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NO. 56812-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC G. BAHL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Were the conditions of community custody that relate to possession of pornographic materials unconstitutionally overbroad or vague?

2. Were the conditions of community custody that prohibit the defendant from frequenting establishments whose primary business pertains to sexually explicit or erotic material unconstitutionally overbroad or vague?

3. Was the condition of community custody prohibition against possession or control of sexual stimulus material for the defendant's particular deviancy unconstitutionally vague?

4. The defendant raises the issue of whether the condition that the defendant not possess sexual stimulus material for his particular deviancy as defined by the supervising community corrections officer and therapist is an unlawful delegation of authority for the first time on appeal. Should the court decline to consider this issue because he has not shown that it is a manifest error involving a constitutional right pursuant to RAP 2.5(a)(3)?

5. Did the trial court improperly delegate supervision of conditions of community custody to the Department of Corrections?

II. STATEMENT OF THE CASE

On September 7, 2004 K.G. was in the process of divorcing her husband. That evening she had a fight with her husband. When he left K.G. was upset, so she took some medication to help her calm down. The drugs caused her to become very sleepy. 1 RP 95, 98, 102-105, 114.

K.G. went to sleep, only to be awoken by the defendant touching her leg. When she asked him what he was doing the defendant told her that he wanted to make sure that she was o.k. and that he wanted to make her feel good. She told the defendant to leave, and he did. K.G. then locked the door behind the defendant. 1 RP 114 - 118.

K.G. went to bed. She was awakened by the defendant performing oral sex on her. K.G. was very frightened by the defendant's actions. The defendant then proceeded to have penile-vaginal sex with K.G. After he ejaculated K.G. was able to talk the defendant into leaving her home. 1 RP 118-119, 131-135.

Police contacted the defendant after K.G. reported the rape. He admitted to coming into K.G.'s house through an unlocked screen door and performing both oral and vaginal sex with K.G. 2 RP 249-252, 255-262.

Another neighbor, J.D., also reported that on that same evening the defendant came to her door about 11:45 p.m. and exposed his penis to her. 1 RP 58, 61-64.

The defendant was charged with Second Degree Rape, First Degree Burglary, Residential Burglary and Indecent Exposure and First Degree Criminal Trespass. 1 CP 150-151. The defendant was convicted of Second Degree Rape and First Degree Burglary. The jury acquitted the defendant of the other two burglary charges and was unable to reach a decision on the Indecent Exposure Charge. 1 CP 49,50, 51,52.

The defendant was sentenced to a maximum term of life and a minimum term within the standard range. 1 CP 20. He was sentenced to serve a term of 18-36 months of community placement on the burglary charge, and a term of community custody on the Second Degree Rape charge. 1 CP 21. The court imposed conditions of community custody which included the following:

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.

1 CP 28.

III. ARGUMENT

A. THE TRIAL COURT SHOULD HAVE THE OPPORTUNITY TO CLARIFY THE PROHIBITION AGAINST PORNOGRAPHY.

A probationer has a due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison. United States v. Guagliardo, 278 F.3d 868, 872, (9th Cir. 2002), cert. denied, 537 U.S. 1004, 123 S.Ct. 515, 154 L.Ed.2d 401 (2002). The defendant argues that the condition of community custody which prohibits him from possessing or accessing pornographic materials as directed by the supervising community corrections officer is unconstitutionally vague and an improper delegation of authority to the Department of Corrections.

Two recent cases have addressed this issue. In one case the court found the prohibition against possessing pornography without the prior consent of his parole office was unconstitutionally vague. State v. Sansone, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). The court relied on federal authority which found that a

“probationer cannot reasonably understand what is encompassed by a blanket prohibition on ‘pornography.’ Guagliardo, 278 F.3d at 872, cited by Sansone, 127 Wn. App. at 638. Here the court prohibited the defendant from possessing pornography. Sansone and Guagliardo establish that such a bare bones prohibition is unconstitutionally vague.

However, a court may prohibit a defendant from possessing pornography if that term has been further defined. A defendant who had been convicted of child molestation had been ordered to “comply with all crime related prohibition”. The Department of Corrections then directed the defendant not to “purchase, own, or [peruse] any pornography, catalogs or material which can be read or viewed for sexual gratification” and which “involved children” in State v. Smith, 130 Wn. App. 721, 724-725, 123 P.3d 896 (2005). The court rejected the defendant’s claim that the holding in Sansone controlled the outcome of his case. Rather, the court ruled that because the prohibition was considerably more specific, that an ordinary person would know without reference to a treatment provider or community corrections officer what was prohibited. Smith, 130 Wn. App. at 727-728.

While the current wording of the condition prohibiting pornography is vague, the trial court should have the opportunity to clarify that condition. The State requests that the Court remand the case to the Trial Court to clarify what it means by “pornography”. If the trial court clarifies the term, the condition will no longer be unconstitutionally vague. In turn, there would be no delegation of authority to the Department of Corrections to define that term.

B. THE CONDITION THAT THE DEFENDANT NOT FREQUENT ESTABLISHMENTS WHOSE PRIMARY BUSINESS PERTAINS TO SEXUALLY EXPLICIT OR EROTIC MATERIAL IS NOT VAGUE OR OVERBROAD.

The defendant next argues that the prohibition against frequenting establishments whose primary business pertains to sexually explicit or erotic material is unconstitutionally vague. The terms “sexually explicit” and “erotic” are sufficiently definite to apprise the defendant of what is prohibited.

A statute is presumed to be constitutional, and a party challenging it has the burden to prove that it is unconstitutional beyond a reasonable doubt. Smith, 130 Wn. App. at 726-727. Due process does not require impossible standards of specificity because some degree of vagueness is inherent in the use of our language. “Thus, a vagueness challenge cannot succeed merely

because a person cannot predict with certainty the exact point at which conduct would be prohibited.” State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998).

Both “sexually explicit” and “erotic” are defined by statute. RCW 9.68.130(2) defines “sexually explicit material.” RCW 9.68A.011(3) lists a number of acts which comprise “sexually explicit conduct”. Each statute sets out specifically what is included within the definitions. Additionally, sexually explicit material excludes specific kinds of materials. The term sexually explicit is not unconstitutionally vague or overbroad. State v. Stelman, 106 Wn. App. 283, 290, 22 P.3d 1287 (2001).

“Erotic materials” is defined by RCW 9.68.050 and RCW 9.68A.150(2). As the term erotic is used in chapter 9.68A it is not unconstitutionally vague. Soundgarden v. Eikenberry, 123 Wn.2d 750, 758-759, 871 P.2d 1050, cert. denied, 513 U.S. 1056, 115 S.Ct. 663, 130 L.Ed.2d 598 (1994).

The defendant argues these statutes are not applicable to the issue raised here. He claims the definitions in those statutes are limited to the crimes listed in the particular RCW chapters in which they are contained. BOA at 6 n. 2. However, terms defined

by statutes do assist in determining whether those terms are unconstitutionally vague as used in the context presented here.

When the Smith court analyzed whether the phrase “sexual gratification” as part of a supervision condition was unconstitutionally vague, it looked to the juvenile sexual motivation statute. Smith, 130 Wn. App. at 727. RCW 13.40.020 defines the terms used in chapter 13.40 RCW. As used in that statute, the term sexual gratification is not unconstitutionally vague. State v. Halstien, 122 Wn.2d 109, 119-120, 857 P.2d 270 (1993). The Smith court found the prohibition to not possess material which can be used for sexual gratification at least as specific as the statutory definition at issue in Halstien. Smith, 130 Wn. App. at 727. Thus statutory definitions are helpful when assessing whether a term used as part of a probation condition is vague. Given the fact that the court has found the terms “sexually explicit” and “erotic” are not void for vagueness in other contexts, the terms are not vague in the context of the conditions at issue here.

The defendant also relies on United States v. Ristine, 335 F.3d 692, 695 (8th Cir. 2003). Ristine was convicted of receiving child pornography. As a condition of his supervision he was prohibited from owning or possessing any pornographic materials,

using any form of pornography or erotica, and going into any establishment where pornography or erotica can be obtained or viewed. Ristine, 335 F.3d at 694.

The decision in Ristine does not support the defendant's position for two reasons. First, Ristine did not claim that the restrictions concerning "erotica" were overbroad or vague. Ristine, 335 F.3d 694 n.2. Thus, that issue was not decided by the court. Second, the court noted there was a split of authority regarding the constitutionality of a prohibition involving pornography. Because the defendant had not challenged the conditions at the trial level, the court considered the issue under the plain error test, rather than the abuse of discretion standard. Under the latter standard the court said it may have had to choose between the two lines of reasoning it believed more compelling. It did not make that choice, and upheld the condition under the plain error test. Ristine, 335 F.3d at 695.

As the Ristine court recognized, some jurisdictions have found that conditions prohibiting possession of "sexually oriented or sexually stimulating materials", and from "patronize[ing] any place where such material or entertainment is available" is not unconstitutionally vague. See United States v. Phipps, 319 F.3d

177, 192-193 (5th Cir. 2003). In upholding this condition the court recognized that by virtue of the nature of language, exacting specificity could not be expected when drafting supervision conditions. They nevertheless did not violate the constitution because of some imprecision. The court said that “conditions of probation can be written – and must be read—in a commonsense way’ because ‘it would be impossible to list’ every instance of prohibited conduct, hence ‘[s]entencing courts must inevitably use categorical terms to frame the contours of supervised release conditions.’” Phipps, 319 F.3d at 193, quoting, United States v. Paul, 274 F.3d 155, 166 (5th Cir. 2001), cert. denied, 535 U.S. 1002, 122 S.Ct. 1571, 142 L.Ed.2d 492 (2002).

Finally, the defendant challenges the condition on the basis that it violates the First Amendment and Washington Constitution Article 1, section 5. The court should reject that argument as well.

“An offender’s usual constitutional rights during community placement are subject to SRA-authorized infringements.” State v. Hearn, ___ Wn. App. ___, 128 P.3d 139, 141 (2006), State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), State v. Waggy, 111 Wn. App. 511, 517, 45 P.3d 1103 (2002). The condition at issue here is an SRA authorized infringement because a court may order

the defendant to stay outside of specific geographical boundaries as well as comply with crime related prohibitions. RCW 9.94A.700(5)(a),(e). The cases cited by the defendant to support his argument that banning him from certain locations infringes on his constitutional rights under both the Federal and State constitutions are inapposite. None of those cases involve persons who have been convicted of a crime and are subject to conditions of a criminal judgment and sentence.

C. THE CONDITION THAT THE DEFENDANT NOT POSSES OR CONTROL SEXUAL STIMULUS MATERIAL IS NOT UNCONSTITUTIONALLY VAGUE.

The defendant contends that the term "sexual stimulus material" is vague, and therefore unconstitutional. The cases cited by the defendant do not support this claim.

A statute may be void for vagueness if it is phrased in terms that are so vague that a person of common intelligence must necessarily guess at its meaning and differ as to its application. Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). However, "impossible standards of specificity are not required. A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct."

State v. Bohannon, 62 Wn. App. 462, 468, 814 P.2d 694, 697 (1991), quoting Eze, 111 Wn.2d at 27, 759 P.2d 366.

The court specifically found the phrase “for the sexual stimulation of the viewer” clarified and narrowed the reach of RCW 9.68A.040(1)(b) which made it unlawful to cause a minor to engage in sexually explicit conduct, knowing that conduct would be photographed. Bohannon, 62 Wn. App. at 468. Thus the phrase is not so vague as to render its application uncertain.

The defendant also cites State v. Mobley, 129 Wn. App. 378, 118 P.3d 413 (2005). That case dealt with the sufficiency of the evidence to convict a defendant under RCW 9.68A.070, Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, and not the due process question presented here. To the extent that it is relevant, it supports the conclusion that “sexual stimulus material” is not unconstitutionally vague.

In order to prove the offense the State is required to show that the sexually explicit conduct in question was an exhibition done for the purpose of sexual stimulation of the viewer. The evidence in Mobley consisted of the officer’s testimony that the people in the pictures were children or adolescents, the child victim testified that the defendant showed her “bad pictures of naked” children, and the

pictures themselves. The court noted that the jury was instructed on the definition of sexually explicit conduct. Thus, even though the defendant had not designated the pictures on appeal, there was sufficient evidence to support the charge. Mobley, 129 Wn. App. at 387. The definition of sexually explicit conduct includes the term “sexual stimulation” without further elaboration. By extension then, the term is sufficiently definite that the average person would know what it means. In other words, it is not unconstitutionally vague.

The defendant argues that sexual stimulation may be any one of a number of things, including attending dance clubs or leering at cheerleaders. Thus the condition does not give him any guidance as to what is proscribed. He fails to read the phrase in the context of the entire condition. The prohibition is not for anything that may be sexually stimulating to the public at large. Rather, it is limited to “materials” which would sexually stimulate the defendant based on his “particular deviancy.” Thus, dance clubs and cheerleaders are not included in this condition at least because they are not “materials.”

The defendant also claims that, like the prohibition against pornography in Sansone, this condition is an unlawful delegation of the court’s authority to the community corrections officer and the

therapist. Like the defendant in Smith, the defendant raises this issue on appeal without having raised it first at the trial court level. The Smith court declined to address the issue because the defendant had not shown that the alleged error was a manifest error affecting a constitutional right. Noting that RCW 9.94A.715(2)(b) gave the department the authority to impose conditions “based upon the risk to the community,” the court said it was not clear the alleged error was a violation of a statutory rather than constitutional right. Smith, 130 Wn. App. at 729.

Furthermore, an issue raised for the first time on appeal must be “manifest”. A defendant must show the error is manifest by demonstrating actual prejudice. State v. Munguia, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001) review denied, 145 Wn.2d 1023, 41 P.3d 483 (2002). The defendant has not shown that he was prejudiced by allowing the community corrections officer or therapist to determine what sexual stimulus material is as it relates to his specific deviancy. Since the condition at issue is specifically limited as to materials and the defendant’s specific deviancy, it does not result in the same problem present in Sansone. In Sansone, because pornography was not defined by the court, the definition of that term could change depending on the particular

sensitivities of the defendant's current community corrections officer. Here, because the term is modified by the defendant's particular deviancy, it does not leave the community corrections officer or the therapist unfettered discretion. The defendant is therefore put on notice of what is proscribed. For that reason the court should either decline to address the issue, because it is not a manifest constitutional error, or find that it is not an unlawful delegation of authority.

Finally, the defendant argues that the First Amendment protects an adult's right to view sexually explicit movies, videos, and magazines. While that may be true for an adult not under the jurisdiction of the court pursuant to a criminal conviction, as discussed above, it is not true for the defendant.

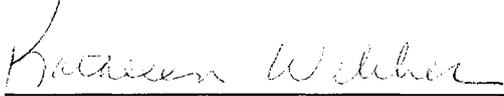
IV. CONCLUSION

The State asks the Court to remand the case to Superior Court to clarify the community custody condition that the defendant not possess or access pornographic materials. The State further asks the Court to find that the remaining conditions at issue are not

unconstitutionally vague or overbroad, or an unlawful delegation of
the court's authority.

Respectfully submitted on April 7, 2006.

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THE STATE OF WASHINGTON,

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Appellant.

No. 56812-4-I

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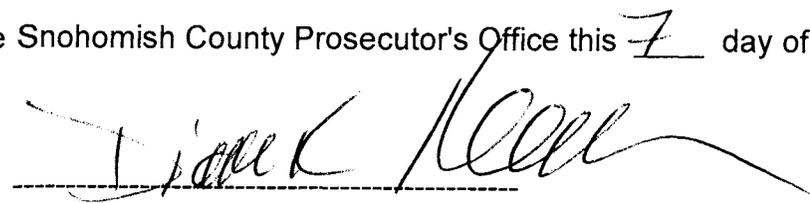
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BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 7 day of April, 2006.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal dashed line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit