IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH C. MOSHER, Appellant	No. 38946-1-II UNPUBLISHED OPINION

Hunt, J.—Kenneth C. Mosher appeals his second amended sentence, imposed following revocation of his SSOSA (special sexual offender sentencing alternative) and one condition of his community custody.[1] He argues that the trial court improperly amended his sentence and that condition (b)(9) of his community custody, prohibiting his viewing pornographic material, is unconstitutionally vague. We affirm his second amended sentence, but we accept the State's concession of error and vacate community custody condition (b)(9).

FACTS

After Mosher pleaded guilty, the trial court granted his request for a SSOSA and imposed a sentence of confinement for 59 months to life, suspended under the SSOSA guidelines. The

[1] A commissioner of this court considered this matter initially and referred it to a panel of judges.

trial court also imposed a community custody condition that prohibited Mosher from viewing "pornographic material of any kind on or in any type of media or electronic device except for treatment" purposes. CP 137. A week later, the trial court amended paragraph 4.5(a) of the sentence to impose a period of actual confinement, as it had originally intended. Under "CONFINEMENT," next to "59 months on Count I," it added "all suspended." CP 145. At the bottom of subsection (a), it wrote "6 months in jail now (59 mos suspended)." CP 145. Mosher did not object at the time.

Five years later, Mosher came before the trial court for violating conditions of his SSOSA. When a question arose about the precise terms of his sentence and community custody, the court entered a second amended sentence to clarify that community custody was for life. It also set Mosher's minimum term at 65 months of confinement, combining the 59 months suspended and the six months already served. CP 49. Mosher did not object to these amendments.[2] The parties agreed not to pursue the violations. Two months later, however, Mosher admitted to using methamphetamine and marijuana. These violations prompted the trial court to revoke his SSOSA and to lift suspension of his sentence of confinement for 65 months to life. Mosher appeals.

ANALYSIS

Mosher contends that the second amended sentence improperly modified the first amended sentence. A trial court has jurisdiction under CrR 7.8 to amend a judgment to correct a clerical

[2] The second amended judgment and sentence community custody conditions included, but renumbered from "condition (b)(7)" to "condition (b)(9)," the original community custody condition prohibiting Mosher from viewing pornographic materials. CP 56. *See also* CP 137, 151.

mistake at any time. CrR 7.8(a); *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004). A reviewing court looks to whether the judgment, as amended, embodies the trial court's intention, as expressed in the record. *Snapp*, 119 Wn. App. at 627. If it does, a reviewing court will uphold the amendment as a clerical correction. *Snapp*, 119 Wn. App. at 627.

The first amended sentence was clearly intended to impose six months of immediate incarceration in addition to the 59 suspended months. The sentence provided that all of the 59 months were suspended. Plainly, six months of that time could not be both suspended and immediately imposed. The second amended sentence did nothing more than restate the sentence the trial court had imposed earlier in the first amended sentence, which, at most, was a clerical correction of the original sentence one week earlier and clearly embodied the trial court's intent to impose some confinement, in spite of suspending most of Mosher's sentence. Furthermore, Mosher voiced no objection. We will not disturb the trial court's amendments to Mosher's sentence.

But Mosher's challenge to condition (b)(9) of the second amended sentence is well taken. Under that condition, Mosher cannot "view pornographic material of any kind or in any type of media or electronic device except for treatment." CP 56. As the State properly concedes, the courts of our state have overturned such conditions because no precise legal definition exists for the terms "pornography" and "pornographic material," and there are no ascertainable standards of guilt to protect against arbitrary enforcement. *See State v. Bahl*, 164 Wn.2d 739, 754-758,

193 P.3d 678 (2008); *State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). Because condition (b)(9) is unconstitutionally vague, we must vacate it.

We remand to the trial court to remove community custody condition (b)(9). In all other respects, we affirm the second amended judgment and sentence.

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.

Hunt, J.

We concur:

Bridgewater, P.J.

Van Deren, C.J.