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

STATE OF WASHINGTON, Respondent, v. JAMES BRADLEY ANDERSON, Appellant.	)	No. 79942-8-I UNPUBLISHED OPINION

VERELLEN, J. — James Anderson contends that on remand from a prior appeal overturning one of four child sex offenses, the trial court mistakenly concluded it did not have the authority to resentence. But the mandate narrowly directed the trial court to dismiss the single conviction with prejudice. There was no resulting change to the standard sentencing range. We did not authorize a resentencing.

The mandate also directed the trial court to clarify a condition of community custody restricting Anderson from frequenting areas where minor children congregate. He challenges the revised condition as vague, overbroad, and not crime related. Although the broad limitations on church services and restaurants are problematic, the specific arguments, existing record, and limited briefing do not support any relief on appeal. Therefore, we affirm.

FACTS

A jury convicted Anderson of one count of second degree child molestation (count I), one count of first degree rape of a child (count II), two counts of first degree child molestation (counts III and IV), and one count of second degree rape of a child (count V). The court sentenced Anderson to a standard range sentence of 280 months' incarceration based on an offender score of 12. The court also imposed a community custody condition that required Anderson to avoid "areas where minor children are known to congregate."[1]

Anderson appealed and argued, in part, the State presented insufficient evidence to sustain his conviction for second degree child molestation. Anderson also argued the above condition was void for vagueness. The State conceded both issues. This court accepted the State's concession and remanded for dismissal of count I and revision of the condition.[2]

On remand, Anderson sought resentencing at the bottom of the standard range. To support his request, defense counsel submitted evidence of Anderson's postconviction rehabilitation efforts. At the hearing on remand, the State noted the dismissal of count I reduced Anderson's offender score to 9 but did not reduce the standard range. The trial court focused on this court's

[1] Clerk's Papers (CP) at 59.

[2] CP at 42.

mandate, concluding: "I would have to interpret this language that they didn't intend me to resentence."[3]

The court entered an amended judgment and sentence dismissing count I but left Anderson's sentence at 280 months. The court also revised the community condition to provide examples of "areas where minor children are known to congregate."[4]

Anderson appeals.

ANALYSIS

I. Discretion to Resentence

Anderson contends the trial court failed to recognize its discretion to resentence.

"The trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate."[5] Here, in the mandate, this court specifically stated: "In summary, we remand for dismissal with prejudice of Anderson's conviction for second degree child molestation in count I and for revision of the community custody condition. Otherwise, we affirm."[6]

At the hearing following remand, the trial court interpreted this court's language "to suggest they weren't expecting a resentencing, especially since

[3] Report of Proceedings (RP) (Apr. 22, 2019) at 8.

[4] CP at 22.

[5] State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

[6] CP at 42.

they didn't say that on resentencing we should change that condition, they said we should just revise that one condition of the sentence."[7] The court also stated it was "not persuaded that [the case was] sent back to me for this purpose given the language."[8] "I don't really see a basis. . . . [I]f they wanted me to resentence him, they would have said on resentencing this condition has to be different."[9] The court determined, given that the dismissal did not change the standard range: "I think I would have to interpret this language that they didn't intend me to resentence on everything else."[10]

Anderson cites to State v. Kilgore[11] and In re Personal Restraint of Sorenson[12] to address the scope of an appellate court's mandate. In Kilgore's initial appeal, our Supreme Court affirmed this court's reversal of two of Kilgore's convictions. The court remanded the case to the superior court for "further proceedings" consistent with the court's opinion.[13] On remand, Kilgore sought resentencing under Blakely v. Washington.[14] The trial court declined to resentence. Kilgore again appealed.

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[7] RP (Apr. 22, 2019) at 4.

[8] Id. at 6.

[9] Id. at 7.

[10] Id. at 8.

[11] 167 Wn.2d 28, 216 P.3d 393 (2009).

[12] 200 Wn. App. 692, 403 P.3d 109 (2017).

[13] Kilgore, 167 Wn.2d at 34.

[14] 542 U.S. 296, 124 S. Ct 2531, 159 L. Ed. 2d 403 (2004).

In the subsequent appeal, our Supreme Court affirmed this court's determination that although "the mandate in Kilgore I did not explicitly authorize the trial court to resentence Kilgore," the mandate was "open-ended" and "in theory, the trial court could have considered resentencing Kilgore."[15]

However, the court acknowledged:

> Where an error in a defendant's offender score affects the applicable sentencing range, resentencing is required. Resentencing is also required where the sentencing range is unaffected "if the trial court had indicated its intent to sentence at the low end of the range, and the low end of the correct range is lower than the low end of the range determined by using the incorrect offender score."[16]

In Kilgore, our Supreme Court determined resentencing was not required because "[a]lthough Kilgore's offender score was reduced from 18 to 12, his presumptive sentencing range remained the same," and "[t]he trial court indicated no intention to sentence Kilgore at the low end of the sentencing range."[17] Ultimately, although the trial court had the discretion to resentence, resentencing was not required under the circumstances.

In Sorenson, Division Two of this court upheld Sorenson's conviction on direct appeal but mandated for correction of scrivener's errors: "We affirm, but remand to correct scrivener's errors in Sorenson's judgment and sentence."[18]

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[15] Kilgore, 167 Wn.2d at 42.

[16] Id. at 41-42 (emphasis added) (quoting In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 868, 50 P.3d 618 (2002)).

[17] Id. at 42.

[18] Sorenson, 200 Wn. App. at 699 (internal quotation marks omitted).

Later, in a personal restraint petition, the court addressed the timeliness of Sorenson's petition: "Our instructions left the trial court with no discretion as to the actions it could take on remand."[19]

Here, our mandate specifically stated: "In summary, we remand for dismissal with prejudice of Anderson's conviction for second degree child molestation in count I and for revision of the community custody condition. Otherwise, we affirm."[20] Anderson argues "[d]ismissal of a current conviction, even where the sentence range does not change, necessarily implies resentencing."[21] But he fails to provide authority to support this proposition. The mandate here is not open ended, as in Kilgore, or strict, as in Sorenson. But consistent with the analysis in Kilgore, Anderson does not present a situation that warrants resentencing because Anderson's sentencing range remained the same, and the trial court did not indicate an intention to sentence Anderson at the low end of the sentencing range.[22] And, similar to Sorenson, our mandate in Anderson's original appeal left the trial court with no discretion as to the actions it could take on remand.[23]

[19] Id.

[20] CP at 42.

[21] Appellant's Br. at 8.

[22] See Kilgore, 167 Wn.2d at 42.

[23] See Sorenson, 200 Wn. App. at 699.

Therefore, the trial court did not abuse its discretion when it determined this court's mandate in Anderson's original appeal did not include resentencing.

Additionally, we decline to rewrite our opinion in Anderson's original appeal. Anderson argues if the mandate did not allow for resentencing, "then this Court should amend the original opinion to so allow" because "[d]ismissal of a current conviction necessarily gives the trial court discretion to resentence."[24] But as previously stated, Anderson does not provide any citation to authority to support this proposition.

We also note that on remand, the trial court indicated: "I don't think it would have made a significant difference to the court's decision as to the ranges."[25] Of course, here, the dismissal lowered Anderson's offender score, but it did not change the standard range. We read the trial court's comment as an indication that even if the mandate allowed for resentencing, the evidence of Anderson's post-sentencing actions would not have swayed the court from the original sentence. This also runs counter to any relief on appeal.

II. Community Custody Condition

Anderson argues the revised community custody condition is unconstitutionally vague, overbroad, and not crime related.

[24] Appellant's Br. at 13.

[25] RP (Apr. 22, 2019) at 8.

We review community custody conditions for abuse of discretion.[26] "A trial court abuses its discretion if it imposes an unconstitutional condition."[27] "A legal prohibition, such as a community custody condition, is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement."[28]

Here, in the original judgment and sentence, the court imposed a community custody condition that required Anderson to avoid "areas where minor children are known to congregate."[29] In the first appeal, the State conceded, and this court agreed, the condition was unconstitutionally vague. On remand, the court revised the condition as follows:

> Do not frequent areas where minor children are known to congregate, this includes, but is not limited to: parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play area (indoor or outdoor), sports fields being used for youth sports, arcades, church services, restaurants, and any specific location identified in advance by [the Department of Corrections] or [community corrections officer].[30]

As to vagueness, Anderson concedes the revised condition satisfies the first prong of the vagueness test, but he argues the revised condition does not

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[26] State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

[27] Id.

[28] Id.

[29] CP at 59.

[30] CP at 22.

satisfy the second prong because "it does nothing to cabin the [community corrections officer's] discretion."[31] We disagree. The community corrections officer's discretion is limited to clarifying the definition by providing specific locations "in advance" to Anderson. The community correction officer's discretion is not unchecked, and the limited discretion allowed does not render the condition unconstitutionally vague. The condition provides fair notice and is not subject to arbitrary enforcement.

"'Overbreadth analysis is intended to ensure that legislative enactments do not prohibit constitutionally protected conduct, such as free speech.'"[32] In part, Anderson argues the condition's prohibition on attending church services is overbroad because it implicates his free exercise of religion. Article I, section 11 of the Washington Constitution and the First Amendment of the United States Constitution protect an individual's religious freedom.[33] "[A]ny burden upon religious free exercise must withstand strict scrutiny."[34] "Under this standard, the complaining party must first prove the government action has a coercive effect on his or her practice of religion."[35]

[31] Appellant's Br. at 17.

[32] State v. Knowles, 91 Wn. App. 367, 372, 957 P.2d 797 (1998) (quoting City of Seattle v. Ivan, 71 Wn. App. 145, 149, 856 P.2d 1116 (1993)).

[33] State v. Balzer, 91 Wn. App. 44, 53, 954 P.2d 931 (1998).

[34] Id.

[35] Id.

Anderson argues the condition "implicates" his right to freedom of religion, but does not offer any evidence to satisfy his burden of proving that the condition has a coercive effect on his practice of religion.[36] Although an unrestricted limitation on attending church services is problematic, on the narrow arguments, undeveloped record, and limited briefing presented by Anderson, freedom of religion is not squarely before us.

Finally, sentencing courts have the general authority to impose crime-related community custody conditions.[37] The imposition of a crime-related prohibition is necessarily fact specific and left to the discretion of the trial court.[38]

Anderson argues the inclusion of church services and restaurants in the prohibition is not crime related because his crimes occurred in "the confines of his home."[39] However, as identified by our Supreme Court:

> A court does not abuse its discretion if a "reasonable relationship" between the crime of conviction and the community custody condition exists. The prohibited conduct need not be identical to the crime of conviction, but there must be "some basis for the connection."[40]

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[36] See id.

[37] RCW 9.94A.030(10).

[38] In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

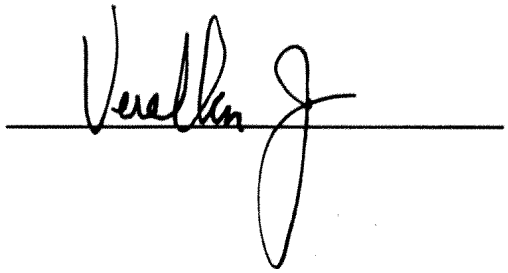
[39] Appellant's Br. at 18.

[40] State v. Nguyen, 191 Wn.2d 671, 684, 425 P.3d 847 (2018) (quoting State v. Irwin, 191 Wn. App. 644, 657-59, 364 P.3d 830 (2015)).

Anderson's criminal activity involved children. There is a reasonable relationship between his crimes of conviction and prohibiting him from frequenting places where children congregate, which might extend to some church services and restaurants.

We conclude the revised condition is not unconstitutionally vague or overly broad. And the condition is crime related.

Therefore, we affirm.



WE CONCUR: