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Court of Appeals
Division II
State of Washington

No. 96313-4

NO. 50250-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK WALLMULLER
Appellant.

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

Mason County Cause No. 11-1-00463-5

The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT – CORRECTED

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by requiring Mr. Wallmuller to pay for the cost of urinalysis and/or breathalyzer testing as a community custody condition, despite having found him indigent and imposing only mandatory costs.

2. The trial court abused its discretion by failing to order a Presentence Investigation Report (PSI).

3. The trial court abused its discretion by imposing an unconstitutional condition of community custody that Mr. Wallmuller not frequent places where children congregate because it is impermissibly vague and subject to arbitrary enforcement.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion by requiring Wallmuller to pay for the cost of urinalysis and/or breathalyzer testing as a community custody condition when the court already determined Wallmuller to be indigent and unable to pay costs?

2. Did the trial court abuse its discretion by failing to order a PSI when the PSI is statutorily mandated for all felony sex offenses?

3. Did the trial court abuse its discretion by ordering the community custody condition that Mr. Wallmuller not frequent places where children congregate, because it is vague and overbroad and does not provide fair warning of proscribed conduct which exposes appellant to arbitrary enforcement?

4. Should this Court deny appellate costs because Mr. Wallmuller is indigent?

B. STATEMENT OF THE CASE

On June 3, 2014, Mr. Wallmuller pled guilty to the charges of first degree child rape and sexual exploitation of a minor. CP 731. The court accepted his plea and he was sentenced on June 27, 2014. CP 741. The victim did not address the court during re-sentencing. Mr. Wallmuller subsequently appealed his sentence based on: 1) the fact that the trial court erred in calculating his offender score and applicable sentencing range by not presenting proof of his criminal history; and 2) that three of the community custody conditions were improper because they were not crime-related prohibitions. This Court agreed, struck three conditions of community custody and remanded for proof of the prior convictions. CP 828.

The court did not order a PSI. RP 45-51, 55. During the

March 8, 2016 resentencing, the court issued a Felony Judgment and Sentence with included the following challenged community custody conditions:

> Appendix H (b)(14) The defendant shall, at his/her own expense, submit to random urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance.
>
> Appendix H (b)(17) The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds and shopping malls.

CP 841.

The trial court entered an order of indigency at the sentencing hearing and determined that Mr. Wallmuller did not have the ability to pay discretionary LFO's. CP 2376-77; 2452;1RP 21.

This timely appeal follows. CP 843.

C. ARGUMENTS

1. THE TRIAL COURT ABUSED ITS DISCRETION BY REQUIRING MR. WALLMULLER TO PAY DISCRETIONARY COSTS, AFTER DETERMINING WALLMULLER HAD NO ABILITY TO PAY.

The trial court imposed discretionary Legal Financial Obligations (LFOs) after determining that Mr. Wallmuller could not pay

these costs. During resentencing on March 8, 2016, counsel for Mr. Wallmuller stated on the record that due to his financial circumstances, Mr. Wallmuller "shouldn't have to pay anything but mandatory costs." RP 16-17. The Court agreed, found Mr. Wallmuller did "not have a significant ability to pay," and struck costs that were "non-mandatory." RP 21.

Perhaps unwittingly, the Court failed to strike the following discretionary costs in Appendix H(b)(14):

> The defendant shall, **at his/her own expense**, submit to random urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance.

CP 841 (emphasis added). While defense counsel for Mr. Wallmuller did not object to this condition at the time of sentencing, this Court may exercise its discretion under RAP 2.5(a) to review challenges related to discretionary LFOs not raised below. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

The lower court's decision to impose discretionary LFOs is reviewed for an abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A trial court abuses this discretion when its decision is based on untenable grounds or reasons. *Clark*, 191 Wn.

App. at 372.

A LFO is defined as any "financial obligation that is assessed to the offender as a result of a felony conviction." RCW 9.94A.030(31). The imposition of the community custody provision at issue in this case imposes a discretionary LFO because it is a financial obligation that was assessed as a result of a felony conviction. RCW 9.94A.030(31).

In *Blazina*, 182 Wn.2d 827, the Court reiterated the language of RCW 10.01.160(3) which provides the court may not order a defendant to pay costs unless the defendant is or will be able to pay them. *Blazina*, 182 Wn.2d at 837-38. Here the trial court determined Mr. Wallmuller could not pay discretionary LFO's. 1RP 21.

The trial court abused its discretion by imposing condition H(b)(14), a discretionary LFO, after the trial court determined Mr. Wallmuller could not pay. The inconsistent imposition of a LFO after determining a defendant cannot pay is an abuse of discretion because it is imposed on an untenable basis. *Blazina,* 182 Wn.2d at 837-39; *Clark*, 191 Wn. App. at 372; RCW 10.01.160(3).

Accordingly, this Court must vacate the condition requiring Mr. Wallmuller pay for his random urinalysis and/or breathalyzer tests.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ORDERING A PSI.

RCW 9.94A.500(1) provides that the trial court must order the Department of Corrections to prepare a pre-sentence investigation for all felony sex offense convictions. *Id*. RCW 9.94A.500(1) provides in relevant part:

> In addition, **the court shall**, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders.

(Emphasis added). Former RCW 9.94A.110 also required the trial court to order a PSI in felony sex offenses:

> the court shall, at the time of plea or conviction, order the [Department of Corrections] to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense.... The court shall consider the risk assessment and presentence reports.

Id.

Use of the term "shall" is mandatory and unambiguous. *State v. Brown*, 178 Wn. App. 70, 79, 312 P.3d 1017 (2013) (citing *State v.*

Q.D., 102 Wn.2d 19, 29-30, 685 P.2d 557 (1984) (noting that "use of the word 'shall' creates an imperative obligation unless a different legislative intent can be discerned")).

In *Brown*, 178 Wn. App. at 79, the appellate Court held that the trial court abused its discretion in refusing to order a PSI in violation of former RCW 9.94A.110 because that statue like current RCW 9.94A.500 "mandated such a report." *Id*. The state conceded error in *Brown*. *Id*.

Brown was also a sex offense case like Mr. Wallmuller's, where the victim did not speak at sentencing or submit a written statement. The Court in *Brown* explained that the PSI has other purposes including the court to hear and understand a sexual abuse victim's 'voice'. "Where the legislature has made such investigations mandatory, as it has done for felony sexual offenses, we should not lightly overlook a sentencing court's refusal to order one." *Brown*, 178 Wn.App. at 85.

The Court in *Brown* rejected the state's argument that the error was harmless. *Brown*, 178 Wn. App. at 80-81. The Court explained that the PSI is mandatory because it provides the court with information that a victim statement or allocution may fail to address.

Brown, 178 Wn. App. at 80-81; *State v. Crider*, 78 Wn. App. 849, 899 P.2d 24 (1995).

Brown provides controlling authority for this case. It is reversible error to fail to prepare a presentence report in a felony sex case. Accordingly, this Court must vacate the sentence and remand for a PSI to precede resentencing. *Brown*, 178 Wn. App. at 85.

3. THE CONDITION TO AVOID PLACES WHERE CHILDREN CONGREGATE IS UNCONSTITUTIONALLY VAGUE.

In the present case, the sentencing court issued the following community custody condition (b)(17):

> The defendant **shall not loiter in nor frequent places where children congregate** such as parks, video arcades, campgrounds and shopping malls.

CP 841 (emphasis added). Mr. Wallmuller challenges as unconstitutionally vague, the language “where children congregate”.

A defendant can challenge community custody conditions for the first time on appeal. *State v. Bahl,* 164 Wn.2d 739, 745, 193 P.3d 678 (2008). Community custody conditions are reviewed under the abuse of discretion standard regardless of whether they are challenged as improper crime-related conditions or as

unconstitutionally vague or overbroad conditions. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); *State v. Magna*, 197 Wn. App 189 (2016); *State v. Irwin*, 191 Wn. App 644, 652, 364 P.3d 830 (2015). An unconstitutional community custody condition will always be an abuse of discretion. *Irwin*, 191 Wn. App at 652 (citing to *State v. Sanchez*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010)).

Due process requires community custody conditions not be vague. *Irwin*, 191 Wn. App at 652. A community custody condition is not vague if it: 1) provides ordinary people fair warning of the proscribed conduct; and 2) has ascertainable standards that protect the defendant from "arbitrary enforcement." *Irwin*, 191 Wn. App at 653; *Bahl*, 164 Wn.2d at 752–53; U.S. Const. Amend. XIV; Wash. Const. art. I, § 3.

In *Irwin*, the defendant pled guilty to second degree molestation. The court imposed a community custody condition that prohibited him from frequenting places where minors were "known to congregate, as defined by the Supervising [CCO]". *Irwin*, 191 Wn. App at 649. The Court of Appeals determined the condition was unconstitutionally vague under both prongs of the vagueness test. *Irwin*, 191 Wn. App at 654–55.

The court reasoned, prohibiting Irwin from going anywhere "children are known to congregate," did not provide "sufficient notice" such that an ordinary person would know "what conduct [wa]s proscribed." *Irwin*, 191 Wn. App at 655 (quoting *Bahl*, 164 Wn.2d at 753). The Court in *Irwin* also found that allowing the CCO to further designate prohibited locations was unconstitutional because it subjected Irwin to arbitrary enforcement. *Irwin*, 191 Wn. App at 655.

In *State v. Magna*, Magana was convicted of third degree rape and his sentence included the condition that he "not frequent parks, schools, malls, family missions or establishments where children are known to congregate or other areas as defined by supervising CCO [community corrections officer], treatment providers." *Magna*, 197 Wn. App. 189, 200 (2016).

The Court in *Magana* struck this community custody condition even though it identified places to avoid because it was unconstitutionally vague and susceptible to arbitrary enforcement due the "boundless" authority conferred on the CCO to determine "where children congregate". *Magna*, 197 Wn. App. at 201.

> [A] community custody condition that empowers a CCO to designate prohibited spaces is constitutionally impermissible because it is susceptible to arbitrary

> enforcement ... While the condition lists several prohibited locations and explains that the list covers places where children are known to congregate, the CCO's designation authority is not tied to either the list or the explanatory statement.

Magna, 197 Wn. App. at 201. The court struck the condition as vague. *Id*.

While both *Irwin* and *Magana* addressed, in part, the discretion conferred upon a CCO to further designate prohibited locations as a part of the condition, both Courts also found the broad language defining prohibited locations within the condition would lead to unconstitutional, arbitrary enforcement. *Irwin*, 191 Wn. App at 655 (quoting *Bahl*, 164 Wn.2d at 753); *Magna*, 197 Wn. App. at 201. In *Irwin*, it was "areas where minor children were **known** to congregate, as defined by the CCO." (Emphasis added) *Irwin*, 191 Wn. App at 649.

In *Magna*, the lower court attempted to meet the requirements of *Irwin* by listing examples of prohibited locations but then broadened the condition by including the language, "…**or establishments where children are known to congregate**." (Emphasis added) *Magna*, 197 Wn. App. at 200.

In both cases, regardless of the language conferring authority

to the CCO to further designate, the sweeping, broad language was unconstitutional because it did not provide standards to protect against arbitrary enforcement. *Irwin*, 191 Wn. App at 655, *Magna*, 197 Wn. App. at 201.

Here, Appendix H(b)(17) did not give authority to a CCO to further designate "now unknown locations", but it did require the CCO to determine "**where children congregate**" rather than the narrower but still vague "**where children are known to congregate**". This is unconstitutionally vague because: (1) an ordinary person would not know what places he or she needed to avoid because children are everywhere; and (2) it does not have ascertainable standards that protect the defendant from "arbitrary enforcement." *Irwin*, 191 Wn. App at 653; *Bahl*, 164 Wn.2d at 752–53; U.S. Const. Amend. XIV; art. I, § 3.

If the court had provided an exclusive list the of locations for Mr. Wallmuller to avoid, the condition would likely survive a challenge because it would be clear, definite and limited. Here, however, the condition, in essence, requires Mr. Wallmuller to stay out of the public realm, because children might be present, and because the CCO could subjectively determine that Mr. Wallmuller was in violation of

this condition any place where children can be found.

In sum, this condition is vague because it does not give ordinary people sufficient notice to understand what conduct is proscribed and the condition remains "vulnerable to arbitrary enforcement." *Irwin*, 191 Wn. App. at 655; *Magna*, 197 Wn. App. at 201. Under *Irwin* and *Magna*, this condition should be stricken as void for vagueness. *Irwin*, 191 Wn. App. at 655; *Magna* 197 Wn.App. at 201. This Court should reverse the sentence and remand to strike this provision.

4. APPEAL COSTS SHOULD NOT BE AWARDED.

Under RCW 10.73.160(1), the appellate courts have broad discretion to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Grant,* 196 Wn. App. 644, 651, 385 P.3d 184 (2016).

Ability to pay is a significant consideration in the discretionary imposition of appellate costs. *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). "[T]he imposition of costs against indigent defendants raises problems that are well documented in *Blazina* — e.g., 'increased difficulty in reentering society, the doubtful recoupment of money by the government, and in equities in

administration.'" *Sinclair*, 192 Wn. App. at 391 (*quoting Blazina*, 182 Wn.2d at 835).

If one meets the standards for indigency set forth in GR 34, "courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Accordingly, once indigency is established, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn. App. at 933 (appellate costs stricken for 66 year old, serving 20 year minimum prison sentence); RAP 15.2(f); (Accord *Grant*, 196 Wn. App. at 551-52 (appellate costs stricken- no change in indigency status).

RAP 15.2(f) specifically provides that a defendant is presumed to remain indigent "throughout the review," unless the appellate court finds his financial condition has improved "to the extent [he] is no longer indigent," this court should exercise its discretion to waive appellate costs. RAP 15.2(f)1.

1A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

Here, the trial court and the Court of Appeals determined that Mr. Wallmuller is indigent; the Court of Appeals determined that Mr. Wallmuller could not pay LFOs and; there is no evidence that Mr. Wallmuller's financial status has changed. CP 846, RAP 15.2(f). In light of Mr. Wallmuller's indigent status, and the presumption under RAP 15.2(f) that he remains indigent "throughout the review," this Court should exercise its discretion to waive appellate costs.

D. CONCLUSION

Mr. Wallmuller respectfully requests this Court reverse the sentence and remand for a PSI, strike the offending community custody provisions and deny appellate costs.

DATED this 26th day of October 2017.

Respectfully submitted,

_____
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_____
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I, Lark Pelling, a person over the age of 18 years of age, served the Mason County Prosecutor's Office timw@co.mason.wa.us and Frank Wallmuller/DOC#321793, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed on October 26, 2017. Service was made by electronically to the prosecutor and Frank Wallmuller by depositing in the mails of the United States of America, properly stamped and addressed.

_____

Lark Pelling, WSBA No. 37770
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LAW OFFICES OF LISE ELLNER

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