

68321-7

68321-7

No. 68321-7-I

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

VLADIK BYKOV,
Appellant,

vs.

HONORABLE STEVE ROSEN and CITY OF SEATTLE,
Respondents.

BRIEF OF RESPONDENTS

PETER S. HOLMES
SEATTLE CITY ATTORNEY

Richard Greene
Assistant City Attorney
WSBA #13496

Attorneys for Respondent

Seattle City Attorney
Criminal Division
P.O. Box 94667
Seattle, Washington 98124
telephone: (206) 684-8538

8
1:33
MAY 14 2011

TABLE OF CONTENTS

A.	<u>RESPONSE TO ASSIGNMENTS OF ERROR</u>	1
1.	Petitioner has not established that the trial court's probation condition that petitioner "not use any device connected to the Internet" was an unconstitutional prior restraint; moreover, it was reasonable and necessary to deter petitioner from engaging in future email harassment of the victim or other persons.	
2.	The superior court correctly denied petitioner's request for relief through a writ of habeas corpus because he did not establish that the probation condition was unconstitutional.	
2.	The superior court correctly entered Conclusion of Law #5.	
B.	<u>ISSUES PRESENTED FOR REVIEW</u>	1-2
1.	Has petitioner, who was convicted of Harassment for sending an email to the victim from a computer, established that a probation condition barring him from using a device connected to the Internet is an unconstitutional prior restraint, where this condition is not based on the content of any expression and regulates only the manner in which he communicates with his attorney and conducts legal research?	
2.	Has petitioner, who was convicted of Harassment for sending an email to the victim from a computer, established that a probation condition barring him from using a device connected to the Internet violates his right to	

communicate with his attorney and conduct legal research?

C.	<u>STATEMENT OF THE CASE</u>	2-4
D.	<u>ARGUMENT</u>	
1.	Petitioner has not established that the trial court's probation condition was an unconstitutional prior restraint.	4-7
2.	Petitioner has not established that the trial court's probation condition violates his Constitutional al rights	7-11
E.	<u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

Table of Cases

Federal:

<i>United States v. Brigham</i> , 569 F.3d 220 (5 th Cir.), <i>cert. denied</i> , 130 S.Ct.1013 (2009)	9
<i>United States v. Demers</i> , 634 F.3d 982 (8 th Cir. 2011)	10
<i>United States v. Locke</i> , 482 F.3d 764 (5 th Cir. 2007)	9
<i>United States v. Paul</i> , 274 F.3d 155 (5 th Cir. 2001), <i>cert. denied</i> , 535 U.S. 1002 (2002)	10
<i>United States v. Tome</i> , 611 F.3d 1371 (11 th Cir.), <i>cert. denied</i> , 131 S.Ct. 674 (2010)	9

Washington state:

<i>Bradburn v. The North Central Regional Library District</i> , 168 Wn.2d 789, 231 P.3d 166 (2010)	7
<i>DCR, Inc. v. Pierce County</i> , 92 Wn. App. 660, 964 P.2d 380 (1998), <i>review denied</i> , 137 Wn.2d 1030 (1999), <i>cert. denied</i> , 529 U.S. 1053 (2000)	5 & 6
<i>Harris v. Charles</i> , 171 Wn.2d 455, 256 P.3d 328 (2011)	5
<i>In re Marriage of Meredith</i> , 148 Wn. App. 887, 201 P.3d 1056, <i>review denied</i> , 167 Wn.2d 1002 (2009)	6
<i>In re Marriage of Suggs</i> , 152 Wn.2d 74, 93 P.3d 161 (2004)	5
<i>In re Pettit v. Rhay</i> , 62 Wn.2d 515, 383 P.2d 889 (1963)	4
<i>Ino Ino, Inc. v. Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997), <i>cert. denied</i> , 522 U.S. 1077 (1998)	6
<i>Miesbauer v. Rhay</i> , 79 Wn.2d 505, 487 P.2d 1046 (1971), <i>overruled on other grounds Wood v. Morris</i> , 87 Wn.2d 501, 554 P.2d 1032 (1976)	4
<i>Sanders v. City of Seattle</i> , 160 Wn.2d 198, 156 P.3d 874 (2007)	6
<i>State v. Bassett</i> , 128 Wn.2d 612, 911 P.2d 385 (1996)	5
<i>State v. Bobenhouse</i> , 143 Wn. App. 315, 177 P.3d 209 (2008), <i>affirmed</i> , 166 Wn.2d 881, 214 P.3d 907 (2009)	8
<i>State v. Combs</i> , 102 Wn. App. 949, 10 P.3d 1101 (2000)	8-9
<i>State v. Hearn</i> , 131 Wn. App. 601, 128 P.3d 139 (2006)	9
<i>State v. Noah</i> , 103 Wn. App. 29, 9 P.3d 858 (2000),	

<i>review denied</i> , 143 Wn.2d 1014 (2001)	11
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	8
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 717 (2000)	8
<i>State v. Romero</i> , 95 Wn. App. 323, 975 P.2d 564, <i>review denied</i> , 138 Wn.2d 1020 (1999)	8
<i>World Wide Video of Washington, Inc. v. City of Spokane</i> , 125 Wn. App. 289, 103 P.3d 1265, <i>review denied</i> , 155 Wn.2d 1014 (2005)	5
Other jurisdictions:	
<i>Commonwealth v. Hartman</i> , 908 A.2d 316 (Pa. Sup. 2006)	10
<i>People v. Harrisson</i> , 134 Cal.App.4 th 637, 36 Cal.Rptr.3d 264 (2005), <i>review denied</i> (2006)	10 & 11
<i>Smith v. State</i> , 779 N.E.2d 111 (Ind. App. 2002), <i>transfer denied</i> , 792 N.E.2d 37(2003)	10
<i>State v. Cloward</i> , 960 So.2d 356 (La. App. 2007)	9
<i>State v. Ehli</i> , 681 N.W.2d 808 (N.D. 2004)	10
<i>State v. Martin</i> , 674 N.W.2d 291 (S.D. 2003)	10
<i>State v. McKinney</i> , 112 Ohio Misc.2d 30, 750 N.E.2d 1237 (2000)	10
Statutes	
RCW 7.36.130	4

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. Petitioner has not established that the trial court's probation condition that petitioner "not use any device connected to the Internet" was an unconstitutional prior restraint; moreover, it was reasonable and necessary to deter petitioner from engaging in future email harassment of the victim or other persons.

2. The superior court correctly denied petitioner's request for relief through a writ of habeas corpus because he did not establish that the probation condition was unconstitutional.

3. The superior court correctly entered Conclusion of Law #5.

B. ISSUES PRESENTED FOR REVIEW

1. Has petitioner, who was convicted of Harassment for sending an email to the victim from a computer, established that a probation condition barring him from using a device connected to the Internet is an unconstitutional prior restraint, where this condition is not based on the content of any expression and regulates only the manner in which he communicates with his attorney and conducts legal research? (Assignments of Error 1, 2 & 3)

2. Has petitioner, who was convicted of Harassment for sending an email to the victim from a computer, established that a probation condition barring him from using a device connected to the Internet violates his right to communicate with his attorney and conduct legal research? (Assignments of Error 1, 2 & 3)

C. STATEMENT OF THE CASE

Petitioner was convicted of Harassment in Seattle Municipal Court based on sending an email to the victim. CP at 149. This email was sent by a computer. RP at 11. As the victim stated, “In that email, Mr. Bykov made an express threat that I am going to end up like Rasputin. And he specifically mentioned a dagger.” CP at 20. Petitioner also wrote “Mr. Fresonke, I am writing to you this email to warn you of the future. If something bad happens to you, always remember that you are responsible for it.” CP at 47.

Petitioner also sent to the victim an email with a photograph of his father and inquired how to get in contact with him. CP at 20.

According to the victim, petitioner also has used the victim’s name to open fraudulent email accounts. CP at 20.

One condition of petitioner's suspended sentence was that he not use any device connected to the Internet. CP at 150. He sought a writ of habeas corpus, alleging a variety of claims, including that this Internet restriction was unconstitutional in that it hindered his ability to communicate with his counsel and conduct legal research. CP at 4-5, 13-14, 76 & 86-87; RP at 10-12. The superior court denied petitioner's request for relief, in pertinent part, as follows:

5. Inasmuch as the basis for petitioner's conviction was an email he sent to the victim, prohibiting petitioner from further use of the instrumentality of his crime is neither unreasonable nor unconstitutional. *See State v. Riley*, 121 Wn.2d 22, 36-38, 846 P.2d 1365 (1993) (sentence condition imposed on defendant convicted of Computer Trespass prohibiting owning a computer or communicating with computer bulletin boards not unreasonable or unconstitutional). The constitutional rights of a convicted defendant are subject to reasonable restrictions to protect the public. *State v. Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000) (prohibition on using computer not unconstitutional). Petitioner's ability to use a telephone or mail to contact his lawyer and to use a law library for legal research is not impaired. Petitioner has ample and adequate substitutes for use of the internet.

CP at 155-56.

Petitioner appeals the denial of his request for relief, challenging only this Internet restriction.

D. ARGUMENT

1. Petitioner has not established that the trial court's probation condition was unconstitutional prior restraint.

In order to obtain relief through a writ of habeas corpus, a petitioner must establish that the judgment or process whereby he is in custody violates his constitutional rights.¹ The petitioner has the burden of showing not only the violation of a constitutional right, but resulting prejudice as well.² A petitioner seeking a writ of habeas

¹ *In re Pettit v. Rhay*, 62 Wn.2d 515, 518, 383 P.2d 889 (1963). RCW 7.36.130 provides, in pertinent part:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge the party when the term of commitment has not expired, in either of the cases following:

(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the state of Washington or of the United States have been violated and the petition is filed within the time allowed by RCW10.73.090 and 10.73.100.

² *Miesbauer v. Rhay*, 79 Wn.2d 505, 509, 487 P.2d 1046 (1971), *overruled on other grounds Wood v. Morris*, 87 Wn.2d 501, 554 P.2d 1032 (1976).

corpus raises a collateral attack and bears a higher burden than on direct appeal.³

Petitioner contends that the Internet restriction is an unconstitutional prior restraint. A governmental attempt to restrict the *content* of future speech is a prior restraint.⁴ Examples of a prior restraint include a court order prohibiting counsel from discussing a particular case with the press or the general public,⁵ a court order prohibiting making invalid and unsubstantiated allegations or complaints to third parties about a particular person⁶ or an order prohibiting contacting a governmental agency regarding a particular person's immigration status.⁷ All these orders forbade rather particularized communications. The trial court's probation condition is not based on the content of petitioner's speech and does not prohibit any particular communication.

³ *Harris v. Charles*, 171 Wn.2d 455, 461, 256 P.3d 328 (2011).

⁴ *World Wide Video of Washington, Inc. v. City of Spokane*, 125 Wn. App. 289, 304, 103 P.3d 1265, *review denied*, 155 Wn.2d 1014 (2005) (emphasis supplied); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 670, 964 P.2d 380 (1998), *review denied*, 137 Wn.2d 1030 (1999), *cert. denied*, 529 U.S. 1053 (2000).

⁵ *See State v. Bassett*, 128 Wn.2d 612, 911 P.2d 385 (1996).

⁶ *See In re Marriage of Suggs*, 152 Wn.2d 74, 93 P.3d 161 (2004).

A regulation does not rise to the level of a prior restraint if it merely restricts the time, place or manner of expression.⁸ Examples of restrictions that are not prior restraints include a prohibition on the distance an adult entertainer may come within a customer,⁹ a prohibition on carrying aloft a stick-mounted sign¹⁰ and a library's prohibition on accessing certain categories of content on the Internet.¹¹ These restrictions regulate peripheral aspects of expressive conduct such as the place of a dancer's performance and the manner of carrying a sign.

The trial court's probation condition regulates a peripheral aspect of petitioner's expression such as the manner in which petitioner communicates with his attorney and the method by which he conducts legal research. The probation condition is certainly content-neutral and a reasonable means of preventing petitioner from

⁷ See *In re Marriage of Meredith*, 148 Wn. App. 887, 201 P.3d 1056, *review denied*, 167 Wn.2d 1002 (2009).

⁸ *Ino Ino, Inc. v. Bellevue*, 132 Wn.2d 103, 126, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077 (1998); *DCR, Inc.*, 92 Wn. App. at 671.

⁹ *Ino Ino, Inc.*, 132 Wn.2d at 125-28; *DCR, Inc.*, 92 Wn. App. at 675.

¹⁰ *Sanders v. City of Seattle*, 160 Wn.2d 198, 224-25, 156 P.3d 874 (2007).

continued email harassment of the victim or from using the Internet to harass other persons. As the superior court determined, petitioner has ample other means by which to contact his attorney and conduct legal research. Petitioner has not established that the trial court's probation condition was an unconstitutional prior restraint – it was not based on the content of petitioner's expression and merely restricts the manner in which he communicates with his attorney and conducts his legal research.

2. Petitioner has not established that the trial court's probation condition violates his constitutional rights.

Petitioner contends that the probation condition violates his First Amendment rights. In his petition and before the superior court, however, he made no such claim and argued only that this probation condition “effectively denied communication with his attorney, which has been through email and he is unable to conduct legal research and preparation because of lack of Internet access.”¹²

¹¹ *Bradburn v. The North Central Regional Library District*, 168 Wn.2d 789, 802, 231 P.3d 166 (2010).

¹² CP at 4-5, 13-14, 76 & 86-87; RP at 10-12.

As petitioner has no constitutional right to counsel of his choice,¹³ a constitutional right to a particular method of access to counsel or to a particular means of conducting legal research seems doubtful.

A convicted defendant's constitutional rights can be restricted if the restriction is reasonably necessary to accomplish the needs of the State and public order.¹⁴ For example, in *State v. Riley*,¹⁵ the court held that prohibiting a defendant convicted of Computer Trespass from communicating with computer bulletin boards was not unconstitutional as it would tend to discourage him from contacting other computer hackers. This plainly was a prohibition on expression, but nevertheless valid. In *State v. Combs*,¹⁶ a defendant convicted of Child Molestation was prohibited from using a computer because he had used a computer to show pornographic images to his victims. Prohibiting the defendant from using the very tool he had employed in committing his crime was valid. In *State v.*

¹³ *State v. Roberts*, 142 Wn.2d 471, 515-16, 14 P.3d 717 (2000) (not constitutional error to deny defendant his counsel of choice); *State v. Romero*, 95 Wn. App. 323, 327, 975 P.2d 564, review denied, 138 Wn.2d 1020 (1999).

¹⁴ *State v. Bobenhouse*, 143 Wn. App. 315, 332, 177 P.3d 209 (2008), affirmed, 166 Wn.2d 881, 214 P.3d 907 (2009).

¹⁵ 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993).

Hearn,¹⁷ the court held that prohibiting a defendant convicted of possession of methamphetamine from associating with known drug dealers was not an unconstitutional restriction on her constitutional right to association. “Recurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders.”¹⁸ Likewise, petitioner’s further harassment of the victim is a problem that logically can be discouraged by prohibiting access to the means by which petitioner harassed the victim in the first place.

Courts in other jurisdictions have upheld probation conditions prohibiting a defendant’s access to the Internet.¹⁹ In *United States v.*

¹⁶ 102 Wn. App. 949, 953, 10 P.3d 1101 (2000).

¹⁷ 131 Wn. App. 601, 608-09, 128 P.3d 139 (2006).

¹⁸ *Hearn*, 131 Wn. App. at 609.

¹⁹ See *United States v. Tome*, 611 F.3d 1371, 1375-78 (11th Cir.), *cert. denied*, 131 S.Ct. 674 (2010) (year-long Internet ban reasonably related to nature of defendant’s offenses, need to help him with his rehabilitative treatment, to provide just punishment and to protect both victim used in Internet pornography and others who use the Internet); *United States v. Brigham*, 569 F.3d 220, 232-34 (5th Cir.), *cert. denied*, 130 S.Ct.1013 (2009) (rejecting challenge to probation condition forbidding defendant from possessing or utilizing a computer or internet connection device); *United States v. Locke*, 482 F.3d 764, 768 (5th Cir. 2007) (probation condition denying defendant access to the Internet was constitutional); *State v. Cloward*, 960 So.2d 356, 362 (La. App. 2007) (no error in imposing probation condition that defendant not have access to the

Demers,²⁰ a defendant convicted of Possession of Child Pornography was forbidden from having access to an internet-connected computer, and the court rejected his argument that this restriction violated his First Amendment rights. In *United States v. Paul*,²¹ the court upheld a probation condition prohibiting the defendant, who had been convicted of Possessing Child Pornography, from possessing or having access to computers or the Internet. In *People v. Harrisson*,²² the court upheld a probation condition forbidding the defendant, convicted of Possessing Child Pornography, from accessing the Internet.

internet); *Commonwealth v. Hartman*, 908 A.2d 316, 320-21 (Pa. Sup. 2006) (upholding probation condition that defendant not possess or use a computer, own a cell phone or PDA with Internet capabilities, or otherwise access the Internet); *State v. Martin*, 674 N.W.2d 291, 305 (S.D. 2003) (prohibition against defendant possessing a computer or accessing the Internet during the ten-year probationary period valid); *Smith v. State*, 779 N.E.2d 111, 118 (Ind. App. 2002), *transfer denied*, 792 N.E.2d 37(2003) (upholding condition that defendant may not use any computer or have access to any online computer services); *State v. Ehli*, 681 N.W.2d 808, 810 (N.D. 2004) (probation condition prohibiting defendant from using the Internet were reasonable and related to the offense committed); *State v. McKinney*, 112 Ohio Misc.2d 30, 750 N.E.2d 1237, 1240 (2000) (applying probation condition that defendant not own computers and stay off the Internet).

²⁰ 634 F.3d 982, 983-85 (8th Cir. 2011).

²¹ 274 F.3d 155, 167 (5th Cir. 2001), *cert. denied*, 535 U.S. 1002 (2002).

In upholding the probations conditions imposed in this case, we recognize the ubiquity of the Internet and its power as a tool of commerce, information, and entertainment. Nonetheless, when such a beneficial tool is put to evil use, there is no constitutional impediment to restrictions reasonably calculated to forestall a recurrence.²³

The government has a compelling interest in protecting citizens from harassment.²⁴ Because petitioner chose to use the Internet to harass the victim, prohibiting him from further use of the Internet was a reasonable and necessary means of protecting from further harassment not only this victim, but other persons as well.

²² 134 Cal.App.4th 637, 36 Cal.Rptr.3d 264 (2005), *review denied* (2006).

²³ *Harrison*, 134 Cal.App.4th at 647.

²⁴ *State v. Noah*, 103 Wn. App. 29, 41, 9 P.3d 858 (2000), *review denied*, 143 Wn.2d 1014 (2001).

E. CONCLUSION

Based on the foregoing argument, the superior court's decision denying petitioner's request for relief through a writ of habeas corpus should be affirmed.

Respectfully submitted this 9th day of November, 2012.

PETER S. HOLMES
SEATTLE CITY ATTORNEY

Richard Greene

Richard Greene
Assistant City Attorney
WSBA #13496