

NO. 79988-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ERIC G. BAHL,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Has the defendant waived any argument that certain conditions of community custody are unconstitutionally vague, where he did not object to those conditions at sentencing on that ground, and he has not demonstrated imposition of those conditions constitute manifest constitutional error?

2. Should the Court consider a pre-enforcement challenge to community custody conditions on the ground that they are unconstitutionally vague?

3. Are certain community custody conditions imposed by the trial court unconstitutionally vague where the terms are defined by other statutes, and each condition has a core of conduct that is included in those terms?

## **II. STATEMENT OF THE CASE**

The significant facts in this case have been mostly outlined in the State's response brief. Additional facts are outlined as follows:

The Department of Correction recommended the court impose a number of conditions of community. Two of those conditions were

Do not possess or access pornographic materials, as directed by the supervising Community Corrections

Officer. Do not frequent establishments whose primary business pertains to sexually explicit or erotic material.

Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.

The defendant objected to these conditions on the basis that they were not crime related. He did not argue that they were unconstitutionally vague. 7-26-05 RP 8-9. The court included those conditions as part of the defendant's community custody.

### **III. ARGUMENT**

#### **A. THE DEFENDANT DID NOT PRESERVE THIS ISSUE FOR REVIEW. HE HAS NOT DEMONSTRATED A MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE.**

Generally an appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a), State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A party is limited to review on the specific ground asserted at the trial level. Kirkman, 159 Wn.2d at 926, State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Grounds which have not been argued at the trial level are not considered on appeal because the trial court has not been given the opportunity to consider or remedy a claimed error. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

At sentencing the defendant objected to the conditions he now challenges on the basis that they were not crime related. 7-26-05 RP 8-9. He did not challenge those conditions on the basis he now asserts. He has therefore failed to preserve for review the issue of whether these conditions were unconstitutionally vague. Had the defendant claimed the conditions were vague when the court ordered them at sentencing, the court would have had the opportunity to clarify those conditions for him. Because he did not do so, the defendant has waived review of this issue.

A limited class of errors (manifest error(s) affecting a constitutional right) may be raised for the first time on appeal. RAP 2.5(a)(3). The "manifest error" exception is a narrow one, permitting review only of "certain constitutional questions." State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 343, 835 P.2d 251 (1992). An error is "manifest" under RAP 2.5 if it is "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." Lynn, 67 Wn. App. at 345. Actual prejudice must be apparent from the record before an alleged error constitutes a "manifest" error. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). If the record is not sufficient to determine the merits of the constitutional claim then the

claimed error is not manifest and appellate review is not warranted. State v. Yonker, 133 Wn. App. 627, 634, 137 P.3d 888 (2006).

The defendant cannot sustain his burden to show actual prejudice because he is not currently supervised, nor has he been accused of violating one of the challenged conditions of community custody. There is nothing in the record to rely upon to determine whether the challenged conditions were vague as applied to the defendant's conduct. There is no certainty that someday he may be accused of violating the conditions of his sentence based on conduct which was at the periphery of the conditions imposed. Thus, he cannot show that he has been actually prejudiced by those conditions imposed by the court that he now challenges

**B. THE COURT SHOULD NOT CONSIDER A PRE-ENFORCEMENT CHALLENGE TO COMMUNITY CUSTODY CONDITIONS ON THE BASIS THAT THEY ARE VAGUE**

**1. A Pre-Enforcement Challenge On The Basis The Conditions Are Vague Is Not Ripe For Review And Invites Unnecessary Litigation.**

When a vagueness challenge does not involve First Amendment rights it must be evaluated in light of the particular facts of the case. Thus, when the challenge does not involve First Amendment interests a challenge must be judged as applied to the challenging party's conduct. Spokane v. Douglass, 115 Wn.2d 171,

182, 795 P.2d 693 (1990). Two of the challenged conditions here do not involve a First Amendment right. Any challenge to those conditions must be made in light of the defendant's conduct.

Arguably the condition prohibiting pornography does involve a First Amendment right. Obscene materials are not protected by the First Amendment. Roth v. United States, 354 U.S. 476, 484-85, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). However, the First Amendment does protect private possession of obscene material. Stanley v. Georgia, 394 U.S. 557, 568, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). The Court of Appeals considered the same pornography condition at issue in this case and said it did not involve a First Amendment right. State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). However, that court did not consider the Court's decision in Stanley. Even if this condition encompasses a First Amendment right, there are valid reasons why this Court should treat the challenge the same as the other conditions. For those reasons this Court should not consider a challenge to the pornography condition unless there is some conduct which provides context for that challenge.

The rationale for the rule which limits vagueness challenges to matters that do not involve the First Amendment rests on considerations of judicial economy. “[A]pplication of this rule frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.” United States v. National Dairy Products Corp., 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Even where a party has argued a statute violates the First Amendment, the Court has been cautious to avoid facial invalidation of the statute when it was unnecessary. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02, 105 S.Ct. 2794, 86 L.E.d2d 394 (1985). The Court recognized two cardinal rules: (1) to never anticipate a question of constitutional law before it was necessary to decide it, and (2) never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These guideposts were based on the principle that a statute may be both constitutional in part and unconstitutional in part. Brockett, 472 U.S. at 502.

In the present case the defendant is still in custody, and has not begun to serve his term of community custody. As a result he

has not even had the opportunity to violate the challenged conditions. It may be wholly unnecessary to ever consider whether the conditions are vague because the defendant may never violate them. The defendant did not tell the court at sentencing that he did not understand the scope of those conditions. That fact suggests that the defendant understood what the court prohibited, and the conditions were not vague to him.

Some courts have analyzed whether certain community custody conditions were unconstitutionally vague before those conditions were alleged to have been violated. State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992), State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006), and State v. Riles, 86 Wn. App. 10, 936 P.2d 11 (1997), affirmed, 135 Wn.2d 326, 957 P.2d 655 (1998). In none of these cases did the court analyze whether the conditions at issue involved a First Amendment right or whether the challenge should be analyzed either facially or as applied to the offender's conduct.

Other Courts have refused to consider constitutional challenges to supervision conditions in the abstract. Where a defendant sentence was suspended after his conviction as a habitual offender and he was placed on 20 years of probation, the

court refused to consider whether or not his sentence was cruel and unusual in the event it was revoked because the issue was not ripe for review. State v. Langland, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985). “[A] person may not urge unconstitutionality of a statute unless he is harmfully affected by the particular feature of the statute alleged to be unconstitutional.” The court followed this reasoning when addressing a vagueness challenge to a community custody condition prohibiting the defendant from possessing or using any paraphernalia that could be used to ingest or process controlled substances. State v. Motter, 139 Wn. App. 797, 804, 162 P.3d 1190 (2007).

Even courts which have considered pre-enforcement vagueness challenges have only analyzed a facial challenge to the condition. For example, in Llamas-Villa the defendant challenged the condition of community placement prohibiting him from associating with persons using, possessing, or dealing controlled substances. He claimed that this was not sufficiently narrowly drawn because it should have been limited to persons he knew were engaged in that activity. The Court refused to consider the issue, stating that the defendant could address that issue if he was ever alleged to have violated that condition. Llamas-Villa, 67 Wn.

App. at 456. In Riles the defendant challenged a condition that he not go where children are known to congregate. He claimed that the condition would preclude him from all public places. The Court refused to consider this argument, stating “this challenge can best be resolved as applied to Riles’ actual conduct if and when he is accused of violating a condition.” Riles, 86 Wn. App. at 18.

This court should follow the authority of other courts that have refused to consider vagueness challenges to conditions of an offender’s sentence before they have been alleged to have been violated. As stated, considerations of judicial economy form the basis for the rule that a vagueness challenge is analyzed as applied to the affected party’s conduct. Judicial economy would not be served by consideration of the defendant’s vagueness challenges before he is alleged to have violated them.

The relief the defendant sought in this case was remand to the Superior Court to impose conditions that were not vague. Brief of Appellant at 14. This request contemplates that the conditions could be constitutionally valid under some circumstances. If this Court were to allow consideration the vagueness challenge without any conduct to tie it to, the Court would have to analyze the issue by resort to hypothetical situations. If this Court found that there

were hypothetical situations in which the conditions could be vague, the defendant's suggested remedy would be to remand to the trial court for a second try at making the conditions sufficiently definite to cover those hypothetically vague situations. The defendant would be free to again appeal on the ground of unconstitutional vagueness prior to enforcement of those conditions. The appellate courts would again be in the position of attempting to determine the issue in a vacuum. The consequence of this procedure would be an endless cycle of appeals and remand for the period of the defendant's term of community custody.

Further, if a defendant is successful in convincing a court that there are some hypothetical situations in which the condition imposed was vague, a decision remanding the matter to the trial court to try again could open the floodgate for other defendants who have been ordered to comply with similar conditions to bring endless rounds of appeals challenging those similar conditions even though the hypothetical situations contemplated by the court may never come up for those other defendants.

As discussed below, there is a core of conduct which is encompassed in the conditions imposed by the trial court which a reasonable person would understand is prohibited. Thus the

defendant may never violate the conditions imposed. This is particularly apparent in light of the fact that the defendant never indicated to the trial court that he did not understand the conditions ordered by the court. If he is honestly uncertain about the scope of those conditions, the defendant may bring a motion to clarify the conditions in the trial court. This procedure balances the defendant's interest in knowing what is prohibited and the court's interest in judicial economy.

A pre-enforcement challenge to the community custody conditions at issue here raises the serious potential for wasted judicial resources. In contrast, because there is a core of conduct which is encompassed in the conditions, and defendant has the option to ask for clarification of the conditions if he is unclear about conduct at the periphery of that core, the risk that the defendant may violate the conditions because he could not determine what was proscribed is relatively minimal.

**C. THE CONDITIONS IMPOSED BY THE COURT WERE NOT UNCONSTITUTIONALLY VAUGE.**

If this Court decides review is appropriate the conditions challenged by the defendant are not unconstitutionally vague.

The due process vagueness doctrine is designed to provide citizens with fair warning of what conduct they must avoid, and to protect them from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute or condition is presumed to be constitutional unless the challenging party proves it to be unconstitutional beyond a reasonable doubt. State v. Sansone, 127 Wn. App. at 639.

The test for determining whether a condition is sufficiently definite is common intelligence. "If persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some areas of disagreement, the ordinance is sufficiently definite." Douglass, 115 Wn.2d at 179. Citizens are expected to resort to statements of law in statutes and court rulings when interpreting statutes and sentencing conditions. Douglass, 115 Wn.2d at 180.

The vagueness doctrine does not require impossible standards for specificity. This Court has stated that it will not void a legislative enactment merely because all of its possible applications cannot be specifically anticipated. State v. Smith, 111 Wn.2d 1, 10, 959 P.2d 372 (1988). This Court reasoned "[m]any criminal laws would be rendered void, and still more would be narrowed to the point of ineffectiveness, if we permitted the vagueness doctrine to

be used 'to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.'" Smith, 111 Wn.2d at 10 quoting, Colten v. Kentucky, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). This reasoning should apply equally to vagueness challenges to community custody conditions ordered by a trial court.

**1. The Pornography Condition Is Not Unconstitutionally Vague.**

When considering whether a statute or condition is unconstitutionally vague, courts have looked to other statutes and statements of the law for guidance. Smith, 111 Wn.2d at 9, State v. Smith, 130 Wn. App. 721, 727, 123 P.3d 896 (2005). Statutory and case authority provides guidance here to show that there is a core of conduct which is encompassed in pornography prohibition.

RCW 9.68.140 makes "promoting pornography" a crime. That statute provides that "[a] person who, for profit-making purposes and with knowledge, sells, exhibits, displays, or produces any lewd matter as defined in RCW 7.48A.010 is guilty of promoting pornography."

“Lewd matter” is in turn defined under RCW 7.48A.010(2):

(2) “Lewd matter” is synonymous with “obscene matter” ...

The statute then enumerates those materials which are prohibited.

“Lewdness” in turn has “those meanings which are assigned to it under the common law”, and “prurient” means “that which incites lasciviousness or lust.” RCW 7.48A.010 (3) & (9). These definitions provide sufficient notice of what has been proscribed, and provides guidelines for enforcing the condition.

The crime and definitions have survived challenges under both the state and federal constitutions. State v. Reece, 110 Wn.2d 766, 774, 776, 757 P.2d 947 (1988), cert. denied, 493 U.S. 812 (1989). Although Reece addressed whether RCW 9.68.140 and RCW 7.48A.010 withstood scrutiny under the First Amendment and Art. 1, §5, it also considered whether the materials at issue were obscene under those statutes. This Court reviewed those materials and concluded that it did. Reece, 110 Wn.2d at 953. This ruling suggests that there is a core of conduct encompassing the proscription against pornography, and that ordinary persons are not left to guess at its meaning. Thus, the pornography condition is not unconstitutionally vague.

The Court of Appeals came to a different conclusion when considering a similar condition prohibiting possession of pornography as applied to the defendant's conduct in Sansone. The court's reasoning in that case was flawed. The Court in Sansone did not consider Douglass and other authority which used statutes and legal authority to determine whether there was a core of conduct which ordinary persons would understand was swept within the prohibited conduct. Nor did it consider the fact that this Court had in effect found the term pornography contained such core conduct in Reece. The court should not have decided the case on vagueness grounds. Instead the court should have simply stated that the conduct the defendant was accused of did not fall within the definition of pornography as recognized in Washington.

The Sansone decision is further flawed because it leaves the impression that it found a proscription against pornography as a community custody condition would be vague in any circumstance. As demonstrated by Reece that is not true.

Sansone relied on the reasoning in United States v. Loy, 234 F.3d 251 (3<sup>rd</sup> Cir. 2001) and United States v. Guagliardo, 278 F.3d 868 (9<sup>th</sup> Cir. 2002). Neither of these cases should be considered

persuasive authority for the proposition that pornography is an unconstitutionally vague term.

In Loy the defendant brought a pre-enforcement challenge to a condition of supervised release that he not possess all forms of pornography, including legitimate adult pornography on the basis that the term “pornography” was unconstitutionally vague. Loy, 237 F.3d at 262. The court agreed for several reasons. First, while the term obscenity had been extensively examined “the term ‘pornography,’ unmoored from any particular statute, has never received a precise legal definition” from any court and was undefined in the federal code. Loy, 237 F.3d at 263. As shown the term has been defined by statutes in Washington. Pornography is defined as lewd matter, which is further defined as synonymous with obscene matter. Unlike Loy the terms are defined here.

The Loy court also said it could note numerous examples of materials which were sexually explicit. However it was debatable whether those items were pornographic. Loy, 237 F.3d at 264. This reasoning ignores the rule that, notwithstanding some areas of disagreement, if common persons can understand what is proscribed the condition is sufficiently definite. Douglass, 115 Wn.2d at 179.

Loy also stated the condition must be narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation to avoid First Amendment infirmity, relying on U.S. v. Crandon, 173 F.3d 122 (3<sup>rd</sup> Cir. 1999). Loy, 237 F.3d at 264. Crandon relied on 18 U.S.C. §3583 to determine whether a condition prohibiting the defendant from using the internet was proper. In Washington an offender's constitutional rights are subject to SRA-authorized infringements. State v. Riles, 135 Wn.2d at 347. This is different from Federal law. While the Federal statute requires that the condition "involves no greater deprivation of liberty that is reasonably necessary for the purposes of deterrence and protection of the public," Washington only requires the condition be "crime related." Compare 18 U.S.C. §3583(d)(2) with RCW 9.94A.712(6)(a)(i) and RCW 9.94A.700(5).

The decision in Guagliardo is no more persuasive in deciding the issue than the decision in Loy. The Court in Guagliardo simply relied on the reasoning in Loy with no further analysis. Guagliardo, 278 F.3d at 872.

Finally, the Court in Sansone did not consider authority which found a prohibition against possessing pornography was not unconstitutionally vague. One court recognized that circuit courts

which have considered similar conditions have come to a different conclusion than the Loy court did. United States v. Ristine, 335 F.3d 692, 695 (8<sup>th</sup> Cir. 2003).

**2. The Prohibition Against Frequenting Establishments Whose Primary Business Pertains To Sexually Explicit Or Erotic Materials And Possession Of Sexual Stimulus Material Are Not Unconstitutionally Vague.**

The State has argued these conditions are not unconstitutionally vague in its response brief in the Court of Appeals. The State will rely on those arguments presented there.

**IV. CONCLUSION**

For the forgoing reason, the State requests this Court affirm the Court of Appeals and decline to consider a pre-enforcement challenge to the community custody condition on the basis that they are unconstitutionally vague. In the alternative the State asks this Court to find the conditions are not unconstitutionally vague.

Respectfully submitted on February 6, 2008.

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