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STATE OF WASHINGTON
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Supreme Court No. 96313-4
Court of Appeals No. 50250-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

FRANK A. WALLMULLER,

Respondent.

SUPPLEMENTAL BRIEF OF
PETITIONER – STATE OF WASHINGTON

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I. STATEMENT OF THE ISSUE

At sentencing following Wallmuller's convictions for rape of a child in the first degree and sexual exploitation of a minor, the trial court, as a condition of community custody, ordered that Wallmuller "shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls." *Is this condition unconstitutionally vague even though it provides a descriptive list of the kinds of places that the defendant is prohibiting from frequenting?*

II. STATEMENT OF FACTS RELEVANT TO ISSUE

The Court of Appeals decision in this case adequately summarizes the facts necessary to the this Court's review, except that the entire text of the community custody condition at issue is 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)).

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III. ARGUMENT

In this case, Wallmuller pleaded guilty to sex crimes against children. RP 32-48. These crimes included rape of a child in the first degree (a violation of RCW 9A.44.073) and sexual exploitation of a minor (a violation of RCW 9.68A.040). CP 12. Because the elements of these offenses adequately describe the harm to the child victims involved, a graphic description of Wallmuller's crimes is unnecessary. In addition to the crimes of conviction in this case, Wallmuller also has a history of harming children. CP 13.

Thus, it was in this context that the trial court, in addition to a temporary term of total confinement, also imposed a life term of community custody. CP 16. And it was in this context that the trial court ordered the community custody condition at issue here (that Wallmuller "shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls"). CP 25 (condition 17). The State has a great interest in protecting child victims from crimes perpetrated by sex offenders. *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009). "When sex offenders reenter society, they are much more likely than any other type of offender to be rearrested

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for a new rape or sexual assault.” *McKune v. Lile*, 536 U.S. 24, 32-33, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion). The State contends that, as in *McCormick*, Wallmuller’s rights are already diminished significantly as he was convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions.” *Id.* at 702.

Once a defendant has been found guilty in a fair trial, “[t]hat finding justifies imposing extensive restrictions on the individual’s liberty.” *Morrissey v. Brewer*, 408 U.S. 471, 483, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Additionally, “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (quoting *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948)).

Obviously, while Wallmuller is serving a term of total confinement, he is isolated from children and is isolated from places where children congregate and is, therefore, presumably not a threat to children. But when he is released from total confinement and placed on

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community custody, he becomes a threat to children unless he is also isolated from children while on community custody. Thus...

An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

Pell v. Procunier, 417 U.S. 817, 822–23, 94 S. Ct. 2800, 2804, 41 L. Ed. 2d 495 (1974).

In this context – where Wallmuller is allowed to be released from total confinement to live on community custody – the conditions of his release should not be so technically defined that preventing his access to children while on community custody creates an unsolvable semantical Rubik's cube. A community custody condition is unconstitutionally vague if it does not sufficiently define the proscribed conduct so an ordinary

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person can understand it or if its interpretation permits arbitrary enforcement. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). But complete certainty is not required. *Id.* In the instant case, the condition at issue provides a descriptive list of kinds of places that define the preceding phrase – “where children congregate” – and is preceded by the explanatory description “such as[.]” Thus, an ordinary person can easily understand that the boundaries of the prohibition. The only alternative would be to add words upon words to cover all possible semantic contortions and prohibit Wallmuller from going near any place where children congregate, hang out, typically visit, and so on until the imagination is exhausted and to then add a long list of all possible places where he would be likely to encounter vulnerable children.

Language similar to the community custody condition at issue in this case has been approved against vagueness challenges in other jurisdictions. *See, e.g., State v. Simonetto*, 232 Wis. 2d 315, 606 N.W.2d 275 (Wis. Ct. App. 1999); *Britt v. State*, 775 So. 2d 415 (Fla. Dist. Ct. App. 2001); *United States v. Crume*, 422 F.3d 728 (8th Cir. 2005); *United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008); and, *State v. Gauthier*, 201 Vt. 543, 145 A.3d 833 (2016).

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In the instant case, the Court of Appeals cited *State v. Norris*, 404 P.3d 83, 86 (Wash. Ct. App. 2017), *review granted*, 190 Wn.2d 1002, 413 P.3d 12 (2018), and *aff'd in part, rev'd in part sub nom. State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018), to find the condition at issue in the instant case is unconstitutionally vague. *State v. Wallmuller*, 4 Wn. App.2d 698, 423 P.3d 282 (2018). Citing *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), the Court of Appeals found that:

Arguably, the condition here is less vague than in *Irwin* because it provides a short list of locations where Wallmuller knows he is not allowed to go. However, the condition contains the phrase “such as” before its list of prohibited places, indicating that frequenting more places than just those listed would violate the condition. As in *Norris*, this short list does not cure the inherent vagueness of the phrase “places where children congregate.”

Wallmuller at 703. Ultimately the Court of Appeals concluded its analysis of this issue by stating:

We agree with the court in *Norris* that a modified condition stating, “The defendant shall not loiter in nor frequent parks, video arcades, campgrounds, and shopping malls” would not be unconstitutionally vague. On remand, the trial court can vacate this condition or modify the condition consistent with this opinion.

Id. at 704. The effect of the Court of Appeals ruling is that the State would be required to provide an exhaustive list of all the places where

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Wallmuller is prohibited from going while released from total confinement and serving his sentence on community custody. The State respectfully contends that the Court of Appeals ruling in this case conflicts with this Court's holding in *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

IV. CONCLUSION

The State respectfully requests that this Court validate the constitutionality of the community custody condition at issue, sustain the trial court, and reinstate the community custody condition at issue.

DATED: February 22, 2019.

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Appendix

Foreign Cases

KeyCite Yellow Flag - Negative Treatment

Distinguished by *Whatley v. Zatecky*, 7th Cir.(Ind.), August 15, 2016

775 So.2d 415
District Court of Appeal of Florida,
First District.

Tross BRITT, Appellant,
v.
STATE of Florida, Appellee.

No. 1D99-3416.

|
Jan. 5, 2001.

Synopsis

Defendant was convicted in the Circuit Court, Duval County, Lance M. Day, J., of a sexual offense involving a minor and he appealed. The District Court of Appeal, Webster, J., held, in a matter of first impression, that conditions of community control imposed on defendant that prohibited him from living near or working at a "school, daycare center, park, playground, or other place where children regularly congregate" were not unconstitutionally vague.

Affirmed.

West Headnotes (3)

[1] **Criminal Law** ⇌ Probation and related dispositions

Defendant failed to preserve for appellate review issue of whether trial court committed fundamental error when it imposed conditions of community control in its written order that were not orally pronounced, where defendant did not raise issue in the trial court.

1 Cases that cite this headnote

[2] **Sentencing and Punishment** ⇌ Validity

Conditions of community control imposed on defendant who had been convicted of sexual offense involving a minor that prohibited

him from living near or working at a “school, daycare center, park, playground, or other place where children regularly congregate” were not unconstitutionally vague; doctrine of *ejusdem generis* required phrase “or other place where children regularly congregate” to be read in conjunction with enumeration of specific places identified, and thus conditions were sufficiently precise to give person of ordinary intelligence fair notice of what constituted forbidden conduct.

8 Cases that cite this headnote

[3] Constitutional Law → Statutes

The standard for testing vagueness under state law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.

Cases that cite this headnote

Attorneys and Law Firms

*416 Nancy A. Daniels, Public Defender; Phil Patterson, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Lori D. Stith, Assistant Attorney General, Tallahassee, for Appellee.

Opinion

WEBSTER, J.

In this direct criminal appeal, appellant raises two issues: (1) whether the trial court committed fundamental error when it imposed conditions of community control in its written order that were not orally pronounced; and (2) whether conditions of community control prohibiting him from living near or working at a “school, daycare center, park, playground, or other place where children regularly congregate” are unconstitutionally vague and, therefore, void. We affirm.

[1] Appellant did not raise the first issue in the trial court. Therefore, it has not been preserved. It does not constitute fundamental error, which may be raised for the first time on appeal. *E.g., Maddox v. State*, 760 So.2d 89, 104–05 (Fla.2000);

Klarich v. State, 730 So.2d 419 (Fla. 5th DCA 1999), *approved*, 760 So.2d 150 (Fla.2000). Accordingly, we will not address the merits of the issue challenging the inclusion in the written order of certain conditions of community control that were not orally pronounced.

[2] Appellant next challenges as unconstitutionally vague two conditions of community control. The first prohibited appellant from doing “volunteer work, employment, or community activity at any school, daycare center, park, playground, or other place where children regularly congregate”; and the second prohibited appellant from “liv[ing] within 1,000 feet of a school, daycare center, park, playground, or other place where children regularly congregate.” Both conditions of supervision are now mandatory for individuals convicted of sexual battery upon a minor and other similar offenses, as was appellant. § 948.03(5)(a) 2 & 6, Fla. Stat. (Supp.1998). According to appellant, impermissible vagueness is created by the phrase “or *417 other place where children regularly congregate.” We disagree.

[3] “The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.” *Brown v. State*, 629 So.2d 841, 842 (Fla.1994) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)). The state contends that the doctrine of *eiusdem generis* requires that the phrase “or other place where children regularly congregate” be read in conjunction with the enumeration of specific places identified, i.e., schools, daycare centers, parks and playgrounds. *See generally Green v. State*, 604 So.2d 471, 473 (Fla.1992) (“Under the doctrine of *eiusdem generis*, where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated”). We agree with the state. Applying this general rule of construction, we are of the opinion that the two conditions challenged by appellant are sufficiently precise to “give [] a person of ordinary intelligence fair notice of what constitutes forbidden conduct.” 629 So.2d at 842. We note that, although this appears to be a matter of first impression in Florida, other states that have addressed the issue have held that substantively indistinguishable conditions are not unconstitutionally vague. *See, e.g., People v. Delvalle*, 26 Cal.App.4th 869, 31 Cal.Rptr.2d 725, 730–31 (1994) (a condition of probation requiring the defendant to stay away from places where minor children congregate, such as elementary schools, daycare centers, and parks, did not violate the defendant's rights of free association and due process of law, and was neither overbroad nor ambiguous); *State v. Riles*, 135 Wash.2d 326, 957 P.2d 655, 666 (1998) (community placement conditions

requiring a sex offender to have no contact with minor children, avoid places where minors congregate, and not frequent places where minors were known to congregate, were not unconstitutionally vague, and were within the trial court's authority); *State v. Simonetto*, 232 Wis.2d 315, 606 N.W.2d 275 (1999) (a condition of probation which prohibited the defendant, who had been convicted of possessing child pornography, from going where children may congregate was not vague or overbroad because it clearly prevented the defendant from going to places where children were likely to gather such as schools, daycare centers, and playgrounds). We, too, hold that the conditions at issue are not unconstitutionally vague. Accordingly, we affirm.

AFFIRMED.

BARFIELD, C.J. and VAN NORTWICK, J., concur.

All Citations

775 So.2d 415, 26 Fla. L. Weekly D154

KeyCite Yellow Flag - Negative Treatment

Distinguished by State v. Stewart, Wis.App., March 15, 2006

232 Wis.2d 315
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
Carl SIMONETTO, Defendant-Appellant. †

No. 99-0486-CR.

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Submitted on Briefs Oct. 22, 1999.

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Opinion Released Dec. 15, 1999.

|
Opinion Filed Dec. 15, 1999.

Synopsis

Defendant, who was convicted of possessing child pornography and was placed on probation after receiving stayed sentence, filed postconviction motion challenging conditions of probation. The Circuit Court, Walworth County, John R. Race, J., denied motion, and defendant appealed. The Court of Appeals, Brown, P.J., held that: (1) condition of probation that defendant not “go where children may congregate” was reasonable, necessary, and was not overly broad, but (2) holding restitution open for the State to identify victims violated statute establishing 90-day maximum hold-open period.

Affirmed in part and reversed in part.

West Headnotes (9)

[1] Sentencing and Punishment ⇌ Necessity of Writing

Circuit court's clarification of a condition of probation was not required to be reduced to writing to be effective.

2 Cases that cite this headnote

- [2] **Sentencing and Punishment** ⇌ Imposition of Conditions and Obligations
Probationer is entitled to know in advance the reach of a condition of probation so that he or she may regulate his or her conduct accordingly.

Cases that cite this headnote

- [3] **Sentencing and Punishment** ⇌ Validity

Condition of probation that defendant, who was convicted of possessing child pornography and was diagnosed as a pedophile and a nascent child molester, not “go where children may congregate” was eminently reasonable and necessary; defendant corresponded via computer with teenage boys for purposes of sexual arousal and he admitted to his sex therapist that eventually his actions would have led to actual sexual contact. W.S.A. 948.12, 973.09.

2 Cases that cite this headnote

- [4] **Sentencing and Punishment** ⇌ Discretion of Court

It is within the broad discretion of the circuit court to fashion appropriate conditions of probation in each individual case, as long as those conditions appear to be reasonable and appropriate. W.S.A. 973.09(1)(a).

3 Cases that cite this headnote

- [5] **Sentencing and Punishment** ⇌ Validity or Reasonableness of Conditions in General

On review, the Court of Appeals tests the validity of conditions of probation by how well they serve the probation's dual goals of rehabilitation and protection of the community.

2 Cases that cite this headnote

- [6] **Constitutional Law** ⇌ Sex Offenders

Constitutional Law ⇌ Freedom of Association

Sentencing and Punishment ⇌ Validity

Condition of probation preventing defendant, who was convicted of possessing child pornography, from going where children congregate was

not overly broad, so as to unreasonably impinge upon his constitutional right of freedom of association and right to travel; court's list of prohibited places was extensive enough to give defendant a clear idea of where he could not go, and he was able to go to any of the listed locations, after getting prior approval from his agent. U.S.C.A. Const.Amend. 1; W.S.A. 948.12.

4 Cases that cite this headnote

[7] Sentencing and Punishment ⇌ Validity

Conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to a defendant's rehabilitation.

1 Cases that cite this headnote

[8] Sentencing and Punishment ⇌ Probation as Right or Privilege

Probation is a privilege extended to a convict by the grace of the state; it is not a right.

1 Cases that cite this headnote

[9] Sentencing and Punishment ⇌ Validity

Condition of probation which held restitution open in case the postal inspector identified victims of child pornography violated statute establishing 90-day maximum hold-open period for entry of restitution after a sentence is imposed. W.S.A. 973.20(13)(c).

1 Cases that cite this headnote

Attorneys and Law Firms

****276 *316** On behalf of the defendant-appellant, the cause was submitted on the briefs of Christopher L. Hartley of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of James E. Doyle, attorney general, and Gregory M. Posner-Weber, assistant attorney general.

*317 Before BROWN, P.J., NETTESHEIM and ANDERSON, JJ.

Opinion

¶ 1 BROWN, P.J.

Carl Simonetto, who was convicted of possessing child pornography, challenges a condition of probation that he not “go where children may congregate” as being vague and overly broad. We disagree. The circuit court, at the hearing on Simonetto's motion for postconviction relief, sufficiently spelled out the contours of the prohibition. We do agree with Simonetto, however, that it was error for the circuit court to hold open restitution for more than ninety days for the State to identify the victims. We affirm those parts of the judgment and the order concerning the condition that Simonetto not frequent areas where children congregate but reverse those parts holding restitution open.

¶ 2 The facts are brief and not in dispute. The police executed a search warrant at Simonetto's residence and seized videotapes and Simonetto's computer. The videotapes depicted children engaged in sexual acts and the computer's files contained pornographic images of children. The search warrant had been issued based on information obtained from a United States Postal Inspection Service investigation. Simonetto was charged with fifteen counts of possession of child pornography, contrary to § 948.12, STATS., and pled no contest.

¶ 3 The circuit court imposed and stayed sentence and placed Simonetto on probation for sixteen years. One of the conditions of probation was “not to go where children may congregate.” Simonetto challenged this condition in a motion for postconviction relief, which the circuit court denied. At the hearing, the circuit court rejected Simonetto's argument that the condition was overly broad and vague, stating that “if *318 [Simonetto] doesn't understand ... the meaning of the court's judgment and rules of probation ... he can have reference to the rules as promulgated by the department.” Specifically, the circuit court referred to a standard condition of sex offender supervision promulgated by the Department of Corrections (DOC). That standard reads: “You shall not enter into any area frequented by persons under age 18, including, but not limited to, schools, day care centers, playgrounds, parks, beaches, pools, shopping malls, theaters, or festivals without prior approval from you[r] agent.” Further, the circuit court refused to modify the condition that held restitution open. Simonetto renews both arguments on appeal and we address them in turn.

[1] [2] ¶ 4 Simonetto claims that the condition “not to go where children may congregate” is neither reasonable nor appropriate under § 973.09, STATS., and that it violates his constitutional right of association and right to travel. Before addressing each prong of this argument, we take care of a threshold issue. Simonetto's brief-in-chief discusses only the condition as it is worded on the judgment of conviction. The State's response addresses the condition as clarified at the postconviction hearing by reference to the DOC condition. In his reply, Simonetto states, “[T]he condition set forth in [the DOC document] is not the condition of probation ordered by the circuit court. Furthermore, **277 the circuit court at the post-conviction hearing never modified the condition listed in the judgment of conviction to reflect the language in [the DOC document].” But, what Simonetto fails to recognize is that the circuit court's clarification need not be reduced to writing to be effective. While we do not see the circuit court's written condition of probation as in conflict with its oral clarification of that condition, were there a conflict *319 the oral pronouncement would control. *See State v. Perry*, 136 Wis.2d 92, 113, 401 N.W.2d 748, 757 (1987). Thus, we are free to examine both the written condition and the oral clarification in our analysis.¹

[3] ¶ 5 We now turn to Simonetto's claim that the circuit court's condition was neither reasonable nor appropriate and thus was in violation of § 973.09(1)(a), STATS. He argues that the condition not only restricts his contact with children but also with adults, as “any public place is a place where children ‘may congregate.’” This renders it overly broad, says Simonetto. Furthermore, he urges, the condition is “not reasonably related to the need to protect the public or the objective of rehabilitation” because Simonetto “was neither charged with nor convicted of conduct involving physical contact with children.”

[4] [5] ¶ 6 First, we note that it is within the broad discretion of the circuit court to fashion appropriate conditions of probation in each individual case, *see State v. Nienhardt*, 196 Wis.2d 161, 167, 537 N.W.2d 123, 125 (Ct.App.1995), as long as those conditions “appear to be reasonable and appropriate,” § 973.09(1)(a), STATS. On review, we test the validity of conditions of probation by how well they serve the dual goals of probation: rehabilitation and protection of the *320 community. *See Nienhardt*, 196 Wis.2d at 167, 537 N.W.2d at 125.

¶ 7 The condition that Simonetto not go to areas where children routinely congregate is eminently reasonable and necessary. Simonetto's collection of child pornography was extensive and extremely graphic. Simonetto corresponded via computer with teenage boys for purposes of sexual arousal. Two psychotherapists familiar with his case testified without contradiction that he is a pedophile and a

nascent child molester. Simonetto's sex therapist testified that Simonetto himself "doesn't deny that eventually it would have led to that [actual sexual contact]." Simonetto is not someone who should be hanging around parks, malls and beaches. In lieu of prison, he must restrict himself to areas where children do not congregate. This condition is necessary to protect the community and may even help Simonetto overcome his problem by removing what to him is obviously a stimulus.

[6] [7] ¶ 8 Simonetto next argues that the condition that he not go where children congregate "violates the defendant's constitutional right of freedom of association and right to travel." But Simonetto is a convicted felon: his conditions of probation "may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to [his] rehabilitation." *Edwards v. State*, 74 Wis.2d 79, 84-85, 246 N.W.2d 109, 111 (1976). As noted above, Simonetto's absence from places where children congregate will separate him from the physical temptation posed to him by children. The condition prevents him from getting himself into situations that may lead to further *321 criminal conduct. And the condition, as clarified by the circuit court, is not overly broad. Simonetto is not prevented from ever going anywhere where a child might be. Rather, he may **278 not go at will to those areas where common sense tells us that children are likely to gather. The court's list-schools, day care centers, playgrounds, parks, beaches, pools, shopping malls, theaters and festivals-while not exhaustive, was certainly extensive enough to give Simonetto a clear idea of where he could not go. And should he wish to go to one of the listed locations, he can-he just has to get prior approval from his agent. This condition is not overly broad.

[8] ¶ 9 Before moving on to Simonetto's last issue, we pause to comment that probation is a privilege extended to a convict by the grace of the state. *See State v. Evans*, 77 Wis.2d 225, 230, 252 N.W.2d 664, 666 (1977). It is not a right. *See id.* Simonetto could be in prison; instead, the court chose to grant him conditional liberty. He should consider himself fortunate.

[9] ¶ 10 Simonetto's last argument concerns the circuit court's condition that restitution be held open in case the postal inspector identifies some of the victims. The State acknowledges that this was error. Section 973.20(13)(c), STATS., creates a ninety-day maximum hold-open period for entry of restitution after a sentence is imposed. *See State v. Handley*, 173 Wis.2d 838, 843-44, 496 N.W.2d 725, 728 (Ct.App.1993). We thus reverse that part of the judgment that leaves restitution open.²

*322 Judgment and order affirmed in part; reversed in part.

All Citations

232 Wis.2d 315, 606 N.W.2d 275, 2000 WI App 17

Footnotes

† Petition for review denied Feb. 22, 2000.

1 The State also argues, as a threshold issue, that the case is not ripe because Simonetto has not shown how he has been harmed by the restriction. *See State v. Armstead*, 220 Wis.2d 626, 628, 583 N.W.2d 444, 446 (Ct.App.1998), *review denied*, 224 Wis.2d 264, 590 N.W.2d 490 (1999) (court of appeals will not decide issues based on hypothetical or future facts). We think a probationer is entitled to know in advance the reach of a condition so that he or she may regulate his or her conduct accordingly. We address the merits.

2 The State suggests that we “remand the case with directions to consider whether requiring Simonetto to provide for medical and/or mental health care for his victims constitutes a reasonable and appropriate condition of probation.” In support of this argument, the State relies on *State v. Beiersdorf*, 208 Wis.2d 492, 561 N.W.2d 749 (Ct.App.1997), in which we upheld imposing as a condition of probation the cost of DNA testing to determine paternity of the sexual assault victim's unborn child. *See id.* at 502-03, 561 N.W.2d at 754. This reliance is misplaced. In *Beiersdorf* there was an identified victim, here there is not. That is the reason the circuit court held restitution open—we do not now know who Simonetto's victims are. We fail to understand how *Beiersdorf* helps the State overcome this fact. Nor do we see how the State's theory addresses the § 973.20(13)(c), STATS., ninety-day maximum hold-open period for entry of restitution.

201 Vt. 543
Supreme Court of Vermont.

STATE of Vermont
v.
Thomas GAUTHIER.

No. 14-142.

|
March 25, 2016.

Synopsis

Background: State filed probation revocation complaint. The Superior Court, Orange Unit, Criminal Division, Robert P. Gerety, Jr., J., revoked defendant's probation. Defendant appealed.

Holdings: The Supreme Court, Dooley, J., held that:

[1] any error in failure of probation order to provide defendant with adequate notice that he was subject to each and every one of the conditions listed, but not checked, on that document was not plain error;

[2] defendant's argument that probation conditions were facially unenforceable, on basis that they were contradictory, was a collateral challenge which could have been brought in a direct appeal, and thus argument was barred;

[3] conditions of defendant's probation which prohibited defendant from drinking alcohol to extent it interfered with employment or welfare of defendant's family and also prohibited defendant from purchasing, possessing, or consuming alcohol were not contradictory or ambiguous; and

[4] probation condition stating that defendant "may not access or loiter in places where children congregate, i.e. parks, playgrounds, schools, etc." was not overly vague and thus did not violate defendant's due process rights.

Affirmed.

Robinson, J., concurred in part, dissented in part, and filed opinion, joined by Skoglund, J.

West Headnotes (15)

[1] **Criminal Law** ⇌ Probation and related dispositions

Any error in failure of probation order to provide defendant with adequate notice that he was subject to each and every one of the conditions listed, but not checked, on that document was not plain error; there was no wholesale failure to provide defendant with a document listing his probation conditions, defendant received a probation order listing all of the conditions, and defendant was fully aware of the information that was allegedly not provided. 28 V.S.A. § 252(c).

2 Cases that cite this headnote

[2] **Criminal Law** ⇌ Necessity of Objections in General

A claim of error rises to the level of plain error only if: (1) there is error; (2) the error is obvious; (3) the error affects substantial rights and results in prejudice to the defendant; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

2 Cases that cite this headnote

[3] **Sentencing and Punishment** ⇌ Questions of law or fact

A violation of probation presents a mixed question of law and fact.

Cases that cite this headnote

[4] **Sentencing and Punishment** ⇌ Proceedings

In a probation revocation proceeding, the trial court makes the necessary factual findings about the probationer's actions and then makes a legal conclusion concerning whether those actions amounted to a violation of the probationary terms.

Cases that cite this headnote

[5] **Criminal Law** ⇌ Probation

Criminal Law ⇌ Sentencing

In a probation revocation proceeding, Supreme Court affirms the trial court's factual findings if supported by credible evidence and the legal conclusions if supported by the findings.

Cases that cite this headnote

[6] **Sentencing and Punishment** ⇌ Defenses and objections

In a probation-violation proceeding, defendant may not collaterally attack the probation conditions on a basis that could have been brought in a direct appeal.

1 Cases that cite this headnote

[7] **Sentencing and Punishment** ⇌ Defenses and objections

Defendant's argument that probation conditions were facially unenforceable, on basis that they were contradictory, was a collateral challenge which could have been brought in a direct appeal, and thus argument was barred in probation-violation proceeding.

1 Cases that cite this headnote

[8] **Criminal Law** ⇌ Plea

Defendant's argument that he received inadequate notice of probation conditions was not a collateral challenge to such conditions and thus was not barred from being raised in probation-violation proceeding.

1 Cases that cite this headnote

[9] **Sentencing and Punishment** ⇌ Construction, operation, and compliance

Conditions of defendant's probation which prohibited defendant from drinking alcohol to extent it interfered with employment or welfare of defendant's family and also prohibited defendant from purchasing, possessing, or consuming alcohol were not contradictory or ambiguous and thus provided defendant with sufficient notice of conditions; defendant

could meet requirements of both conditions simply by abiding by the stricter condition.

1 Cases that cite this headnote

[10] Sentencing and Punishment ⇌ Construction, operation, and compliance

Probation condition stating that defendant “may not access or loiter in places where children congregate, i.e. parks, playgrounds, schools, etc.” was not an exhaustive list of places which the condition prevented defendant from accessing or loitering in, even though abbreviation “i.e.” generally introduced an exclusive list; when condition was read in its entirety, it was evident that list was meant to be illustrative, since list had “etc.” placed at end of it.

1 Cases that cite this headnote

[11] Constitutional Law ⇌ Conditions

To satisfy due process, a defendant must have notice of what acts may amount to a violation of probation. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[12] Sentencing and Punishment ⇌ Validity or reasonableness of conditions in general

In interpreting terms of probation, court looks to the common understanding of the language used.

Cases that cite this headnote

[13] Constitutional Law ⇌ Sentencing and punishment in general

Constitutional Law ⇌ Conditions

Sentencing and Punishment ⇌ Validity

Probation condition stating that defendant “may not access or loiter in places where children congregate, i.e. parks, playgrounds, schools, etc.” was not overly vague and thus did not violate defendant's due process rights; phrase “where children congregate” was descriptive enough to put a defendant on notice that it included all places where children were likely to be found in large numbers. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[14] Constitutional Law ⇌ To probation or parole officers

The court may not delegate the power to impose probation conditions to a probation officer, but the court may, however, give probation officers discretion in the implementation of probation conditions.

1 Cases that cite this headnote

[15] Criminal Law ⇌ Probation and related dispositions

Any improper delegation of authority to probation officer, through probation condition which precluded defendant from accessing places where children congregate unless approved in advance by probation officer, was not plain error, in case in which defendant's probation was revoked for conduct including attending a fair, which probation officer had told defendant that he was not allowed to attend; language of condition provided defendant with sufficient notice that he was precluded from attending the fair.

3 Cases that cite this headnote

Attorneys and Law Firms

****835** William H. Sorrell, Attorney General, and Evan Meenan, Assistant Attorney General, Montpelier, for Plaintiff–Appellee.

Matthew F. Valerio, Defender General, and Joshua O'Hara, Appellate Defender, Montpelier, for Defendant–Appellant.

Present: REIBER, C.J., DOOLEY, SKOGLUND and ROBINSON, JJ., and BURGESS, J. (Ret.), Specially Assigned.

Opinion

DOOLEY, J.

***545** ¶ 1. Defendant Thomas A. Gauthier appeals from the trial court's order revoking his probation. Defendant argues that the probation conditions that

the court determined he had violated are unenforceable because he claims the conditions were not part of “a certificate explicitly setting forth the conditions” of probation, as required by 28 V.S.A. § 252(c). Defendant also raises challenges to specific conditions, arguing that they are contradictory or vague and not enforceable. We affirm.

¶ 2. The facts are taken from the record and are uncontested, except when indicated. In May 2009, defendant was charged with one count of engaging in a sexual act with a person under the age of sixteen, 13 V.S.A. § 3252(c), a felony, and one count of furnishing alcohol to a person under the age of twenty-one, 7 V.S.A. § 658(a) (1). The charges arose from an April 2009 incident in which defendant, then age twenty, had intercourse with a fifteen-year-old girl in the back of a car after a night of drinking alcohol and smoking marijuana.

¶ 3. In November 2009, defendant and the State entered into a deferred-sentencing agreement. See 13 V.S.A. § 7041(a) (authorizing court to defer sentencing and place defendant on probation under conditions). Under the terms of that agreement, the State dismissed the furnishing-alcohol charge, defendant pleaded guilty to the sexual-act charge, and sentencing was deferred for five years while defendant was placed on probation, which required him to conform to several conditions. The trial court accepted the agreement in March 2010.

*546 ¶ 4. In June 2010, the State filed a violation-of-probation complaint against defendant, alleging that he had been out of state without permission in violation of one of the conditions in his deferred-sentence **836 agreement. Defendant admitted the violation, and the trial court imposed sentence at an October 2010 hearing. See *id.* § 7041(e) (“Upon violation of the terms of probation or of the deferred sentence agreement, the court shall impose sentence.”).

¶ 5. At the sentencing hearing in connection with that violation of probation, the State proposed a deal whereby the court would impose a zero-to-four-year sentence, all suspended, and would impose the probation conditions in the original deferred-sentencing agreement as well as “some special sex-offender treatment conditions that the Department of Corrections uses in these types of cases.” Defendant expressed concern that the condition restricting contact with people under the age of eighteen would interfere with his relationship with his then-nine-month-old daughter, but ultimately accepted the State's offer. The court imposed “a sentence of zero to four years, all suspended with probation; the same probationary conditions that previously existed, as well as the special sex-offender conditions that have been marked as State's 1.”

¶ 6. The probation order issued by the court consists of one page with a two-page attachment. The initial page lists several conditions and references “State’s 1, attached conditions,” and the two-page attachment is labeled with a “State’s 1” exhibit sticker. The attachment contains a list of additional conditions, and each condition is preceded by a box. None of the boxes are checked. The probation order was signed by the court, defendant’s probation officer, and defendant. Defendant did not appeal his sentence. Subsequently, defendant filed motions to modify several conditions, including some on the attached list, indicating that he understood he was bound by them.

¶ 7. Defendant’s probation officer filed several probation-violation complaints, alleging defendant had accessed social media sites and pornography, possessed alcohol, been in a place where children congregate, and violated his curfew. Defendant disputed the violations, but did not argue that the probation order failed to provide him with proper statutory notice. Following a contested hearing, the court found that defendant violated the following probation conditions: (1) drinking alcohol; (2) accessing and loitering *547 in places where children congregate; and (3) violating his curfew. Based on these violations, the court revoked defendant’s probation.

[1] ¶ 8. On appeal from this revocation, defendant argues for the first time that the conditions are not enforceable because the order did not meet the statutory notice requirement. The statute requires that “[w]hen an offender is placed on probation, he or she shall be given a certificate explicitly setting forth the conditions upon which he or she is being released.” 28 V.S.A. § 252(c). According to defendant the “special sex-offender conditions” listed on the “State’s 1” attachment are unenforceable because the probation order did not provide him adequate notice that he was subject to each and every one of the conditions listed, but not checked, on that document.

¶ 9. Defendant’s challenge to the validity of the probation conditions based on alleged noncompliance with 28 V.S.A. § 252(c) is unpreserved. Defendant did not raise this challenge in the probation-revocation proceeding that is now on appeal.

[2] ¶ 10. In these circumstances, defendant can prevail only if there was plain error. A claim of error rises to the level of plain error only if “(1) there is error; (2) the error is obvious; (3) the error affects substantial rights and results in prejudice **837 to the defendant; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *State v. Waters*, 2013 VT 109, ¶ 16,

195 Vt. 233, 87 A.3d 512. Applying these factors, we conclude there was no plain error because even if the first element is present, the last three are not. The error, if any, was not obvious. There was no wholesale failure to provide defendant with a document listing his probation conditions. In fact, defendant received a probation order listing all of the conditions. Further, defendant was not prejudiced by any failure to comply with § 252(c) because he was fully aware of the information that was allegedly not provided. Finally, the error, if any, does not seriously affect “the fairness, integrity or public reputation of judicial proceedings.” *Waters*, 2013 VT 109, ¶ 16, 195 Vt. 233, 87 A.3d 512. In fact, the remedy—to let defendant violate probation conditions he agreed to—has an adverse effect on the integrity or public reputation of the judiciary. For these reasons, defendant fails to demonstrate plain error.

[3] [4] [5] ¶ 11. Therefore, we turn to defendant's arguments concerning the particular violations of probation and the resulting revocation *548 of his probation. A violation of probation “presents a mixed question of law and fact.” *State v. Woolbert*, 2007 VT 26, ¶ 8, 181 Vt. 619, 926 A.2d 626 (mem.). The trial court makes the necessary factual findings about the probationer's actions and then makes a legal conclusion concerning whether those actions amounted to a violation of the probationary terms. *Id.* We affirm the factual findings if supported by credible evidence and the legal conclusions if supported by the findings.

¶ 12. Defendant challenges the court's conclusions that he violated the condition prohibiting him from possessing alcohol and the condition prohibiting him from accessing and loitering in places where children congregate. In both instances defendant does not challenge the court's underlying factual findings; rather, defendant asserts that those findings are insufficient to support a violation.

[6] ¶ 13. At the outset, we emphasize that defendant's arguments are being made in the context of a probation-violation proceeding. We have held that a defendant is “barred from raising a collateral challenge to a probation condition that he was charged with violating, where the challenge could have been raised on direct appeal from the sentencing order.” *State v. Austin*, 165 Vt. 389, 401, 685 A.2d 1076, 1084 (1996). Therefore, defendant may not collaterally attack the conditions on a basis that could have been brought in a direct appeal.

¶ 14. Defendant's challenges to the alcohol violation stem from the fact that the court imposed two conditions related to alcohol—one on the main page of the probation order and a different one in the attached list. The first condition prohibits defendant from drinking alcohol to the extent it interferes with his

employment or the welfare of his family. The second condition prohibits defendant from purchasing, possessing, or consuming alcohol. The court concluded that defendant violated this second more-restrictive condition when he admitted that he had consumed alcohol. Defendant argues that the conditions are contradictory and therefore ambiguous. According to defendant, this ambiguity should be construed against the State and in favor of the less-restrictive condition.

[7] ¶ 15. To the extent defendant argues the conditions on their face are unenforceable because they are contradictory and therefore vague, his challenge could **838 have been brought in a direct appeal and is therefore barred.

[8] [9] *549 ¶ 16. To the extent defendant's argument is about lack of notice, it is not "an impermissible collateral challenge." See *State v. Lucas*, 2015 VT 92, ¶ 8, — Vt. —, 129 A.3d 646 (explaining that defendant's challenge to two similar probation conditions as providing conflicting instruction and therefore inadequate notice was not barred). Defendant did not, however, raise this notice argument below, and we therefore review it for plain error. See *id.* ¶ 9 (stating that where defendant did not raise fair-notice argument below, it would be reviewed for plain error); see *State v. Allen*, 145 Vt. 593, 599, 496 A.2d 168, 171 (1985) (holding that defendant failed to preserve notice argument related to more restrictive alcohol condition and reviewing for plain error).

¶ 17. We conclude that there was no error, let alone plain error, in this case insofar as the two alcohol conditions are not contradictory or ambiguous. We were faced with a similar situation in *State v. Allen*. In that case, the probationer was subject to the same two alcohol conditions imposed in this case. One condition prohibited the purchase, possession, or consumption of alcohol. *Allen*, 145 Vt. at 598–99, 496 A.2d at 171. Another condition prohibited him from consuming alcohol to the extent it interfered with his employment or the welfare of his family. *Id.* at 599, 496 A.2d at 171. The probation officer sought clarification from the trial court, and the court replied that the condition prohibiting the purchase, possession, or consumption of alcohol was to be enforced. On appeal from a violation of that condition, the probationer argued that he did not have proper notice of the conditions imposed on him. This Court rejected the notion that there was any ambiguity and explained that "[a]t all times" the probationer was on notice that he was subject to the stricter alcohol condition. *Id.*

¶ 18. Similarly, we conclude here that there is no merit to defendant's arguments that the conditions were contradictory or ambiguous. Although the probation order contained two conditions related to alcohol, the terms of the conditions are

not in conflict. Defendant could meet the requirements of both conditions simply by abiding by the stricter condition.

¶ 19. Even if there was some ambiguity or inconsistency, this does not rise to the level of plain error since defendant has not demonstrated that any error results in “a miscarriage of justice.” *550 *State v. Bruno*, 2012 VT 79, ¶ 33, 192 Vt. 515, 60 A.3d 610 (quotation omitted) (defining plain error). Defendant was aware at all times that both conditions had been imposed and presents no evidence that he was confused or misled about the requirements of the conditions. See *Lucas*, 2015 VT 92, ¶ 10, — Vt. —, 129 A.3d 646 (holding that trial court's enforcement of more-restrictive residence condition did not amount to plain error where record failed to demonstrate that two residence conditions resulted in defendant being confused or misled about content of conditions or his obligations).

[10] ¶ 20. Defendant's final arguments concern the violation of the condition prohibiting him from accessing or loitering in places where children congregate by attending the Tunbridge World's Fair. The condition reads: “You may not access or loiter in places where children congregate, i.e., parks, playgrounds, schools, etc., unless otherwise approved, in advance, by your probation officer or designee.” At the probation-violation proceeding, defendant's probation officer testified that the night before the fair he sent a text message to defendant, reminding defendant that his conditions of probation prevented defendant from attending the fair. He **839 further testified that he attended the fair the following day and saw defendant there. Defendant argued that he did not receive the text from his probation officer, that he was at the fair doing community service, and that the condition was too vague to include the fair.

¶ 21. The court found that there was sufficient evidence to support a violation. The court found that the fair is a place where children congregate—especially on Saturday when defendant attended—and that defendant's probation officer did not give permission to attend the fair. The court concluded that defendant had violated the condition by going to the fair.

¶ 22. On appeal, defendant argues for the first time that he cannot be violated for going to the fair because the condition's plain language provides an exclusive list of places, which does not include fairs. Defendant's argument hinges on the use of the prefix “i.e.” in the language of the probation condition. This abbreviation stands for the latin “id est,” meaning “that is.” Black's Law Dictionary 749 (7th ed. 1999). Therefore, according to defendant, the list of places following “i.e.” is an exhaustive explanation of the places defendant can go, as opposed to a list that is

preceded by “e.g.,” which indicates the items following it are examples. Because the list does not include “fair,” defendant *551 claims he was not on notice that attendance at the fair was prohibited. Defendant did not raise this argument below, and therefore he must demonstrate there was plain error. See *State v. Butson*, 2008 VT 134, ¶ 15, 185 Vt. 189, 969 A.2d 89 (setting forth plain-error standard); see also *Lucas*, 2015 VT 92, ¶¶ 8–9, —Vt. —, 129 A.3d 646 (explaining that lack-of-notice argument not collaterally barred in probation-revocation proceeding, but subject to plain-error review if not raised below).

¶ 23. There was no plain error insofar as the language of the entire condition combined with the facts of the case provided defendant with notice that the list of places in the condition was illustrative, and could include a fair. Generally, as defendant correctly points out, the abbreviation “i.e.” means “that is” and usually introduces explanatory information about the phrase preceding it. This is in contrast to the abbreviation “e.g.,” which generally introduces a nonexclusive list of examples. It does not follow, however, that the list following “i.e.” in this case is exclusive. See *Austin*, 165 Vt. at 400, 685 A.2d at 1083 (explaining that probation agreement “is not to be treated as a strait-jacket that defies common sense” (quotation omitted)).

¶ 24. When the condition is read in its entirety, it is evident that the list is meant to be illustrative. The list has “etc.” at the end of it, indicating that there existed other places that could satisfy the operative language “places where children congregate.” Further, this construction makes sense. Considering that the main purpose of the condition was to preclude defendant from accessing or loitering in places where children congregate, it is reasonable to conclude that the list following that operative phrase was meant for purposes of example not limitation. See *United States v. MacMillen*, 544 F.3d 71, 74–75 (2d Cir.2008) (holding that list in condition directing defendant to avoid “areas or locations where children are likely to congregate [,] such as schools, daycare facilities, playgrounds, theme parks, arcades, recreational facilities, and recreation parks” was “merely illustrative of the types of places where children are likely to be”). Therefore, we conclude that the condition put defendant on notice that he was prohibited from accessing and loitering in places where children congregate, and not just in parks, playgrounds, and schools.

**840 [11] [12] [13] ¶ 25. Further, there is no merit to defendant's argument that the language “where children congregate” is overly vague and *552 thus failed to put him on notice that he was prohibited from attending the Tunbridge Fair.¹ To satisfy due process, a defendant must have notice of what acts may

amount to a violation of probation. *State v. Sanville*, 2011 VT 34, ¶ 8, 189 Vt. 626, 22 A.3d 450 (mem.). In interpreting terms of probation, this Court looks to the common understanding of the language used. *State v. Danaher*, 174 Vt. 591, 594, 819 A.2d 691, 695 (2002) (mem.) (explaining that defendant had fair notice that word “contact” used in probation order meant in proximity because that was “the ordinary meaning of contact”). Congregate is commonly used to mean to “come together in a group or crowd.” Merriam–Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/congregate> [<https://perma.cc/EZ4T26FR>]. As other courts have found, the phrase “where children congregate” is descriptive enough to put a defendant on notice that it includes all places where children are likely to be found in large numbers. See *MacMillen*, 544 F.3d at 75 (holding that phrase “areas or locations where children are likely to congregate” was not vague and list of places in condition was merely illustrative and not exhaustive). And, as the trial court found here, the fair is a place where children are known to gather in large numbers, especially at the time defendant attended.

¶ 26. We are not persuaded by the cases defendant cites to support his lack-of-notice argument because the language of the conditions in the other cases differs in significant ways from the language in this case. In several of the cases cited by defendant the phrase “where children congregate” follows, rather than precedes, the list of places, and for that reason courts have found that the condition failed to provide clear instruction as to what places must be avoided. For example, in *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir.2001), the court concluded that a condition prohibiting the defendant from “being on any school grounds, child care center, playground, park, recreational facility or in any *553 area in which children are likely to congregate” was overly broad because it was unclear if the phrase “area in which children are likely to congregate” applied only to “any area,” and could be read to prohibit access to any park, even if it was not a place children were likely to congregate. See *Fitzgerald*, 805 N.E.2d at 868 (concluding condition overly broad because places listed before limiting phrase “where children are known to congregate” and remanding for clarification). In another case cited by defendant, the condition prohibited lingering, loitering, or spending time at locations where children were “present.” *Ellis v. State*, 221 Ga.App. 103, 470 S.E.2d 495, 496 (1996). The court there concluded this condition lacked specificity because it could be applied to prohibit the defendant “from shopping at virtually any store.” *Id.*

**841 ¶ 27. The condition in this case does not suffer from either of these infirmities. The list of illustrative places *follows* the operative phrase “where children congregate,” and therefore provides a sufficient limitation on the places to

be avoided. Further, the condition at issue prohibits defendant from accessing or loitering in places where children *congregate* as opposed to where they are simply present.

[14] [15] ¶ 28. Defendant's final contention is that the condition impermissibly delegates authority to his probation officer. The court may not delegate the power to impose probation conditions to a probation officer. *State v. Moses*, 159 Vt. 294, 300, 618 A.2d 478, 482 (1992). The court may, however, give probation officers discretion in the implementation of probation conditions. *Id.* Defendant asserts that the condition is impermissible because it grants the probation officer authority to give defendant permission to go to a particular place. Defendant did not raise this challenge below, so our review is for plain error.

¶ 29. Defendant likens his situation to that presented in *State v. Rivers*, 2005 VT 65, 178 Vt. 180, 878 A.2d 1070. In that case, the defendant was under a condition precluding “contact” with children under the age of sixteen without his probation officer's prior approval. *Id.* ¶ 16. This Court held that the probation officer's instruction to defendant that he could not attend a fair amounted to an improper delegation because the condition was so broad that it essentially gave the probation officer authority to determine which public places the defendant could frequent. *Id.* ¶ 14.

*554 ¶ 30. We conclude that there was no plain error in this case insofar as defendant fails to demonstrate how he was prejudiced by any improper delegation in this condition. Unlike the language in *Rivers*, the language of the condition here provided defendant with sufficient notice that he was precluded from attending the fair. Thus, in contrast to *Rivers*, it was the condition itself, imposed by the court, and not any instructions from defendant's probation officer that set the parameters of defendant's conduct.

Affirmed.

ROBINSON, J., concurring in part, dissenting in part.

¶ 31. Insofar as the majority holds that there was no error in this case in connection with the alcohol-related conditions purportedly applied to defendant, I dissent from the majority's analysis. However, I concur in the majority's affirmance of the trial court's decision concerning those conditions on narrower plain-error grounds.²

¶ 32. The probation order in this case included the following condition:

You shall not drink alcoholic beverages to the extent they interfere with your employment or the welfare of your family, yourself or any other person. You must submit to any alcosensor test or any other alcohol test when your probation officer or their designee tells you to do so.

**842 ¶ 33. The additional conditions appended to the probation order, listed but not checked, includes the following condition:

You shall not purchase, possess or consume any alcoholic beverages, or illegal substances, and shall enter and successfully complete a course of substance abuse screening and/or treatment, including residential, if so directed by your Probation Officer or designee.

*555 ¶ 34. On the basis of his admission to having wine with dinner on more than one occasion three years prior, the court concluded that defendant had violated the second of the above conditions relating to alcohol consumption.

¶ 35. We have consistently recognized that due process requires that a defendant know what conduct is forbidden before the State initiates a probation revocation proceeding. See *State v. Hammond*, 172 Vt. 601, 602, 779 A.2d 73, 75 (2001) (mem.) (quoting *State v. Bubar*, 146 Vt. 398, 405, 505 A.2d 1197, 1201 (1985)); see also *State v. Peck*, 149 Vt. 617, 619, 547 A.2d 1329, 1331 (1988) (“[D]ue process requires that a convicted offender be given fair notice as to what acts may constitute a violation of [the defendant's] probation.”). A condition of probation must be “so clearly implied that a probationer, in fairness, can be said to have notice of it.” *State v. Austin*, 165 Vt. 389, 398, 685 A.2d 1076, 1082 (1996) (quotation omitted).

¶ 36. The first of the alcohol-related conditions in defendant's probation order clearly suggests to defendant, or any other reasonable probationer, that he is free to possess and consume alcoholic beverages as long as doing so does not interfere with his employment or the welfare of himself or other. In stark contrast, the second of these conditions—the one listed in an appendix to the probation order that lists

a host of conditions, each next to an unchecked check-box—completely prohibits defendant from possessing or consuming any alcoholic beverages.³ These two conditions communicate squarely inconsistent messages as to what conduct is expected of defendant.

*556 ¶ 37. The majority asserts that the two conditions are not contradictory or ambiguous because defendant could meet the requirements of both conditions simply by abiding by the stricter condition. *Ante*, ¶ 18.

¶ 38. While logically true, the majority's position on this point is in tension with the requirement that probation conditions must give a defendant fair notice of what conduct is prohibited and what conduct is required. See *State v. Sanville*, 2011 VT 34, ¶¶ 9–10, 189 Vt. 626, 22 A.3d 450 (mem.). Moreover, it flies in the face of **843 the rule of lenity, requiring us to construe ambiguous statutes—or in this case, probation conditions—in favor of the defendant. *State v. LaBounty*, 2005 VT 124, ¶ 4, 179 Vt. 199, 892 A.2d 203. The question here is not whether defendant can technically comply with one provision without running afoul of the second, or whether the two can be parsed in a way that is logically consistent; the question is whether the inclusion of both conditions communicates inconsistent messages about what conduct is proscribed.

¶ 39. A California appeals court considered a similar situation in reviewing a probation order that contained three different conditions relating to internet usage. *In re Victor L.*, 182 Cal.App.4th 902, 106 Cal.Rptr.3d 584 (2010). One condition prohibited the minor (in a juvenile case) from accessing or participating in any social networking site; a second prohibited the minor from using, possessing, or having access to a computer with an internet connection; and the third prohibited the minor from using the internet without school or parental supervision. The court noted that the second condition prohibited all internet usage, whereas the first and third conditions contemplated that the defendant would be allowed internet access with certain limitations. *Id.* at 602. The court rejected the suggestion that in the face of overlap the most restrictive condition prevails, and noted that applying the second condition would render the first and third conditions either superfluous or contradictory. *Id.* The court explained:

It appears to us that the Internet provisions—part of a pre-printed form—were intended to provide a graduated range of conditions restricting Internet access and were not intended to be checked off willy-nilly in all gang-related cases.... We believe the form calls

for the probation officer and court to assess which level of *557 Internet restriction is most appropriate for the minor in each case and to select the appropriate condition of probation accordingly.

Id. at 602–03.

¶ 40. Concluding that the overlap of the first and third conditions was neither incomprehensible nor contradictory, but that the application of the second condition prohibiting use or access to an internet-enabled computer alongside either or both of the other conditions made no sense, the court concluded that all three conditions together were unconstitutionally vague. *Id.* at 603. In order to remedy the inconsistency, the court narrowed the second condition so that it only reached the act of possessing a computer with internet access, and did not purport to restrict use or access. *Id.*

¶ 41. In this case, the various forms from which the State and ultimately the court have drawn conditions likewise provide for a graduated range of conditions relating to alcohol usage that “were not intended to be checked off willy-nilly” in all crimes of sexual violence. *Id.* Inclusion of both conditions communicates inconsistent messages to a defendant concerning what behavior is proscribed and suggests a lack of the individualized consideration required in the imposition of probation conditions. See *Putnam*, 2015 VT 113, ¶ 41, — Vt. —, 130 A.3d 836.

¶ 42. I do not believe this Court's analysis in *State v. Allen*, 145 Vt. 593, 496 A.2d 168 (1985), compels a contrary conclusion. In that case, after the court's imposition of the two alcohol related conditions, the defendant and the State had a dispute about the interaction of the two conditions. *Id.* at 598–99, 496 A.2d at 171. In response, the State sought clarification from the court, which issued an order affirming that the more stringent condition applied. In the context of a subsequent proceeding for **844 violation of the condition, this Court affirmed the propriety of enforcing the more stringent of the two conditions. *Id.* In *Allen*, before the violation, the court specifically addressed and resolved the ambiguity arising from the inclusion of the two provisions. To the extent that any language in the Court's opinion in that case suggests that the two provisions are not in tension and not ambiguous, it should be overruled as inconsistent with the more rigorous scrutiny of probation conditions that has characterized this Court's subsequent decisions. See, e.g., *Putnam*, 2015 VT 113, — Vt. —, 130 A.3d 836; *558 *State v. Campbell*, 2015 VT 50, 199 Vt. 78, 120 A.3d 1148; *State v. Bostwick*, 2014 VT 97, 197 Vt. 345, 103 A.3d 476.

¶ 43. Because the error in imposing inconsistent probation conditions concerning alcohol usage does not rise to the level of plain error on the record in this case, I concur in the Court's judgment affirming the violation of the no-alcohol condition.

¶ 44. I am authorized to state that Justice SKOGLUND joins this concurrence and dissent.

All Citations

201 Vt. 543, 145 A.3d 833, 2016 VT 37

Footnotes

- 1 We note that some of the cases cited by defendant involved challenges to similar conditions on constitutional grounds as void for vagueness. See, e.g., *Fitzgerald v. State*, 805 N.E.2d 857, 868 (Ind.Ct.App.2004) (holding that, as written, condition prohibiting access to playgrounds and parks or other places children are known to congregate was overly vague and remanding for court to reconsider and clarify). Defendant is barred from raising such a collateral challenge in the context of this probation-violation proceeding. Therefore, we consider solely whether the condition adequately informed him that attending the fair was prohibited. See *Lucas*, 2015 VT 92, ¶ 8, — Vt. —, 129 A.3d 646.
- 2 I concur in the Court's conclusions that in this case the court's enforcement of probation conditions listed on a form next to unchecked boxes does not rise to the level of plain error and that the probation condition prohibiting defendant from accessing places where children congregate was sufficient to provide defendant notice with respect to his presence at the fair on a Saturday afternoon. I express no opinion on the questions of whether this condition is supportable in this case, is unconstitutionally overbroad, or gives rise to an impermissible delegation of authority to defendant's probation officer.
- 3 The fact that the attachment purportedly containing the second, more severe condition lists a host of conditions next to check-boxes, all of which are unchecked, further calls into question the enforceability of this condition. I concur with the majority that on the record in this case enforcement of the conditions listed in the attachment next to unchecked boxes does not amount to plain error. *Ante*, ¶ 10. Prior to the violation at issue here, defendant successfully sought to amend conditions contained on the attachment, undermining the argument that the absence of check marks left *this* defendant without notice that the listed conditions applied. But we have recognized that use of a list like this, with no specific conditions checked, creates confusion about what conditions are actually imposed. *State v. Cornell*, 2014 VT 82, ¶ 7, 197 Vt. 294, 103 A.3d 469. And we have held that rote imposition of standardized probation conditions, without any consideration of their applicability in a particular case, "runs afoul of the principles of individualized sentencing." *State v. Putnam*, 2015 VT 113, ¶ 41, — Vt. —, 130 A.3d 836. These factors render the probation order in question problematic at best, but are not the basis for this separate opinion.

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