

72338-3

72338-3

NO. 72338-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

SAMUEL LEE IRWIN,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Samuel Irwin pled guilty to three counts of Child Molestation in the Second Degree and one count of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct.

Irwin challenges the conditions of community custody prohibiting him from frequenting locations where minor children congregate as unconstitutionally vague and regarding prohibiting him from possessing media storage devices as not crime related and overbroad.

Given the significant interest of the State and the Irwin's diminished privacy interests, the condition prohibiting him from frequenting locations where minor children congregate is not unconstitutionally vague. It is also not ripe for review given that specific locations have not been set.

The condition prohibiting him from possessing media storage devices is related to the crime of Child Molestation in the Second Degree and the related charge of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct.

II. ISSUES

- (1) Where a defendant has diminished privacy interests given his sexual offenses against children, is the condition prohibiting

him from going to locations where children are known to congregate unconstitutionally vague?

- (2) Where the community corrections officer has not set the locations where a defendant is not to go where minor children congregate, is the defendant's challenge ripe for review?
- (3) Where a defendant is convicted of Child Molestation in the Second Degree connected to his self-produced photographs is a condition that prohibits possession of media storage devices not related to the crime?
- (4) Given the defendant's diminished privacy rights and use of digital media to take and store photographs, is the condition about media storage devices overbroad?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On February 2, 2014, Samuel Irwin was charged with four counts of Child Molestation in the First Degree alleged to have occurred between July 1, 2013, and July 31, 2013. CP 1-2. Irwin was alleged to have sexual contact with three separate children of family friends or relatives. CP 87-8.

On July 11, 2014, Irwin pled guilty under an amended information to three counts of Child Molestation in the Second Degree and one count of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct. CP

87-8, 89-101, 7/11/14 RP 9, 12-13.¹ The case was continued for a presentence investigation. 7/11/14 RP 13-4.

The presentence report detailed Irwin's offenses, including photographs taken of unclothed pubic areas of minor females on August 2, 2013, at 1:20 p.m. and 1:45 p.m. CP 108-9. Another photograph taken at 1:45 p.m. on August 2, 2013 shows Z.J.N. posing with her pubic area unclothed with a person pulling away the juvenile female underwear and touching her labia. CP 109-10. This describes self-produced photography of acts of molestation occurring against Z.J.N. CP 109.

On August 7, 2014, Irwin was sentenced to 116 months on charges of Child Molestation in the Second Degree and 60 months on the charge of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct. 8/7/14 RP 13, CP 119-134. Community custody of 4 months was ordered on the Child Molestation in the Second Degree and conditions of supervision were set. CP 123, 8/7/14 RP 10-16.

On August 13, 2014, Irwin timely filed a Notice of Appeal. CP 135-151. The Notice of Appeal specifically noted Irwin was challenging conditions of community custody. CP 135.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

4/2/14 RP	Motion for New Counsel (in volume with 7/11/2014)
7/11/14 RP	Guilty Plea Hearing (in volume with 4/2/14)
8/7/14 RP	Sentencing Hearing

2. Trial Court Proceedings on Community Custody Conditions

At sentencing Irwin contended the condition regarding not frequenting areas where minor children are known to congregate as defined by the community corrections officer was too vague. 8/7/14 RP 10. Irwin conceded that conditions relating to schools, playgrounds, and public swimming pools were places where children congregate. 8/7/14 RP 10. The concern was in leaving discretion to the community corrections officer. 8/7/14 RP 10.

Before the trial court, Irwin contended the conditions to not possess or maintain access to a computer and to not possess computer parts, digital cameras, or any device to store or produce digital media or images, was too broad. 8/7/14 RP 11. The condition relating to digital cameras was contended not to be crime-related and also too broad. 8/7/14 RP 11.

The trial court modified the conditions in response.

You're probably not going to make it out of custody. If you do, those conditions, we can clean those up a little bit regarding the computer issues. He's not to have access to the Internet, and those sorts of things. The cameras, we can even delete that, because there's a camera in every device in America today. I think it would be impossible.

He shouldn't frequent areas of high concentration of children, such as swimming pools and schools and things like that. Public restaurants would be all right.

8/7/14 RP 12. Regarding digital computers and media devices, the court stated:

The Internet and any storage device that can contain a pornographic photo. Use that. I'm not going to micromanage it any further than that.

8/7/14 RP 16. The language in the appendix attached to the judgment and sentence reads as follows:

5. Do not frequent areas where minors are known to congregate, as defined by the supervising CCO.

11. You may not possess or maintain access to a computer unless specifically authorized by CCO. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, or any device to store or reproduce digital media or images. Defendant may reside in a residence where a computer or other device capable of storing images is located.

CP 132-4.

IV. ARGUMENT

- 1. Given the defendant's diminished privacy rights from the sexual offense convictions for offenses against minors, the condition prohibiting frequenting areas where minors are known to congregate as defined by the Community Corrections Officer is not unconstitutionally vague.**

The State has a legitimate interest in protecting the public and specifically minor children from sexual offenders. Conditions so precise that they require specific locations would not adequately address these concerns.

Thus, the condition prohibiting frequenting areas where minors are known to

congregate as defined by the Community Corrections Officer is not unconstitutionally vague.

In *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009), the Supreme Court addressed violations of conditions of community custody that the defendant “not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.” This is the precise language involved in the present case. The defendant in *McCormick* was challenging the revocation contesting his alleged violation of the condition was not willful. *State v. McCormick*, 166 Wn.2d at 699, 213 P.3d 32 (2009). But the analysis from *McCormick* should be considered. The Court noted the significant State interest that involves a conviction for a sexual offense and the defendant’s diminished privacy rights as a result of conviction.

Examining the State's interests, the government has an important interest in protecting society, particularly minors, from a person convicted of raping a child. That interest is rationally served by imposing stringent conditions related to the crime McCormick committed. The condition forbidding McCormick from frequenting areas where minors congregate serves as a way to prevent McCormick from being in a situation where he would have an opportunity to again harm a child.

Also, McCormick's rights are already diminished significantly as he was convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. **Those conditions, like the one at issue, serve an important societal purpose in that they are limitations on McCormick's rights that relate to**

the crimes he committed. See former RCW 9.94A.120(5) (1998), recodified as RCW 9.94A.670(5)(a); *Riles*, 135 Wn.2d at 349-51 (holding that special conditions on a probationer must be crime-related).

State v. McCormick, 166 Wn.2d 689, 702-03, 213 P.3d 32 (2009) (emphasis added).

We hold the wording of the condition that McCormick not frequent areas where minors are known to congregate does not require the State to prove McCormick acted willfully. We also hold the state and federal due process clauses do not require the State to prove McCormick willfully violated the condition of his suspended sentence that he not frequent areas where minors are known to congregate because the strong governmental interest in protecting the public outweighs McCormick's diminished interest.

State v. McCormick, 166 Wn.2d 689, 710, 213 P.3d 32 (2009).

Specifying the particular locations where Irwin is prohibited from going such as churches, schools, playgrounds, or public swimming pools would by necessity omit locations where children may be congregating. This significantly harms the State's interest in protecting minors. The mini-mart near a school or an arcade at a shopping mall may be a location where children congregate but the same location in a strip mall on a busy highway would not. Giving the community corrections officer the ability to set the location adequately addresses the State's legitimate interest in providing protection of minors.

Irwin cites to *State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010) to support his contention that the condition here is

unconstitutionally vague. However, *Sanchez Valencia* involves defining the specific term of drug paraphernalia and the latitude that would give to the community corrections officer.

Moreover, the breadth of potential violations under this condition offends the second prong of the vagueness test, rendering the condition unconstitutionally vague. Because the condition might potentially encompass a wide range of everyday items, it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Bahl, 164 Wn.2d at 753 (quoting *Kolender*, 461 U.S. at 357). As petitioners note, “an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,” such as sandwich bags or paper. Supp'l Br. of Appellant at 10. Another probation officer might not arrest for the same “violation,” i.e., possession of a sandwich bag. **A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.** Accordingly, we hold that the condition at issue is void for vagueness.

State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) emphasis added). In contrast, the present situation defines locations which Irwin may frequent which are at this point unknown to the community corrections officer. Of necessity, they cannot be defined at this point and the State interest in later setting the location is significant as described above.

Irwin would not be without recourse; if a location is set where children do not congregate, he could seek modification of the conditions by the Court.

2. Because the community corrections officer has not set specific locations, Irwin's challenge to the condition to avoid locations where minors congregate is not ripe for review.

Because the condition is highly dependent on the facts of the proposed location, review of this condition is not ripe.

In *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010), the Court determined that a challenge to a community custody condition defining drug paraphernalia was ripe for review because it restricted the defendant's conduct upon release from prison. But part of that evaluation was determining whether the three prongs of the ripeness test were met.

We recently addressed a preenforcement challenge to a community custody condition in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). We recognized such a claim is ripe for review on direct appeal “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *Id.* at 751 (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). “The court must also consider ‘the hardship to the parties of withholding court consideration.’” *Id.* (quoting *First United*, 129 Wn.2d at 255).

State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). The Court in *Sanchez Valencia* determined the condition was primarily a legal definition, did not require further factual development, and whether the challenged action was final.

The State contends that here, considering the three prongs of the ripeness test, review is not ripe. The condition is not primarily a legal

definition. The condition is factually dependent because it relies on the community corrections officer evaluating Irwin's living situation and habits upon release, and are not in place as a restriction on conduct until the community corrections officer sets the locations. In addition, the limitation is not final because Irwin has the remedy to contest a community corrections officer's determination that a particular location is one where children congregate. The Court in *Sanchez Valencia* recognized that challenging conditions such as searches and collection of fines are premature until actions are taken. *State v. Sanchez Valencia*, 169 Wn.2d at 789, 239 P.3d 1059 (2010), citing, *State v. Ziegenfuss*, 118 Wn. App. 110, 113-15, 74 P.3d 1205 (2003), *State v. Massey*, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996), *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992).

Here no locations have been set and no enforcement action has been taken. Irwin's challenge to this condition is not ripe for review.

3. The condition relating to not possessing storage devices is related to the child molestation in the second degree.

Irwin pled guilty in Count 1 to Child Molestation in the Second Degree of Z.J.N on or about and between June 1, 2014, and September 15, 2013. CP 97.

Irwin pled guilty in Count 4 to Possession of Depictions of Minors Engaged in Sexually Explicit Conduct admitting general possession of

“visual or printed matter depicting a minor engaged in sexually explicit conduct” between June 1, 2013, and January 30, 2014. CP 98.

The presentence investigation report detailed extensive use of Irwin’s computer to access and store the depictions. CP 107-112. But what was most significant in those depictions was that it was apparent that Irwin was photographing his child molestation of Z.J.N. CP 109. The acts occurred in the same time frame and the photograph showed his physical touching of Z.J.N. CP 109.

A condition of computer access during community custody was proposed by the Department of Corrections. CP 118. But the Court modified the condition to remove digital cameras, web cams, wireless video devices or receivers and CD/DVD burners.

11. You may not possess or maintain access to a computer unless specifically authorized by CCO. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, or any device to store or reproduce digital media or images. Defendant may reside in a residence where a computer or other device capable of storing images is located.

CP 132-4.

“Crime-related prohibitions” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

We review a court's imposition of crime-related prohibitions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

“The philosophy underlying the ‘crime-related’ provision is that ‘[p]ersons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.’” *Riley*, 121 Wn.2d at 36-37

State v. Cordero, 170 Wn. App. 351, 373-4, 284 P.3d 773 (2012).

The State contends that in the present case given that Irwin’s acts of molestation being depicted in his photographs is related both to the charge of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct as well as his acts of Child Molestation in the Second Degree. There are tenable grounds and reasons for these conditions related to the crime of conviction.

The plain language of RCW 9.94A.505(8), read together with the definitional provision RCW 9.94A.030(13), further supports the conclusion that trial courts possess authority to impose crime-related prohibitions under RCW 9.94A.505(8), independent of any other SRA provision. As noted above, RCW 9.94A.505(8) provides: “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8) (emphasis added). RCW 9.94A.030(13) defines a “crime-related prohibition” as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...” RCW 9.94A.030(13). Together, these provisions plainly authorize trial courts, as part of any

sentence, to impose orders prohibiting conduct directly relating to the circumstances of an offender's crime.

State v. Armendariz, 160 Wn.2d 106, 112-13, 156 P.3d 201 (2007).

Irwin cites to *State v. Zimmer*, 146 Wn. App. 405, 190 P.3d 121 (2008), and *State v. O’Cain*, 144 Wn. App. 772, 184 P.3d (2008), contending both are “on point” regarding conditions being on a crime of conviction. The State contends otherwise. *Zimmer* involved the access to cell phones for a person convicted of possession of methamphetamine. *State v. Zimmer*, 146 Wn. App. 405, 190 P.3d 121 (2008). *O’Cain* involved a condition of accessing the internet for person convicted of second degree rape. *State v. O’Cain*, 114 Wn. App. 772, 184 P.3d 1262 (2008). There was no evidence in *O’Cain* that internet use contributed to the rape.

In contrast here, the offense of molestation was part and parcel of his acts of photography of minor children. It was so intimately connected that it was part of the crime of conviction. As described above in *McCormick*, there is a significant State interest in protection of minor children. This condition furthers that interest by limiting Irwin’s means of engaging in conduct leading to the molestation.

The State contends the trial court would have been within its discretion to include the restrictions regarding digital cameras, webcams and

wireless video devices. But the trial court did not abuse its discretion when narrowing the conditions.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the community custody conditions set by the trial court.

DATED this 30 day of March, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Mary Swift, addressed as Nielsen Broman Koch PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 30 day of March, 2015.

Vickie Maurer
VICKIE MAURER, DECLARANT