

FILED  
COURT OF APPEALS  
DIVISION II

2013 SEP -5 2:11:35

STATE OF WASHINGTON

No. 44194-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD I. JOHNSON,

Appellant.

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

---

The Honorable Beverly Grant, Stephanie Arend and Brian Tollefson,  
Judges

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pm 9/4/13

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A. ASSIGNMENTS OF ERROR

1. The conviction for first-degree criminal trespass should be reversed, because there was insufficient evidence to prove all the essential elements of the crime, beyond a reasonable doubt.

Appellant Donald Johnson assigns error to the following portions of the Findings of Fact and Conclusions of Law re: Bench Trial:

[Finding] V

... Melvin did not know the defendant, **and had not invited him into her residence.** . . .

...

CONCLUSIONS OF LAW

...

III

... The defendant knew that the entry into Melvin's apartment was unlawful, as he knew that he was not licensed, invited, or otherwise privileged to enter or remain in the apartment.

CP 107, 110 (emphasis added).

2. The sentencing court erred in imposing a combination of community custody and confinement which exceeded the statutory maximum for the voyeurism crime.
3. The sentencing court exceeded its statutory authority and violated appellant Donald Johnson's First Amendment and due process rights in imposing improper conditions of community placement. Johnson assigns error to the following conditions contained in the judgment and sentence, Appendix H:
  13. You shall not possess or consume any controlled substances without a valid prescription from a licensed physician.

....

16. . . . Do not have any contact with physically or mentally vulnerable individuals.  
  
...
18. Submit to polygraph and/or plethsmograph testing upon direction of your Community Corrections Officer and/or therapist at your expense.  
  
...
24. You shall not have access to the Internet at any location nor shall you have access to computers (with the exception of for employment purposes) unless otherwise approved by the CCO. You are also prohibited from joining or perusing any public social websites (Face Book [sp], MySpace, etc.) or telephoning any sexually-oriented "900" telephone numbers.
25. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 145-4.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding Mr. Johnson guilty of first-degree criminal trespass when there was insufficient evidence to prove that he either entered or remained unlawfully in the relevant apartment?
2. Did the sentencing court err in ordering a combined term of community custody and incarceration which exceeded the statutory maximum for each voyeurism offense?
3. The Legislature authorized a sentencing court to impose a condition of community custody prohibiting consuming or possessing controlled substances without a valid prescription, but did not limit the medical personnel from whom such a prescription must be issued.

Did the sentencing court err and was the condition limiting

Johnson to prescriptions from “a licensed physician” unauthorized where it is lawful in this state for many other types of medical personnel to issue prescriptions and the Legislature has not chosen to impose such a limitation?

4. Was the condition prohibiting contact with “physically or mentally vulnerable individuals” improper as not crime-related?
5. Did a condition fail to satisfy due process requirements by ordering Johnson not to patronize “establishments that promote the commercialization of sex” but failing to give any notice of which establishments might meet that definition and failing to define the term so as to allow for arbitrary enforcement?
6. Where there is no evidence that the defendant ever accessed the internet, any social media sites, a cellular phone or other media or that places involving commercialization of sex were involved in the crime in any way, are conditions prohibiting Johnson from accessing such media or going to such places unauthorized by statute and further are they in violation of Johnson’s First Amendment and due process rights?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Donald Johnson was charged by amended information with two counts of “voyeurism” and one count of first-degree criminal trespass. CP 28-29; RCW 9A.44.115(2)(a); RCW 9A.52.070. Pretrial and other proceedings were held before the Honorable Judge Beverly Grant on May 29, 2012, the Honorable Katherine Stolz on August 6, 2012, and the Honorable Brian Tollefson on August 27, 2012, after which a bench trial was held before Judge Grant on October 8 and 9, 2012.<sup>1</sup> Judge Grant found Johnson guilty as charged and entered findings

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<sup>1</sup>The verbatim report of proceedings in this case consists of five volumes, which will be referred to as follows: the proceedings of May 29, 2012, as “1RP; August 6, 2012, as “2RP;”

and conclusions. CP 105-11. On November 9, 2012, the judge imposed a standard-range sentence for each offense. CP 116-33.

Johnson appealed, and this pleading follows. See CP 141.

2. Testimony at trial

On April 6, 2012, Erica Sopak was staying in an apartment in Lakewood, taking care of her friend's kids while the friend was in jail. RP 34, 40. Sopak was out grocery shopping and got a phone call from her brother, who was with the kids. RP 41. According to Sopak, her brother said "there is some dude in the back" of the apartment who had tried to get in the window when one of the kids, S, who was about 11 years old at the time, was taking a shower. RP 41. The brother said he had called the police and Sopak rushed home. RP 41.

When she arrived, Sopak spoke to S. RP 41-42. Sopak said that S reported having been in the shower and seen someone looking in the window and trying to open it. RP 41-42. Sopak herself saw nothing and did not know what had happened, because she was not there and "just got a phone call." RP 42.

S, who was 12 at the time of trial, testified that she was in the shower when she saw someone come up to the window. RP 56-57. She was scared and got out, going to tell her babysitter, who she said was the manager of the apartment that day. RP 57. The manager told her to stay inside and that she would call the police. RP 58. S eventually got back

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August 27, 2012, as "3RP;"  
October 8 and 9, 2012, as "RP;"  
the sentencing proceedings of November 9, as "SRP."

into the shower because she still had soap on her or in her hair. RP 58.

Again, she said, the same man came up and tried to open the window. RP 59.

S estimated that it was maybe two minutes between the first and second times she was in the shower. RP 59.

S said she could see the man but could not see what he looked like “that much.” RP 59. She nevertheless identified a man named Donald Johnson as the person who had looked in. RP 59-60. According to S, at some point after she got out of the shower, her brother, her sister and her friend were sitting at the window and the man came by and said something like “I love you” to her friend. RP 59-62. S also said the man asked everyone to come out of the house. RP 62.

Julie Stanley, the apartment manager, ran over when she heard screaming and said that she saw Johnson with his hands on the window, trying to pull it open. RP 45-47. She said they got S out of the shower and then saw Johnson in the apartment complex, trying to get into the apartment where S was first and then going to the unit next door. RP 47-48. Stanley said she had seen Johnson before the incident “wandering around in our parking lot” and in front of the complex, and thought he was there for at least an hour. RP 50.

The next door apartment was rented by a woman named Marti Melvin. RP 49. Melvin testified that she was sitting on the couch watching television that day when there was a knock on her door. RP 71-72. She yelled, “[c]ome in,” thinking it was someone she knew. RP 72-73. A man came in and asked about S and another girl and she told him

she did not know what he was talking about. RP 72. She also said that S who lived next door was 11. RP 72. Melvin thought she and the man engaged in some “idle chatter” but she did not remember too much about it. RP 72.

Melvin said much of the conversation happened while Johnson was standing in the doorway and Melvin was sitting on the couch. RP 72-73. He said, “I’m just going to come in” and came inside. RP 73. Melvin admitted she did not really know what she did at that point, saying she was “kind of confused.” RP 74. The man was kind of looking around the apartment and said he was going to use the restroom, walking back that way. RP 73-74. He was opening cupboards and looking around a little and opened the bathroom door and looked inside. RP 74-75.

Melvin herself opened a closet door and said, “[s]ee, there’s nobody in here.” RP 75. She said that, when “he didn’t find anybody . . . he just walked out.” RP 75-76. She thought he went and knocked on the door to another neighbor’s home and she followed behind. RP 76-77.

Melvin remembered the manager then calling her and saying he had been peering into S’s bathroom. RP 76. Melvin asked Johnson, “[a]re you serious? You were just looking in on an 11 year-old girl in the shower?” RP 75. According to Melvin, Johnson said, “[s]he looked like she was 21.” RP 75. She said he walked over towards the street and “lingered out there for awhile.” RP 75.

Melvin said that she did not mean to invite Johnson into her apartment that day but had thought it was a manager who was a friend. RP 75-76. But when asked, specifically, “[o]nce he is in the apartment at

some point did you tell him to leave,” she answered, clearly, “[n]o.” RP 76. She said the only conversations she had with him were the brief one when he was in the doorway before he came inside and then when she asked him about looking in on an 11-year-old. RP 78. A report on the incident said something about Melvin’s child telling Johnson to leave but Melvin did not think that happened. RP 79.

Melvin said she did not remember ever telling him to leave and did not remember if her son - or anyone else - had done so. RP 79-81.

Stanley testified that, she was on the phone to police and went into Melvin’s apartment, noticing Johnson inside. RP 50. Stanley asked if Melvin knew Johnson and, when she said “[n]o, Stanley asked, “[t]hen what’s he doing in your house?” RP 50. At that point, according to Stanley, Melvin started asking Johnson what he was doing and telling him, “[g]et out of my house.” RP 50-51. Stanley admitted he “left the apartment after that.” RP 51.

Stanley followed him from a distance, still on the phone with police, and said Johnson wandered around the driveway and parking lot of the apartment complex before leaving. RP 51-52. When police arrived, she directed them to where Johnson had gone and identified him as the man in question. RP 52-53.

City of Lakewood police officer James Henson responded to the call at the apartment complex that day. RP 29, 34. When he got to the complex, he did an “area check,” looking for the person he had heard described but not finding them. RP 35. After that, the officer spoke to the witnesses. RP 35-37.

At some point, Henson was told there was a man who seemed to fit the description and who was “around the corner really close.” RP 37. The report came from an officer who had responded to the call and found Johnson in the area. RP 38, 67. According to that officer, when asked, Johnson said he had been at the complex looking for a girl he wanted to talk to there but that he was a little “vague” in his answers. RP 67. Henson took Sopak and Stanley to go see the man and Sopak said, “[t]hat’s him. That’s him,” when she saw Johnson. RP 38-39.

D. ARGUMENT

1. THE CONVICTION FOR CRIMINAL TRESPASS MUST BE REVERSED, BECAUSE THE PROSECUTION FAILED TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE CRIME, BEYOND A REASONABLE DOUBT.

Both the state and federal due process clauses require the prosecution to bear the burden of proving all essential elements of a crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). When the prosecution fails to meet that burden, this Court must reverse and dismiss the conviction.

Here, the prosecution failed to prove all the essential elements of first-degree criminal trespass. That offense is defined in RCW 9A.52.070(1), which provides that “[a] person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.” In finding Johnson guilty of the offense, the trial court relied on the belief that Mr. Johnson “knew that the entry into

Melvin's apartment was unlawful, as he knew that he was not licensed, invited, or otherwise privileged to enter or remain in the apartment." CP 110. The court also declared that Mr. Johnson "knew that the entry or remaining was unlawful[.]" CP 110.

But there was not substantial evidence to support those findings. Entering and remaining unlawfully are two separate means of committing the same criminal act. See e.g., State v. Klimes, 117 Wn. App. 758, 73 P.3d 416 (2003), reversed in part on other grounds by, State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). Courts have discussed the difference between entering and remaining unlawfully, and the requirements of proof for each means. A person enters or remains unlawfully when she "is not then licensed, invited, or otherwise privileged to so enter or remain." Allen, 127 Wn. App. At 131.

Where, however, the defendant is invited into a home, his initial entry is lawful and the "unlawful entry" means of committing a crime will not apply. See State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988). Thus, when the defendant was invited to spend the night in a guest room and then broke into a locked bedroom to assault the victim, there was insufficient proof of "felonious entry" into the building. State v. Thompson, 71 Wn. App. 634, 861 P.2d 492 (1993). Instead, the Court held, where the initial entry into the building is lawful, the defendant may only be convicted of burglary or a similar crime under the "unlawful remaining" means of committing the crime. 71 Wn. App. at 640-41.

Here, the court clearly relied on "entering" as unlawful. RP 86. But the entry was with permission. There was insufficient evidence to

support the “entering” prong of the crime. There was also insufficient evidence to support the conviction for the “remaining” prong. In the oral decision, the judge said that “the overall impression is that you entered and attempted to remain on the premises even after she had asked you to leave.” RP 86. The court also said, “[y]ou entered upon consent, however you were asked to leave and you did not leave immediately.” RP 90.

Melvin testified that, after being told to come in, Johnson entered and went through the apartment with Melvin close behind. RP 72-77. And Melvin said that she was surprised when the person who entered was Johnson, not an expected friend. RP 72-77.

But not once did Melvin say that she asked Johnson to leave her apartment. RP 72-77. And when asked specifically to comment, she was unequivocal in her “no.” RP 72-77. Further, even if Melvin’s denials were outweighed by the recollection of the neighbor that Melvin had, in fact, asked Johnson to leave, the neighbor’s testimony was that, when asked, Johnson complied. RP 50-51. Thus, there was not sufficient evidence that Johnson either entered or remained unlawfully, as required to prove the criminal trespass offense.

Because there was insufficient evidence to support the conviction for first-degree criminal trespass, reversal and dismissal of the conviction is required.

2. THE SENTENCING COURT ERRED IN IMPOSING A  
COMBINED TERM OF COMMUNITY CUSTODY AND  
CONFINEMENT WHICH EXCEEDED THE  
STATUTORY MAXIMUM

In addition to improperly convicting Johnson based upon

insufficient evidence, the trial court also erred in imposing a term of 36 months for community custody for each of the voyeurism offenses, because those terms exceeded the statutory maximum for each offense.

A sentencing court's authority is limited to imposing only those sentences which are statutorily authorized. See, State v. Boyd, 174 Wn.2d 470, 471-72, 275 P.3d 321 (2012). Voyeurism is a class C felony. See RCW 9A.44.115(3); State v. Diaz-Flores, 148 Wn. App. 911, 201 P.3d 1073, review denied, 166 Wn.2d 1017 (2009). The statutory maximum for such crimes is 60 months. See RCW 9A.20.021(1)(c). And the "statutory maximum" includes not just time in confinement but also any time spent on community supervision or custody. See Boyd, 174 Wn.2d at 471-72.

Here, the sentencing court ordered Johnson to serve 57 months each for the voyeurism crimes, but followed that with a term of 36 months. CP 130-33. Thus, the total term ordered was 93 months, 33 months longer than the statutory maximum punishment under RCW 9A.20.021(1)(c).

It appears that the court and the prosecution were laboring under an old version of the relevant law. In the past, because of the uncertainty of whether a defendant might earn "good time" credit towards a reduction in their sentence, courts were faced with a dilemma of how to ensure the maximum possible sentence was actually served. See, e.g., In re Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). Courts decided to try ordering a sentence "under which, if the offender earned early release from confinement, he or she would be transferred to community custody for the balance of the maximum sentence." State v. Winborne, 167 Wn. App. 320, 322, 273 P.3d 454, review denied, 174 Wn.2d 1019 (2012). Because

it could not know how much “good time” a defendant might later earn, the court would order a sentence of confinement and custody which, combined, would exceed the statutory maximum. See id. The courts would then rely on the Department of Corrections (DOC) to release the offender once the statutory maximum had been served, even if more time had been ordered in the judgment and sentence. See id.

In Brooks, supra, our Supreme Court upheld this practice as proper, with a proviso: that DOC must be required to effect such a release under the law and the judgment and sentence must specifically direct DOC “to ensure that whatever release date it sets under no circumstances may the offender serve more than the statutory maximum.” Brooks, 166 Wn.2d at 672. The latter language, called a Brooks clause, was deemed to have cured the problem of a defendant being ordered to serve a term longer than the maximum sentence, because the Supreme Court thought the language would ensure that no more than that maximum would be served. Id.

And it is that language that the court here included in the judgment and sentence after ordering 57 months in custody for each of the two voyeurism convictions and a further 36 months on community custody after that. CP 125 (providing, “[t]hat under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense”).

But Brooks no longer controls. By amendments in 2009 and beyond, the Legislature changed the sentencing statutes. Now, it is not DOC but instead the court which is required to amend the length of a term of community custody if the combination of that term and term of

incarceration exceeds the statutory maximum. RCW 9.9A.701(9) now provides:

The term of community custody specified by this section 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 as provided in RCW 9A.20.021.

(Emphasis added). As a result of this change in the law, a sentencing court no longer has the authority to order a combined term of confinement and community custody which exceeds the statutory maximum and use a Brooks notation to try to remedy the error. See Winbourne, 167 Wn. App. at 457-58. Instead, the trial court is required to reduce the term of community custody to ensure that the total term of such custody and confinement do not exceed the statutory maximum. Boyd, 174 Wn.2d at 474.

Reversal and remand for resentencing to reduce the term of community custody ordered is therefore required.

3. THE SENTENCING COURT ERRED IN ORDERING CONDITIONS OF COMMUNITY CUSTODY WHICH WERE NOT STATUTORILY AUTHORIZED AND/OR WERE IN VIOLATION OF JOHNSON'S CONSTITUTIONAL RIGHTS

In addition to the other errors, the sentencing court also erred in ordering conditions of community custody 13, 16, 18, 24, 25 and 26, because those conditions were not statutorily authorized and some of them were also in violation of Johnson's constitutional rights to due process and under the First Amendment.

Sentencing courts do not have unfettered discretion in fashioning

conditions of community custody to impose. See, e.g., State v. Kolsenik, 146 Wn. App. 790, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). Instead, just as with the limit of the statutory maximum, a sentencing court must order only those sentencing conditions which are authorized by the statute. See In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

Here, the trial court exceeded its statutory authority, in multiple ways. As a threshold matter, these issues are properly before the 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). Further, a challenge to such a condition may be made even before the defendant has started serving community custody time, because a “preenforcement” challenge is proper on appeal if that challenge raises primarily a legal question and no further factual development is required. Id.

All of the conditions challenged in this case meet those standards. In general, sentencing conditions are reviewed for abuse of discretion. See, State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). Where, however, a sentencing court imposes a sentencing condition not authorized by statute, it abuses its discretion. Id.; see State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Put another way, because courts have no inherent authority to craft any sentencing condition they choose, ordering a condition which is not authorized by statute is acting outside the court’s authority, and relief should be granted. See Kolesnik, 146 Wn. App. at 806.

Here, the relevant statute, RCW 9.94A.703, provides three types of conditions: mandatory, which the court must impose; “waivable,” which are imposed by default unless waived by the court; and “discretionary,” which the court may order, if it so chooses. RCW 9.94A.703(1), (2) and (3). None of the challenged conditions in this case were authorized under any of those sections of the statute.

First, condition 13 was not statutorily authorized. In that condition, the court prohibited Johnson from possessing or consuming controlled substances without a valid prescription from a “licensed physician.” CP 146-47.

RCW 9.94A.703(2) provides a “waiveable” condition of community custody that the offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions. Thus, the sentencing court had the statutory authority to order Johnson not to consume or possess controlled substances without a lawful prescription. But the statute did not authorize the sentencing court to limit the relevant medical personnel who could issue such a prescription to only “physicians,” as the court did here. In fact, the Legislature has given prescription-writing authority to not only physicians but also osteopaths, optometrists, dentists, podiatrists and certain physician assistants and nurse practitioners. See RCW 69.41.030(1).

Further, it is to be assumed that the Legislature was aware of its own definition of who was so authorized when it wrote the proper condition in RCW 9.94A.703(2). See, e.g., Wynn v. Earin, 163 Wn.2d 361, 372, 181 P.3d 806 (2008). Its decision not to limit “lawful

prescriptions” to those written only by a physician is telling - instead, it chose only to require a prescription to be “lawful.” RCW 9.94A.703(2). The trial court did not have the authority to override that Legislative decision by limiting the professionals from whom Johnson could get a “lawful prescription.”

Other conditions were also unauthorized as exceeding the trial court’s statutory authority. In condition 16, Johnson was ordered to have no contact with “physically or mentally vulnerable individuals.” CP 146-47. RCW 9.94A.703(2)(b) permits the sentencing court to impose, as a “discretionary” condition, that the defendant “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” Thus, a “no contact” order for S was authorized. See, e.g., In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010).

But a “no contact” order or other prohibition must be at least somewhat related to the crime. See e.g., State v. Riles, 135 Wn.2d 326, 342-43, 957 P.2d 655 (1988). There was no evidence that the case involved “physically or mentally vulnerable individuals.” Further, another condition prohibited Johnson from access to children, thus ensuring they were not meant to be included in the definition of “vulnerable individuals” in condition 16. CP 145-46. Condition 16 was not crime-related and was improper. See, e.g., Riles, 135 Wn.2d at 350.

More concerning, several conditions were not only not authorized - they were in violation of Johnson’s constitutional rights. Condition 18 requires Johnson to “[s]ubmit to polygraph and/or plethsmograph testing upon direction of your Community Corrections Officer and/or therapist at

your expense.” CP 145-46. As Division One has recently noted, “[p]lethsmograph testing is extremely intrusive.” State v. Land, 172 Wn. App. 593, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013). Under the sentencing statutes, it can be ordered if the person ordering it is a qualified treatment provider and it is part of crime-related treatment. See State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). But, as the Land Court held, it is improper to use such testing “as a routine monitoring tool subject only to the discretion of a community corrections officer.” 172 Wn. App. at 605.

Indeed, the Land Court agreed with the defendant that requiring him to submit to plethsmograph testing “at the discretion of a community corrections officer” violated the “constitutional right to be free from bodily intrusions.” 172 Wn. App. at 605. It struck down a condition very similar to the condition here, requiring him to participate in urinalysis, breathalyzer, polygraph and plethysmograph testing at the discretion of the community corrections officer. Id.

Here, the condition 18 exceeds the permissible bounds in requiring Johnson to “[s]ubmit to polygraph and/or plethsmograph testing upon direction of your Community Corrections Officer and/or therapist at your expense.” CP 146-47. The condition should have been limited to a requirement for submission to such tests when asked by a treatment provider, not at the behest of the CCO.

Conditions 24 and 25 also not only exceeded the statutory authority of the court but also violated Johnson’s constitutional rights- this time, the First Amendment and due process. The conditions provided:

24. You shall not have access to the Internet at any location nor shall you have access to computers (with the exception of for employment purposes) unless otherwise approved by the CCO. You are also prohibited from joining or perusing any public social websites (Face Book [sp], MySpace, etc.) or telephoning any sexually-oriented "900" telephone numbers.
25. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 146-47.

There is nothing in the record indicating that this case involved, in any way, access to the Internet, or social websites, or telephoning "900" numbers. Nor is there anything in the record that any "sexually explicit materials" were involved, or a cell phone with access to the Internet, or a prostitute, or an "establishment" that "promote[s] the commercialization of sex."

State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008), is essentially on point. In that case, the Court noted that a "crime-related prohibition" must, by definition, relate to the circumstances and facts of the crime. The defendant, O'Cain, had been convicted of second-degree rape for having met a girl, walked off with her, grabbed her and pushed her over a fence, raped her and ran away. 144 Wn. App. at 773. He was ordered to "not access the Internet without the approval" of his CCO and sex-offender treatment provider. On review, the Court first rejected the idea that it was proper to order the limitation because it could mean that

O’Cain’s risk to the community could be less. Because “the internet access condition” was a prohibition and did not involve affirmative conduct, it had to be “crime-related,” the O’Cain Court held. 144 Wn. App. at 775. And because there was no evidence O’Cain had accessed the internet before the rape or that internet access or use contributed in any way to the crime, the condition was not crime-related, not statutorily authorized and had to be stricken. Id.

Further, that the prohibition is unconstitutionally vague, as it fails to provide ascertainable standards for enforcement and fails to provide sufficient notice of what is prohibited. State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting “establishments whose primary business pertains to sexually explicit or erotic material.” 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the “commercialization of sex” and thus are prohibited. Further, definitions vary. For example, some define the “commercialization of sex” as “offering or receiving any form of sexual conduct in exchange for money.” See, e.g., Christopher R. Murray, “Grappling with ‘Solicitation’: The Need for Statutory Reform in North Carolina after Lawrence v. Texas,” 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Others define “[t]he commercialization of sex” as including “all forms of media,

including movies, television shows, songs, advertising, and magazines,” used “to sell products and attract consumer interest” - thus potentially prohibiting a much wider range of places. See Takiyah Rayshawn McClain, “An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act, 40 VAND. J. TRANSN’L L. 597, 603 (2007).

In addition, the First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Where a condition of community custody affects materials or conduct protected by the First Amendment, a “stricter standard” applies, requiring the government to show that the restriction in question is “reasonably necessary to accomplish the essential needs of the state and public order.” Bahl, 164 Wn.2d at 757. That standard was not met by conditions 24 and 25 here. This Court should so hold.

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E. CONCLUSION

STATE OF WASHINGTON

For the reasons stated herein, this Court should reverse and dismiss  
the conviction for criminal trespass. In the alternative, the Court should  
order remand for resentencing and also strike the improper conditions of  
community custody.

DATED this 4th day of September, 2013.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE BY EFILING/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 by e-filing this date to this Court's upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Mr. Donald Johnson, DOC 841406, MCC, P.O. Box 777, Monroe, WA. 98272.

DATED this 4th day of September, 2013.  
Respectfully submitted,

  
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