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February 16, 2017
Court of Appeals
Division I
State of Washington

NO. 75258-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DOMINIQUE NORRIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PATRICK OISHI

BRIEF OF RESPONDENT

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A ISSUES PRESENTED

1. Community custody conditions prohibiting behavior must be crime-related, meaning there must be a relationship between the crime and the condition. Are Norris's community-custody prohibitions on entering sex-related businesses and possessing and using sexually explicit material reasonably related to his convictions of second-degree child molestation for repeatedly having sex with a 12-year-old boy?

2. Is the verb "use" properly included in the community custody condition ordering Norris not to "use or consume alcohol," when those verbs are essentially synonymous?

3. Should the community custody condition imposing a curfew on Norris be stricken because it is not a valid crime-related prohibition?

4. A community custody condition is not unconstitutionally vague if it provides ordinary people fair warning of proscribed conduct and has standards that are definite enough to protect against arbitrary enforcement. One of Norris's community custody conditions requires him to notify his community corrections officer and sexual deviancy treatment provider of "any dating relationship." Is this condition not unconstitutionally vague?

5. This Court has determined that a community custody condition prohibiting a defendant from entering “places where minors congregate” is unconstitutionally vague. Should that portion of community custody condition eighteen be stricken from Norris’s judgment and sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Dominique Norris was charged by information in King County Superior Court in August 2010 with two counts of second-degree child rape. CP 1-2. In March 2012, Norris pleaded guilty to amended charges of three counts of second-degree child molestation. CP 9-34. The sentencing court imposed a 72-month standard range sentence, suspended under a special sexual offender sentencing alternative (SSOSA). CP 35-41. The judgment and sentence included an appendix with standard and special conditions of community custody. CP 43.

After a pattern of violations of the SSOSA, in May 2016 the sentencing court revoked Norris's suspended sentence for using marijuana and failing to take her oxycodone as prescribed. CP 47-68, 96-97. The trial court imposed the original 72-month term and reimposed the community custody conditions. CP 97.

Norris timely filed a notice of appeal of her SSOSA revocation. CP 98. She now challenges several community-custody conditions, but not the revocation itself.

2. SUBSTANTIVE FACTS

Norris repeatedly had sex with a 12-year-old boy who was related to the father of Norris's children. CP 3, 27. The sexual intercourse occurred over a period of months, usually at the boy's home, though also once or twice at another apartment. Id. Norris professed love for the boy and text-messaged him photos of herself in her underwear. Id. Eventually, the boy told a coach. Id. Norris admitted to a member of her church that she had been having sex with the child. CP 3-4, 27-28.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY IMPOSED COMMUNITY-CUSTODY CONDITIONS REGARDING SEX-RELATED BUSINESSES, SEXUALLY EXPLICIT MATERIALS, AND ALCOHOL.

Norris complains that, as a convicted child molester on community custody, she should not be barred from entering sex-related businesses, such as adult bookstores and strip clubs, and from possessing and viewing sexually explicit material. She also complains that she should not be told not to “use” alcohol. These community custody conditions should be affirmed.

a. Additional Relevant Facts.

Appendix H of Norris’s judgment and sentence imposes several “Special Conditions” of community custody related to sex offenses, including:

(10) Do not enter sex-related businesses, including x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.

(11) 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.

(12) Do not use or consume alcohol.

CP 43, 110.

- b. The Conditions Pertaining To Sex-Related Businesses And Sexually-Explicit Materials Were Properly Entered As Reasonably Related To The Circumstances Of The Crime.

Trial courts have authority to impose “crime-related prohibitions” as conditions of community custody. RCW 9.94A.703(3)(f). “Crime-related prohibitions” must “directly relate[] to the circumstances of the crime for which the offender has been convicted[.]” RCW 9.94A.030(10). “Directly related” includes conditions that are “reasonably related” to the crime. State v. Irwin, 191 Wn. App. 644, 656-57, 364 P.3d 830 (2015).

This court reviews the factual basis for crime-related conditions under a “substantial evidence” standard. Irwin, 191 Wn. App. at 656. Reviewing courts will strike community custody conditions when there is “no evidence” in the record that the circumstances of the crime related to the community custody condition. Id. at 657. On the other hand, courts will uphold crime-related community custody decisions when there is some basis for

the connection; there is no requirement that the prohibited activity be factually identical to the crime. Id. For example, in State v. Kinzle, a child molestation case, the court upheld a prohibition on dating women with minor children, even though the defendant had not molested children of the women that he dated. 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

When convicted “of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials [are] all crime related and properly imposed.” State v. Magana, ___ Wn. App. ___, ___ P.3d ___, No. 33701-4-III, 2016 WL 7377339, at *5 (Wash. Ct. App. Dec. 20, 2016). Norris’s crimes — repeatedly molesting and having sexual intercourse with a child — directly involved sexual arousal, sexual deviancy, sexual predation, and the sexual objectification of young men. Keeping Norris away from sexually explicit businesses, performances, and materials that primarily involve sexual arousal and sexual objectification is directly and reasonably related to the circumstances of the crime.

In cases where the courts have stricken community custody conditions as lacking any connection to the crime, the prohibitions were on broad activities of otherwise normal life.

See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (prohibition on Internet use generally). By contrast here, the conditions keeping Norris away from places and materials that sensationalize and celebrate the sexual objectification of others is clearly connected to her crimes of having sex with a child.

This Court should affirm those community custody conditions because these conditions are reasonably related to Norris's crimes. This is especially true when Norris text-messaged a sexually explicit photograph of herself to the child victim's phone. CP 3, 27.

c. The Court Properly Prohibited Norris From "Use" Of Alcohol.

Norris concedes that the court had the authority under RCW 9.94A.703(3)(e) to prohibit her from consuming alcohol. She takes issue with the court's prohibition on the "use" of alcohol. This is frivolous. The statute, at the time of Norris's offenses, permitted the court to order Norris to "[r]efrain from consuming alcohol." RCW 9.94A.703(3)(e). However, "consume," among other things, means "to use." Merriam Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/consume> (accessed on October 12, 2016). Although redundant and likely unnecessary in

light of the court's prohibition on "consumption," the court properly prohibited Norris from the "use" of alcohol pursuant to RCW 9.94A.703(3)(e).¹

2. THE STATE AGREES THAT THE CURFEW CONDITION OF COMMUNITY CUSTODY SHOULD BE STRICKEN BECAUSE IT IS NOT CRIME-RELATED.

The State concedes that Special Condition 7 of Appendix H of Norris's judgment and sentence, requiring that she "[a]bide by a curfew of 10 p.m. – 5 a.m. unless directed otherwise" should be stricken. CP 43. Here, there was no specific allegation that Norris's criminal conduct occurred during those hours, and the facts reflect that most of Norris's abuse of the boy occurred in the home where she was residing at the time. The curfew is not reasonably related to Norris's crimes.

¹ The legislature amended RCW 9.94A.703(3)(e) effective July 2015 to say, "Refrain from *possessing or consuming* alcohol." SENTENCE AND PUNISHMENT—ALCOHOL AND CONTROLLED SUBSTANCES—POSSESSION OR USE, 2015 Wash. Legis. Serv. Ch. 81 (S.B. 5104) (emphasis added). This does not apply to Norris's case, however.

**3. THE COMMUNITY CUSTODY CONDITION
REQUIRING NORRIS TO DISCLOSE DATING
RELATIONSHIPS IS NOT IMPERMISSIBLY
VAGUE.**

Appendix H to the Judgment and Sentence includes Special Condition 5, which requires Norris to “[i]nform the supervising CCO and sexual deviancy treatment provider of any dating relationship.” CP 51. Norris challenges this condition as unconstitutionally vague. Her argument fails.

This court reviews community custody conditions for abuse of discretion, and will reverse only if the condition is “manifestly unreasonable,” which an unconstitutionally vague condition would be. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Laws are unconstitutionally vague if they fail to provide ordinary people with fair warning of proscribed conduct or lack standards that are definite enough to protect against arbitrary enforcement. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008).

However, “a community custody condition 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.” Sanchez Valencia, 169

Wn.2d at 793 (internal quotation marks omitted) (quoting State v. Sanchez Valencia, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)). Impossible standards of specificity are not required. City of Seattle v. Eze, 111 Wn.2d 22, 26-27, 759 P.2d 366 (1988) (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). “Condemned to the use of words, we can never expect mathematical certainty from our language.” Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). “[I]f men of ordinary intelligence can understand a penal statute, *notwithstanding some possible areas of disagreement*, it is not wanting in certainty.” State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984) (emphasis added).

For example, In Sanchez Valencia, our supreme court found a community custody prohibition on possessing or using “any paraphernalia that can be used for the ingestion or processing of controlled substances” was unconstitutionally vague because the phrase encompassed a virtually limitless variety of commonplace items. 169 Wn.2d at 785, 793-95. But the court noted that the more-specific phrase “drug paraphernalia” would not have been unconstitutionally vague. Id. at 794 (explaining that the mistake in affirming the condition was erroneously reading the adjective “drug”

into the condition). See also id. at 795 (J.M. Johnson, J., concurring) (“[a] ban on drug paraphernalia is sufficient to inform the petitioners of what is proscribed and prevent arbitrary enforcement”).

The term “dating relationship,” along with the terms “date,” and “to date,” are common terms of ordinary understanding. “Date” has an ordinary dictionary definition in this context: “a social engagement between two persons that often has a romantic character.” Merriam Webster’s Online Dictionary <http://www.merriam-webster.com/dictionary/date> (accessed on February 10, 2017). The term “dating relationship” has a similar and commonsensical statutory definition: “a social relationship of a romantic nature.” RCW 26.50.010 (emphasis added).

The term “dating relationship” is not an indecipherable phrase for ordinary people. While the term “relationship” – as with “paraphernalia” in Sanchez Valencia – is an expansive term encompassing a wide range of situations, the term “*dating* relationship” – as with “*drug* paraphernalia” – sufficiently narrows the field so as to provide fair warning of what Norris must report, and is definite enough to protect against arbitrary enforcement.

Norris imagines a string of scenarios that she worries might confuse her or her CCO, but conditions of community custody are “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.” Sanchez Valencia, 169 Wn.2d at 793. The law does not say that a prohibition is vague any time it is subject to hair-splitting.

Norris cites to a nonbinding federal case, United States v. Reeves,² as “instructive.” However, in Reeves, the condition at issue was to notify a probation officer of any “significant romantic relationship.” Id. at 80. The court found that the layers of adjectives left too much room for confusion about the scope of the requirement: “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. at 81 (citing Mozart, Jane Austen, and Hollywood romantic comedies of the 1980’s and 2000’s).

Here, Norris is simply required to disclose any “dating relationship,” which is a commonly understood term. There is no extra layer of subjectivity here. “[F]air warning is not to be confused

² 591 F.3d 77 (2d Cir. 2010).

with the fullest, or most pertinacious, warning imaginable.” United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994). “Conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail.” Id. While the term “dating relationship” is not mathematically precise and does not specifically address the details of every “what if,” that does not make it unconstitutionally vague. Norris’s argument fails.

4. THE COURT SHOULD STRIKE THE PORTION OF COMMUNITY CUSTODY CONDITION EIGHTEEN THAT RESTRICTS NORRIS FROM ENTERING “ANY PLACES WHERE MINORS CONGREGATE.”

Norris also challenges community custody condition eighteen as unconstitutionally vague. She is partially correct. The first clause of the condition, “Do not enter any parks/playgrounds/schools” is sufficiently definite and need not be stricken. However, the remaining language (“or any places where minors congregate”) should be stricken as it does not provide adequate notice to Norris as to what is proscribed.

This Court recently considered a vagueness challenge to a community custody condition similar to condition eighteen imposed here. Irwin, 191 Wn. App. 644. The court held that a condition that

ordered a defendant to “not frequent areas where minor children are known to congregate” without further specifying the exact locations that were off limits was unconstitutionally vague. Id. at 649. Based on the reasoning in Irwin, that portion of condition 18 that prohibits Norris from entering “any places where minors congregate” is unconstitutionally vague and must be stricken. However, Irwin noted that the constitutional deficiency stemmed from the lack of “clarifying language or an illustrative list of prohibited locations (as suggested by trial counsel).” 191 Wn. App. at 655. See also Magana, 2016 WL 7377339 at *4 (condition prohibiting “places where children are known to congregate” allows CCO “too much discretion” and is “boundless”).

Certainly, informing Norris that she may not enter parks, playgrounds, or schools provides her sufficient notice to understand what conduct is proscribed. Norris complains that the term “schools” is also vague, but any person with ordinary intelligence can tell what the word “schools” means. As previously noted, “conditions of probation do not have to be cast in letters six feet high, or to describe every possible permutation, or to spell out every last, self-evident detail.” United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994).

This condition should be amended to say simply, "Do not enter any parks, playgrounds or schools."

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the special sex-offender-related community-custody conditions pertaining to sex-related businesses, sexually explicit materials, alcohol use and dating relationships. (Appendix H, Special Conditions 5, 10, 11 and 12.) The case should be remanded for the judgment and sentence to be amended as follows:

Strike the sentence, "Abide by a curfew of 10 p.m. - 5 a.m. unless directed otherwise," from Special Condition 7; and

Replace Special Condition 18 with the sentence, "Do not enter any parks, playgrounds or schools."

DATED this 16th day of February, 2017.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Dominique Debra Norris, Cause No. 75258-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of February, 2017.

A handwritten signature in black ink, appearing to read "D. Debra Norris", is written over a horizontal line.

Name:

Done in Seattle, Washington