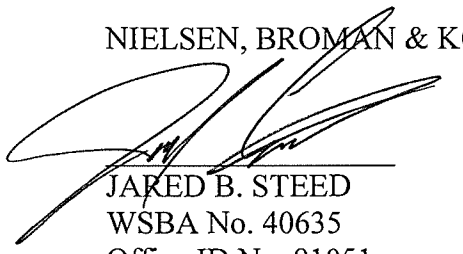
D. CONCLUSION

The trial court exceeded its statutory sentencing authority by imposing a community custody condition that was not crime-related. This Court should remand the judgment and sentence for vacation of the unlawful condition.

DATED this 18th day of September, 2012.

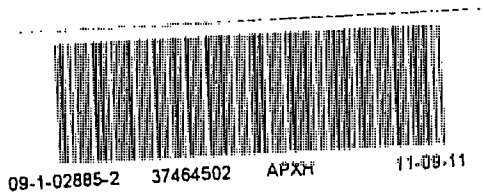
Respectfully submitted,

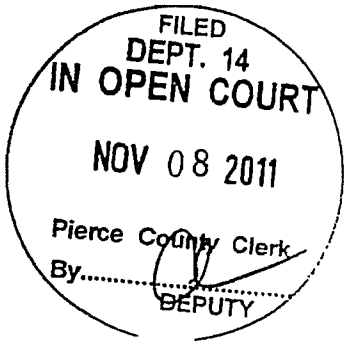
NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

Appendix





IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON	**Cause No** 09-1-02885-2
Plaintiff	**JUDGEMENT AND SENTENCE (FELONY)**
v.	**APPENDIX H**
VanSyckle, Kevan M.	**COMMUNITY PLACEMENT / CUSTODY**
Defendant	
DOC No. 352699	

The court having found the defendant guilty of offense(s) qualifying for community custody, it is further ordered as set forth below.

COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.94A.712 committed on or after September 1, 2001 to include up to life community custody; for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

(1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
(2) Work at Department of Corrections' approved education, employment, and/or community service; any long-haul truck driving employment must be approved by the CCO.
(3) Not consume controlled substances or alcohol, except pursuant to lawfully issued prescriptions;
(4) While on community custody do not unlawfully possess controlled substances;
(5) Pay supervision fees as determined by the Department of Corrections;
(6) Receive prior approval for living arrangements and residence location;
(7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
(8) Notify community corrections officer of any change in address or employment; and
(9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

10. Reside at a residence and under living arrangements approved of in advance by your community corrections officer. You shall not change your residence without first obtaining the authorization of you community corrections officer.
11. Enter and complete, following release, a state approved sexual deviancy treatment program (if Court-Ordered) through a certified sexual deviancy counselor. You are to sign all necessary releases to ensure your community corrections officer will be able to monitor your progress in treatment.
12. You shall not change sexual deviancy treatment providers without prior approval from the Court and your community corrections officer.
13. You shall not possess or consume any mind or mood altering substances, to include alcohol, or any controlled substances without a valid prescription from a licensed physician.
14. Have no contact with the victim(s) (M.D.), without prior approval of the Court. This includes but is not limited to personal, verbal, written or contact through a third party.
15. Hold no position of authority or trust involving children under the age of 18.
16. Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason. Do not have any contact with physically or mentally vulnerable individuals. except biological children
17. Have no contact with minors or children under the age of 18, without prior approval from your community corrections officer and sexual deviancy treatment provider.
18. Inform your community corrections officer of any romantic relationships to verify there

is no victim-age children involved.

19. Submit to polygraph and plethysmograph testing upon direction of your community corrections officer and/or therapist at your expense. You must successfully pass all polygraph/plethysmograph tests, and indicate no deception at any time on either type of test. Failing either type of test and/or indicating deception will be a violation of your conditions of community custody.
20. Register as a sex offender in your county of residence, per sentencing statute.
21. Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court
22. Submit to testing for DNA purposes, and for an HIV test.
23. Follow all conditions imposed by your sexual deviancy treatment provider and CCO.
24. Obey all laws.
25. You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the Court. You also are prohibited from joining or perusing any public social websites (Face book, MySpace, etc.)
26. Obtain both a Domestic Violence Evaluation, and a psychosexual evaluation, and comply with any/all treatment recommendations.
27. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

11/8/2011
DATE

JUDGE/PIERCE COUNTY SUPERIOR COURT

FILED
DEPT. 14
IN OPEN COURT
NOV 08 2011
Pierce County Clerk
By..... DEPUTY

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 42786-9-I
	)	
KEVAN VANSYCKLE,	)	
	)	
Appellant.	)	

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 18H DAY OF SEPTEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVAN VANSYCKLE,
DOC NO. 352699
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF SEPTEMBER, 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 18, 2012 - 2:46 PM

Transmittal Letter

Document Uploaded: 427869-Appellant's Brief.pdf

Case Name: Kevan Vansyckle
Court of Appeals Case Number: 42786-9

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:
pcpatcecf@co.pierce.wa.us