

FILED
SUPREME COURT
STATE OF WASHINGTON
3/16/2018 4:10 PM
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CLERK

SUPREME COURT NO. 94883-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary E. Roberts, Judge

SUPPLEMENTAL BRIEF OF PETITIONER HAI MINH NGUYEN

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A. ISSUES PRESENTED

Hai Minh Nguyen’s sentence prohibits him from using, possessing, accessing, or viewing “sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.” CP 65.

1. Given that such materials do not directly relate to any circumstance of the crimes—child rape and molestation—does the condition exceed sentencing authority to impose only crime-related prohibitions?

2. Is this condition unconstitutionally vague because it fails to provide adequate notice of prohibited materials and allows for arbitrary enforcement, and because it is so broad that it encompasses a substantial amount of material protected by the First Amendment?

B. STATEMENT OF THE CASE

The State charged Nguyen with first degree child rape, first degree child molestation, second degree child rape, and second degree child molestation. CP 21-22. The charges arose from T.P.’s allegations that Nguyen massaged and sucked her breasts, inserted his fingers into her vagina, and performed oral sex on her multiple times when she was between ages six and 13. RP 67-68, 134, 138-40, 143-55. The jury convicted Nguyen as charged. CP 51-54. There was no indication from T.P. or any other evidence

presented at trial or discussed at sentencing suggesting sexually explicit or erotic materials played any role whatsoever in the crimes.

The trial court sentenced Nguyen to community custody condition 11, which states, “Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.” CP 65. The trial court also ordered Nguyen to obtain a sexual deviancy evaluation upon release and to follow the evaluator’s recommendations. CP 64 (condition 4).

Nguyen appealed, arguing that the prohibition on sexually explicit and erotic materials did not meet the definition of crime-related prohibition in RCW 9.94A.030 and that the prohibition was void for vagueness. Br. of Appellant at 21-30; Reply Br. at 9-11. He also pointed out that the condition was intolerably overbroad and encompassed materials protected by the First Amendment. Br. of Appellant at 22; Reply Br. at 9-10. The Court of Appeals held that the prohibition is ipso facto crime-related because Nguyen was convicted of sex crimes. Opinion at 12.¹ The Court of Appeals also held that because the prohibition referenced statutory definitions, it was ipso facto not

¹ State v. Nguyen, noted at 199 Wn. App. 1056, 2017 WL 3017516, slip op. at 12 (2017).

vague. Opinion at 11. This court granted review of the community custody condition issue. State v. Nguyen, 189 Wn.2d 1030, 407 P.3d 1143 (2018).

C. ARGUMENT

1. A BAN ON SEXUALLY EXPLICIT MATERIALS IS NOT DIRECTLY RELATED TO ANY CIRCUMSTANCE OF NGUYEN’S CRIMES AND THEREFORE EXCEEDS JUDICIAL SENTENCING AUTHORITY

A sentencing court has authority to require an offender to comply with “any crime-related prohibitions.” RCW 9.94A.703(3)(f). Crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(10) (emphasis added).

The Court of Appeals and the State interpret RCW 9.94A.030(10) so that a prohibition on all sexually explicit or erotic materials directly relates, per se, to the circumstances of any sex crime.² Such an interpretation is inconsistent with the plain language of the statute and with how the courts

² The State claims it does not advocate for a per se rule banning sexually explicit materials in every sex case. Yet the State relied on State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016), below, which indeed sets forth a per se rule, albeit without analysis. And the State also posits “it would be difficult to imagine a situation where a prohibition on such materials was not reasonably related to a felony sex offense,” betraying its intention to impose per se bans on sexually explicit materials in every felony sex offense case regardless of the circumstances surrounding an individual’s criminal conduct. Answer to Petition for Review at 7 n.3.

have previously interpreted and applied crime-relatedness. As such, such an interpretation must be rejected.

Courts interpret statutes by first looking to their plain language as the best gauge of legislative intent. TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). Although the issue of crime-relatedness arises frequently in the Washington reports, no court has definitively addressed the logical and legal limits of RCW 9.94A.030(1)'s phrase "directly relates to the circumstances of the crime" based on the plain meaning of this language. Generally, where the words in a statute are undefined, a court will rely on dictionary definitions to supply an ordinary meaning. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). If a statute's meaning is plain on its face, the court must apply that meaning. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The word "circumstance" in the statutory definition of crime-related prohibition is perhaps the most important. "Circumstance" is undefined in the statute but is defined in the dictionary as

a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or logically is likely to be present

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 410 (1993). Thus, a circumstance of the crime committed is a part or attribute of the crime, or something that accompanies, conditions, or determines the crime. So defined, the fact that sexually explicit materials played no part in Nguyen's crimes means that they do not qualify as a circumstance of the crimes.

But RCW 9.94A.030(10)'s language is more demanding still. It does not permit a prohibition based upon a mere circumstance of the crime but only one that "directly relates" to such a circumstance. To "relate" means "to show or establish a logical or causal connection between." WEBSTER'S, supra, 1916. "Directly" means "in close relational proximity." Id. at 641. Thus, the prohibition must pertain to a close, logically connected part of the crime.

There has never been any evidence or information presented in this case that sexually explicit materials played any role before, during, or after the crimes. The record is silent as to sexually explicit materials except for the community custody condition at issue. Nor has the State ever attempted to establish that sexually explicit materials bear some other logical connection to Nguyen's crimes, such as evidence that Nguyen's behavior or self-control was or would be affected by access to or possession of sexually explicit or erotic materials. Under RCW 9.94A.030(10)'s clear language, a prohibition on viewing, accessing, possessing, or using sexually explicit materials is not crime-related. It must be stricken from Nguyen's judgment and sentence.

Case law supports Nguyen’s interpretation. The Court of Appeals struck down a similar prohibition on possessing sexually explicit materials where “no evidence suggested that such materials were related to or contributed to his crime.” State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014). As in Kinzle, no evidence suggested that access or viewing of sexual explicit materials related to or contributed to Nguyen’s crimes.

Likewise, in State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008), the Court of Appeals struck a condition prohibiting internet access because there was “no evidence O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime.” In State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008), the court struck a condition prohibiting possession of cell phones or data storage devices because no evidence in the record showed Zimmer used or intended to use such devices to possess or distribute methamphetamine. This was so even recognizing that such devices were commonly used to distribute illegal drugs. Id. at 414. In State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), overruled on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), this court struck a community custody condition prohibiting contact with “any minor-age children” because “[i]t is not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender’s crime.” These cases stand for a clear

proposition: where the record before the reviewing court does not support any factual nexus between the community custody prohibition and the commission of the crimes, the community custody prohibition may not be imposed as a crime-related prohibition under RCW 9.94A.030(10).³

The State has relied on two cases to support its looser interpretation of RCW 9.94A.030(10), but neither aids its position. Answer to Petition for Review at 5 (discussing State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), and Kinzle). In Warren, this court upheld a no-contact order with child sexual abuse victims' mother as a crime-related condition even though the mother was not one of the direct victims. 165 Wn.2d at 33-34. This court, acknowledging it was a "close question," pointed out, "She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and

³ Recent unpublished cases are in accord. See, e.g., State v. Starr, noted at 200 Wn. App. 1070, 2017 WL 4653443, at *5 (2017) (in child molestation case, prohibition on sexually explicit materials not crime related because no evidence presented that such materials related to offense) State v. Dossantos, noted at 200 Wn. App. 1049, 2017 WL 4271713, at *5 (2017) (same); State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 2649834, at *3 (2016) (in indecent liberties case, same); State v. Hasselgrave, noted at 184 Wn. App. 1021, 2014 WL 5480364, at *12 (2014) (prohibition on going to establishments promoting "commercialization of sex" not reasonably crime-related where no evidence suggested such establishments related to defendant's crime of child rape); State v. Clausen, noted at 181 Wn. App. 1019, 2014 WL 2547604, at *8 (2014) (conditions prohibiting possessing sexually explicit material and patronizing establishments that promote commercialization of sex not crime-related because no evidence suggested Clausen possessed sexually explicit material in connection with crime of child rape); State v. Whipple, noted at 174 Wn. App. 1068, 2013 WL 1901058, at *6 (2013) (prohibition on possessing and frequenting establishments that deal in sexually explicit materials not crime-related where nothing in record suggested child rape offenses involved such materials or establishments).

[the mother] testified against Warren” Id. Warren’s criminal history also included direct violence against the mother. Id. at 34. Because actual evidence in the record supported a no-contact order between Warren and his victims’ mother, the no-contact order was crime-related. Id.

In Kinzle, the court approved a condition directing Kinzle not to date women or form relationships with families who have minor children. 181 Wn. App. at 785. The State argues that Kinzle supports a liberal interpretation of crime-relatedness given that Kinzle “had not molested children of the women that he dated.” Answer to Petition for Review at 5. As an initial matter, the Kinzle court upheld this condition not as a crime-related condition under RCW 9.94A.030(10), but as a condition that prohibits “direct or indirect contact with the victim of the crime or a specified class of individuals” under RCW 9.94A.703(3)(b). Kinzle, 181 Wn. App. at 785 (emphasis added). In any event, however, Kinzle gained access to the children he molested through his social relationship with their parents. Id. Because of this fact, the condition prohibiting relationships with persons and families with minor children directly related to Kinzle’s criminal conduct. Id. Unlike the situations in Kinzle and Warren, no evidence in this case’s record has anything to do with the prohibition at issue.

The Court of Appeals held that conditions regarding access to sexually explicit materials are automatically “crime-related and properly imposed for

sex offenses.” Opinion at 12 (citing State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016)).⁴ This holding usurps the legislature’s definition of “crime-related prohibition,” which, as discussed, requires the prohibition to directly relate to a circumstance of the crime. The appellate courts here and in Magana simply ignore this language, exempting all sex crimes from the “crime-related prohibition” definition. If the legislature wishes to impose bans on certain materials based on a sex offense conviction alone, it may do so subject to constitutional limitations. But the legislature has not done so, and the courts are not empowered to legislate in its place.⁵

Finally, as Washington’s preeminent sentencing treatise states, “There must be some basis for the ‘crime-related’ determination if the limitation is to have any meaning. For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime-related requirement out of the statute.” David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 4.5 (1985). Nguyen asks the courts to heed this

⁴ Division One has since repudiated Magana: “To the extent Magana stands for either a categorical approach or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree. As previously noted, there must be some evidence supporting a nexus between the crime and the condition.” State v. Norris, 1 Wn. App. 2d 87, 98, 404 P.3d 83 (2017), review granted, ___ Wn.2d ___, ___ P.3d ___, 2018 WL 1190159 (2018).

⁵ As a policy matter, it is dubious that sexually explicit or erotic materials make a person more likely to engage in sex crimes or less likely to control sexual behavior. The State has not put forth any evidence or authority to establish this proposition.

admonition in this and in every other case presenting the issue of crime-relatedness. The condition prohibiting viewing, accessing, using, or possessing sexually explicit and erotic materials is not crime-related and must be stricken from Nguyen's judgment and sentence.

2. THE CONDITION FAILS TO DEFINE THE PROHIBITION WITH SUFFICIENT DEFINITENESS AND INVITES ARBITRARY ENFORCEMENT, RENDERING IT VAGUE, AND SWEEPS IN TOO MANY FIRST AMENDMENT MATERIALS, RENDERING IT OVERBROAD⁶

The prohibition on sexually explicit and erotic materials also fails to provide fair notice of which materials are prohibited and would lead to arbitrary enforcement. The prohibition sweeps in a wide swath of materials, most of which qualify as protected speech under the First Amendment. As a result, the condition is both void for vagueness and intolerably overbroad.

a. Condition 11 is void for vagueness

Under the due process vagueness doctrine, community custody conditions must provide fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The due process clause also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is

⁶ If the court agrees that the prohibition on sexually explicit materials is not crime-related on statutory grounds, there is no need to reach Nguyen's constitutional challenges. See Cnty. Telecable of Seattle, Inc. v. City of Seattle, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008).

unconstitutionally vague if (1) it is not sufficiently definite so that ordinary persons can understand what it proscribes or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. Condition 11 fails under both prongs.

In Bahl, this court reasoned that because definitions of pornography can and do differ widely—they may “include any nude depiction, whether a picture from *Playboy Magazine* or a photograph of Michelangelo’s sculpture of David”—the prohibition on perusing pornography was not sufficiently definite to apprise ordinary persons of what is permitted and what is proscribed.” Id. at 756. The same is true of the prohibition on all sexually explicit materials, erotic materials, and depictions of sexually explicit conduct. Countless works of art, literature, film, and music explicitly describe, depict, and relate sex and sexuality. Nguyen has no way to know which of these works he can possess, use, access, or view, and which he cannot. Like the ban on pornography, the condition here is unconstitutionally vague.

“Limitations upon fundamental rights are permissible, provided they are imposed sensitively.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). When a condition “concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” Bahl, 164 Wn.2d at 753. “[A] stricter

standard of definiteness applies if material protected by the First Amendment falls within the prohibition.” Id.

Sexually explicit materials, erotic materials, and depictions of sexually explicit conduct are protected by the First Amendment. Condition 11 makes no distinction between sexually explicit materials involving adults versus children. Sexually explicit materials, such as adult pornography, are protected by the First Amendment. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992). Pornographic drawings, even of children, are also constitutionally protected. Id. (citing New York v. Ferber, 458 U.S. 747, 764-65, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)). “Books, films, and the like are *presumptively* protected by the First Amendment” Id. at 550 (citing Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d. 34 (1989)). Paintings, music, poetry, and other such works are “unquestionably shielded” by the First Amendment. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). The blanket ban on *all* sexually explicit or erotic materials fails to satisfy the requisite clarity to ensure First Amendment rights are honored. The condition impacts Nguyen’s ability to read a certain book, view a certain painting or film, or listen to a certain song. The condition is intolerably vague.

To be sure, the Bahl court approved of a condition that prohibited Bahl from “frequenting ‘establishments whose primary business pertains to

sexually explicit or erotic material.” Bahl, 164 Wn.2d at 758. The court discussed dictionary definitions of “sexually explicit” and “erotic,” and also pointed out that statutes provided definitions of such terms. Id. at 758-60. The court held that because “[t]he challenged terms [we]re used in connection with a prohibition on frequenting business,” “[w]hen all the challenged terms, with their dictionary definitions, are considered together, we believe the condition is sufficiently clear. It restricts Bahl from patronizing adult bookstores, adult dance clubs, and the like.” Id. at 759.

No similar context saves the prohibition here, and the Bahl court explicitly declined to “decide whether th[e] definition [of sexually explicit material] would be sufficient notice (given that Mr. Bahl was not convicted under this statute)” Id. at 760. Under federal law, a statutory definition of a term does not give notice of the term’s meaning as used in a sentencing condition *unless* the definition is contained in the same criminal statute that the defendant was convicted of violating. See United States v. Thompson, 653 F.3d 688, 696 (8th Cir. 2011); Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006). Nguyen was not convicted of violating the statutes defining sexually explicit materials, erotic materials, or depictions of sexually explicit conduct.

And the statutory definitions compound rather than mitigate the prohibition’s vagueness. Under RCW 9.68.130(2)’s sexually explicit material definition, several works of art might qualify as “flagellation or torture in the

context of a sexual relationship,” such as those of American photographer Robert Mapplethorpe, who extensively photographed the underground BDSM scene in 1960s and 1970s New York. Reasonable minds still differ as to whether these or other similar works qualify as “works of art or of anthropological significance.” Reasonable minds would also differ as to whether an image “emphasiz[ed] the depiction” of genitals. Does a simple nude emphasize genitalia? If not, what line should be drawn? RCW 9.68.130(2) leads to many more questions than answers.

“Sexually explicit conduct” under RCW 9.68A.011(4) applies to actual or simulated depictions of sexual intercourse, masturbation, sadomasochistic abuse, and touching clothed or unclothed genitals. Under this definition, could Nguyen watch a movie or TV show with a sex scene that showed no actual nudity but simulated intercourse? Would this prohibition preclude viewing music videos featuring crotch-grabbing Michael Jackson or Madonna? What about Mapplethorpe’s photos exhibited in a museum?

“Erotic material” under RCW 9.68.050(2) presents similar problems. Reasonable minds would differ on whether the “dominant theme” of the material “taken as a whole” appeals to the prurient interest of minors in sex. Would Sir Mix-a-Lot’s *Baby Got Back*, in which he explicitly relates the sexual virtues of “big butts,” so appeal? Do Madonna and Michael Jackson videos? And how would a person ever know in advance whether erotic

materials are “utterly without redeeming social value?” As the Bahl court pointed out in its reliance on United States v. Loy, 237 F.3d 251 (3d Cir. 2001), judges and lawyers could not possibly answer these questions. Bahl, 164 Wn.2d at 746-48 (discussing Loy).

[W]e could easily set forth numerous examples of books and films containing sexually explicit material that we could not absolutely say are (or are not) pornographic It is also difficult to gauge on which side of the line the film adaptations of Vladimir Nabokov’s *Lolita* would fall, or if Edouard Manet’s *Le Dejeuner sur L’Herbe* is pornographic (or even some of the Calvin Klein advertisements)

Loy, 237 F.3d at 264.

The same reasoning applies here. Because the prohibition does not give fair notice of what is allowed and what is disallowed, it is unconstitutionally vague under the first prong of Bahl’s vagueness analysis.

Condition 11 is also infirm under Bahl’s second prong because it leads to arbitrary enforcement. Where a condition allows a third party to “direct what falls within the condition” it “only makes the vagueness problem more apparent since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758. A creative corrections officer could recite several films, books, artworks, advertisements, songs, and other materials that fall within the prohibition. The prohibition is so broad that a vindictive corrections officer could apply it to almost anything. The condition essentially supplies the State with an arbitrary go-to-jail card.

The Court of Appeals pointed out that “the condition allows a sexual deviancy provider to give Nguyen prior approval to possess such material, but does not give the provider or community corrections officer the authority to determine the definition of the prohibited material.” Opinion at 11. First, this distinction is meaningless because the treatment provider or CCO still has authority to determine, based on his or her personal titillation, what violates the condition. Second, the condition assumes that Nguyen will receive guidance from a deviancy provider, yet “[t]he condition cannot identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed, and this record does not show that any deviancy has yet been identified.” Bahl, 164 Wn.2d at 761. Although he must obtain a deviancy evaluation, CP 64 (condition 4), Nguyen might not have any diagnosable deviancy and thus no provider to direct anything.

In sum, condition 11 is insufficiently definite and invites arbitrary enforcement. Its vagueness requires that it be stricken.

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REDACTED - See 4/4/18 ruling granting motion to strike

REDACTED - See 4/4/18 ruling granting motion to strike

[REDACTED]

D. CONCLUSION

The statutorily and constitutionally infirm community custody condition prohibiting access, viewing, use, and possession of sexually explicit materials must be stricken from Nguyen’s judgment and sentence.

DATED this 16th day of March, 2018.

Respectfully submitted,

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March 16, 2018 - 4:10 PM

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