No.44674-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES BERNARDE,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

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1. The trial court abused its discretion in revoking the Special Sex Offender Sentencing Alternative (SSOSA).

2. The trial court erred in imposing a sentence without a determinate term of community custody and instead delegating the task to the Department of Corrections (DOC).

3. The trial court acted outside its statutory authority in imposing certain conditions of community custody and further imposed conditions which violated Bernarde's First Amendment and due process rights and his rights to be free from unreasonable governmental intrusions into his private affairs. Bernarde assigns error to the following "OTHER CONDITIONS" set forth in Appendix H to the Judgment and Sentence:

> 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**.
>
> . . .
>
> 15. **Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.**
>
> . . .
>
> 19. **Submit to** polygraph and **plethysmograph testing upon direction of your community corrections officer or therapist at your expense**.

CP 57-58 (emphasis added).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant has successfully completed sex-offender is it an abuse of discretion for the trial court to later revoke a Special Sex

Offender Sentencing Alternative (SSOSA) based on termination from subsequent treatment?

2. Did the trial court err in failing to set forth a specific term of post-sentence community custody, instead improperly delegating the task of setting that term to DOC?

3. All conditions of community custody or supervision imposed in a judgment and sentence must be statutorily authorized. Did the sentencing court exceed its statutory authority in limiting the providers from whom the defendant may receive a prescription to far fewer than the Legislature authorized?

4. Did the sentencing court violate Bernarde's due process rights and err in imposing a condition prohibiting him from possessing or perusing "pornographic" materials without defining that term, instead delegating to the community corrections officer to decide when the defendant is in violation?

Did the court further violate Bernarde's First Amendment rights by prohibiting him from constitutionally-protected activity without limiting that prohibition so that it was narrowly tailored?

5. Were Bernarde's rights to be free from unreasonable governmental intrusion into his private affairs violated when he was ordered to submit to plethysmograph testing when directed to by his community corrections officer or therapist when that condition was not sufficiently limited to legitimate treatment purposes?

C. STATEMENT OF THE CASE

1. Procedural Facts

In 2003, appellant James L. Bernarde was charged by amended information with and pled guilty to seven counts of second-degree child molestation. CP 5-8; RCW 9A.44.086. The Honorable Judge Stephanie Arend imposed a SSOSA and, after hearings before her and the Honorable Commissioner Megan Foley (as indicated) on July 13, August 10 and October 26, 2007, January 11, April 25, May 23 and October 24, 2008, April 10 and July 10, 2009, February 12, 2010, February 11 and August 12, 2011, July 27, August 1 (Foley), August 3, September 28, October 24 (Foley), and November 9, 2012, February 22 and March 22, 25 and 27, 2013, the court revoked the SSOSA and imposed sentence. CP 342-44.[1]

Bernarde appealed and this pleading follows. See CP 345.

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[1]The verbatim report of proceedings in this case consists of multiple, non-chronologically paginated volumes, which will be referred to as follows:

July 13, 2007, as "1RP;"
August 10, 2007, as "2RP;"
October 27, 2007, as "3RP;"
January 11, 2008, as "4RP;"
April 25, 2008, as "5RP;"
May 23, 2008, as "6RP;"
October 24, 2008, as "7RP;"
April 10, 2009, as "8RP;"
July 10, 2009, as "9RP;"
February 12, 2010, as "10RP;"
February 11, 2011, as "11RP;"
August 12, 2011, as "12RP;"
July 27, 2012, as "13RP;"
August 1, 2012, as "14RP;"
August 3, 2012, as "15RP;"
September 28, 2012, as "16RP;"
October 24, 2012, as "17RP;"
November 9, 2012, as "18RP;"
February 22, 2013, as "19RP;"
March 22, 25, and 27, 2013, as "20RP."

2. Facts admitted as part of plea

Bernarde was accused of seven counts of second-degree child molestation for sexual contact with two early-teen daughters. CP 5-8. In his Statement on Plea of Guilty, Mr. Bernarde declared:

> During the period January 2002 to May 2003, I had sexual contact w/A.B. + K.B. who were between the ages of 12-14, not married to me and where I was 36 months older than them. This contact took place in WA State.

CP 36-37.

3. Facts relevant to SSOSA

In exchange for Bernarde's pleas, the prosecution recommended and the trial court imposed a SSOSA. CP 9-13. The sentence imposed but suspended was for 116 months for each count, to run concurrent. CP 40-54. The SSOSA started with 180 days of "total confinement" with credit for 30 days served, followed by 4 years of community custody. CP 47. Bernard was ordered to "[u]ndergo and successfully complete" an outpatient sex offender treatment program for "3 years or successful completion." CP 47-48.

With a few fits and starts, Bernarde made progress and, on July 10, 2009, his treatment provider sent a glowing report, declaring that he had made such "significant progress" that the provider was "releasing" Bernarde "as a successful graduate" of the sex-offender therapy program. CP 171-74. That same day, the parties appeared and discussed the fact that Bernarde was "in compliance" and that the treatment provider wanted to release him. 9RP 3-8.

Judge Arend expressed some concern that there had been a report

the previous year indicating that Bernarde was having trouble with accepting responsibility. 9RP 4. The judge declared, however, "we'll terminate treatment today." 9RP 4. A review hearing was set for February 12, 2010. 9RP 5. The written order filed in the court file had originally been titled "ORDER CONTINUING SSOSA TREATMENT," but "CONTINUING" was lined out and the word "TERMINATING" inserted. CP 169-70. The Order also provided, in relevant part, "[t]he Court finds that the defendant has ~~yet to~~ fully comply [sic] with and successfully complete all of the requirements and conditions of the treatment program ordered in the above-entitled cause." CP 169-70. But the boilerplate language in the order was not changed and still provided, "[t]he requirement of treatment in this cause is continued." CP 169-70.

When the parties next appeared in 2010, they discussed the inconsistencies in the order and concluded that the court had terminated treatment and they had used the wrong form. 10RP 2-7. Mr. Bernarde recalled that the hearing was supposed to be the last review but because Judge Arend thought the prior order was inconsistent and she did not have a "specific independent recollection" that she had terminated treatment, the judge said, she was going to "err on the side of caution for the protection of the public and set another review hearing." 10RP 8.

An order "re SSOSA Sentence" entered the same date, signed by Judge Arend, specifically provided, "[d]efendant has completed his SSOSA-required treatment" and "aftercare treatment is recommended but not required." CP 280.

In February 11, 2011, Bernarde was still in compliance with his

supervision requirements. 11RP 2-3. The same was true on August 12, 2011, when Bernarde's CCO said Bernarde was "doing what he's supposed to do" and that, in fact, the CCO was "proud" of Bernarde. 13RP 2-3. Another review hearing was set out for another year because supervision was for two more years. 13RP 3-4. The court entered an "ORDER CONTINUING SSOSA," lining out the word "TREATMENT" in the title and writing on the form that he had completed "tmt 2010." CP 191-92. Still in the boilerplate language was a declaration that "the defendant has yet to fully comply with and successfully complete all of the requirements and conditions of the treatment program ordered in the above-entitled cause." CP 191-92.

The following May, however, Bernarde had a new CCO and she filed a "violation" report. CP 195-204. The issues were things that the new CCO had concerns about, which Bernarde said the previous CCO had allowed, such as unscheduled out-of-county travel for work. CP 195-204. While recognizing that Bernarde had been managed by several CCO's over the years, the new CCO gave him a verbal "reprimand" and reminded him of the conditions imposed. CP 195-204. The CCO also said that she had learned from Bernarde that he had unexpected contact with a ten-year old child at church when the child had unexpectedly approached and shaken Bernarde's hand. CP 200. As a result, the CCO said, she had "directed" him to contact the sex offender providers and "resume Sex Offender Treatment." CP 202.

On July 19, 2012, the prosecutor filed a Petition alleging that Bernarde had the improper contact on May 3, 2012 (potentially the church

incident), and had also had a "failure/alteration" on a polygraph on July 17, 2012. CP 209-12. Counsel noted at the hearing on the issue that it was not that there was "deception" in the polygraph but that there was "breath holding" and that Bernarde has issues with anxiety. 13RP 3-4. She also pointed out that Bernarde was having to make some "adjustments" from a CCO who was very flexible to what the new CCO wanted. 13RP 3-4. A CCO filling in for Bernarde's absent CCO said she wanted him "back into treatment." 13RP 8. She recognized he "did complete treatment per the original sentencing conditions" but thought he appeared to have "regressed." 13RP 8.

The court asked counsel if she had "any problem" with the new treatment recommendation and she responded, "[n]o," saying she had read that recommendation from the CCO in the report and talked to Bernarde about it. 13RP 8. The court said, "[t]hat's appropriate." 13RP 8-9.

On August 1, the prosecution filed a Petition to revoke the SSOSA, saying that Bernarde had "failed to obey all laws" by driving a car without having insurance on about July 31, 2012. CP 213-14. The prosecutor then scheduled a hearing before the Honorable Commissioner Megan Foley, where Bernarde acknowledged the offense. 14RP 7-8. The Commissioner also speculated that Bernarde probably did not have a valid license because of his record, although Bernarde objected to such "fact-finding" by the court. 14RP 8-9. At a hearing before Judge Arend a few days later, the court imposed a 30-day period in custody and indicated that "other violations" would be addressed in the future. CP 217-18; 15RP 9. At that hearing, counsel also told Bernarde he had to be "[b]ack in treatment

according to DOC." 15RP 13. An "order modifying sentence" was entered reflecting that sanction. CP 217-18.

About a month later, another "violation report" was filed referring to the unexpected contact with a 10-year-old shaking Bernarde's hand on May 3, 2012. CP 221-37. The only "violation" listed, however, was an allegation that he drove without a valid license the same day he drove without insurance, about July 31, 2012. CP 224. On September 28, 2012, the parties appeared before Judge Arend and an amended order was entered in order to ensure that Bernarde have only "incidental contact" with minors under 16 at his work or church with CCO permission. 16RP 5. Counsel explained the circumstances of the church contact where the 10-year old boy had shaken Bernarde's hand unexpectedly. 16RP 5. Although it was "incidental contact" that had always been allowed, counsel acknowledged Bernarde that had not reported it to his new CCO at the time. 16RP 5. Bernarde himself, however, said he had reported it the next day. 16RP 5-6.

Bernarde really wanted to go back to church but had been told he could not unless he spoke to the pastor and told about his crimes or had a "safety plan." 16RP 6. The CCO said she wanted approval of the chaperone for church, noting that Mrs. Bernarde had some issues with her age and mental health and thus she could not serve in that capacity herself. 16RP 6-7. The "safety plan" was being worked out with Bernarde's treatment provider but the prosecutor declared there was an "email" asking for an order for Bernarde to "continue with treatment until successfully discharged by his treatment provider" because there was a claim that he

was having "some difficulties as a former graduate from SO treatment." 16RP 7. The CCO also said, "Department of Corrections would like him to continue with treatment." 16RP 8-9.

Counsel took no position on that request but noted that Bernarde has worked very hard and had needed to pay the treatment provider in order to get a report from her. 16RP 9-10. The court concluded that the "bottom line" was that "there's a request that he be required to continue in treatment" and "at this point that seems appropriate," so the court granted the request. 16RP 10-11. An order was entered "modifying" the "safety plan for church" which included "[t]he defendant shall continue with treatment." CP 238.

About a month later, in October of 2012, the prosecution filed a petition asking for the SSOSA to be revoked because "[d]efendant had contact with minors." CP 244. A subsequent report issued by the treatment provider said it appeared that, over the 14 group therapy sessions Bernarde had done recently, he had "regressed," that he had not done his "safety plan" or another assignment. CP 247-49. The treatment provider stated that two weeks after the September 28 hearing, Bernarde had reported on a polygraph that he had incidental contact at a worksite, so he was then taken into custody. Id. She concluded that he needed "on-going therapeutic attention" and polygraphs but was recommending another treatment provider because she did not have time for him in her own schedule. CP 248-49.

On November 9, 2012, counsel told the court that she thought the contact was only "incidental." 18RP 11-12. She told the court that

Bernarde had been losing jobs as an electrician because he could not longer travel outside the county without permission as in the past. 18RP 12-13. There was also a lot of frustration for him because of the changes he was having to adjust to with the new CCO. 18RP 19-20.

Bernarde himself said he had not had any contact with kids. 18RP 24-25. He thought that there was a misunderstanding about what he had said when he was trying to figure out how to deal with the new rules. 18RP 24-25. He said for "nine years this is what was acceptable" but it had all changed. 18RP 25-26. He also felt he had done nothing wrong. 18RP 25-26.

The judge expressed concern that there had been some troubles years ago. 18RP 30-31. She imposed 45 days in custody, set a review hearing, required Bernarde to get a new treatment provider and said she would "insist upon exact and complete compliance with the CCO." 18RP 30-31. After learning about Bernarde's problems with money and the difficulty he had getting paying work, the court changed the sanction to 30 days. 18RP 33-34.

On February 6, 2013, a violation report was filed, indicating that Bernarde had "failed to obey all laws by striking" his wife and injuring her abdomen "on or about 1/30/13" and by failing to tell DOC of a change of address "within 24 hours of moving on 1/31/13[.]" CP 243-46. An amended petition filed a few days later added that Bernarde had also failed to report to DOC within 24 hours of release, had failed to obey all laws by violating an active no-contact order regarding his wife, and had been "terminated from court[-]ordered sex offender treatment. . .on 2/17/13."

CP 279.

At a hearing on February 22, the prosecutor noted that the assault charge was set for trial in Tacoma Municipal court in March. 19RP 3. Counsel noted that the rules kept changing on Bernarde and he was really trying to comply but that it was worthwhile to note that Bernarde's mistakes were minor, not involving inappropriate contact with minors. 19RP 10-11. The court said that some things, like reporting a change of address, were "kind of basic." 19RP 12-13. Judge Arend also said she appreciated, however, that Bernarde was working. 19RP 12-13.

On March 18, 2013, the prosecution filed a Petition to have the SSOSA revoked on the grounds that Bernarde "had contact with minors" with no date specified. CP 304-307. A few days later, a "supplemental" was filed by the CCO, which said Bernarde had unauthorized/unreported contact with minors on March 1, 2013, and "since on or about March 2nd, 2013." CP 305. Bernarde had gotten approval for the hotels he was staying at but had failed a polygraph about having unreported contact with a minor. CP 305-306. He had then said he had seen some kids with their family in the motel lobby when he was checking in. CP 305-306. He also said that he had talked to some women at their home about a job and their kids came home, walked by him on the porch and entered the house. CP 306-307. He said he had left about 5-10 minutes later. Id.

An amended petition was filed on about March 18, alleging "unreported and unauthorized contact with minors" between March 1-15, 2013. CP 325-29.

A hearing on the allegations was held before Judge Arend on

March 22, 25 and 27, 2013. At the hearing, counsel noted that Bernarde had stipulated to three of the violations: failing to report within 24 hours, violating the no-contact order with his wife and being terminated from treatment as a result of his arrest. 20RP 4-6.

Two officers testified about going to a "domestic" dispute call involving Bernarde and his wife on January 30, 2013. 20RP 14-36. One officer said that, when they arrived, Mrs. Bernarde was "gasping for air," upset, and reported having an argument about a table. 20RP 26. The officer said Mrs. Bernarde told him Bernarde had grabbed one end of the table and shoved it into her stomach. 20RP 27.

Mrs. Bernarde, however, testified that she felt Bernarde "gets all the blame for it and it's not only him" that was involved. 20RP 37-38. She said they were playing and the table hit her but her son must have misunderstood when he thought she said Bernarde had hit her with the table. 30RP 38-39. According to Mrs. Bernarde, they were talking about having the table put into the garage and he said when he had rested he would do it, after which they sort of shoved it at eachother and, she said, "[o]ne of those times when I pushed, it came back and it hit me." 30RP 39-30. She said it was "the plain truth" that Bernarde had not pushed the table but the legs sort of just folded and the table fell into her. 30RP 38-47.

Mrs. Bernarde's adult son said he had called police when he heard a commotion and opened the door to the bedroom to see his mom bending over, holding her "tummy" and saying, "[h]e hit me, he hit me." 20RP 54-55. When he called police, he told them "[h]e's beating my mother with a

table; she's pretty hurt." 20RP 62-64.

The prosecutor conceded that the criminal charges in Tacoma Municipal Court regarding the alleged assault were dismissed, saying it was "due to issues with Ms. Bernarde's version of events." 20RP 7-8.

Bernarde's CCO, Sally Saxon, testified that she had taken over supervision in August of 2012 and believed that Bernarde had been released after his arrest on a Thursday in the evening but had not reported by Friday at five. RP 67-70. She said he did not leave a phone call or message over the weekend but had registered with the sheriff's office that following Monday and only came in to report to Saxon when she told him to. 20RP 68-71.

Saxon first admitted that incidental contact like that at the motel or on the porch was not a problem itself but the problem was Bernarde "failed to report it." 20RP 64-65. A little later, however, she decided the motel contact was, in fact, a problem and Bernarde should have taken some "action to minimize" the contact in the lobby, which had occurred when he was checking in and a family had come in to do the same. 20RP 120-21.

The CCO also opined that Bernarde had "regressed to pre-treatment behavior." 20RP 77-78. She also conceded that Bernarde was having to get used to new rules and that those rules had changed the behavior that had been permitted for years so Bernarde could work. 20RP 81-82, 116-17.

Saxon agreed that Bernarde was still a "Level 1, low risk" to reoffend. 20RP 82. She also admitted that he had called and left voice

messages when he moved hotels from Friday to Saturday. 20RP 88.

Saxon ultimately conceded that the contact in the motel lobby was "incidental" but that she did not think it was incidental contact when the kids came home from school and walked past Bernarde on the porch. 20RP 88, 103-104. She also said, "[w]hether it's incidental or not, he was given direct orders not to be in proximity or at any location where a minor resided." 20RP 88-89. According to the CCO, because children lived at the home, as soon as they showed up, Bernarde "should have excused himself and left the property" even though the kids went inside. 20RP 103-04. She thought being out on the porch while the kids were in the home was "[s]till proximity." 20RP 107-108.

The CCO conceded, however, that Bernarde had disclosed the contacts to the polygraph officer and that officer had specifically described the disclosures as admissions of "incidental contact with minors" and that incidental contact did not need to be reported. 20RP 105-106. She nevertheless maintained that Bernarde should have done something different with these contacts. 20RP 102-104.

Bernarde testified that he was dropped by the treatment provider when he was arrested for the assault of his wife - an assault he denied. 20RP 132-33. On the day in question, he said, his wife was very upset about not being allowed by some family members to see another. 20RP 134-35. She was taking things off a table he was using when he sort of pulled it back and she pulled it towards herself. 20RP 134-35. He said he did not have a good grip on it and it went towards her. 20RP 134-35.

Regarding the "porch" incident, Bernarde explained that he had

arranged to be at the house when the kids were in school so that there would be no kids there. 20RP 147-48. When the kids came by, he and his friend who had worked the job were in the front yard, about 10 feet away, not actually on the porch. 20RP 147-48. Bernarde explained that he did not think to tell anyone about the incidents because the kids were so far away and they went inside the house right away. 20RP 148-49.

In ruling, Judge Arend said the testimony from Bernarde that the table was pulled out of his hands was "completely incredible" to the court because of the relative sizes of the people involved. 20RP 182-84. The judge was convinced that the prosecutor had proven the assault and told Bernarde that, "[t]his far into the game, it should be clear as a bell what you should do for the protection of the community." 20RP 184-85. She was also concerned that Bernarde was not "erring on the side of caution" which he should be doing this close to the end of supervision and after she had given Bernarde a "second chance" the previous year. 20RP 184-85. Judge Arend then found "all six violations to have occurred" and that "revocation is the only appropriate remedy." 20RP 184-85.

In the "Order Revoking Sentence" the court found three violations based on stipulation: 1) failure to report a change of address to DOC within 24 hours of "his move" on January 31, 2013, 2) failing to "obey all laws" by contacting his wife on February 3, 2013, and 3) that he had been "terminated from court ordered sex offender treatment on February 17, 2013. CP 342-44. The court also concluded that, based on the testimony, Bernarde had "failed to obey all laws" by assaulting his wife on January 30, 2103, had failed to report to DOC within 24 hours after his release

from custody on January 31, 2013, and had "unreported and unauthorized contact with minors" between March 1 and 15, 2013. CP 342-44.

D. ARGUMENT

1. THE COURT ABUSED ITS DISCRETION IN TERMINATING THE SSOSA

The SSOSA system was created in order to provide a sentencing alternative for certain first-time offenders who are found to be amenable to treatment and who accept responsibility for their crimes. See, State v. Pannell, 173 Wn.2d 222, 227, 267 P.3d 349 (2011). With a SSOSA, the defendant is given a mostly-suspended sentence, ordered to participate in treatment and given "heavy incentive" to comply with conditions and make satisfactory progress, in order to avoid having the suspended sentence revoked. Id. Revocation is authorized during the period of community custody if the offender either "violates the conditions of the suspended sentence" or if the court "finds that the offender is failing to make satisfactory progress in treatment." Id. A court's decision to revoke a SSOSA is reviewed for abuse of discretion. State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). A court abuses its discretion when it makes a "manifestly unreasonable" decision or acts on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In this case, it Bernarde's position that this Court should find that the trial court abused its discretion in revoking the suspended sentence in part based on Bernarde's termination from treatment. Under former RCW 9.94A.670(2003), as part of a SSOSA, the court was authorized to order

treatment "for any period up to three years in duration." The court was also to have a "treatment termination hearing," at which the court was authorized to modify the conditions of community custody and either terminate treatment or "extend treatment for up to the remaining period of community custody." Former RCW 9.94A.670(8) (2003).

Here, that hearing occurred on July 10, 2009, when Judge Arend said, "we'll terminate treatment today" and entered the order terminating treatment after finding that Bernarde had fully complied and successfully completed the order of treatment in the judgment and sentence. 9RP 4: CP 169-70. If there was any question on that, it was resolved when Judge Arend reaffirmed that order in February of 2010, signing another order which said, "[d]efendant has completed his SSOSA- required treatment." CP 280. Thus, Bernarde complied fully with the treatment order in the SSOSA.

The court was authorized to revoke the suspended sentence if the defendant either violates the conditions of the suspended sentence or fails to make significant progress in treatment. Former RCW 9.94A.670(1) (2003). And here, one of the bases for the revocation was the fact that Bernarde had been terminated from treatment. But Bernarde had already successfully completed the term of treatment ordered as part of the SSOSA several years before the new CCO decided further treatment should be imposed. See CP 280; 9RP 1-4. The "treatment termination hearing" was held and treatment terminated based on Bernarde's successful completion of sex offender treatment - an accomplishment that cannot be seen as anything other than making "significant progress" in treatment. While it is

true that he was ordered to return to treatment several years later and was terminated from that treatment based on his arrest, it is Bernarde's position that the court's revocation should not have been based on a failure to comply with the SSOSA requirement for treatment when, in fact, Bernarde did successfully complete SSOSA training at one point. This Court should so hold and should reverse and remand for the trial court to reconsider its decision to revoke.

2. THE SENTENCING COURT ERRED IN FAILING TO ORDER A PROPER TERM OF COMMUNITY CUSTODY AND INSTEAD DELEGATING ITS DUTY TO THE DEPARTMENT OF CORRECTIONS

Bernarde is also entitled to relief because the sentence the court imposed on revocation was in error. In imposing a sentence, a court may not exceed the statutory maximum for an offense, taking both the term of custody and the term of community custody combined. See Pannell, 173 Wn.2d at 228-29. Here, the statutory maximum is 10 years. See RCW 9A.44.086, RCW 9A.20.021(1)(b).

Here, in imposing the sentence after revocation, the court ordered Bernarde to serve 116 months in custody, to be followed by another 4 years of community custody - a total of 164 months, far more than the 120 month maximum. See CP 40-54. At the hearing on the revocation, the prosecution proposed adding language saying that Bernarde was sentenced to a "term of community custody for that period of time that equals the difference between 120 months - - which would be the maximum on this Class B - and the period of time spent in total confinement less credit [for] time served and good time." 20RP 191. In the Order revoking the

suspended sentence, the court included that language, referring to "Appendix F," which was not attached to the document but was apparently the Appendix F attached to the judgment and sentence which imposed conditions for the term of post-sentence community custody. See CP 344; CP 53.

This notation, however, does not suffice. In In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), the Supreme Court held that it was proper to impose a term of confinement and community custody which exceeded, on its face, the statutory maximum, so long as the trial court writes on the judgment and sentence that the combination of community supervision and custody cannot exceed the statutory maximum. But in 2008, the Legislature changed the relevant statutory scheme. See Laws of 2008, ch. 231, § 57(3); State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011). In addition, the scheme was changed again in 2009, including a new requirement that sentencing courts fix the term of community custody - either a fixed term of 12, 18 or 36 months, depending on the offense. Laws of 2009, ch. 375, § 5; see Franklin, 172 Wn.2d at 836.

In Franklin, the Supreme Court was faced with the question of whether the changes to the statutes were retroactive and should apply to someone who was sentenced prior to the amendments but had a Brooks notation on the judgment and sentence. Franklin, 172 Wn.2d at 837. The Court answered that question in the affirmative, noting the plain language the Legislature had used in 2009, which provided, in relevant part:

> This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a

> term of community custody or probation with the department, or sentenced after the effective date of this section.

Franklin, 172 Wn.2d at 839 (quoting, Laws of 2009, ch. 375, § 20). For people who had already been sentenced as of 2009, the Court found, DOC has been charged with recalculating the length of community custody and resetting them as required. Franklin, 172 Wn.2d at 840-41. When the trial court has not yet imposed the sentence, however, the responsibility for ensuring compliance with the new sentencing requirements is placed squarely on the shoulders of the sentencing judge. Id.

Here, the sentence was not imposed until the date that the trial court revoked the SSOSA. See, State v. Morrison, 70 Wn. App. 593, 596-97, 855 P.2d 696 (1993). As Division One has noted, at a revocation hearing the court is not "modifying" an existing judgment and sentence but instead using the SSOSA provisions to order execution of a sentence which has been suspended. 70 Wn. App. at 596. Further, because the conditions of community supervision are tailored to try to work as a "separate control or check on a defendant," Division One has found that the Legislature intended that the determination of not only the length but also the conditions of community custody happens at the time the suspension is revoked and the actual sentence imposed. Id; see also, State v. Daniels, 73 Wn. App. 734, 737, 871 P.2d 634 (1994).

As a result, the trial court here had the duty to ensure that the proper term of community custody was imposed, rather than simply leaving that term up to DOC to decide. The court failed in that duty. In fact, the order revoking does not even declare that Bernarde's term of

community custody and confinement must not exceed 120 months. Instead, it simply ordered Bernarde to serve a "term of community custody for that period of time that equals the difference between 120 months and the period of time spent in total confinement less credit [for] time served and good time." CP 272-73.

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), is instructive. In that case, the defendant was ordered to serve 54 months in custody, followed by 12 months of community custody, although the statutory maximum for the crime was 60 months. 174 Wn.2d at 471-72. On the judgment and sentence, there was an indication that the "total term of confinement and community custody actually served could not exceed the 60-month statutory maximum." 174 Wn.2d at 472. On review, the court of appeals held that the notation was sufficient under Brooks, but the Supreme Court disagreed. Id. Under RCW 9.94A.701(9), the Court noted, the community custody term "shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime." Boyd, 174 Wn.2d at 472-73. As a result, the Court held, a Brooks notation is no longer sufficient. Id. And because the defendant was sentenced after the effective date of the changes, it was the trial court's duty to reduce the term of community custody to avoid a sentence in excess of the statutory maximum, not make a Brooks notation.

The trial court erred in imposing the sentence here without making sure that it was limited to the statutory maximum, and by improperly delegating to DOC to ensure that the proper sentence is served. The term

of community custody imposed should have been reduced by the court to ensure that Mr. Bernarde would not serve more than the 120 month maximum. This Court should so hold and should reverse with instructions for the trial court to conduct the proper calculation and impose the correct term.

3. COMMUNITY CUSTODY CONDITIONS 13, 15 AND 19 WERE NOT STATUTORILY AUTHORIZED, CONDITION 15 IS IN VIOLATION OF BERNARDE'S DUE PROCESS AND FIRST AMENDMENT RIGHTS AND CONDITION 19 VIOLATES HIS RIGHTS TO BE FREE FROM UNREASONABLE GOVERNMENTAL INTRUSION INTO HIS PRIVATE AFFAIRS

This Court should also strike conditions 13, 15 and 19, set forth in the judgment and sentence as conditions of post-sentence community custody. A sentencing court's authority to impose conditions of a sentence is limited. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. Id. As a result, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999). When a trial court exceeds that authority by imposing an unauthorized condition of community custody, this Court will order remand with instruction to strike the unauthorized condition. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

In this case, the trial court acted outside its statutory authority in ordering several of the conditions of community custody and, further, several of those conditions violated Bernarde's significant constitutional rights.

As a threshold matter, this issue is properly before this Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008); see State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id. Here, the issues revolve around whether the court had statutory authority to order the relevant conditions and whether several of the conditions run afoul of several of Bernarde's constitutional rights.

None of those issues require further factual development. In addition, the issues are properly before the Court because the trial court's order imposing the relevant conditions was only officially entered as a result of the revocation of the SSOSA. See, e.g., Morrison, 70 Wn. App. at 596-97.

And, as the Supreme Court has noted, the "risk of hardship" to a defendant facing improper conditions of community custody is real, because upon the defendant's release from prison the conditions will immediately restrict him and he could be subject to punishment for their violation. See Bahl, 164 Wn.2d at 751-52.

On review, this Court should strike conditions 13, 15 and 19 in whole or in part. Those conditions, contained in Appendix H of the Judgment and Sentence, provide as follows:

> 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**.

. . .

15. **Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.**

. . .

19. **Submit to** polygraph and **plethysmograph testing upon direction of your community corrections officer or therapist at your expense**.

CP 58-59 (emphasis added).

In general, a sentencing court has broad discretion to impose conditions of community custody which are "crime related prohibitions," which means conditions which are "directly relate[d] to the circumstances of the crime for which the offender has been convicted." See O'Cain, 144 Wn. App. at 775. Under former RCW 9.94A.703(2)(c) (2003), a mandatory condition of community custody is that "[t]he offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." Former RCW 9.94A.703(3)(e) (2003) similarly authorizes a prohibition against consuming alcohol.

But those statutes did not support the trial court's order here. In condition 13, the sentencing court limited not only controlled substances or alcohol but also "any mind or mood altering substances." CP 58-59. Further, it limited the prescribing authority for any substances to only a "licensed physician." CP 58-59.

Aside from the subjectivity of what qualifies as a "mind or mood altering substance," "lawfully issued prescriptions" under former RCW

9.94A.703(2)(c)(2003) are *not* limited to those issued by a "licensed physician." Under RCW 69.41.030, prescriptions can be lawfully issued by many others, such as registered nurses, physician assistants, advanced registered nurse practitioners, optometrists and dentists. Obviously aware that it had authorized many different medical/dental and other health practitioners to write valid prescriptions, the Legislature chose, in former RCW 9.94A.703(2)(c)(2003), to authorize a condition of community custody which reflected that diversity of medical/health practitioners who have been given such authorization.

By limiting Bernarde to having prescriptions only from "licensed physicians," the trial court effectively overrode the Legislative decision to allow those on community custody to have access to lawfully issued prescriptions from *all* entities legally authorized to issue such prescriptions if needed. Condition 13 thus exceeded the trial court's statutory authority.

Condition 15 not only exceeded the court's statutory authority but also violates Bernarde's First Amendment and due process rights as well. A condition is vague and in violation of due process under the state and federal constitutions if the condition is either not defined with sufficient "definiteness" so that an ordinary person could determine what conduct was prohibited, or if the condition "does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

Condition 15 suffered from both of those defects. Bahl, supra, and Sansone, supra, are instructive. In Bahl, the relevant condition prohibited the defendant from "possessing or accessing" pornographic materials, "as

directed by the supervising Community Corrections Officer." 164 Wn.2d at 754. In finding the condition unconstitutionally vague, the Supreme Court noted that, by delegating to the CCO what falls under the condition, the condition "virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement." 164 Wn.2d at 758.

Similarly, in Sansone, a condition mandated that the defendant not possess or peruse pornographic materials without prior approval, leaving what constituted "pornography" to be "defined by the therapist and/or Community Corrections Officer." 127 Wn. App. at 634-35. The vagueness of the condition was shown by the use of the term "pornography," a general, expansive term. 127 Wn. App. at 639. That vagueness was also shown by the delegation to the therapist/DOC to define what amounts to "pornography." Id. The condition was unconstitutionally vague because it created "a real danger that the prohibition on pornography will ultimately translate to a prohibition on whatever the officer personally finds" offensive, even if it is not legally pornography. Id.

Here, condition 15 suffers from similar infirmities. It does not limit itself to prohibiting behavior which could even possibly be declared "crime-related," such as possession of child pornography - although there was no claim that such pornography was used in this case. Instead, the condition prohibits Mr. Bernarde from possessing or seeing *any* "pornography," regardless whether it is legal, adult pornography unrelated to the crimes. Further, the condition leaves it up to the community corrections officer to define that term without even limiting that definition

to material involving children alone.

But where a condition of community custody or placement infringes upon a fundamental right such as those protected under the First Amendment, the condition must be "clear. . . and. . . reasonably necessary to accomplish essential state needs and public order." See Bahl, 164 Wn.2d at 758. And to be "crime-related," a prohibition must be related to the circumstances of the crime. See State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). There is no evidence that viewing *adult* pornography had anything to do with the crimes in this case - and that is, in fact, First Amendment protected activity. Where, as here, the state seeks to preclude a defendant from engaging in lawful, constitutionally protected activity, it must meet greater requirements for specificity in order to be narrowly tailored to serve an important governmental interest. Bahl, 164 Wn.2d at 757-58.

Further, condition 15 violates due process not only by failing to give Bernarde sufficient notice of what conduct will amount to a violation but also because it delegates to the CCO to define "pornography." As the Supreme Court noted in Bahl, when a condition provides that the "community corrections officer can direct what falls within the condition," that is clearly vague, because it not only does not provide ascertainable standards for enforcement but also fails to provide sufficient notice to the offender of what will subject him to punishment. See Bahl, 164 Wn.2d at 758.

Most egregious, condition 19 was not only unauthorized as a matter of law but violated Bernarde's rights to be free from governmental

intrusion into his private affairs. That condition required Bernarde to "submit to polygraph and plethysmograph testing upon direction of your community corrections officer or therapist at your expense." CP 58-59.

Even defendants in criminal cases such as Bernarde are entitled under both the state and federal due process clauses to protection against governmental intrusion into certain fundamental liberties. See, Troxell v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 157 L. Ed. 2d 49 (2000); see, In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.3d 256 (1998). And there can be no question that penile plethysmograph testing involves an invasion into the bodily integrity of defendants. A plethysmograph "measures sexual arousal by means of an electronic recording device attached to the penis of the person being tested." Parker, 91 Wn. App. at 219. Once the device is attached, it then monitors the person's sexual arousal or responses when he is shown images of "naked women and children of various ages involved in various types of sexual activity." Id. As one court has described it, the test is "invasive and degrading." Id.

Recognition of the seriously intrusive nature of this kind of testing and the bodily integrity rights of the defendant appears to also underlie our highest court's rulings on the use of the test. The Supreme Court has held that plethysmograph testing, unlike polygraph testing, does not serve the purpose of monitoring compliance with community custody. See State v. Riles, 135 Wn.2d 326, 345-46, 957 P.3d 655 (1988), overruled in part and on other grounds by, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Instead, because such testing is a way to determine immediate sexual arousal in response to specific stimuli, it is only relevant to

treatment or evaluation for treatment. Id.

As a result, in Riles, the Court made it clear that a sentencing court may not require the defendant to submit to plethysmograph testing except as part of a treatment condition, if one is ordered. 135 Wn.2d at 345. And recently, in State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), review denied, 177 Wn.2d 1016 (2013), Division One struck down a similar condition in a case involving child rape and child molestation. The Court found the condition was improper and a violation of the defendant's constitutional right "to be free from bodily intrusions, declaring:

> Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider. **But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.**

Land, 172 Wn. App. at 605-606 (emphasis added).

Here, the order authorized not only the treatment provider but also the CCO to require Bernarde to submit to the extreme intrusive penile plethysmograph testing. Instead of being limited to treatment purposes, under the order the CCO (and, technically, the treatment provider) can order Bernarde to be subjected to this extremely intrusive testing for any reason whatsoever, including the misguided and impermissible purpose of "monitoring compliance" which the Supreme Court has held does not apply. Because condition 19 was not limited to ordering Bernarde to undergo the testing only for treatment purposes and by a treatment provider, the condition was in violation of Bernarde's rights to be free from unreasonable governmental intrusion and this Court should so hold.

Conditions 13, 15 and 19 should be stricken.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Bernarde relief.

DATED this 18th day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. James Bernarde, DOC 863676, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 18th day of November, 2013.

/s/Kathryn Russell Selk
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