IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW TALLETT, Appellant.	No. 39800-1-II UNPUBLISHED OPINION

Armstrong, J. — Andrew Tallett appeals a community custody condition prohibiting him from purchasing, possessing, or viewing any pornographic materials. Tallett claims, and the State concedes, the condition violates his constitutional right to due process because the terms "pornography" and "pornographic material" are unduly vague. We remand for resentencing.

FACTS

Tallett was convicted of first degree burglary, third degree assault, indecent liberties, and fourth degree assault. In an unpublished opinion, we reversed the third degree assault conviction and remanded the case for resentencing on the remaining convictions. The trial judge imposed a community custody condition prohibiting Tallett from purchasing, possessing, or viewing any pornographic materials.

ANALYSIS

State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008), controls the issue here, an issue Tallett can raise for the first time on appeal, *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); and before the State seeks to enforce it.[1] *Bahl*, 164 Wn.2d at 744.

[1] *Bahl* held that constitutionality claims may warrant pre-enforcement review when "the issues

Bahl held that community custody conditions are unconstitutionally vague if (1) they fail to define criminal offenses so that ordinary people can understand what conduct is prohibited and (2) the wording of the statutes effectively encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *State v. Sansone*, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005); *Bahl*, 164 Wn.2d at 752-53; *see also City of Spokane v. Douglass*, 115 Wn.2d 171, 179-80, 795 P.2d 693 (1990). The court reasoned that First Amendment freedoms warrant a higher standard of specificity because a fundamental constitutional right remains at stake.[2] *Bahl*, 164 Wn.2d at 753, 757-58.

In *Bahl*, the community custody condition prohibited the accessing and possession of pornographic material. Here, it prohibits the purchasing, viewing, and possession of it. The difference in wording is immaterial, however. "Pornography" and "pornographic materials" are unconstitutionally vague because the terms do not clearly define the offense in common parlance, thereby encouraging arbitrary or discriminatory enforcement. *Bahl*, 164 Wn.2d at 758. Tallett would have no reason to know what constituted "pornographic material," or whether his actions would violate the condition. And the community corrections officer(s) would have overly broad interpretive power when applying the condition.[3]

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raised are primarily legal, do not require further factual development, and the challenged action is final." *Bahl*, 164 Wn.2d at 751. Furthermore, it held that the court must also consider "'the hardship to the parties of withholding court consideration,'" and that Bahl's claims were indeed ripe under this standard. *Bahl*, 164 Wn.2d at 751 (quoting *First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmark's Pres. Bd.*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996) (Dolliver, J., dissenting)).

[2] *See also Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *United States v. Williams*, 444 F.3d 1286, 1306 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

In conclusion, we accept the State's concession that Tallett's community custody prohibition on purchasing, possessing, or viewing any pornographic materials is unconstitutionally vague. We remand this case to the trial court for resentencing.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Penoyar, C.J.

[3] The court in *Bahl* concluded the terms were unconstitutionally vague despite the existence of state statutes that aim to clarify "pornography." *Bahl*, 164 Wn.2d at 756-57. The court maintained that because these statutes do not fit the *Bahl* context, they violate the first condition of vagueness (that statutes are clear enough that those compelled to follow them can understand them and do so). *Bahl*, 164 Wn.2d at 756.