

FILED
SUPREME COURT
STATE OF WASHINGTON
4/11/2018 4:17 PM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 94883-6
(CONSOLIDATED FROM 95274-4)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent / Cross-Petitioner,

v.

DOMINIQUE NORRIS,

Petitioner / Cross-Respondent.

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

The Honorable Patrick Oishi, Judge

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

JENNIFER WINKLER
Attorney for Petitioner / Cross-Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| C. <u>ARGUMENT</u> | 3 |
| 1. THE “DATING RELATIONSHIP” CONDITION IS UNCONSTITUTIONALLY VAGUE AND IS NOT SAVED BY A STATUTORY DEFINITION..... | 3 |
| a. <u>The condition is unconstitutionally vague.</u> | 4 |
| b. <u>The mere existence of a statutory definition for a phrase used in a community custody condition does not insulate the condition from a vagueness challenge.</u> | 9 |
| 2. A BAN ON ENTERING SEX-RELATED BUSINESSES IS NOT DIRECTLY RELATED TO ANY CIRCUMSTANCE OF NORRIS’S CRIMES AND THEREFORE EXCEEDED THE TRIAL COURT’S SENTENCING AUTHORITY. | 12 |
| D. <u>CONCLUSION</u> | 20 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|--|-----------|
| <u>City of Spokane v. Douglass</u> 115 Wn.2d 171, 795 P.2d 693 (1990)..... | 7 |
| <u>State v. Alcocer</u> __ Wn. App. 2d __, __ P.3d __, 2018 WL 1415657 (Mar. 22, 2018)..... | 19 |
| <u>State v. Autrey</u> 136 Wn. App. 460, 150 P.3d 580 (2006)..... | 4 |
| <u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008)..... | 4, 10, 11 |
| <u>State v. Clausen</u> noted at 181 Wn. App. 1019, 2014 WL 2547604 (2014)..... | 18 |
| <u>State v. Costich</u> 152 Wn.2d 463, 98 P.3d 795 (2004)..... | 13 |
| <u>State v. Dickerson</u> noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016)..... | 8 |
| <u>State v. Dossantos</u> noted at 200 Wn. App. 1049, 2017 WL 4271713 (2017)..... | 18 |
| <u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993)..... | 4 |
| <u>State v. Hesselgrave</u> noted at 184 Wn. App. 1021, 2014 WL 5480364 (2014)..... | 18 |
| <u>State v. Irwin</u> 191 Wn. App. 644, 364 P.3d 830 (2015)..... | 11, 19 |
| <u>State v. Johnson</u> 180 Wn. App. 318, 327 P.3d 704 (2014)..... | 7, 11, 12 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|--|-----------------------|
| <u>State v. Kintz</u> 169 Wn.2d 537, 238 P.3d 470 (2010)..... | 13 |
| <u>State v. Kinzle</u> 181 Wn. App. 774, 326 P.3d 870 (2014)..... | 16, 19 |
| <u>State v. Llamas-Villa</u> 67 Wn. App. 448, 836 P.2d 239 (1992)..... | 14 |
| <u>State v. Magana</u> 197 Wn. App. 189, 389 P.3d 654 (2016)..... | 19 |
| <u>State v. Moultrie</u> 143 Wn. App. 387, 177 P.3d 776 (2008)..... | 10, 11 |
| <u>State v. Norris</u> 1 Wn. App. 2d 87, 404 P.3d 83 (2017)..... | 1, 2, 3, 8, 9, 19, 20 |
| <u>State v. O’Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008)..... | 16 |
| <u>State v. Parramore</u> 53 Wn. App. 527, 768 P.2d 530 (1989)..... | 15 |
| <u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998)..... | 14, 17 |
| <u>State v. Sanchez Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010)..... | 6, 9, 10, 17 |
| <u>State v. Skillman</u> 60 Wn. App. 837, 809 P.2d 756 (1991)..... | 12 |
| <u>State v. Starr</u> noted at 200 Wn. App. 1070, 2017 WL 4653443 (2017)..... | 17 |
| <u>State v. Stewart</u> noted at 196 Wn. App. 1046, 2016 WL 6459834 (2016)..... | 18 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---|------|
| <u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008)..... | 18 |
| <u>State v. Whipple</u> noted at 174 Wn. App. 1068, 2013 WL 1901058 (2013)..... | 18 |
| <u>State v. Zimmer</u> 146 Wn. App. 405, 190 P.3d 121 (2008)..... | 17 |
| <u>TracFone Wireless, Inc. v. Dep't of Revenue</u> 170 Wn.2d 273, 242 P.3d 810 (2010)..... | 13 |

FEDERAL CASES

| | |
|--|------------|
| <u>Farrell v. Burke</u> 449 F.3d 470 (2d Cir. 2006) | 10 |
| <u>Kolender v. Lawson</u> 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)..... | 7 |
| <u>United States v. Reeves</u> 591 F.3d 77 (2d Cir. 2010) | 6, 7, 8, 9 |

RULES, STATUTES AND OTHER AUTHORITIES

| | |
|--|------------------------|
| David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 4.5 (1985)..... | 4, 15, 20 |
| RCW 9.68.130 | 3, 15 |
| RCW 9.68A.011 | 3 |
| RCW 9.94A.030 | 12, 13, 14, 16, 17, 18 |
| RCW 9.94A.670 | 2 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|--|----------|
| RCW 9.94A.703 | 12, 13 |
| RCW 9A.44 | 10 |
| RCW 9A.44.086 | 2 |
| RCW 26.50.010 | 9, 11 |
| U.S. CONST. amend. XIV | 4 |
| WASH. CONST. art. I, § 3 | 4 |
| WEBSTER'S THIRD NEW INT'L DICTIONARY (1993)..... | 4, 5, 14 |

A. ISSUES PRESENTED

1. As a condition of community custody, the trial court ordered Dominique Norris to “[i]nform the supervising [community corrections officer (CCO)] and sexual deviancy treatment provider of any dating relationship.” CP 43 (condition 5). Is this condition unconstitutionally vague?

2. The trial court imposed a condition banning Norris from entering sex-related businesses, to include “x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.” CP 43 (condition 10). Because such a prohibition does not directly relate to any circumstance of her crimes, does it exceed the trial court’s authority to impose only crime-related prohibitions?

B. STATEMENT OF THE CASE

The State charged Norris with two counts of second degree child rape, alleged to have occurred between December 1, 2009 and February 28, 2010. CP 1-2. The complainant, 13-year-old D.T., was the younger brother of Norris’s children’s father. CP 3. The State alleged Norris and D.T. initially had sexual contact at D.T.’s residence, when Norris was staying there, and later at Norris’s residence. CP 3. According to the charging documents, Norris and the complainant exchanged text messages and Norris sent him “a photo of herself in pants and a bra.” CP 3, 27

Norris pleaded guilty to three counts of second degree child molestation in March of 2012. CP 11-24, 35; RCW 9A.44.086. The court suspended a standard-range 72-month sentence and imposed a Special Sex Offender Sentence Alternative (SSOSA) under RCW 9.94A.670. CP 38. The court ordered Norris to, among other requirements, undergo sex offender treatment and comply with certain conditions as set forth in Appendix H of the judgment and sentence. CP 39. The court added additional conditions at subsequent hearings. E.g. CP 113-17.

The State sought revocation of Norris's SSOSA in April of 2016. CP 70. The State alleged Norris violated the conditions of her suspended sentence by consuming marijuana and consuming more oxycodone than the prescribed amount. CP 121, 124. Norris agreed the underlying acts occurred. CP 74. But she requested that, rather than revoking the SSOSA, the court sanction her with jail time and then permit her to enter drug treatment. Norris also argued that the factual allegations did not, as a matter of law, permit revocation of the SSOSA. CP 72-76; RP 92-104.

The court revoked Norris's SSOSA. RP 117; CP 96-97. It imposed the previously suspended sentence including 72 months of confinement and 36 months of community custody. CP 38, 40. The court also imposed several community custody conditions. CP 43-44.

Norris appealed, challenging six of the conditions. The Court of Appeals agreed that four of the six challenged conditions were invalid, State v. Norris, 1 Wn. App. 2d 87, 92-100, 404 P.3d 83 (2017), including the one the State now challenges. Id. at 97-98 (finding sex-related business condition insufficiently crime-related).¹ But it affirmed two others, including the one Norris now challenges. Id. at 94-96 (rejecting vagueness challenge to “[i]nform . . . of any dating relationship” condition).

Norris filed a petition for review arguing the dating relationship condition was vague. Taking issue with reversal of the sex-related business prohibition, the State filed a cross-petition. This Court accepted review on both matters and consolidated this case with State v. Nguyen, no. 94883-6.

C. ARGUMENT

1. THE “DATING RELATIONSHIP” CONDITION IS UNCONSTITUTIONALLY VAGUE AND IS NOT SAVED BY A STATUTORY DEFINITION.

The “dating relationship” condition is unconstitutionally vague, and a statutory definition somewhere in the Washington statutes does not insulate the condition from a vagueness challenge. This case involves a sex

¹ The Court of Appeals also affirmed as crime-related a prohibition on 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.” The Court noted that Norris had sent the complainant a “photo of herself in pants and a bra.” Norris, 1 Wn. App. 2d at 91, 99. Norris did not seek review on this issue.

crime. If a sentencing court wants a supervised person to notify her CCO and treatment provider regarding sexual relationships, it can say so. E.g. State v. Autrey, 136 Wn. App. 460, 465, 468, 150 P.3d 580 (2006).

a. The condition in unconstitutionally vague.

The condition requiring Norris to inform her CCO and treatment provider of any dating relationship is unconstitutionally vague.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is thus void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

The condition here does not provide Norris with adequate notice of what she must do to avoid sanction and does not prevent arbitrary enforcement. The question is what constitutes a “dating relationship.”

Commonly understood, a “relationship” is “a state of affairs existing between those having relations or dealings.” WEBSTER’S THIRD NEW INT’L

DICTIONARY 1916 (1993). A “date” means “an appointment or engagement [usually] for a specified time . . . [especially]: an appointment between two persons of the opposite sex for the mutual enjoyment of some form of social activity” or “an occasion (as an evening) of social activity arranged in advance between two persons of opposite sex.” Id. at 576. Referring to a person, a “date” is “a person of the opposite sex with whom one enjoys such an occasion of social activity.” Id.

Such behavior conceivably covers a large range of human interaction. The condition, as written, leaves the dividing line between a non-dating relationship and a dating relationship intractably blurry. The condition requires Norris to take affirmative action to avoid running afoul of her sentence but requires her to do so without a standard for determining when she must do so. The condition does not provide Norris adequate notice as to what relationships she is prohibited from forming. A reasonable person cannot describe a standard necessary to avoid arbitrary enforcement. Suppose Norris has dinner with a man in a restaurant. Is that a date? Would that constitute a “dating relationship”? What if it was a one-time occasion? Is that enough to form a “relationship” with someone? Does meeting someone twice for a social activity turn an ordinary relationship into a dating relationship? Three times? Suppose Norris strikes up a relationship with a man online, and then they go out to a movie. Is that a dating

relationship? What if Norris and another person enjoy social activities together, but (perhaps contrary to outward appearances) they consider themselves “just friends.” Does that qualify as a dating relationship?

A condition that leaves so much room for speculation is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking prohibition on “paraphernalia” because “‘an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,’ such as sandwich bags. . . . Another probation officer might not arrest for the same ‘violation,’ i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual [CCOs] is unconstitutionally vague.”).

If the phrase “dating relationship” is meant to be limited to a romantic relationship, however, the vagueness problem remains. United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation department upon entry into a “significant romantic relationship” was vague, in violation of due process. Id. at 79, 81. The court observed that “people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’” Id. at 81.

“What makes a relationship ‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions, and genders.” Id. The condition had “no objective baseline,” as “[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a ‘significant romantic relationship.’” Id.

The condition in Norris’s case suffers from the same sort of defect. “Subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” State v. Johnson, 180 Wn. App. 318, 327, 327 P.3d 704 (2014) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)) (internal quotation marks omitted). Norris’s liberty during supervised release should not hinge on the accuracy of her prediction of whether a given CCO, prosecutor, or judge would conclude that a targeted relationship had been formed without first informing the CCO or treatment provider. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as “dating relationship” in a non-arbitrary manner.

The Court of Appeals’ opinion asserts that Reeves is distinguishable because it involved a prohibition on “significant romantic” relationships.

According to the Court, the qualifiers “significant” and “romantic” created an extra layer of subjectivity. Norris, 1 Wn. App. 2d at 94-95.

Unlike Division One, however, Division Three of the Court of Appeals adopted the Reeves court’s reasoning in State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016). There, the trial court imposed a community custody condition prohibiting Dickerson from “enter[ing] a romantic relationship without the prior approval of the [community corrections officer] and Therapist.” Id. at *1 (alteration in original). Relying on Reeves, Division Three of the Court of Appeals held the condition was unconstitutionally vague because “it is not clear which relationships will require the permission of both the community custody corrections officer and therapist.” Dickerson, 2016 WL 3126480, at *5. Further, “[t]he condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic.” Id.

The condition in Dickerson, prohibiting “romantic” relationships, did not contain “highly subjective qualifiers,”² but still the Court found it vague. Contrary to the Court of Appeals opinion in this case, the condition

² Norris, 1 Wn. App. 2d at 95.

in Norris's case suffers from the same species of defect as the invalid conditions in Dickerson and Reeves.

There is no presumption in favor of constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The condition here is unconstitutional because it fails to provide reasonable notice as to what Norris must do to comply with it. It also exposes Norris to arbitrary enforcement. As such, the condition violates due process and should be stricken or modified.

- b. The mere existence of a statutory definition for a phrase used in a community custody condition does not insulate the condition from a vagueness challenge.

Next, the Court of Appeals also noted, in a footnote, that the phrase "dating relationship" is defined by statute at RCW 26.50.010(2). Norris, 1 Wn. App. 2d at 95 n. 6. But the mere existence of a statutory definition for a phrase used in a community custody condition does not insulate the condition from a vagueness challenge. The condition in this case references no statute or statutory definition.

Moreover, Norris was not convicted of a crime under the statutory scheme that contains the definition. A statutory definition of a term does not give notice of the term's meaning in a judgment and sentence unless the

definition is contained in the same criminal statute that the defendant was convicted of violating. Farrell v. Burke, 449 F.3d 470, 487 (2d Cir. 2006) (cited by Bahl, 164 Wn.2d at 755). Norris was not convicted of violating a protection order under chapter 26.50 RCW, so the definition of “dating relationship” in that chapter cannot defeat Norris’s vagueness challenge.

In Bahl, this Court declined to decide whether the statutory definition of “sexually explicit” alone would provide sufficient notice. Bahl was not convicted under that statute. Bahl, 164 Wn.2d at 760. Similarly, the concurrence in Sanchez Valencia maintained that a statutory definition of the term “drug paraphernalia” would be sufficient “to dispel vagueness concerns” only where the person was convicted of a drug offense. Sanchez Valencia, 169 Wn.2d at 796 n.1 (J.M. Johnson, J., concurring).

Norris was convicted under chapter 9A.44 RCW. CP 35. No unreferenced statutory definition of the term “dating relationship” found in another title of the RCW dispels the vagueness problem.

In this respect, Norris’s case is like State v. Moultrie, in which the defendant challenged as unconstitutionally vague the condition of his sentence prohibiting contact with “vulnerable, ill or disabled adults.” 143 Wn. App. 387, 396, 177 P.3d 776 (2008). The State argued the terms “vulnerable” and “disabled” provided sufficient notice of the type of person with whom Moultrie is to avoid contact because those terms were defined

by statute. Id. at 397. The Court of Appeals rejected the State’s argument: “Because there is no indication that the trial court in fact intended to limit the terms of the order to these statutory definitions, we will not presume it did so or otherwise rewrite the trial court’s order.” Id. at 397-98. The statutorily defined terms of “vulnerable adult” and “developmental disability” were the identical (or nearly identical) to terms used in the sentencing condition. But the condition was still found vague. Id. at 396-97; see also Johnson, 180 Wn. App. at 328-29 (finding “vulnerable” to be vague for similar reasons).

Again, as in Moultrie, there is nothing in the judgment and sentence that shows the trial court intended to limit the condition on “dating relationships” to its statutory definition. Cf. RCW 26.50.010(2) (specifying that the “[f]actors that the court may consider in [determining whether a dating relationship exists] include: (a) The length of time the relationship has existed; (b) the nature of the relationship; and (c) the frequency of interaction between the parties”).

A community custody condition prohibiting conduct must give ordinary people sufficient notice to “understand what conduct is proscribed.” State v. Irwin, 191 Wn. App. 644, 655, 364 P.3d 830 (2015) (quoting Bahl, 164 Wn.2d at 753). And it must also be sufficiently definite

to prevent arbitrary enforcement. Irwin, 191 Wn. App. at 655. The prohibition here fails in both respects.

2. A BAN ON ENTERING SEX-RELATED BUSINESSES IS NOT DIRECTLY RELATED TO ANY CIRCUMSTANCE OF NORRIS'S CRIMES AND THEREFORE EXCEEDED THE TRIAL COURT'S SENTENCING AUTHORITY.

The Court of Appeals correctly held that the trial court exceeded its statutory sentencing authority because the ban on entering sex-related businesses, such as "x-related movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material," CP 43, is not directly related to the circumstances of the crimes.

The State claims the Court of Appeals' applied RCW 9.94A.030(10) in an "unworkably narrow" manner. Answer to Petition for Review and Cross-Petition (Answer) at 8. Yet the State interprets the statute so that any sex-related prohibition is triggered any time a sex crime is committed. Answer at 8-9. Such an interpretation is inconsistent with the plain language of the statute, as well as prior case law, and should be rejected.

"A trial court's sentencing authority is limited to that expressed in the statutes." State v. Skillman, 60 Wn. App. 837, 838, 809 P.2d 756 (1991); accord Johnson, 180 Wn. App. at 325. A trial 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).³

Courts interpret statutes by first looking to their plain language as the indicator of legislative intent. TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)). Although the issue of crime-relatedness arises frequently in Washington, no court has squarely tackled the phrase “directly relates to the circumstances of the crime” based on its plain meaning.

Generally, where the words in a statute are undefined, a court will rely on dictionary definitions. 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” appears in the statutory definition of crime-related prohibition. “Circumstance” is undefined in the statute but is defined in the dictionary as

³ Cf. RCW 9.94A.703(3)(d) (“As part of any term of community custody, the court may order an offender to . . . [p]articipate in rehabilitative programs or otherwise perform affirmative conduct *reasonably related* to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community” (emphasis added)).

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, supra, 410. Thus, a circumstance of the crime is a part or attribute of the crime, or something that accompanies, conditions, or determines the crime. The fact that sex-related business played no part in Norris's crimes means they do not qualify as a circumstance of the crimes.

RCW 9.94A.030(10) is even more demanding. It does not permit a prohibition based upon a loose connection to a 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. Understood in this manner, the prohibition must pertain to the actual crime, not just to any potential crime within a broad and varied category of criminal activity.⁴

As the leading commentator indicates, the Sentencing Reform Act represented a shift in in sentencing philosophy, away from the broad notion of coerced rehabilitation, and toward a more circumscribed view of a

⁴ This formulation does not eschew caselaw indicating that no strict causal link is required between prohibited activity and the underlying crime. E.g. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992), overruled on other grounds by State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998).

sentencing court's powers. State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 4.5 (1985)). The SRA “does not specify how certain the sentencing judge must be that the conduct being prohibited is directly related to the crime of conviction.” Moreover, “[t]he existence of such a relationship will always be subjective.” Parramore, 53 Wn. App. at 530 (quoting Boerner, §4.5). But, “[t]here 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.” Parramore, 53 Wn. App. at 531 (quoting Boerner, § 4.5).

That is the outcome the State desires in this case, and, it appears, all cases involving a sex offense. There is no evidence that sex-related businesses, including businesses “where the primary source of business is related to sexually explicit material” played *any* role in the crimes in this case. CP 43. Yet this is the condition the State wants this Court to endorse.

Another condition, upheld by the Court of Appeals, defines “sexually explicit material” via RCW 9.68.130, that is

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the

context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance [are not included].

The only indication of sex-related visual material in the record is the risqué selfie (bra and pants) that Norris reportedly sent to the complainant. See note 1, supra. Although the Court of Appeals upheld the prohibition on possession of “sexually explicit materials” as sufficiently crime-related, there was no indication that the “selfie” qualified as such. And the sex-related business prohibition transports the matter yet another step from reality. Under the plain language of RCW 9.94A.030(10), a prohibition on entering such businesses—an activity not connected with the circumstances of Norris’s crimes—cannot be considered crime-related.

Case law is in accord. Division One struck down a prohibition related to establishments selling sexually explicit materials where “no evidence suggested that such materials were related to or contributed to [the] crime.” State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Likewise, in State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), the Court 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. This is not a case where a defendant used the internet to contact and

lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

In State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008), Division Two 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.

And in State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), overruled on other grounds by Sanchez Valencia, 169 Wn.2d 782, 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.”

The cases are clear: Where the record does not support a factual nexus between the prohibition and the commission of the crime, the prohibition may not be imposed as a crime-related prohibition under RCW 9.94A.030(10).⁵

⁵ Several recent unpublished cases are in accord. See 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 where there was no evidence such materials related to offense); State v. Dossantos, noted at 200 Wn.

The State has, thus far, relied on three cases to support its looser interpretation of RCW 9.94A.030(10), but none aids its position. Answer at 7-8, 10-11. In the first case, State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), 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. Id. at 33-34. This Court, acknowledging it was a "close question," pointed out, "She is the mother of the two child victims; Warren attempted to induce her not to cooperate in the prosecution of the crime; and [the mother] testified against [him.]" Id. Warren's criminal history also included violence against the mother. Id. at 34. Because evidence in the record supported a no-contact order between Warren and the mother, the order was sufficiently crime-related. Id.

App. 1049, 2017 WL 4271713, at *5 (2017) (same); State v. Stewart, noted at 196 Wn. App. 1046, 2016 WL 6459834, at *3 (2016) (in indecent liberties case, same); State v. Hesselgrave, 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 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 relating to 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).

In Kinzle, 181 Wn. App. at 785, Kinzle was convicted of molesting children in the home where he was staying with friends and their children. A prohibition on dating women and forming relationships with families with minor children was, not surprisingly, upheld as crime-related. Id.⁶

The final case is State v. Magana, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). There, Division Three simply concluded, without analysis, that “[b]ecause Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed.” Id.

But here, the Court of Appeals correctly rejected the Magana “categorical approach,” that is, “the broad proposition” that a sex offense conviction alone justifies imposition of any sex-related prohibition. Norris, 1 Wn. App. 2d at 98.⁷ Meanwhile, the State argues it is not advancing a

⁶ See also Irwin, 191 Wn. App. at 659 (upholding computer ownership ban where Irwin took and stored photographs of himself molesting victims).

⁷ Division Three recently adhered to Magana in State v. Alcocer, ___ Wn. App. 2d ___, ___ P.3d ___, 2018 WL 1415657, at *2 (Mar. 22, 2018). But it added

the State has a legitimate interest in restricting access to sexually explicit content in an effort to reduce recidivism. [T]he sexual activity portrayed in pornography typically fails to model realistic behavior or affirmative consent by equal partners. The simple fact of a sex offense conviction is indicative of a defendant’s manifest inability to process the complex messages sent by pornography in a healthy and legal manner.

Id. The Court cites neither record nor authority to support these broad claims.

regime in which any sex crime can trigger any sex-related prohibition. Answer at 9 n. 2. It calls the Court of Appeals' decision "unworkably narrow," decries an overly "strict interpretation" of the SRA, and urges its own more "measured interpretation." Answer at 8-9. Yet this is perplexing because, as stated, the Court of Appeals *affirmed* a related prohibition as sufficiently crime-related. Norris, 1 Wn. App. 2d at 99.

In summary, the record must support the imposition of a crime-related condition.⁸ The State's proposed categorical approach is untenable and inconsistent with the plain language of the SRA.

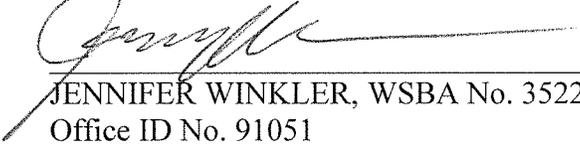
D. CONCLUSION

This Court should reverse the Court of Appeals and find the dating relationship condition vague. But this Court should affirm the Court of Appeals' rejection of a "categorical approach" to sex-related prohibitions.

DATED this 11th day of April, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner / Cross-Respondent

⁸ The State submitted as additional authorities on appeal two studies connecting pornography and recidivism. The Court of Appeals correctly rejected this as a tardy attempt to submit evidence and an invalid public policy argument better suited to legislative advocacy. Norris, 1 Wn. App. 2d at 98.

NIELSEN, BROMAN & KOCH P.L.L.C.

April 11, 2018 - 4:17 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94883-6
Appellate Court Case Title: State of Washington v. Hai Minh Nguyen
Superior Court Case Number: 14-1-06211-3

The following documents have been uploaded:

- 948836_Briefs_20180411161400SC385615_0542.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was ASBOP 94883-6.pdf

A copy of the uploaded files will be sent to:

- MarchK@nwattorney.net
- amy.meckling@kingcounty.gov
- ian.ith@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Re filing under anchor case # copy mailed to; Dominique Norris, 357063 Washington Corrections Center for Women
9601 Bujachich Rd NW Gig Harbor, WA 98332

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180411161400SC385615