

NO. 71713-8-I

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

STATE OF WASHINGTON

Respondent

v.

BRANDON G. KEMPMA,

Appellant

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 5

 A. A COMMUNITY CUSTODY CONDITION RELATING TO DRUG
 PARAPHERNALIA IS NOT CRIME RELATED. 5

IV. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	7, 9
<u>State v. Llamas-Villa</u> , 67 Wn. App. 448, 836 P.2d 239 (1992).....	6
<u>State v. O’Cain</u> , 144 Wn. App. 772, 184 P.3d 1262 (2008)	6
<u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.2d 1059 (2010).....	8, 9

FEDERAL CASES

<u>Posters ‘N’ Things, Ltd. v. United States</u> , 511 U.S. 513, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994).....	8
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WASHINGTON STATUTES

RCW 69.50.412.....	6, 9
RCW 69.50.412(1)	6
RCW 69.50.4121(1)	7
RCW 69.50.5121	9
RCW 9.94A.030(10)	5
RCW 9.94A.703	5
RCW 9.94A.703(3)(f).....	5

OTHER AUTHORITIES

http://en.wikipedia.org/wiki/Drug_paraphernalia (visited 11/7/14)....	8
http://www.justice.gov/archive/ndic/pubs6/6445/6445p.pdf (visited 11/7/14)	8

I. ISSUES

1. Was a condition of community custody prohibiting the defendant from possessing illegal drug paraphernalia crime related?

2. Should the court address alternative grounds for finding the drug paraphernalia condition should be struck when, under the circumstances of this case, it was not authorized by statute?

3. Was the condition prohibiting possession of illegal drug paraphernalia unconstitutionally vague?

II. STATEMENT OF THE CASE

The defendant, Brandon Kempma, lived across the street from S.G, DOB March 2000 between 2006 and 2013. S.G. occasionally played with the defendant's daughter. The defendant began talking to S.G. more frequently when she turned 12. He began by talking to her about her school and other non-sexual topics. Eventually the defendant started talking to S.G. about sexual acts that he wanted to do with S.G. Some of the conversations about sexual matters were in person, and many were through text messages. 2 RP 6-7, 11-20.

On one occasion the defendant asked S.G. to come over to his house at night. S.G. snuck out of her home and went to the

defendant's garage. The defendant asked S.G. to have sex with him but she would not agree to do that. A few days later the defendant saw S.G. and asked her why she did not want to have sex with him. S.G. did not respond. 2 RP 17-24.

The next time S.G. saw the defendant she was texting her friend L.C. The defendant asked S.G. to text him so they exchanged phone numbers. For the next few months the defendant and S.G. exchanged text messages regularly. Many of those text messages included sexual matters. 2 RP 25-29.

Once they began exchanging text messages the defendant asked S.G. back to his house. S.G. and the defendant were in his garage when the defendant gave S.G. some alcohol to drink. After she drank the alcohol the defendant engaged in sexual intercourse with her on some cushions he had placed between his two cars. The defendant asked S.G. if he could lick her privates, but she did not want to do that. 2 RP 29-42, 61.

The next time S.G. had sexual intercourse with the defendant was in his bedroom. 2 RP 45-56. The third time the defendant has sexual intercourse with S.G. was about three or four days later, again in his garage. Ultimately S.G. and the defendant

engaged in sexual intercourse approximately 25 times over the next two months. 2 RP 56-59.

S.G. told her friend, L.C., DOB March 2000, about her sexual relationship with the defendant. After that L.C. wanted to text the defendant as well. S.G. gave L.C. the defendant's phone number and L.C. and the defendant began texting back and forth. During those text messages the defendant discussed sex. The defendant urged L.C. to listen to her body and not her brain. He suggested that he, S.G., and L.C. have a threesome. 3 RP 18-29.

On January 13, 2013 S.G. was at her friend L.C.'s home. The two girls text messaged the defendant to come over while L.C.'s mother was at work. The defendant came over to L.C.'s home and proposed a threesome. The girls did not want to do that. The defendant exposed himself to the girls. Eventually he left when it was clear the girls did not want to engage in sexual activity with him. 2 RP 77-91; 3 RP 37-50.

When L.C.'s mother came home from work L.C.'s grandfather came over and told L.C.'s mother that there was a car in the drive when she was at work. The girls denied that anyone was at the house. The grandfather took S.G. home. On the way S.G. admitted that the defendant had been at the house while

L.C.'s mother was at work. 3 RP 51-52,100-103, 109-112, 132-133.

S.G.'s mother had seen sexually suggestive text messages on S.G.'s cell phone about one month earlier. When the grandfather and S.G. told S.G.'s mother that the defendant had been at L.C.'s home that day S.G.'s mother called the police. 3 RP 124, 130-132.

As a result of the police investigation the defendant was charged with one count of second degree rape of a child and one count of communication with a minor for immoral purposes. 1 CP 109-110. He was tried on an amended information charging three counts of second degree rape of a child, two counts of communicating with a minor for immoral purposes via electronic communication, and two counts of communicating with a minor for immoral purposes. 1 CP 99-100. He was convicted of all seven counts at trial. 1 CP 22, 30, 65-71.

The court sentenced the defendant within the standard range. 1 CP 33. The court ordered that the defendant be on community custody to commence upon his release from confinement and run for the remainder of the maximum term of each charge. 1 CP 34-35. The court ordered conditions of

community custody including the condition that the defendant “not possess illegal drug paraphernalia.” 1 CP 43.

III. ARGUMENT

A. A COMMUNITY CUSTODY CONDITION RELATING TO DRUG PARAPHERNALIA IS NOT CRIME RELATED.

The defendant argues that the court erred in imposing the community custody condition that he not possess illegal drug paraphernalia on the basis that the condition is not crime related. Because the condition is not related to the circumstances of the crime it was not authorized by law, and should be struck.

RCW 9.94A.703 sets out community custody conditions that must be ordered, may be waived, or may be ordered within the court’s discretion. The prohibition against illegal drug paraphernalia is neither a mandatory condition nor is it a condition that will be imposed unless specifically waived by the court. The court had discretion to order the condition if it was crime related. RCW 9.94A.703(3)(f).

A crime related prohibition is one that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). There need not be a causal link between the prohibition imposed and the crime committed so long

as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

It is unlawful to use drug paraphernalia to perform any one of a number of activities, including injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. RCW 69.50.412(1). While there was evidence the defendant used alcohol to facilitate sexual intercourse with S.G. on one occasion, there is no evidence that the defendant used controlled substances to do so. With no evidence that controlled substances played a part in the rapes or other charges, there was no evidence that drug paraphernalia related to the circumstances of the crime. Thus, the prohibition against drug paraphernalia was not authorized as a crime related condition. Because there was no other statutory authority to impose the condition the court should remand to the trial court for the condition to be struck. State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008).

The defendant argues two other bases on which to invalidate the community custody condition prohibiting possession of drug paraphernalia. He argues the condition is unconstitutionally vague, and that his attorney was ineffective for failing to object to that

condition. In light of the State's concession should be unnecessary to address these two arguments.

Should the court consider the defendant's vagueness challenge the State does not concede that the condition is unconstitutionally vague, and therefore it is unlawful under all circumstances. Both statutes and community custody conditions employ the same test for vagueness. State v. Bahl, 164 Wn.2d 739, 754, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it fails to either (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) provide ascertainable standards of guilty to protect against arbitrary enforcement." Id. at 753 "If persons of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite." Id. at 754. Unless a law implicates constitutional rights, "a facial vagueness challenge can succeed only if the statute is impermissibly vague in all of its applications." Id. at 745 n. 2.

The term "drug paraphernalia" is defined by statute. RCW 69.50.4121(1). It contains a list of items that constitute "drug paraphernalia." Id. The United States Supreme Court has upheld similar statutory language against a vagueness challenge. Posters

'N' Things, Ltd. v. United States, 511 U.S. 513, 525-26, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994). When a term is defined by statute, a court should not be required to reproduce the same definition in a judgment and sentence. Doing so simply invites error and confusion.

In any event, the statutory definition of “drug paraphernalia” coincides with the ordinary understanding of that term. Wikipedia defines the term as “any equipment, product, or material that is modified for making, using, or concealing drugs.”¹ The Department of Justice “Fast Facts” web page defines drug paraphernalia as “any equipment that is used to produce, conceal, and consume illicit drugs.”² Since the term “drug paraphernalia” has a clear and commonly-understood meaning, it is not unconstitutionally vague.

The defendant’s vagueness challenge relies on citation to State v. Valencia, 169 Wn.2d 782, 239 P.2d 1059 (2010). There the court held that a community custody condition prohibiting paraphernalia was unconstitutionally vague. The court reasoned that without limiting the condition to drug paraphernalia, the scope of what was prohibited was so broad that it did neither provided the

¹ http://en.wikipedia.org/wiki/Drug_paraphernalia (visited 11/7/14)

² <http://www.justice.gov/archive/ndic/pubs6/6445/6445p.pdf> (visited 11/7/14)

defendant with fair notice of what was proscribed nor did it provide protection against arbitrary enforcement. Id. at 794-795.

Unlike the condition at issue in Valencia the challenged condition here does limit the scope of what is proscribed. Given the statutory definition for drug paraphernalia the condition not only provides reasonable notice of what is proscribed but it also protects against arbitrary enforcement.

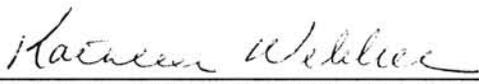
The defendant argues that the condition is vague because the court added "illegal" to the condition. He argues that addition makes the condition unclear because it is unknown whether the term relates to "drug" or "drug paraphernalia." When considering a vagueness challenge to a community custody condition the court will consider the terms in the context in which they are used. Bahl, 164 Wn.2d at 754. Possession of drug paraphernalia is illegal when used or possessed with intent to be used for any one of a number of activities related to controlled substances except marijuana. RCW 69.50.412, RCW 69.50.5121. In context the term "illegal" simply reinforces the condition proscribes the possession of drug paraphernalia if used or intended to be used for one of those activities. Contrary to the defendant's argument, the addition of the term "illegal" is neither ambiguous nor nonsensical.

IV. CONCLUSION

For the foregoing reasons the court should find the condition of community custody that prohibits the defendant from possessing illegal drug paraphernalia is not justified as a crime related prohibition, and should remand the case to the trial court to strike the condition. The court should decline to consider the defendant's claim of ineffective assistance of counsel and his vagueness challenge to the condition as it is unnecessary for the resolution of this case. In the event the court does address the alternative bases the court should find the condition is not unconstitutionally vague.

Respectfully submitted on November 13, 2014.

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November 13, 2014

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**Re: STATE v. BRANDON G. KEMPMA
COURT OF APPEALS NO. 71713-8-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

13th Nov 14

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OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

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The undersigned certifies that on the 13th day of November, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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1908 EAST MADISON STREET
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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 13th day of November, 2014.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit