

FILED

NO. 73653-1-I

March 7, 2016
Court of Appeals
Division I

State of Washington
**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON

Respondent

v.

JOHN MARVIN BILL,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Is a community custody condition that prohibits the defendant from frequenting areas where children are known to congregate as defined by the supervising community corrections officer unconstitutionally vague?

2. Is a community custody condition that if eligible, the defendant enter and successfully complete identified interventions to assist him to improve his skills, relationships, and ability to remain crime free unconstitutionally vague?

3. Did the trial court abuse its discretion by imposing a community custody condition that required that the defendant be directly supervised if he became employed?

II. STATEMENT OF THE CASE

In the summer of 2013 the defendant, John Bill, went swimming at Twin Lakes in Snohomish County two or three times with T.R. and several members of Bill's extended family. Bill's nephew, Perry Charles, was engaged to T.R.'s sister, Tiyanna McCraigie. T.R. was 10 years old at the time. 4/7/15 RP 176-183; 4/8/15 RP 281.

Bill and T.R. played a game while swimming in which Bill would lift T.R. out of the water and throw him back in. Sometimes

Bill lifted T.R. by his feet. Sometimes he lifted T.R. by his buttocks. When Bill lifted T.R. by his buttocks he held on for an extended period of time, up to 60 seconds. Bill also asked T.R. for hugs. Those lasted a long time too. While Bill hugged T.R. he would inch his hand from T.R.'s thigh to his penis. This happened on three to five occasions. T.R. felt uncomfortable whenever Bill touched him this way. 4/7/15 RP 186-190; Ex. 11, page 22-23.

Bill took T.R. on car rides and to the movies sometimes without other family members present. Bill asked his nephew or T.R.'s sister for permission to do that. He did not ask T.R.'s mother for permission. Bill also gave T.R. gifts of clothing and a pillow for his iPad. 4/7/15 RP 193; 4/8/15 RP 275.

T.R.'s mother, Melissa Marks, was concerned about the amount of attention Bill paid her son. She talked to T.R. about it asking him if anyone hurt him. T.R. told his mother how Bill had touched him. Ms. Marks reported this to the police. 4/8/15 RP 276-277.

Bill spoke to Detective Thorne about the game he played with T.R. while swimming. He admitted grabbing T.R.'s buttock while playing the game. He said he got an erection the last time he touched T.R. there. Bill also admitted that he used the game as an

opportunity to fondle T.R.'s penis and scrotum on about five occasions. Bill admitted there were several times when he gave T.R. hugs longer than he should have. During the interview Bill wrote T.R. an apology. It stated in part "I'm sorry for the lake incident. I'm sure things are mixed up. I feel bad for making you feel wrong..." Ex. 8, Ex. 11; 4/8/15 RP 327-340.

Bill was charged with one count of first degree child molestation. 1 CP 190-191. He was convicted after jury trial. 1 CP 1 CP 51. The court sentenced Bill to a term of 60 months to life. 1 CP 23. The court also ordered community custody for any time Bill was released from confinement. The court ordered conditions of community custody including:

(6) Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer...

(11) Hold employment only in a position where you always receive direct supervision...

(19) Based on eligibility, enter and successfully complete identified interventions to assist you to improve your skills, relationships, and ability to stay crime free.

1CP 34-35.

III. ARGUMENT

A. STANDARD OF REVIEW.

The defendant challenges the three community custody conditions. He argues two conditions violate his right to due process under the vagueness doctrine. He also argues that one of those two conditions and a third condition is not related to the circumstances of his crime.

Community custody conditions are reviewed for an abuse of discretion. State v. Vant, 145 Wn. App. 592, 602, 186 P.3d 1149 (2008). They will be reversed only if the trial court abused that discretion. Id. A court abuses its discretion when the court had no authority to impose the condition. Id. It may also abuse its discretion when the condition imposed is unconstitutionally vague. State v. Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010).

B. THE COURT SHOULD REMAND THE CASE TO THE TRIAL COURT TO EITHER STRIKE OR CLARIFY TWO OF THE COMMUNITY CUSTODY CONDITIONS.

The defendant challenges community custody condition (6) and condition (19) on the basis that they are unconstitutionally vague. The vagueness doctrine under the due process clause of the Fourteenth Amendment and Washington constitution article I, §3 applies to community custody conditions. State v. Bahl, 164

Wn.2d 739, 193 P.3d 678 (2008). That doctrine requires that citizens have fair warning of proscribed conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute or sentence condition is unconstitutionally vague if it "(1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2)... does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Bahl, 164 Wn.2d at 743.

Recently this court considered a vagueness challenge to a community custody condition identical to condition (6) imposed here. This court held that a condition that ordered a defendant to "not frequent areas where minor children are known to congregate" without further specifying the exact locations that were off limits was unconstitutionally vague. State v. Irwin, __ Wn. App. __, 364 P.3d 830 ¶¶17-18 (2015). The portion of the condition permitting the CCO to define what those locations were did not save the condition because there remained the potential for arbitrary enforcement. Id. ¶19. Based on the reasoning in Irwin, condition (6) is unconstitutionally vague.

The court had the discretion to impose crime-related treatment or counseling services as a condition of community

custody. RCW 9.94A.703(3)(c). The court may also order the defendant to “participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

Those conditions are validly imposed when the record demonstrates that there is some connection between the crime and the treatment or program ordered. In a burglary case an order for substance abuse treatment was upheld under these two provisions when the defendant admitted using heroin on the night of the burglary and his attorney argued that almost all of the defendant’s legal problems related to his drug problem. State v. Motter, 139 Wn. App. 797, 803, 162 P.3d 1190 (2007), disapproved on other grounds, State v. Valencia, 169 Wn.2d 782, 293 P.3d 1059 (2010). An order for substance abuse treatment was limited to addressing alcohol abuse when the record showed that only alcohol and not some other substance contributed to the offense. State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015).

Here the court did not identify which “interventions” it was ordering, or who was to “identify” those interventions. Unless the intervention relates to the circumstances of the crime it is not

authorized by the Sentencing Reform Act. The defendant admitted that he struggled with his own sexual abuse as a child, and had difficulties forming healthy relationships with others as a result of that. He also said that he knew that his behavior with T.R. was wrong, and would push T.R. away after hugging him for too long. Given that record the court might have ordered moral recognition therapy or cognitive behavioral therapy as the kind of intervention that would address the behavior that led to the crime. However, unless those interventions are actually identified it is unknown what the court has required the defendant to do. Further, the condition suffers from the same infirmity identified in Irwin in that someone other than the court will identify what those interventions are. Under that circumstance there is a possibility for arbitrary enforcement.

Although both of these conditions as written are unconstitutionally vague, they need not be stricken if they can be re-drafted to pass constitutional muster. A list that clarifies what the court considers as a place where minors are known to congregate would give a person of ordinary intelligence notice of what conduct is proscribed. Irwin, 364 P.3d at ¶18. A condition that identifies what intervention the court required would similarly give the

defendant notice what he is required to do, and assure that the condition is related to the circumstances of the crime.

C. A CONDITION REQUIRING DIRECT SUPERVISION DURING EMPLOYMENT WAS AUTHORIZED AS A MEANS OF MONITORING OTHER CONDITIONS.

The defendant also contends that the court abused its discretion when it ordered that he hold employment only in a position where he always received direct supervision. 1 CP 34. He argues that this is not a crime related prohibition because the offense did not occur during the course of his employment. He also contends that other conditions address the potential issue by prohibiting him from seeking employment or volunteer opportunities that would put him in contact or control over minors.

The court had authority to prohibit the defendant from having direct or indirect contact with the victim of the crime or with a specified class of individuals. RCW 9.94A.703(3)(b). The court does not abuse its discretion when it imposes conditions designed to ensure compliance with other conditions of community custody. Vant, 145 Wn. App. at 604.

The defendant was ordered to not have contact with minors in a variety of settings, including in the course of employment. Condition 5 specifically requires the defendant not to seek

employment or volunteer positions that would put him in contact with minors.. 1 CP 34. The defendant does not challenge this condition. Condition 11 is a condition that ensures compliance with condition 5. An employer who directly supervises the defendant provides an additional measure of assurance that the defendant will not have direct or indirect contact with minors in the course of employment. Because it is a condition designed to ensure compliance with other conditions the court did not abuse its discretion when it imposed that condition.

The defendant argues that because other conditions prevent him from working near or around minors, direct supervision while working has no relation to the circumstances of the crime. This argument presupposes that if the defendant becomes employed he will be completely isolated from society. That is an unlikely scenario.

Opportunities for casual contact with minors exist even in jobs that require no contact or control over minors. The defendant's offense occurred in the open, in the presence of numerous members of his extended family. Under this circumstance direct supervision is related to the crime; it provides

additional assurance that minors will be protected from the defendant even through casual contact in the open.

IV. CONCLUSION

The State concedes that as written conditions 6 and 19 are unconstitutionally vague. The court should remand to the trial court to either strike those conditions or make them more specific. Condition 11 relates to the circumstances of the crime, and is designed to ensure compliance with other conditions. The State asks the Court to deny the defendant's request to strike that condition.

Respectfully submitted on March 14, 2016.

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DECLARATION OF DOCUMENT
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AFFIDAVIT BY CERTIFICATION:

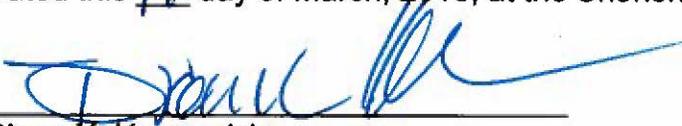
The undersigned certifies that on the 14th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer J. Sweigert, Nielsen, Broman & Koch, SweigertJ@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of March, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office