

NO. 46957-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN CRAIG POWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper, Judge

No. 11-1-03893-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the validity of the superior court's order imposing confinement for failure to complete sexual deviancy treatment appears to be moot where Defendant has apparently already served the confinement ordered.
2. Whether, assuming the validity of the superior court order imposing confinement for failure to complete sexual deviancy treatment may be addressed, that order should be affirmed because it properly sanctioned Defendant's violation of statutorily-authorized community custody conditions.
3. Whether Defendant may be required to make incriminating disclosures about his sexual history as part of his sexual deviancy evaluation and treatment only if the State recognizes that his answers cannot be used in future criminal proceedings.

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2011, Steven Craig Powell, hereinafter referred to as "Defendant," was charged by information with 14 counts of voyeurism and one count of second degree possession of depictions of a minor engaged in sexually explicit conduct. CP 1-8, 9-11, 12-19.

Defendant moved to dismiss the second degree possession of depictions of a minor engaged in sexually explicit conduct charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), *State v. Powell*, 181 Wn. App. 716, 721-22, 326 P.3d 859 (2014), *review denied by*, 181

Wn.2d 1011, 335 P.3d 940 (2014), and the trial court granted that motion.

CP 20.

After trial, a jury returned verdicts of guilty to the remaining 14 counts of voyeurism, two of which the trial court vacated on double jeopardy grounds. *Powell*, 107 Wn.2d at 722, CP 21-23.

On June 15, 2012, the court sentenced Defendant to an exceptional sentence of 30 months in total confinement on each count, to be served concurrently, and to 30 months in community custody. CP 24-40; 44-46.

Among the conditions of that community custody were the following:

(III) The offender shall participate in crime-related treatment or counseling services[.]

CP 39 (Appendix F).

11. Enter and complete, following release, a state approved sexual deviancy treatment program through a certified sexual deviancy counselor....

14. Submit to polygraph and plethysmograph testing upon direction of your community corrections officer and/or therapist at your expense. You must successfully pass all polygraph/plethysmograph tests, and indicate no deception at any time on either type of test. Failing either type of test and/or indicating deception will be a violation of your conditions of community custody.

CP 42 (Appendix H).

Defendant appealed his convictions to this Court, “arguing that the trial court erred by failing to make written findings of fact and conclusions of law as required by CrR 3.6, and ruling that the affidavit supporting the search warrant established probable cause to issue the warrant.” *State v. Powell*, 181 Wn. App. 716, 718, 326 P.3d 859 (2014), *review denied by*, 181 Wn.2d 1011, 335 P.3d 940 (2014); CP 47-58. The State cross-appealed, arguing “that the legislature’s 2010 amendment to former RCW 9.68A.011(3)(2002) expanded the definition of sexually explicit conduct to include the conduct depicted within the images that [Defendant] possessed.” *Powell*, 181 Wn. App. at 718; CP 47-58.

In a published opinion, filed June 10, 2014, this Court “affirm[ed] the trial court’s denial of [Defendant]’s CrR 3.6 motion,” but “because the legislature’s 2010 amendment to the definition of sexually explicit conduct expanded the definition to include the conduct depicted within the images in [Defendant]’s possession,” it “reverse[d] the trial court’s *Knapstad* dismissal of the charge of second degree possession of depictions of a minor engaged in sexually explicit conduct and remand[ed] for further proceedings.” *Id.* at 719; CP 47-58.

The Court’s mandate was filed in superior court on October 17, 2014. CP 59-60.

According to the defendant's Community Corrections Officer (CCO), Defendant was released from custody in March, 2014. 11/21/14 RP 5.¹

On October 27, 2014, the State filed what it titled a post-appeal refiled information reinstating count XV, which charged Defendant with one count of second degree possession of depictions of minor engaged in sexually explicit conduct. CP 63-64. *See* CP 65. After trial, the defendant was found guilty as charged, and sentenced to 60 months in total confinement to be served consecutively to the confinement imposed on the voyeurism counts. CP 88-102 (warrant of commitment and judgment and sentence by supplemental designation of clerk's papers).

On October 20, 2014, Defendant was summons to the superior court for a violation hearing, CP 61-62, and on November 4, 2014, his CCO filed a "COURT-SPECIAL," alleging that Defendant had violated terms of his community custody by failing to comply with Court-ordered treatment by refusing to disclose information regarding his sexual history required to complete a sexual deviancy evaluation. CP 66-79.

On November 26, 2014, after a violation hearing, the court found that Defendant had violated the terms of his community custody requiring

¹ The verbatim report of proceedings in this case consists of two volumes. Because they are not consecutively paginated, they are cited herein through the following format: [Date of Proceeding] RP [Page Number].

him to comply with a sexual deviancy treatment program, *see* CP 39, 42, by “fail[ing] to provide sexual history to [his] psycho[-]sexual evaluator[,]” CP 80-81, and hence, failing to “complete[] the psychosexual evaluation.” 11/26/14 RP 25. The court imposed a sanction of 40 days in total confinement with credit for 30 days served. CP 81; 11/26/14 RP 32. The court ordered Defendant to complete the psycho-sexual evaluation, but indicated that he could complete the history orally rather than in writing, and that he was not required “to discuss any issues in the current case as part of this until the current case is resolved.” 11/26/14 RP 26, 32-33.

On December 5, 2014, Defendant filed a timely notice of appeal of this decision. CP 85. *See* CP 82-84.

2. Facts

On September 29, 2014, certified sex offender treatment provider Jenny Sheridan met with Defendant to begin his court-ordered psychosexual evaluation. CP 78. She asked him to complete a questionnaire, which included a section on his sexual history. CP 78.

When Sheridan met with the defendant again on October 9, 2014, she found that although he had given adequate background information, he “provided no information” in the section related to his sexual history. CP

78. The defendant provided her with “a letter stating that he [was] choos[ing] to exercise his fifth-amendment rights, with regard to reporting any sexual history.” CP 78. Sheridan referred Defendant back to his Community Corrections Officer (CCO) for review of his case. CP 78.

On October 20, 2014, Defendant was summons to the superior court for a violation hearing. CP 61-62.

On November 4, 2014, Defendant’s CCO filed a “COURT-SPECIAL” in the superior court, alleging that Defendant had violated a term of his community custody by failing to comply with Court-ordered treatment when he refused to disclose information regarding his sexual history. CP 66-79; 11/07/14 RP 3-4; 11/21/14 RP 5, 11/26/14 RP 15.

On November 21, 2014, the parties appeared for a violation hearing at which William Sheppard, the defendant’s CCO, stated that, despite being ordered to complete a psychosexual evaluation, Defendant had failed to answer questioning concerning his sexual behavior as part of that evaluation, citing Fifth Amendment rights. 11/21/14 RP 5. The parties both presented case law and the court recessed the matter until November 26, 2014, to read the decisions provided. 11/21/14 RP 4, 11-12.

On November 26, 2014, the parties reappeared for a hearing at which Defendant’s CCO stated that Sheridan told him that “she’s not closing the door on the evaluation and if [Defendant] would prefer to talk

about that portion of the psychosocial [sic] evaluation in person instead of writing it down, that she would be amenable to... that.” 11/26/14 RP 16-17. The State asked the court to find a violation and impose a sanction of 60 days in total confinement. 11/26/14 RP 17-18.

The following exchange occurred thereafter:

THE COURT: What if he[, i.e., the defendant] makes some statement in his history that could expose him to criminal liability, other than the current charges, or charge, one charge?

[DEPUTY PROSECUTOR]: I can't really speak to that, your honor. As the Court indicated, I think that counselors are mandatory reporters and they would probably be obligated to report that.

11/26/14 RP 18-19.

Defendant relied on *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005), to argue that requiring him to disclose his sexual history under threat of confinement violated his Fifth Amendment right against self-incrimination. 11/26/14 RP 19-23.

The following exchange then occurred between the court and the deputy prosecutor:

THE COURT: Well, [Deputy Prosecutor], have you thought about the immunity issue? The State v. King case seems to kind of imply that – I think King said something about the person must – and this is not directly on point; it's a different type of case, but as long as it recognizes the required answers many not be used in a criminal proceeding.

[DEPUTY PROSECUTOR]: Your Honor, if you're asking have I thought about immunity, yes. Is the State going to extend immunity? No. The problem, Your Honor, is that, hypothetically, in this process somebody could tell their evaluator, you know I've done XYZ

....

And admit to any level of horrible criminal activity, so we're not in a position to extend immunity.

THE COURT: Well, if I ordered him to participate in this and he says something that could expose him to criminal immunity [sic], would that be usable in the State's case?

[DEPUTY PROSECUTOR] I can't really speak to that, Your Honor. I suppose, again, we're getting into hypotheticals. It could be. I can tell you the pending charge that the defendant has is a possessory offense, so I don't know.

11/26/14 RP 23-24.

The court subsequently found that Defendant had violated his community custody by "fail[ing] to provide sexual history to [his] psycho[-]sexual evaluator[.]" CP 80, and hence, failing to "complete[] the psychosexual evaluation." 11/26/14 RP 25.

The court imposed a sanction of 40 days in total confinement with credit for 30 days served. CP 81; 11/26/14 RP 32. The court ordered Defendant to complete the psycho-sexual evaluation, but indicated that he could complete the history orally rather than in writing, and that he was not required "to discuss any issues in the current case as part of this until the current case is resolved." 11/26/14 RP 26, 32-33.

C. ARGUMENT.

1. THE VALIDITY OF THE SUPERIOR COURT'S ORDER IMPOSING CONFINEMENT FOR FAILURE TO COMPLETE SEXUAL DEVIANCY TREATMENT APPEARS TO BE MOOT BECAUSE DEFENDANT APPEARS TO HAVE ALREADY SERVED THE CONFINEMENT ORDERED.

Defendant argues that his “privilege against self-incrimination was violated when he was sentenced to 40 days of incarceration for invoking his Fifth Amendment rights and refusing to fully comply with the sex offender treatment program’s disclosure requirements, without a guarantee of immunity against any new criminal charges.” Brief of Appellant (Br. of App.), p. 10.

There are at least three issues bound up in this argument.

First, given that Defendant seems to have already served the 40-day confinement in question, *see* CP 80-81, his argument is probably moot.

Generally, “[a] case is moot if the issues it presents are ‘purely academic,’” and the court cannot grant effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)(quoting *Grays Harbor Paper Co. v. Grays Harbor Cy.*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968)). *See, e.g., In re Dependency of A.K.*, 162 Wn.2d 632, 643, 174 P.3d 11 (2007). “It is not moot, however, if a court can still provide effective relief.” *Turner*, 98 Wn.2d at 733.

Moreover, an appellate court may decide a moot case if (1) “it involves matters of continuing substantial public interest,” *A.K.*, 162 Wn.2d at 643, or (2) the trial court’s ruling has collateral consequences. *See Turner*, 98 Wn.2d at 733.

“To determine ‘whether or not a sufficient public interest is involved,’ [appellate] court[s] look[] at three criteria: “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.’” *A.K.*, 162 Wn.2d at 643 (*quoting In re Det. Of Swanson*, 115 Wn.2d 21, 24, 793 P.2d 962, 804 P.2d 1 (1990)(*quoting Dunner v. McLaughlin*, 100 Wn.2d 832, 838, 676 P.2d 444 (1984))).

In the present case, the sentencing court found that Defendant violated the terms of his community custody requiring him to “[e]nter and complete, following release, a state approved sexual deviancy treatment program[,]” CP 42, *see* CP 39, and ordered him to serve 40 days, with credit for 30 days already served, for that violation. CP 80-81. The Court did not appear to otherwise modify Defendant’s sentence. *See* CP 80-81. Because the court ordered Defendant to serve only 10 more days in confinement on November 26, 2014, *see* CP 80-81, and Defendant was in confinement at the time that order was issued, *see* 11/26/14 RP 21-22, 32-33, Defendant has, at this time, served the sanction at issue.

Therefore, this Court cannot grant effective relief from that sanction, and the case may be considered moot.

However, because the same issue is likely to arise when Defendant is released from confinement on his sentence on count XV, there is a very high “likelihood that the question will recur.” *A.K.*, 162 Wn.2d at 643. *Cf. Antelope*, 395 F.3d at 1133. Moreover, both the public nature of the question presented and “the desirability of an authoritative determination which will provide future guidance to public officers,” *A.K.*, 162 Wn.2d at 643, seem to indicate that “a sufficient public interest is involved” for this Court to consider the case, even if moot.

2. ASSUMING THE VALIDITY OF THE SUPERIOR COURT ORDER IMPOSING CONFINEMENT FOR FAILURE TO COMPLETE SEXUAL DEVIANCY TREATMENT MAY BE ADDRESSED, THAT ORDER SHOULD BE AFFIRMED BECAUSE IT PROPERLY SANCTIONED DEFENDANT’S VIOLATION OF STATUTORILY-AUTHORIZED COMMUNITY CUSTODY CONDITIONS.

The second issue bound up in Defendant’s argument is whether the court properly sanctioned Defendant for a violation of valid terms of his community custody. Resolution of this question involves two sub-issues.

The first is whether the court properly imposed the community custody conditions that required Defendant to “[e]nter and complete,

following release, a state approved sexual deviancy treatment program through a certified sexual deviancy counselor.” CP 42. *See* CP 39. The law and record shows that it did.

Community custody conditions “must be authorized by the legislature.” *State v. Kolesnik*, 146 Wn. App. 790, 192 P.3d 937 (2008). *See State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

“When a court sentences a person to a term of community custody, [it] must impose [the mandatory] conditions of community custody [listed in RCW 9.94A.703(1)],” and, unless waived by the court, the conditions listed in RCW 9.94A.703(2). The court may also impose certain discretionary conditions, RCW 9.94A.703(3), including ordering the offender to “[p]articipate in crime-related treatment or counseling services,” and to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(c) & (f).

“Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); *State v. C.D.C.*, 145 Wn. App. 621, 625, 186 P.3d 1166 (2008).

“Imposition of an unconstitutional condition would... be manifestly unreasonable.” *Bahl*, 164 Wn.2d at 753. Likewise, a sentencing court

abuses its discretion when it exceeds its sentencing authority. *C.D.C.*, 145 Wn. App. at 625.

The sentencing court did not exceed its sentencing authority here.

Defendant was convicted of twelve sex offenses, *compare* CP 1-8, 24-40 *with* RCW 9.94A.030(47)(a)(i). Hence, when the court ordered Defendant to “[e]nter and complete, following release, a state approved sexual deviancy treatment program[,]” CP 42, and “participate in crime-related treatment or counseling services,” CP 39, it did no more than properly “order an offender to:… [p]articipate in crime-related treatment or counseling services,” as authorized by RCW 9.94A.703(3)(c).

Therefore condition (III) of Appendix F and condition 11 of Appendix H were statutorily authorized and properly imposed.

The second sub-issue is whether the court properly sanctioned a violation of these conditions.

RCW 9.94B.040 provides, in relevant part, that “[i]f the court finds that the violation [of a term of community custody] has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation[.]” RCW 9.94B.040(3)(c).

Here, the court found that Defendant failed to comply with the conditions of his community custody, which required completion of a sexual deviancy program by “[f]ail[ing] to provide sexual history to [the]

psycho[-]sexual evaluator,” CP 80-81, which was, according to the record before the court, an important part of completing the initial psychosexual evaluation. *See* CP 78.

Therefore the court was authorized by RCW 9.94B.040 to order Defendant “to be confined for a period not to exceed sixty days for each violation[.]” RCW 9.94B.040(3)(c).

Because the court ordered Defendant to be confined for only 40 days, it properly sanctioned him under RCW 9.94B.040(3)(c).

Importantly, the basis for this confinement was Defendant’s failure to comply with the conditions requiring him to complete “a state approved sexual deviancy treatment program[.]” CP 42. *See* CP 39, and therefore the sanction was not imposed for failure to disclose incriminating information *per se*.

As a result, the community custody conditions requiring Defendant to enter and complete a state-approved sexual deviancy treatment program, CP 39, 42, were properly imposed, and the court properly sanctioned Defendant for his violation thereof.

Therefore, the court’s order should be affirmed.

3. DEFENDANT MAY BE REQUIRED TO MAKE INCRIMINATING DISCLOSURES ABOUT HIS SEXUAL HISTORY AS PART OF HIS SEXUAL DEVIANCY EVALUATION AND TREATMENT ONLY IF THE STATE RECOGNIZES THAT HIS ANSWERS CANNOT BE USED IN FUTURE CRIMINAL PROCEEDINGS.

“[A]rticle 1, section 9 of the Washington Constitution provides that ‘[n]o person shall be compelled in any criminal case to give evidence against himself.’” *In re Personal Restraint of Ecklund*, 139 Wn.2d 166, 985 P.2d 342 (1999).

Similarly, “[t]he Fifth Amendment [to the United States Constitution], made applicable to the states through the Fourteenth Amendment, commands that no person ‘shall be compelled in any criminal case to be a witness against himself.’” *State v. King*, 130 Wn.2d 517, 523, 925 P.2d 606 (1996).

“A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted.” *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

“This prohibition not only permits a person to refuse to testify against himself at a criminal trial, but also allows him not to answer official questions put to him in any other proceeding, civil or criminal, where the answer might incriminate him in future criminal proceedings.” *King*, 130 Wn.2d at 523-24 (emphasis added).

However, “the State may validly insist on answers to incriminating questions and properly administer its probation system *so long as the State recognizes that the answers may not be used in a subsequent criminal proceeding.*” *Id.* at 525-29 (emphasis added).

To invoke the protections against self-incrimination, “a person must show that the compelled disclosure will subject them to substantial hazards of self-incrimination.” *Ecklund*, 139 Wn.2d at 172 (citing *California v. Byers*, 402 U.S. 424, 429, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (1971)). Thus, a defendant “must prove two things: (1) that the testimony desired by the government carried the risk of incrimination,” and “(2) that the penalty he suffered amounted to compulsion.” *United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2005).

“The Fifth Amendment privilege is only properly invoked in the face of ‘a real and appreciable danger of self-incrimination.’” *Antelope*, 395 F.3d at 1134 (quoting, with internal quotation marks omitted, *McCoy v. Comm’r*, 696 F.2d 1234, 1236 (9th Cir. 1983)). “If the threat is remote, unlikely, or speculative, the privilege does not apply[.]” *Id.* “As a general

rule, countervailing government interests, such as criminal rehabilitation, do not trump this right.” *Id.* Consequently, “when ‘questions put to [a] probationer, however relevant to his [or her] probationary status, call for answers that would incriminate him [or her] in a pending or later criminal prosecution,’ he [or she] may properly invoke [the] right to remain silent.” *Id.* (quoting *Murphy*, 465 U.S. at 435, 104 S. Ct. 1136)).

In the present case, the superior court did not alter the conditions requiring Defendant to complete sexual deviancy treatment in its order imposing confinement for Defendant’s failure to comply with such treatment. *See* CP 80-81. Moreover, Defendant’s treatment provider has stated that it may be difficult to complete such treatment “without any sexual history from [Defendant] since the point of the evaluation is to determine risk, amenability and if treatment is needed.” CP 78.

This raises the third, and ultimately fundamental, question in this case: whether Defendant may be compelled to disclose incriminating sexual history in the absence of immunity from the use of such disclosures in subsequent criminal proceedings. He may not be.

While “the State may validly insist on answers to incriminating questions [to] properly administer its probation system” if it “recognizes that the answers may not be used in a subsequent criminal proceeding[.]” it may not insist on such answers while harboring the option of using them in such future proceedings. *King*, 130 Wn.2d at 525-29.

As a result, when Defendant is released he must complete the requisite sexual deviancy treatment program, but he may be required to answer incriminating questions about his sexual history only if the State recognizes that his answers cannot be used in future criminal proceedings.

Therefore, the validity of the superior court's order imposing confinement for failure to complete sexual deviancy treatment, while moot, may be addressed, and should be affirmed as properly imposed. However, when Defendant is released, he may be required to make incriminating disclosures about his sexual history as part of his sexual deviancy evaluation only if the State recognizes that his answers cannot be used in future criminal proceedings.

D. CONCLUSION.

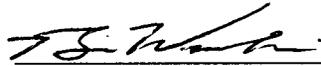
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Assuming the validity of the superior court order imposing confinement for failure to complete sexual deviancy treatment may be addressed, that order should be affirmed because it properly sanctioned Defendant's violation of statutorily-authorized community custody conditions.

However, Defendant may be required to make incriminating disclosures about his sexual history as part of his sexual deviancy evaluation and treatment only if the State recognizes that his answers cannot be used in future criminal proceedings.

DATED: August 28, 2015.

MARK LINDQUIST
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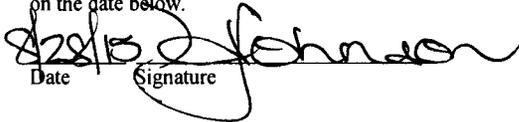


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