

No. 47399-2-II

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

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STATE OF WASHINGTON, Respondent

v.

RONALD SMITH, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF FACTS .....	1
III.	ARGUMENT .....	9
	A. The Trial Court Abused Its Discretion When It Revoked Mr. Smith’s SSOSA. ....	9
	B. The Trial Court Erred When It Imposed An Unconstitutional Community Custody Condition.....	13
IV.	CONCLUSION .....	16

## TABLE OF AUTHORITIES

### Washington Cases

<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990)	14
<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010)	14
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008)	14
<i>State v. Dahl</i> , 139 Wn.2d 678, 990 P.2d 396 (1999)	10
<i>State v. Halstein</i> , 122 Wn.2d 109, 857 P.2d 270 (1993)	14
<i>State v. Land</i> , 172 Wn.App. 593, 295 P.3d 782 (2013)	16
<i>State v. McCormick</i> , 166 Wn.2d 689, 213 P.3d 32 (2009)	10
<i>State v. Partee</i> , 141 Wn.App. 355, 170 P.3d 60 (2007)	13
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	10
<i>State v. Sansone</i> , 127 Wn. App. 630, 111 P.3d 1251 (2005)	15
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010)	14

### Federal Cases

<i>United States v. Guagliardo</i> , 278 F.3d 868, 872 (9 <sup>th</sup> Cir.2002)	15
<i>United States v. Loy</i> , 127 F.3d 251 (3d Cir. 2001)	15

### Statutes

RCW 7.48A.010(2)	16
RCW 9.94A.631	10
RCW 9.94A.670 (11)	10
RCW 9.94A.670 (2)(a)	9

## I. ASSIGNMENT OF ERRORS

- A. The Trial Court Abused Its Discretion In Revoking Mr. Smith's Special Sex Offender Sentencing Alternative (SSOSA).
- B. The Trial Court Erred When It Imposed A Community Custody Condition Barring Mr. Smith From Perusing Pornography as Defined By His Treatment Provider. (CP 61).

### *Issues Relating To Assignments Of Error*

- A. Mr. Smith stipulated to three violations of his suspended sentence. Did the court err in revoking his SSOSA based in part on the court's imaginings unsupported by the record, and failed to take into account that Mr. Smith had a reasonable basis for believing he was not violating the rules?
- B. Does a community custody condition that Mr. Smith "not peruse pornography as defined by the treatment provider" violate Mr. Smith's right to due process of law?

## II. STATEMENT OF FACTS

On June 11, 2010, seventy-three year old Ronald Smith pleaded guilty to three counts of first-degree child molestation of

his then nine-year old granddaughter. (CP 13-18;35; 49). During his psychosexual evaluation Mr. Smith reported that as a result of septic poisoning, which took years to recover from, his memory has been affected. (CP 35). The evaluation concluded that based on Mr. Smith's self-report and the polygraph exams, he did not satisfy a diagnosis of Pedophilia or Hebephilia. The report went on:

“Because his sexual history has been closely examined, he has experienced arrest and so far seven days in jail, probabilities are he is at low risk for future offending. There is no question he has been impacted by his involvement with the court. Although he may have impulse control issues, there is no evidence he is sexually obsessed or compelled to act on his deviant sexual thinking.” (CP 40).

The evaluator recommended group and individual counseling for three years; no unsupervised contact with minor children, and believed overall that Mr. Smith presented with a positive prognosis. (CP 42-43).

The prosecutor recommended a SSOSA for Mr. Smith. (CP 12). The trial court imposed a 130-month sentence, to run concurrent for each count with all but 9 months suspended per SSOSA, followed by community custody for life. (CP 53; 10/22/10 RP 3).

Between the years of 2010 and 2014, while on community custody, Mr. Smith regularly participated in sex offender treatment. The court received 14 compliance updates and reports from the treatment provider and DOC. His participation was rated anywhere from “good” to mostly “excellent” over that time period and he was adjudged as making satisfactory progress in treatment. Mr. Smith was deemed at low risk to reoffend. (Supp. CP<sup>1</sup> Report from Treatment).

On December 19, 2013, DOC sent a letter to the court confirming that Mr. Smith had successfully completed the “Thinking for a Change” program, a required cognitive behavioral intervention program . (CP 79-82).

On February 13, 2014, Mr. Smith’s treatment provider, Dr. Mark Cross sent a letter to Mr. Smith’s CCO. (CP 98). The letter indicated that Mr. Smith was making good overall progress and remained at low risk to re-offend. (CP 98). Dr. Cross recommended that Mr. Smith’s sister, Ms. Wheeler, be approved as a chaperone for Mr. Smith. (CP 99). He also informed DOC:

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<sup>1</sup> The dates of the submitted reports are:  
6/13/2011;7/05/2011;9/06/2011;12/28/2011; 3/22/2012;  
9/26/2012;1/07/2013;3/21/2013; 7/15/2013;  
11/19/2013;2/10/2014;5/27/2014;6/10/2014;6/25/2014 )

“Mr. Smith appears ready to have supervised contact with other minors...Regarding rules for contact, it is *recommended* that Mr. Smith follow the guidelines contained in the Rules for Offender Contact with Victims or Minor (DOC Form 450.320). **Contact with minors could occur in Ms. Wheeler’s home or locations in the community and she should maintain visual supervision of Mr. Smith whenever minors are nearby or have the potential to interact with him.**”

CP 98. (emphasis added).

On that same day, Mr. Smith and Ms. Wheeler signed a “Rules for Offender Contact With Victims or Minors” DOC Form 450.320. (CP 94). The paragraphs referring to home visits and overnight visits were crossed out and initialed by the DOC officer. (CP 94). Ms. Wheeler signed a copy of the SUPERVISOR OF CONTACT STATEMENT OF RESPONSIBILITY, which stated in pertinent part,

“I have been informed of this offender’s supervision and treatment rules and have received a copy of the Offender rules specific to this offender include: See attached treatment rule.”

CP 95.

The document Ms. Wheeler signed, issued by the treatment provider stated, inter alia:

**“The requirements of supervision were discussed. I was informed that I must be able to see Ron Smith at all times when children are present, or it is not supervision. DOC Form 05-695 lists specific rules for supervision that must be followed at all times when I am providing supervision.”**

CP 97. (Emphasis added).

On June 23, 2014, DOC reported to the court that Mr. Smith’s progress was satisfactory and his sister had been approved as his chaperone. (Supp. CP: Report from Treatment 6/23/14).

On January 14, 2015, Mr. Smith was arrested and detained for what was called “a low level violation.” (CP 89). On February 4, 2015, DOC filed a notice of violation. (CP 89-93).

The State filed a petition for an order revoking the SSOSA on February 13, 2015. (CP 106-107). It detailed three violations: The first violation alleged that Ms. Wheeler’s daughter and 16-year-old granddaughter began sharing a home with Ms. Wheeler and Mr. Smith in autumn 2014. (3/20/15 RP 9). There were no allegations of impropriety or that Mr. Smith was ever alone with the teen. (3/20/15 RP 12). When the CCO questioned Ms. Wheeler about the living arrangement, Ms. Wheeler stated, “I am his chaperone.” (CP 91).

The second alleged violation was the presence of a neighbor, who had been invited to the house by Ms. Wheeler for a movie night. (3/20/15 RP 10). The neighbor and her daughter (under age 12) spent one evening watching a movie at Ms. Wheeler's home sometime in the spring of 2014. (CP 111). The neighbor recalled Mr. Smith being in the same room for a period and then leaving to go to his own room. (CP 91). No one accused Mr. Smith of any improprieties with his grandniece or the neighbor child. When questioned, Mr. Smith said "I thought it was okay because Karen [Ms. Wheeler] is my chaperone." (CP 103).

After the CCO learned of the alleged violations, Mr. Smith took a polygraph test. The examiner asked him three questions:

1. "Other than [grand niece] and the neighbor girl, did you withhold any other information during your interview with CCO Carillo this week?"
2. Did you ever have any physical contact with [grand niece] or any other minor that was in your home?
3. Were you ever alone with [grand niece] or any other minor that was in your home?"

(CP 104).

The polygrapher opined that Mr. Smith **was attempting** deception when he answered “no” to the first question. However, he reported the physiological responses to the second two questions were not adequate for him to form an opinion as to truth or deception. He further stated: “Mr. Smith’s answers to the relevant questions asked during this examination are considered **truthful.**” (CP 100-101)(Emphasis in the original). He told the examiner that he did not have physical contact with his grand niece. (CP 103).

The third violation was an unpaid balance of \$1,732.09 for legal financial obligations. (CP 112).

The court held a revocation hearing on March 20, 2015. Mr. Smith stipulated to all three violations. (3/20/15 RP 3-4). At that hearing, defense counsel suggested that because of Smith’s age, (78 years old), a four year history of no community custody violations, and the current two violations involved no inappropriate physical contact, that a brief period in the county jail would suffice to keep Mr. Smith in compliance in the future. Counsel stated that this was Mr. Smith’s “only chance to not serve the rest of his life in prison.” (3/20/15 RP 10-12).

Mr. Smith explained to the court that he had not paid his LFOs because he had been devoting his money toward lodging, food, and utilities. He believed that now that there was more money available because of roommates that he would be able to catch up with his debt. (3/20/15 RP 12-13).

The court commented that the polygraph test did not really help it sort things out, adding 'I have no reason to think he had any sexual contact with a minor that was staying with him, although certainly his deception isn't helpful about that.' (3/20/15 RP 15). The court further added, "I mean, given his age and given apparently the reason of wellness for a long time I'm reluctant to slam him up for another ten years in jail, or thereabouts." (3/20/15 RP 15-16). The court further added, "we're trying to keep him out of trouble because if he gets another one of these things, he's looking at life in prison." (3/20/15 RP 16).

The court went on,

"I don't like the idea of throwing Mr. Smith in prison. I really don't like it. Essentially since he seems to - - I would say make progress. It doesn't look like he's fouled up in treatment. But this is a pretty serious matter. I don't expect him to sexually abuse a young woman when she walks through the door. I expect him to groom her. I expect him to

try to setup situations where who knows what might happen. He could be trying to exploit her by taking photographs, stuff like that, in a bathroom situation who knows what all that might be. I mean, there's all kinds of ways to molest somebody and all kinds of ways to intrude on them, on their person...."

(3/20/15 RP 17).

The trial court then concluded that he could no longer trust Mr. Smith, and revoked the suspended sentence. (3/20/15 RP 19; CP 125-127). At seventy-eight years old, Mr. Smith was sentenced to 118 months in prison. (CP 49-58). He makes this timely appeal. (CP 128-151).

### III. ARGUMENT

A. The Trial Court Abused Its Discretion By Revoking Mr. Smith's SSOSA.

The Special Sex Offender Sentencing Alternative (SSOSA) was created to provide a sentencing alternative for a first-time offender who is found to be amenable to treatment and who voluntarily and affirmatively admits he committed all the elements of the crime to which he pleads guilty. RCW 9.94A.670 (2)(a). The court is authorized to revoke a suspended sentence at any time

during the period of community custody and order execution of the sentence if: (a) the offender violates the conditions or (b) the court finds the offender is failing to make satisfactory progress in treatment. RCW 9.94A.670 (11); *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999)

At the March 20, 2015 hearing, Mr. Smith stipulated that he had violated conditions of his SSOSA. Under such circumstances, a sentencing judge has the discretion to impose up to a 60-day jail term in lieu of executing the original sentence. RCW 9.94A.631. Here, the issue on appeal is whether the trial court abused its discretion in selecting to enforce the remaining 118- month suspended sentence rather than impose probation sanctions.

A court's revocation of a SSOSA suspended sentence due to violations is reviewed for an abuse of discretion. *State v. McCormick*, 166 Wn.2d 689, 705-06, 213 P.3d 32 (2009). An abuse of discretion occurs when the decision of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable reasons if the trial court relies on unsupported facts. *Id.* at 654.

Here, the court engaged in a weighing of the violations against the obvious mitigating factors of advanced age, satisfactory treatment progress, low risk, no previous violations, and current low level violations. The court did not consider, however, the treatment provider letter or the supervisory documents that Mr. Smith and Ms. Wheeler signed.

On February 13, 2014 Mr. Smith and Ms. Wheeler met with Dr. Cross to discuss the responsibilities of a chaperone. Dr. Cross's letter regarding that meeting clearly laid out for the court that Mr. Smith was ready to have supervised contact with minors [not his victim]. The provider further stated that such contact could occur in Ms. Wheeler's home and she should maintain visual supervision of Mr. Smith whenever minors were nearby or had potential to interact with him. Further, the document Ms. Wheeler signed, after learning of her responsibilities from the provider, included the following:

**“The requirements of supervision were discussed. I was informed that I must be able to see Ron Smith at all times when children are present, or it is not supervision.**

DOC Form 05-695 (sic) lists specific rules for supervision

that must be followed at all times when I am providing supervision.” (Emphasis added).

Two of the paragraphs on form DOC 05-685 are crossed out and initialed, it appears, by the CCO Officer “KC”. The two paragraphs are labeled “Home Visits” and “Overnight Visits”. (CP 94). Nothing on that document indicates why those paragraphs were crossed out, or why Ms. Wheeler’s initials and Mr. Smith’s initials were not included for those two paragraphs.

The court should have considered these documents in conjunction with the statement by Ms. Wheeler that she believed it was okay for Mr. Smith to be around her 17 year old granddaughter because she was chaperoning him. It is reasonable that, based on the provider’s instructions and letter, that both Ms. Wheeler and Mr. Smith believed the time had passed for him to be isolated from any children, so long as he was being supervised.

Further, when Mr. Smith was questioned about the alleged violations, his response was, “I thought it was okay because Karen [Ms. Wheeler] is my chaperone.” (CP 103). There was no allegation that Mr. Smith was ever alone with any minor female.

Rather than consider the documents and the understanding that Mr. Smith had regarding his supervision, the court instead engaged in speculation about what could happen. The court imagined that Mr. Smith would “groom” someone, set up situations where he could take advantage of her, and potentially exploit her by taking photos of her in the bathroom. None of these behaviors were alleged, but the court’s imaginings appear to have swayed its decision to revoke the SSOSA. This speculation is particularly problematic when viewed with a backdrop of Mr. Smith’s advanced age, and the likelihood that he will be serving the remainder of his life in prison based on low level violations from a misunderstanding of the rules.

A court is authorized to impose jail time of 60 days per violation, in lieu of a revocation. *State v. Partee*, 141 Wn.App. 355, 362, 170 P.3d 60 (2007). The revocation of the SSOSA under these facts and mitigating factors amounts to an abuse of discretion. Mr. Smith’s SSOSA should be reinstated.

B. The Community Custody Condition Prohibiting Perusing Pornography As Defined By The Treatment Provider Is Unconstitutionally Vague.

The due process clause of the Fourteenth Amendment and article I §3 of the state constitution requires that citizens be afforded fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Unlike a statute, a sentencing condition is not a law enacted by the legislature, and thus does not have a presumption of validity. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

A vagueness challenge to a condition of community custody may be raised for the first time on appeal. *Id.* at 745. Whether a sentencing condition offends a constitutional right is a legal question subsumed within a review for abuse of discretion, and thus is reviewed under an abuse of discretion standard. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374-375, 229 P.3d 686 (2010); *Bahl* 164 Wn.2d at 753. An unconstitutional condition is manifestly unreasonable. A condition of probation will be reversed if it is manifestly unreasonable. *State v. Valencia*, 169 Wn.2d 782,792, 239 P.3d 1059 (2010).

The due process vagueness doctrine protects from arbitrary, ad hoc, or discriminatory enforcement. *State v. Halstein*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if it does not define the offense with sufficient

definiteness such that ordinary people can understand what conduct is prohibited; or if it does not provide ascertainable standards of guilt to protect from arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

Similar to Mr. Smith, in *Bahl*, the trial court imposed a community custody condition, which restricted possession and access to “pornographic material, as directed by the supervising Community Corrections Officer.” *Bahl*, 164 Wn.2d at 743. Citing both state and federal cases, the Court noted that many courts have held such sentencing conditions to be unconstitutionally vague. *Id.* at 754 (citing *United States v. Loy*, 127 F.3d 251 (3d Cir. 2001); *United States v. Guagliardo*, 278 F.3d 868, 872 (9<sup>th</sup> Cir.2002)); *State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005).

On review, the *Bahl* Court reasoned that conditions may be imposed that restrict free speech rights if necessary, but restrictions implicating First Amendment rights must be clear and reasonably necessary to accomplish essential state needs and public order. *Id.* at 758.

The Court observed that the term “pornography” has never been given a precise legal definition. *Id.* at 754. Citing *Loy*, the

Court wrote, “the term ‘pornography’, unmoored from any particular statute, has never received a precise legal definition from the Supreme Court or any other federal court of appeals, and remains undefined in the federal code.” *Loy*, 237 F.3d at 263.

Washington statutes define “lewd matter” as synonymous with “obscene matter,” under RCW 7.48A.010(2); however, pornography is not defined. *Bahl*, 164 Wn.2d at 756. The Court concluded that a restriction on accessing or possessing pornographic materials was unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. It further held that the fact that the condition provided Bahl’s community corrections officer could direct what fell within the condition as acknowledgement that on its face, there were no ascertainable standards for enforcement. *Id.* Similarly here, the unconstitutional vagueness of the custody condition is not resolved by the provision that “pornography” was to be defined by the treatment provider.

The sentencing court here abused its discretion when it imposed an unconstitutional condition, which was manifestly unreasonable. The condition must be stricken. *State v. Land*, 172 Wn.App. 593, 604, 295 P.3d 782 (2013).

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smith respectfully asks this Court to reverse the trial court's revocation of his suspended sentence and reinstate his SSOSA. Mr. Smith also asks this Court to strike the unconstitutionally vague community custody condition.

Respectfully submitted this 21<sup>st</sup> day of October, 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, certify that on October 21, 2015, I served by electronic service by prior agreement between the parties, or first class, postage prepaid, USPS, a true and correct copy of the appellant's brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Graham, WA on October 21, 2015.

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