

29065-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY C. UNDERWOOD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. The trial court erred in imposing a sentencing condition prohibiting the possession of "any materials – printed or visual --- depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer."

II.

ISSUES PRESENTED

- A. IS THE COMMUNITY SUPERVISION PROVISION PROSCRIBING THE POSSESSION OF "ANY MATERIALS - PRINTED OR VISUAL --- DEPICTING ADULTS AND/OR MINORS ENGAGED IN SEXUAL CONTACT AND/OR SEXUALLY EXPLICIT ACTIVITIES INTENDED TO SEXUALLY GRATIFY THEMSELVES OR THE VIEWER" A PROPER COMMUNITY SERVICE CONDITION?
- B. IS THE DEFENDANT'S ISSUE RIPE FOR REVIEW?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

The defendant claims that the sentencing court erred by placing an unconstitutionally vague condition in the defendant's community supervision conditions. There are at least two issues raised by the defendant that require resolution. The first is whether or not the community supervision condition is unconstitutionally vague and two, whether the defendant's claim is ripe for review at this time.

The contested condition prohibits the defendant from possessing "any materials – printed or visual – depicting adults and/or minors engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer." CP 69.

The Washington State Supreme Court has made attempts to address this area of the law, and has issued rulings indicating that restricting offender behavior using the term "pornography" will not pass

muster. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). The defendant relies on the Supreme Court’s opinions regarding vagueness and the term “pornography.” The condition under examination *does not use* the term “pornography.”

Given the form in which the condition was drafted in this case, it is difficult to see how the condition could have been made less vague. The defendant claims that the condition is vague because “any materials—printed or visual” is the same thing as the term “pornography.” This is not so. The defendant leaves out the second part of the condition in the community supervision condition. The proscribed images are not, and could not, be “...any nude depiction...” as claimed by the defendant. Brf. of App. pg. 8. The condition proscribes the possession of any materials depicting adults and/or minors “*engaged in sexual contact and/or sexually explicit activities intended to sexually gratify themselves or the viewer.*”

So, the defendant’s claim that the condition proscribes a vague set of materials, similar to pornography, does not apply to this wording. The defendant leaves out the parts regarding sexual contact and/or sexually explicit *activities* intended to sexually gratify themselves or the viewer.

The defendant's claim that the language of the condition could include a picture from Playboy magazine or a photograph of the statue of David is not apt. A restricted image could not be just nude bodies. The persons in the scenes must be involved in sexual contact and/or sexually explicit activities before the image becomes violative of the condition. The hypothetical photograph, in addition to the requirement to contain sexual contact and/or sexually explicit activities, must be intended to sexually gratify the persons photographed or the viewer. Using the defendant's examples, the statue of David does not contain any sexual contact or sexually explicit activities. Playboy pictures are more likely to be proscribed as they could be produced for purposes of sexually gratifying the viewer. The fact that the defendant might be able to create a scenario that meets defense needs to prove ambiguity does not mean the condition *is* ambiguous.

The Washington State Supreme Court has not ruled on what language will satisfy the Court. The latest series of cases have gone to lengths to find obscure rationales for reversing "vague" sentencing conditions. For example, in *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059, 1064 (2010) the Court noted that "paraphernalia" has been defined in Webster's Third New International Dictionary 1638 (2002) as "property

of a married woman that she can dispose of by will.” Given that *Valencia* was convicted of possession of marijuana with intent to deliver and conspiracy to commit possession of marijuana with intent to deliver, the outer limits of credulity are being reached. No defendant convicted of two separate drug charges could honestly believe that the trial court had prohibited the possession of the “property of a married woman.”

In this case, the defendant pled guilty to two counts of child molestation. As applied to this individual it does not seem reasonable that he cannot tell what kind of images are proscribed by the community supervision condition.

The second issue involves the question of whether the issue raised by the defendant is ripe for review. The State submits that it is not. The defendant is in prison. The contested community supervision condition cannot apply to the defendant until the defendant is released from prison. The court in *State v. Vant*, 145 Wn. App. 592, 605, 186 P.3d 1149 (2008), was faced with a condition similar to the one in this case. *Id.* The *Vant* court did not reach a decision on the question of “vagueness.” Rather, the court noted, “...[I]t cannot be said that any future application of the condition will be unconstitutionally vague as applied to the facts.” *Vant, supra* at 605. The *Vant* court noted that if the defendant was ever charged

with a violation of the condition, he could raise a challenge at that time. *Vant, supra* at 606.

The Washington State Supreme Court in *Bahl* outlined three areas to address when reviewing whether or not a sentencing condition is ripe for review. Those three items are: whether the issues raised are primarily legal; whether the issues do not require further factual development; and whether the challenged action is final. *Bahl, supra* at 751. The *Bahl* Court used “self-proving” logic to decide that if a condition is too vague, then the condition is also ripe for review. *Bahl, supra* at 750-752.

The question in this case is not primarily legal as the actual item or image possessed by the defendant must be assessed. This factor is unintentionally proved by the defendant with his examples questioning what is, and what is not, prohibited under the language of the sentencing condition. The *Bahl* Court found the use of the term “pornography” vague and that issue could be resolved on purely legal grounds. *Bahl, supra* at 750-752. The community supervision condition in this case does not contain the term “pornography” which takes this case out of the *Bahl* analysis.

As for the second factor, whether there is a need for further factual development, the State has addressed that issue above when discussing

whether the condition in this case is “purely legal.” The condition in this case requires not just naked depictions, the persons in the images must be engaged in proscribed *sexual activity*. The requirement for particular kinds of sexual activity to be depicted requires additional facts prior to the imposition of sanctions on the defendant.

The third factor is whether the condition is “final.” The State concedes that the imposed condition is not subject to interruptions. While the courts are not particularly clear on what “final” means, it would seem that a sentencing condition is “final” by any common meanings of the term “final.”

The Supreme Court’s holding in *Bahl* containing the “if the condition is vague, it is automatically ripe” logic does not apply in this case as the condition in question is not vague as it restricts observation of material which involves adult or minor sexual activities. This is not the more typical case where a trial court drafts an order that prohibits the possession of pornography. The questioned condition in this case passes the “vagueness” challenges raised by the defendant.

The trial court’s holdings should be affirmed.

In the alternative, if the language of the contested condition is still deemed to be too “vague,” the State suggests that this case be remanded to the trial court for the purposes of correcting the questioned sentencing condition. Any remand should specifically limit review and correction to the sentencing condition only.

V.

CONCLUSION

For the reasons stated, the community custody provision in question should be affirmed.

Dated this 8th day of December, 2010.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent