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FEBRUARY 27, 2012  
Court of Appeals  
Division III  
State of Washington

No. 29857-4-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JERRY DANIEL SHEEHAN,  
Defendant/Appellant.

APPEAL FROM THE PEND OREILLE COUNTY SUPERIOR COURT  
Honorable Rebecca Baker

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

**1. Because there is no objective definition of what constitutes a “substantial and compelling reason”, the statutes governing the imposition and review of an exceptional sentence deprive Mr. Sheehan of due process and a meaningful review upon appeal.**

**2. Because the sentence of confinement and/or community custody is indeterminate and exceeds the statutory maximum for each offense, the sentence violates the Sentencing Reform Act.**

The State generally responds that since the jury found the aggravating factor of abuse of trust as to all five counts, the aggregate exceptional sentences were justified. Brief of Respondent (hereafter, “BOR”), pp. 5–8, 15.

Appellant does not dispute the finding. He maintains the effect of Blakely<sup>1</sup> on the statutory scheme that requires a judge to find substantial and compelling reasons before acting upon the finding by imposing an exceptional sentence results in lack of an objective standard by which to gauge the decision, thereby depriving him of due process and the opportunity for meaningful review upon appeal. Further, aggregate terms of confinement and community custody may not exceed the statutory

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<sup>1</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

maximum for each crime, as they do here. Appellant incorporates his arguments as set forth at pages 5–19 (Issue 1) and pages 19–22 (Issue 2) of Brief of Appellant.

**3. The sentencing court violated due process and exceeded its statutory authority by imposing a registration requirement in excess of fifteen years following release from confinement.**

The State responds that sex offender registration requirements can exceed the statutory maximum for punishment. BOR, pp. 8–9. The issue raised by appellant has nothing to do with statutory maximums.

Here, the court sentenced Mr. Sheehan to 22 years of confinement followed by 13 years of community custody, yielding a total sentence of 35 years. Reasoning that “community custody counts as confinement”, the court ordered that Mr. Sheehan’s obligation to register as a sex offender would not expire until 15 years after the total sentence of 35 years was served. RP 2680–681, CP 299.

This “reasoning” disregards the plain language of RCW 9A.44.140(2), which provides that “the duty to register shall end fifteen years after the last date or release from confinement”. Contrary to the trial court’s misperception, “confinement” is distinct from any period of community custody. *See State v. Gossage*, 138 Wn. App. 298, 301, 304-

305, 156 P.3d 951 (2007), *rev'd on other grounds by* 165 Wn.2d 1, 195 P.3d 525 (2008).

Provided that upon release from incarceration Mr. Sheehan spends fifteen consecutive years in the community without being convicted of a disqualifying offense, his obligation to register should expire 15 years after he has served 22 years of confinement or after any earlier release date based upon earned good time. RCW 9A.44.140(2). The trial court exceeded its authority by effectively doubling the length of the registration requirement set by the legislature. For the reasons set forth here and in Brief of Appellant, pp. 22–24, the matter must be remanded for resentencing to the statutory length.

**4. The conditions of community custody relating to use or access to any form of pornography are unconstitutionally vague.**

Appellant accepts the State's apparent concession on this issue. *See* BOR, p. 9 (possession), pp. 14–15 (restrict internet access). The remedy for the unconstitutionally vague prohibitions regarding pornography and use of pornography-blocking software is to strike the offending conditions. *See* State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008); State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005).

Further, the State’s recommendation that “the Department of Corrections should be allowed to search for prohibited porn either on the computer or for [sic] published material” and its request for “authorization to control possession, use, or access to child pornography in any form, including the internet” should be summarily disregarded. BOR, p. 9, 16, 17. It is not the province of a reviewing court to create and impose conditions of sentence. The proposed target —“prohibited porn”—is identical to the subject of the conditions being challenged herein, and is equally vague and therefore equally offensive.

**5. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that were not crime-related.**

a. Chemical dependency evaluation and treatment. Appellant accepts the State’s concession on this issue. BOR, p. 12, 14–15.

b. Mental health evaluation and treatment. The State acknowledges that the procedural requirements of former RCW 9.94A.505(9) were not met. BOR 13–14. That statute authorizes a trial court to order an offender to submit to mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176

P.3d 549 (2008). A court may therefore not order an offender to participate in mental health treatment as a condition of community custody “unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime.” State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); *accord* State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); Brooks, 142 Wn. App. at 850–52. The State posits without any supporting authority that imposition of an exceptional sentence trumps (1) the legislature’s determination that mental health evaluation and treatment may only be imposed in specific situations and (2) the clear holdings of the above-cited cases.

The court, in sentencing Mr. Sheehan, did not make the statutorily mandated finding that he was a “mentally ill person” as defined by RCW 71.24.025 and that this mental illness influenced the crimes for which he was convicted. The trial court thus erred in imposing the condition pertaining to mental health evaluation and treatment, and the offending condition must be stricken. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 354.

c. Prohibiting and restricting Internet access as a condition of community custody. Appellant accepts the State's apparent concession on this issue. *See* BOR, p. 14, 16, 17.

**6. The no dating or forming relationships without prior approval condition exceeds the trial court's sentencing authority and impermissibly infringes upon Mr. Sheehan's constitutional rights.**

The State responds that this condition is appropriate because “[d]ating relationships ... may be crime-related because potential partner may be responsible for the safety of live-in or visiting minors. Thus approval of dating and/or sexual relationships is proper.” BOR, p. 18. The State cites State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006) as authority. BOR, p. 12. Unlike in this case, the sentencing conditions in Autrey prohibited the very narrow conduct of “sexual contact.”

In relevant part, the conditions at issue in Autrey were “[t]hat you do not have sexual contact with anyone without his or her explicit consent” and [t]hat you do not have sexual contact with anyone without prior approval of your therapist and your community corrections officer.” Autry, 136 Wn. App. at 465. The defendants in the companion cases had been convicted respectively of rape of a child and second degree assault with sexual motivation, involving a minor. Id. at 467. This Court

determined the two conditions relating to adult sexual contact were reasonably related to the circumstances of the crimes involving children and were therefore appropriate. “Here, the offender's freedom of choosing even adult sexual partners is reasonably related to their crimes because potential romantic partners may be responsible for the safety of live-in or visiting minors.” Id. at 468.

In this case, the condition prohibits the very broad and vague conduct of “dating or forming relationships” without prior approval. The condition is not reasonably crime-related and a narrower restriction could easily have been drafted. As it stands, the prohibition against “forming relationships” covers any number of non-sexual innocuous activities between two people and therefore violates Mr. Sheehan’s right to freedom of association. The victim in this case was a minor child and a member of the family relationship. A more focused condition such as requiring prior approval before dating or forming dating relationships<sup>2</sup> with single parents who have minor children at home, would serve the State’s interest in monitoring Mr. Sheehan’s relevant activities and his compliance with recommended treatment. As written, however, the condition is overbroad and is not narrowly tailored, and infringes upon Mr. Sheehan’s right to

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<sup>2</sup> Or, instead just prohibiting sexual contact, as in Autrey.

freedom of association. Since the infringement is impermissible, the condition should be stricken. *See* Brief of Appellant, pp. 33–36.

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, this Court should reverse the exceptional sentence or, in the alternative, remand the matter for resentencing.

Respectfully submitted on February 27, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 27, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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