

NO. 62090-8-I

IN THE COURT OF APPEALS OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

GENE CAMARATA,

Appellant.

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

The Honorable James C. Lust, Judge

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REPLY BRIEF OF APPELLANT

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2009 AUG 12 PM 4:00  
STATE OF WASHINGTON  
FILED

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A. ARGUMENT IN REPLY

THE STATE'S CONCESSION IS PROPER AND SHOULD BE ACCEPTED.

Camarata's opening brief showed why the trial court's order directing him to "shut down all currently existing web sites and domains" violated the controlling statute and the constitution. Brief of Appellant (BOA) at 4-12.

The state concedes error in response, at least in part. The state's brief, however, suggests the joint sentencing recommendation might have resulted in a waiver of the right to appeal the unlawful condition. Brief of Respondent (BOR) at 1. The state's brief does not cite the record to support this suggestion.

The state's concession is appropriate, but its waiver suggestion lacks merit. The record does not include a plea agreement. See CP 39 (plea form, box is not checked to incorporate a plea agreement). Although the defense did not dispute the state's sentence recommendation, the record does not show Camarata expressly waived his rights to freedom of expression under U.S. Const. amend. 1 or Article 1, § 5 of the Washington Constitution. As the Washington Supreme Court has recently clarified, waivers of constitutional rights must be clearly stated in plea agreements. Waivers of constitutional

rights are never presumed. State v. Knight, 162 Wn.2d 806, 813, 174 P.3d 1167 (2008) (guilty plea to multiple offenses did not waive right to argue double jeopardy violation on appeal); see also Seattle v. Klein, 161 Wn.2d 554, 565-66, 166 P.3d 1149 (2007) (“We have held there exists no presumption in favor of waiver of constitutional rights”). No such waiver appears in this record, either in the plea form, the plea colloquy, or Camarata’s statements to the court.

The state is not without a remedy in future cases. If the state seeks to enforce an agreement that requires a person to waive constitutional rights, it must only show the terms of that agreement and an express waiver of those rights. The state may draft clear written plea agreements or it may secure knowing and intelligent waivers during a plea colloquy. As the Knight decision clarifies, however, the state may not assert such waivers after the fact on appeal, where the record is silent.

This record does not support the state’s assertion Camarata’s free expression rights may have been waived. While the state’s brief suggests it is forebearing a waiver claim, BOR at 1 (“ordinarily the State would argue the appellant has waived his right to appeal [its] imposition”), the state has no waiver claim to forebear.

For these reasons, and the reasons set forth in appellant's opening brief, the state's concession is appropriate. The state's concession does not change the fact that this case raises an issue appropriate for disposition in a published opinion. This Court should provide guidance on the important question when a trial court may and may not impose internet publication prohibitions as a condition of a judgment and sentence.

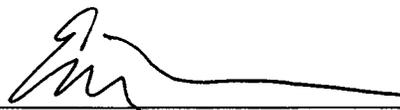
B. CONCLUSION

This Court should vacate the condition requiring Camarata to shut down all currently existing websites and domains. CP 50, 60.

DATED this 12<sup>th</sup> day of August, 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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STATE OF WASHINGTON,	)	
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v.	)	COA NO. 62090-8-1
	)	
GENE CAMARATA,	)	
	)	
Appellant.	)	

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**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 12<sup>TH</sup> DAY OF AUGUST, 2009, 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] PAUL SANDER  
KITTITAS COUNTY PROSECUTOR'S OFFICE  
205 WEST 5<sup>TH</sup> AVENUE, SUITE 213  
ELLENSBURG, WA 98926
  
- [X] GENE CAMARATA  
C/O KITTITAS CUNTY JAIL  
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ELLENSBURG, WA 98926

FILED  
2009 AUG 12 PM 4:00  
CLERK OF SUPERIOR COURT  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF AUGUST, 2009.

x *Patrick Mayovsky*