FILED
Apr 14, 2015
Court of Appeals
Division I
State of Washington

NO. 72338-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL IRWIN,

Appellant.

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

The Honorable Michael E. Rickert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE CONDITION PROHIBITING IRWIN FROM FREQUENTING AREAS WHERE MINOR CHILDREN CONGREGATE IS VOID FOR VAGUENESS.

The State points out that "[t]he mini-mart near a school or an arcade at a shopping mall may be a location where children congregate but the same location in a strip mall on a busy highway would not." Br. of Resp't, 7. Similarly, the State asserts that, "[o]f necessity," the prohibited locations "cannot be defined at this point." Br. of Resp't, 8.

The State's argument amplifies the vagueness of Condition 5. The State essentially concedes that Irwin will not know where he can or cannot go until the condition is enforced at his CCO's discretion. This is the very definition of void for vagueness. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008). The State cannot impose a community custody condition out of "necessity" if it does not sufficiently define the proscribed conduct and does not provide ascertainable standards of guilt. See id. The State's interest in protecting children from sex offenders cannot save the condition from vagueness. This Court should strike Condition 5.

2. THE CONDITION PROHIBITING IRWIN FROM POSSESSING COMPUTERS OR DIGITAL STORAGE DEVICES IS NOT CRIME-RELATED.

The State argues Condition 11 is crime-related because "the offense of molestation was part and parcel of [Irwin's] acts of

photography of minor children." Br. of Resp't, 13. Specifically, the State asserts that one of the photographs depicts "Z.J.N. posing with her pubic area unclothed with a person pulling away the juvenile female underwear and touching her labia. CP 109-10." Br. of Resp't, 3. The State also asserts "it was apparent [from those depictions] that Irwin was photographing his child molestation of Z.J.N. CP 109. The acts occurred in the same time frame and the photograph showed his physical touching of Z.J.N. CP 109." Br. of Resp't, 11.

The State's reading of the record is incorrect. Detectives recovered a photograph of an adult male's hand touching a juvenile female's labia and another of an adult male's hand pulling down a juvenile female's underwear. CP 110. Both of these photographs were taken on September 15, 2013. CP 110. However, contrary to the State's assertions, Z.J.N. is not identifiable in these photographs. CP 110. Nothing in the record indicates these photos depict Z.J.N. See CP 102-12. Furthermore, Z.J.N. reported the sexual abuse occurred sometime between June and July 2013 when she stayed at Irwin's home for several weeks. CP 103-05. This timeframe demonstrates the two objectionable photographs were actually *not* Z.J.N. CP 110.

Simply because the molestation and the explicit photographing occurred around the same time does not mean they are "part and parcel" of

each other. Instead, Condition 11 must "directly relate[] to the circumstances of the crime for which the offender has been convicted." RCW 9.94A .030(10) (emphasis added). This Court should strike Condition 11 because it does not relate to the molestation convictions.

Lastly, the State does not respond to Irwin's argument that Condition 11 is too broad in prohibiting his possession of "any device to store or reproduce digital media or images." CP 134; Br. of Appellant, 14-15; see also In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Even if this Court does not strike Condition 11 in its entirety, it should strike this language.

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should strike the challenged community custody conditions.

DATED this 14th day of April, 2015.

Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SAMUEL IRWIN
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SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF APRIL 2015.

x Patrick Mayovsky