IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL BOYD, Appellant.	No. 38215-6-II UNPUBLISHED OPINION

Penoyar, J. — Michael Allen Boyd appeals his convictions of three counts of first degree child molestation,[1] one count of sexual exploitation of a minor,[2] and one count of second degree assault.[3] In this appeal, he challenges three conditions imposed as part of his community custody obligations. We agree that the pornography condition is unconstitutionally vague and remand for the sentencing court to reformulate or strike that condition. As to the others, we find no error.

Facts

On April 2, 2008, Boyd entered a *Newton*[4] plea of guilty to the above listed counts, which involved five child victims. The sentencing court imposed 180-month minimum indeterminate sentences on the molestation counts with a lifetime of community custody, 120 months on the exploitation count with 36 to 48 months of community custody, and 57 months on the assault count with 18 to 36 months of community custody.

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[1] Violations of RCW 9A.44.083.

[2] A violation of RCW 9.68A.040(1)(b).

[3] A violation of RCW 9A.36.021(1)(e).

[4] *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Certain conditions the sentencing court imposed as part of Boyd's community custody include:

> 15. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.
>
> . . . .
>
> 19. Submit to polygraph and plethysmograph testing upon direction of your community corrections officer or therapist at your expense.
>
> . . . .
>
> 25. You shall not have access to the Internet or webcams without prior approval of community custody officer.

Clerk's Papers (CP) at 174-75. Boyd appeals these conditions.

analysis

I. Standard of Review

Under former RCW 9.94A.700(5)(e) (2002), a sentencing court may impose crime-related prohibitions; i.e., they must be directly related to the circumstances of the crime but need not be causally related. *State v. Autrey,* 136 Wn. App. 460, 467, 150 P.3d 580 (2006); *State v. Letourneau,* 100 Wn. App. 424, 432, 997 P.2d 436 (2000). Our primary concern when reviewing prohibitions is to prevent coerced rehabilitation. *State v. Riley,* 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). If they are not coercive, a sentencing court has broad discretion and we review only for an abuse of that discretion. *Riley,* 121 Wn.2d at 37.

II. Condition 15

Boyd contends that Condition 15 suffers from the same lack of ascertainable standards for enforcement that our supreme court identified in *State v. Bahl,* 164 Wn.2d 739, 193 P.3d 678

(2008).[5] The State concedes that this condition is unconstitutional and we agree. It asks that we remand so the sentencing court may refashion the condition, eliminating that portion of the condition allowing the community corrections officer to define pornography. Boyd simply asks that we strike the condition. Since the condition directly relates to the committed offenses, the sentencing court can refashion the condition so it contains ascertainable enforcement standards. *See Bahl*, 164 Wn.2d at 765 (J.M. Johnson, J. concurring, suggesting use of "sexually explicit" material). As such, we strike the condition but agree that the sentencing court has discretion to refashion it so is not unconstitutionally vague.

III. Condition 19

Boyd argues that this condition requiring plethysmograph testing was improper because such testing is solely for therapeutic purposes and not for monitoring compliance with community custody conditions. *State v. Riles,* 135 Wn.2d 326, 345-46, 957 P.2d 655 (1998). He argues that this condition improperly authorizes a community correction officer to require testing even if he is not in treatment after his release.

At the sentencing hearing, defense counsel objected collectively to conditions 11, 12, and 19, arguing:

> [I]f Mr. Boyd completes treatment in the Department of Corrections and is therefore deemed safe to be at large, I don't know why he would be ordered to complete yet another program. I think that they have that option of requiring treatment, but I don't think that the Court needs to order it because basically the Court is ordering an individual to complete two treatment programs, and that strikes me as unnecessary and unfair.

[5] The *Bahl* court struck a condition restricting possessing and accessing pornographic materials because the condition did not define pornography, leaving this to the community corrections officer's discretion. The court held that a condition "implicating his First Amendment rights must be clear and must be reasonably necessary to accomplish essential state needs and public order." *Bahl*, 164 Wn.2d at 757-58.

Report of Proceedings (RP) at 80. The sentencing court modified the proposed condition, explaining:

> With respect to 11, I'm going to adopt that with an addition at the end of the first sentence, if required by CCO. If he completes it in prison and they don't believe he needs any more, fine, but I have a feeling he won't complete it in prison. That's kind of up to him. So if required by a community custody officer.

RP at 87. We note first that defense counsel did not make the specific objection counsel has presented on appeal and thus the sentencing court did not have an opportunity to correct any such error. *See* RAP 2.5(a) (appellate court may refuse to address claim not first raised in trial court); *but see State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (appellant may challenge an illegal or erroneous sentence for the first time on appeal). Nonetheless, as we noted above, we review these conditions for an abuse of discretion. It is clear when reading condition 19 in conjunction with 11 and 12 that these conditions are intended to ensure that Boyd gets treatment and, if not in prison, while on community custody. The sentencing court acted within reason in imposing this condition and we see no reason to strike it. *See Riles,* 135 Wn.2d at 345 (court may order plethysmograph testing if it imposes crime-related treatment). Further, we do not anticipate that a community corrections officer would seek to require plethysmograph testing except in a treatment context. Boyd may seek relief at the trial court if he believes the community corrections officer is acting unreasonably.

IV. Condition 25

Boyd contends that condition 25, which limits his access to the internet and webcams, was not statutorily authorized, was not crime-related, and the court violated the real facts doctrine in imposing it.

The sentencing court specifically stated that it was not relying on any information Boyd objected to in the presentence investigation report. The court stated, "I did not rely on the information objected to." RP at 89.

The sentencing court accepted all of his objections except two. It found one part of the report to be a reasonable inference from the facts[6] and it found the other to be not a fact, but the investigator's opinion.[7] Boyd does not show or even speculate how these two statements that he objected to could have affected the court's decision in imposing the two remaining community

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[6] Boyd objected that the facts did not support the report's statement that Boyd "enjoys entertaining the neighborhood children." The sentencing court found this to be a fair characterization from Boyd's statement:

> My generosity has been characterized as "grooming" but nothing could be further from the truth. I have given freely to my friends and family and even our neighbors down the street when they needed food. I gave to the Committee not only money but volunteered time for social events. I provided high-paying jobs for over 20 employees in our small community and gave money to help my employees when they needed help."

RP at 70 (discussing CP at 193).

[7] The report stated:

> Although Mr. Boyd has the right to enter a Newton Plea, by doing so it appears he has not admitting [sic] wrongdoing. By not fully admitting wrongdoing, Mr. Boyd presents a danger to our community and the communities [sic] children. Mr. Boyd has displayed deviant and dangerous behaviors and will continue to pose a substantial threat to the safety of our community until he cooperates with sexual deviancy treatment."

CP at 200.

custody conditions. Thus, his claim that the sentencing court relied on unproven facts and thus violated the real facts doctrine[8] is without merit.

Boyd argued below that his crimes did not involve the computer or the internet and thus this condition is not directly related to his crimes. The sentencing court disagreed:

> [Boyd] goes on to say, "I'm guilty of providing a camera to my wife and our marital relationship for her to take certain photos of me when I was unclothed.
>
> And then apparently he says his wife had a lover and it's his private parts in these photos, so apparently there's a plot against him, and then the plotter apparently removed items from the computer.
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> One would think the plotters would delete items in the computer, evidence against them, so it seems a bit inconsistent. He says, "I was sickened by the photos that I viewed with my attorney and the investigator."
>
> And apparently they're not him and his computer; they're pictures of someone else engaged in sexual activity with minors, all of which I, frankly, find his statement pretty hard to believe.

RP at 84-85. Boyd's conviction of sexual exploitation of a minor stemmed from his photographing of two minor girls singly or together engaging in sexually explicit conduct. According to the presentence investigation report, one victim explained that "[o]ver the weekend Boyd took multiple pictures of S.C. and S.R. separately and together in various sexually explicit poses." CP at 185. The police recovered these photographs from Boyd's computer. While there is no evidence of what Boyd did with these photographs, it is common for pedophiles to trade, gather, or distribute such photographs through the internet. The sentencing court acted within

[8] The real facts doctrine is codified in former RCW 9.94A.530(2) (2002):

> (2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

reason in seeking to limit Boyd's access to these tools. We find no abuse of discretion.

We remand for the sentencing court to strike or refashion condition 15 and, if appropriate, to refine condition 19.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.