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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

FRANK WALLMULLER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni Sheldon, Judge

No. 11-1-00463-5

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Because Wallmuller did not object in the trial court, thus depriving this Court of a fully developed record, when the trial court ordered him to pay the costs of urinalysis and breath tests as a condition of community custody, this Court should decline to review this issue, which Wallmuller now raises for the first time on appeal.

2. Because Wallmuller asked the trial court to consider a PSI that had recently been prepared for another of his sex crime convictions rather than to order a duplicate PSI, and because the trial court did in fact have and consider the recently prepared PSI when sentencing Wallmuller in the instant case, any error resulting from the trial court's failure to order an additional PSI was harmless.

3. Because the trial court's order prohibiting Wallmuller from frequenting places where children congregate included a series of descriptive terms that defined the kinds of places that he was prohibited from frequenting, the order is not unconstitutionally vague.

4. The State will not request appeal costs in this case irrespective of whether the State is the substantially prevailing party on appeal.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Wallmuller's statement of facts, except where additional or contrary facts are offered as needed to develop the State's arguments, below. RAP 10.3(b).

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C. ARGUMENT

1. Because Wallmuller did not object in the trial court, thus depriving this Court of a fully developed record, when the trial court ordered him to pay the costs of urinalysis and breath tests as a condition of community custody, this Court should decline to review this issue, which Wallmuller now raises for the first time on appeal.

The trial court entered the sentencing order at issue in this case at a resentencing that occurred on March 8, 2016 after a remand that flowed from a prior appeal. The resentencing appears under the heading "Review Mandate from Court of Appeals" in the verbatim report at pages 11-22.

At the resentencing of this case, the trial court reimposed community custody as required by RCW 9.94A.507. CP 16. As a mandatory condition of community custody, the trial court ordered that Wallmuller shall "[n]ot consume controlled substances except pursuant to lawfully issued prescriptions" and ordered that he "[n]ot consume alcohol." CP 25 (sections (a)(3) and (a)(11)). The trail court also ordered that "[t]he 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 25 (section (b)(14)). Wallmuller did not object to this condition, and in particular, he did not

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object to the requirement that he pay the costs of urinalysis or breath testing, if any. RP 11-22.

Now, for the first time on appeal, Wallmuller contends that the trial court erred by ordering that he pay the costs of any breathalyzer or urine testing as a condition of community custody. Br. of Appellant at 3-5. However, because Wallmuller did not object in the trial court, the record does not contain any reference to what these costs might include, such as the actual expense involved with breath or urine testing. RP 11-22. From our record, due to Wallmuller's failure to object, the record does not reveal whether the fee is a negligible fee of as little as a few dollars, or whether it is a substantial fee of $20 or more. RP 11-22. Additionally, the record provides no information about the frequency at which this fee might be required or whether it would ever be required; nor does the record reveal what the DOC policy might be in regards to indigent defendants who lack the means of paying the fee. RP 11-22.

"[A] defendant has the obligation to properly preserve a claim of error" and "appellate courts normally decline to review issues raised for the first time on appeal." *State v. Blazina,* 182 Wn.2d 827, 830, 834, 344 P.3d 680 (2015); RAP 2.5(a). Additionally, because Wallmuller did not object in the trial court, resulting in an undeveloped record, and because

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the DOC has not actually requested that Wallmuller submit to a breath or urine test, there is no information about the costs of the tests or what the future hardship, if any, might actually be to Wallmuller if any such test were actually requested at some contingent time in the future. As such, the State contends that Wallmuller's claim is not ripe for this court's review. '"Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r,* 129 Wn.2d 238, 255–56, 916 P.2d 374 (1996) (internal quotation marks omitted)).

2. Because Wallmuller asked the trial court to consider a PSI that had recently been prepared for another of his sex crime convictions rather than to order a duplicate PSI, and because the trial court did in fact have and consider the recently prepared PSI when sentencing Wallmuller in the instant case, any error resulting from the trial court's failure to order an additional PSI was harmless.

Immediately after Wallmuller pled guilty in this case, he addressed the court, through counsel, as follows:

> In talking to Mr. Wallmuller, both myself and – [the prosecutor] and myself individually, we would - I am wondering on behalf of Mr. Wallmuller, there was a pre-sentence report done at the

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> time of his last convictions and he's been incarcerated in the Department of Corrections ever since. It is Mr. Wallmuller's desire, if possible, to waive the requirement for pre-sentence report in this matter because really nothing has changed. I understand there would need to be some information about the current offense. I'm sure Mr. Dorcy can provide that to the Court. But we indicated to Mr. Wallmuller we would make the motion to waive the requirement of a pre- sentence report in this matter.

RP 43-44 (June 3, 2014, "Plea Hearing"). Seeking clarification, the trial court judge addressed Wallmuller, as follows:

> And, Mr. Wallmuller, do you understand that the Court is normally given a pre-sentence investigation for a particular crime. In this case you're asking that the Court not order that be done. And there's a couple of things that you lose in that; the fact that there isn't any specific outline by the community corrections person of the alleged offense, and it sounds like [the prosecutor] would be providing that to the Court. And secondly, you lose the recommendation that would be coming from the Department of Corrections. At the end of that report they make a recommendation to the Court, which the Court considers along with the others that are received. So, do you understand what would be missing in this case if we didn't have one?
>
> MR. WALLMULLER: Yes, Your Honor.
>
> THE COURT: Is that acceptable to you?
>
> MR. WALLMULLER: Yes, Your Honor.
>
> THE COURT: Alright. The Court will find that since there was a prior PSI done and Mr. Wallmuller has been incarcerated since that time that the proposal of reading the background information from the prior PSI together with having a overall recitation about the general nature of the offense would be sufficient and I'll allow that to be waived.

RP 45-46 (June 3, 2014, "Plea Hearing").

The parties then appeared for the first sentencing on June 27, 2014. RP 49 (June 27, 2014, "Sentencing"). At the first sentencing hearing, the prosecutor informed the court that the victim and her mother were present but that they did not wish to make a statement. RP 54 (June 27, 2014, "Sentencing"). Later in the hearing, the trial court judge addressed the parties as follows:

> THE COURT: One other housekeeping matter, and that is to include with our Cause No. 11-1-463-5 a copy of at least those pages that the Court did rely on in the PSI so that it is also officially a part of our record. You can either –

RP 73 (June 27, 2014, "Sentencing"). Wallmuller's trial counsel responded, "That seems appropriate, Your Honor." *Id.*

However, following Wallmuller's first appeal, this Court, in case number 46460-8-II, invalidated the judgment and sentence ordered by the trial court on June 27, 2014, and remanded the case for resentencing because the State had not adequately proved Wallmuller's prior criminal history at the time of sentencing (and for the removal of three improper community custody conditions). CP 59-65. In its unpublished opinion in case number 46460-8-II this Court cited *State v. Wallmuller*, 164 Wn. App. 890, 891, 265 P.3d 940 (2011), and referenced the fact that Wallmuller had been convicted of nine other sex offenses in that case, that the Department of Corrections had pre-sentence investigative report (PSI) in 2009 in relation to that case, and that

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Wallmuller had asked the trial court to rely on that 2009 in the instant case rather than to order an additional PSI for this case. CP 61.

In response to this Court's mandate, the trial court resentenced Wallmuller on March 8, 2016. RP 11-22 (March 8, 2016, "Resentencing Hearing"). At the resentencing hearing, the only issues addressed by the trial court were to strike the improper community custody conditions and to receive from the State formal proof of Wallmuller's prior criminal convictions in order to establish that Wallmuller's offender score in excess of nine points, except that the trial court also made a finding that Wallmuller did not have the ability to pay discretionary legal financial obligations. RP 11-22. After receiving formal proof of Wallmuller's offender score, the trial court then reimposed the same sentence it had previously ordered, which was to impose 318 months incarceration on count I and to impose 120 months incarceration on count II. CP 15, 75.

At the outset, it would appear that if error occurred because of the trial court's reliance on the 2009 PSI in lieu of ordering an additional PSI, Wallmuller invited the error. However, RCW 9.94A.500(1) requires that "the trial court shall, at the time of plea or conviction, order... a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense." Our Supreme Court has ruled that "'[t]his statutory language is mandatory and unambiguous.'" *State v. Brown*, 178 Wn. App.

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70, 79, 312 P.3d 1017 (2013) (quoting *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") (citing *State v. Bryan,* 93 Wn.2d 177, 606 P.2d 1228 (1980))). Thus, it appears that even where the defendant has invited the error, if the trial court has exceeded its statutory authority, the invited error doctrine does not preclude appellate review. *In re Pers. Restraint of West,* 154 Wn.2d 204, 214, 110 P.3d 1122 (2005).

However, the facts of the instant case are distinguishable from those of Brown, because in Brown "a presentence report for Brown was not presented to the court at any point[,]" but in the instant case the trial court had and considered a presentence report for Wallmuller. *Brown,* 178 Wn. App. at 82. Thus, the State contends, the reasoning of Brown that disallowed a harmless error analysis in Brown is not applicable in the instant case. *Id.* at 80-82.

"Nonconstitutional error requires reversal only if, 'within reasonable probabilities,' the outcome of the proceeding 'would have been materially affected had the error not occurred.'" *Brown* at 80 (quoting *State v. Crenshaw,* 98 Wn.2d 789, 800, 659 P.2d 488 (1983) (citing *State v. Tharp,* 96 Wn.2d 591, 637 P.2d 961 (1981))). In the

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instant case, the State contends that it is not reasonably probable that the addition of an additional PSI would have changed the sentence ordered by the court and that, therefore, this Court should find that on the limited facts of the instant case, the trial court's failure to order a duplicate PSI was harmless.

3. Because the trial court's order prohibiting Wallmuller from frequenting places where children congregate included a series of descriptive terms that defined the kinds of places that he was prohibited from frequenting, the order is not unconstitutionally vague.

As one of several conditions of community custody, the trial court ordered as follows: "The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls[.]" CP 25 (section (b)(17)). On appeal, Wallmuller cites *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), and contends that this restriction is unconstitutionally vague.

However, the wording of the restriction that was at issue in Irwin had two flaws that are not present in the instant case. *Id.* The wording of the restriction at issue in *Irwin* was as follows: "Do not frequent areas where minor children are known to congregate, as defined by the supervising CCO." *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830

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(2015) (internal quotation marks omitted). The court in *Irwin* found one of the two flaws with this language to be that the restriction was unconstitutionally vague because it required further definition by a corrections officer, which potentially permitted arbitrary application. *Id.* at 654-55. The second flaw was that "[w]ithout some clarifying language or an illustrative list of prohibited locations..., the condition does not give ordinary people sufficient notice to "understand what conduct is proscribed." *Id.* at 655 (quoting *State v. Bahl,* 164 Wn.2d 739, 753, 193 P.3d 678 (2008)).

The language at issue in the instant case does not suffer from either of these two constitutional flaws. CP 25 (section (b)(17)). The language at issue here – "[t]he defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls" – does not require further definition by a corrections officer. CP 25 (section (b)(17)). And the language at issue here provides "clarifying language" and "an illustrative list of prohibited locations" of the sort that was missing from the language at issue in *Irwin. Id.*; *Irwin* at 655.

The due process clauses of the 14th Amendment to the United States Constitution and article I, section 3 of the Washington Constitution

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require that community custody conditions such as the one at issue in the instant case not be vague. *Irwin* at 652-53. To sustain a constitutional vagueness challenge, the community custody condition at issue must provide ordinary people with fair warning of what conduct is proscribed and must have standards are that are definite enough to guard against arbitrary enforcement. *Id.* at 652-53 (citing *Bahl*, 164 Wn.2d at 752-53). "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.'"" *Irwin* at 653 (quoting *State v. Sanchez Valencia,* 169 Wn.2d 782, 793, 239 P.3d 1059 (2010) (internal quotation marks omitted) (quoting *State v. Sanchez Valencia,* 148 Wn. App. 302, 321, 198 P.3d 1065 (2009))).

The State contends that the language at issue here complies with the requirements of the 14th Amendment and Wash. Const. art. I, section 3, because the language does not delegate interpretation to a corrections officer, and because provides a list of clear examples of the kinds of places where children congregate and that Wallmuller is thus prohibited from frequenting.

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4. The State will not request appeal costs in this case irrespective of whether the State is the substantially prevailing party on appeal.

The State will not seek appeal costs in this case.

D. CONCLUSION

The State asks that this Court deny Wallmuller's appeal and confirm his judgment and sentence.

DATED: December 12, 2017.

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