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

STATE OF WASHINGTON,	)	No. 29909-1-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
STEVEN WAYNE WILKINS,	)	
Appellant.	)	

Kulik, J. — Steven Wilkins pleaded guilty to first degree child rape. On appeal, he contends that his plea is invalid because the State breached the plea agreement by failing to recommend a special sex offender sentencing alternative (SSOSA), RCW 9.94A.670, and because the trial court misinformed him of the maximum sentence under the plea. He also challenges three of the community custody conditions placed on his sentence.

We affirm Mr. Wilkins's conviction and remand for the narrowing of the community custody conditions.

FACTS

Benton County charged Mr. Wilkins with two counts of first degree rape of a child, with the aggravating factor that he used his position of trust or responsibility to facilitate the crime.

In October 2010, Mr. Wilkins entered a plea of guilty to first degree child rape. The plea statement informed Mr. Wilkins that the standard range of confinement for first degree child rape was 93 to 123 months, with a maximum term of life. The statement also explained that the sentencing court would impose a minimum term of confinement within the standard range and that the term may be increased by the Indeterminate Sentence Review Board. Mr. Wilkins signed the plea statement, certifying that his lawyer explained the plea statement to him and that he fully discussed the provisions with his lawyer.

As part of the plea, the State agreed to make the following recommendation, "Defendant may petition the court for SOSA and if receives favorable recommendation, defendant to serve 12 months in jail w/balance suspended consistent w/SOSA sentencing." Clerk's Papers (CP) at 10. The State moved to dismiss the second count of

first degree child rape and did not pursue the aggravating factor.

A hearing was held on the same day that Mr. Wilkins entered his plea statement. The court told Mr. Wilkins that he had a maximum possible sentence of life in prison and a standard range sentence of 93 to 123 months. When the court asked if Mr. Wilkins understood that he could be sentenced between 93 and 123 months based on the entry of the plea, Mr. Wilkins said "Yes." CP at 32. The trial court again questioned Mr. Wilkins on his understanding that the sentencing judge could send him to prison for 10 years. Mr. Wilkins again said "Yes." CP at 33. Mr. Wilkins also confirmed that his attorney explained the consequences of entering the plea. The court accepted Mr. Wilkins's plea as knowing, intelligent, and voluntary. The court also ordered a presentence investigation.

The Department of Corrections (DOC) conducted a presentence investigation (PSI) on November 15. The PSI report recommended the standard range sentence for Mr. Wilkins. The PSI report stated that "Mr. Wilkins presented himself as a very cold and remorseless man toward the victim. His denial of the specifics of the offense and claim his victim will eventually get over this is unsettling." CP at 23. Furthermore, "Mr. Wilkins['s] behavior is intolerable and based on the information collected, and interviews conducted, it is evident he poses [a] community safety threat and is considered moderate

to high-risk to re-offend." CP at 23. In regards to a SSOSA, the PSI report also noted that no sex offender evaluation report had been completed or submitted for consideration, but that the trial court may consider the evaluation at sentencing if completed.

The DOC was not aware that a sex offender evaluation had occurred on September 21, 2010, one month before Mr. Wilkins entered his plea. Provider Michael Henry wrote a report and gave it to Mr. Wilkins's attorney, Mr. Sant. Mr. Sant did not provide a copy of this report to the State prior to the guilty plea.

In the sex offender evaluation report, Mr. Henry found that Mr. Wilkins "clearly minimized his actions with the victim," and "if true, his actions demonstrates [sic] a persistent pattern of manipulation and exploitation." CP at 62. Mr. Henry also found that "[Mr. Wilkins] verbalized feelings of remorse for his actions, but my impression is that [Mr. Wilkins's] level of empathy was low and his feelings of remorse were superficial."
CP at 62. Mr. Henry noted that Mr. Wilkins "does not appear to be highly motivated to participate in treatment." CP at 63.

Ultimately, Mr. Henry determined that Mr. Wilkins was a "marginal candidate for referral to the SSOSA program based on his denial of personal or sexual problems, his low level of empathy, low motivation for treatment, financial problems and a lack of

marketable skills." CP at 63. Mr. Henry stated, "although I have found the SSOSA program to be helpful and beneficial to offenders in the past, unless the client can demonstrate a clear ability to commit to the long-term financial, residential and employment accountability imperative to the treatment process, he becomes a liability to the community at large." CP at 63.

Sometime after the presentence report, the State became aware of the sex offender evaluation conducted by Mr. Henry. Also, defense counsel changed from Mr. Sant to Mr. Holt.

In March 2011, the State motioned for the court to find that the State could recommend a prison-based sentence without violating the plea agreement. The State asked the trial court to determine what the parties meant by a favorable recommendation. Specifically, the State wanted to know if the recommendation needed to come from the PSI or Mr. Henry's report or both, and whether Mr. Henry's report was indeed favorable. The trial court found that the favorable recommendation was probably a reference to the recommendation from a sex offender treatment provider, and labeled Mr. Henry as such. The trial court found that Mr. Henry's report did not contain a favorable recommendation for a SSOSA. The court based its finding on Mr. Henry's statements that Mr. Wilkins was a marginal candidate for a SSOSA, had a low level of empathy for the victim, and

had low motivation for treatment. The trial court also found that the PSI did not contain a favorable recommendation for a SSOSA. Thus, the trial court concluded that the State was not required to recommend a SSOSA under the plea agreement.

On March 30, Mr. Wilkins appeared for sentencing. Mr. Wilkins requested that the DOC conduct a new PSI in light of Mr. Henry's report. Mr. Wilkins stated that a new PSI could result in a favorable recommendation for a SSOSA because Mr. Wilkins's financial and living arrangement problems that were identified in Mr. Henry's report had been worked out. The court granted the request.

The DOC issued a new PSI report. The PSI report referred to statements from Mr. Henry's report and found that "Mr. Wilkins only superficially admits guilt for his current sex offense and continually minimizes his role and displaces responsibility onto the minor victim." CP at 39. The PSI report concluded that a SSOSA was not an appropriate option due to Mr. Henry's classification of Mr. Wilkins as a marginal candidate. The PSI report recommended a standard range sentence.

The trial court held a sentencing hearing on May 11. The State requested that the court impose a sentence at the bottom of the standard range. Accordingly, Mr. Wilkins motioned to withdraw his plea because the State violated the agreement by not recommending the SSOSA and because his counsel acted ineffectively. The court

determined that there was no basis for withdrawing the plea, considering the court's earlier ruling that Mr. Henry's report was not favorable and that the State was not required to recommend a SSOSA under the plea agreement.

The trial court sentenced Mr. Wilkins to 93 months of confinement, with a maximum life term. The court also placed several conditions on Mr. Wilkins's sentence.

Mr. Wilkins appeals. He contends that (1) the State breached the plea agreement by not recommending the SSOSA, (2) his plea was invalid because he was not informed of the potential life sentence, and (3) the court exceeded its authority in imposing community custody conditions prohibiting the possession of alcohol, prohibiting the possession of pornography, and prohibiting Mr. Wilkins from holding a position of authority.

ANALYSIS

Plea Agreement and SSOSA. Mr. Wilkins contends that the State was obligated to recommend a SSOSA based on Mr. Henry's favorable recommendation. Mr. Wilkins and the State disagree as to whether Mr. Wilkins received a favorable recommendation under the terms of the plea agreement.

"Because a plea agreement is a contract, issues concerning the interpretation of a plea agreement are questions of law reviewed de novo." *State v. Bisson*, 156 Wn.2d 507,

517, 130 P.3d 820 (2006).

"A defendant may enter a plea to a lesser offense in exchange for the prosecutor's agreement not to file a particular charge or in exchange for the prosecutor's recommendation to the court that a particular sentence be within the standard range." *State v. Koivu*, 68 Wn. App. 869, 871, 847 P.2d 13 (1993).

In plea agreements, fundamental rights of the accused are at stake, and "[d]ue process requires a prosecutor to adhere to the terms of the agreement." *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). "The State fulfills its obligations if it acts in good faith and does not contravene the defendant's reasonable expectations that arise from the agreement." *State v. McInally*, 125 Wn. App. 854, 861-62, 106 P.3d 794 (2005). When a defendant fails to comply with the terms of a plea agreement, he or she loses the right to enforce the agreement. *Id*. at 867.

Plea agreements are contracts between a criminal defendant and the State and are generally analyzed under basic contract principles. *Sledge*, 133 Wn.2d at 839. When compared to contracts in a commercial context, plea agreements tend to be less formal and rely on implicit understandings of the State and defendants and their attorneys. *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003). As a result, "[t]he terms of an agreement are generally defined by what the defendant understood them to be when he or

she entered into the plea agreement." *Id*.

The goal of contract interpretation is to ascertain and give effect to the intent of the parties. *See Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). Words are generally given their ordinary dictionary definition unless another definition was clearly intended. *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). In addition to the expressed language of the contract, the court views, "'the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Oliva*, 117 Wn. App. at 779 (quoting *In re Marriage of Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261, 53 P.3d 516 (2002)).

A SSOSA allows certain first time sex offenders to receive a suspended sentence. RCW 9.94A.670. An offender is eligible for a SSOSA if all the criteria listed in RCW 9.94A.670(2) are met. If the court deems an offender eligible, an evaluation may be ordered to determine if an offender is amenable to treatment. RCW 9.94A.670(3). The examiner shall assess the offender's amenability to treatment and relative risk to the community. RCW 9.94A.670(3)(b). The SSOSA provision "was intended to be used for those offenders who had committed less serious crimes and who were thought to be

amenable to treatment." *State v. Goss*, 56 Wn. App. 541, 544, 784 P.2d 194 (1990).

Webster's dictionary defines "favorable" as "expressing approval" and "indicative of a successful outcome." Webster's Third New International Dictionary 830 (1993).

In the plea agreement between Mr. Wilkins and the State, a favorable recommendation was a condition precedent. "Failure to comply with a condition precedent excuses performance under a contract." *McInally*, 125 Wn. App. at 867-68. Thus, the issue of whether the State breached the plea agreement rests on whether Mr. Wilkins fulfilled the condition precedent by receiving a favorable recommendation.

Considering the agreement as a whole, the intent of the parties, and the SSOSA statute, we interpret a favorable recommendation to mean a recommendation that approves Mr. Wilkins for a SSOSA sentence based on the belief of a successful outcome. In terms of a sex offender evaluation report, a favorable recommendation reaches favorable conclusions regarding Mr. Wilkins's amenability to treatment and Mr. Wilkins's relative risk to the community. *See* RCW 9.94A.670(3)(b). This interpretation does not contravene Mr. Wilkins's reasonable expectations. It is reasonable to conclude that Mr. Wilkins understood the plea to mean that the State would recommend a SSOSA if an evaluator recommended Mr. Wilkins for a SSOSA.

Mr. Wilkins maintains that Mr. Henry's report contained a favorable

recommendation because it recommended a SSOSA sentence, regardless if the recommendation was marginal.

However, the sex offender evaluation recommendation made by Mr. Henry was not a favorable recommendation for several reasons. First, the report did not expressly recommend Mr. Wilkins for a SSOSA sentence. If Mr. Henry sought to recommend Mr. Wilkins for a SSOSA, he could have clearly stated his intention. Instead, the report concluded that "[Mr. Wilkins] appears to be a marginal candidate for referral to the SSOSA program based on his denial of personal or sexual problems, his low level of empathy, low motivation for treatment, financial problems and a lack of marketable skills." CP at 63. The classification of Mr. Wilkins as a marginal candidate for referral is not favorable, especially taken in context with the list of problems Mr. Henry identified in reaching his conclusion. This recommendation is not indicative of a successful outcome if a SSOSA was imposed.

Second, the evaluation does not specifically conclude that Mr. Wilkins was amenable to treatment. Mr. Henry concluded that Mr. Wilkins's feelings of remorse were superficial and he did not appear to be highly motivated to participate in treatment. The report also expresses concern "about the conflicting reports of [Mr. Wilkins] and the victim regarding frequency of the sexual offenses, which [Mr. Wilkins] minimizes." CP

at 63. Again, Mr. Henry's classification of Mr. Wilkins as a marginal candidate and Mr. Henry's other statements about Mr. Wilkins's lack of motivation casts doubts on Mr. Wilkins's amenability to treatment.

Finally, the evaluation points out that Mr. Wilkins could be a risk to the community. The report states, "although I have found the SSOSA program to be helpful and beneficial to offenders in the past, unless the client can demonstrate a clear ability to commit to the long-term financial, residential and employment accountability imperative to the treatment process, he becomes a liability to the community at large." CP at 63. The report does not reach a favorable conclusion regarding Mr. Wilkins's relative risk to the community.

The PSI did not result in a favorable recommendation either. The PSI concluded that a SSOSA was not an appropriate sentencing option for Mr. Wilkins.

Neither Mr. Henry's report nor the PSI resulted in a favorable recommendation.[1] Because the condition precedent was not met, the State was not required to recommend a SSOSA. This is the same conclusion reached by the trial court in the plea clarification

[1] The State contends that the PSI is the only recommendation applicable to the plea agreement. In making this argument, the State contends that Mr. Henry's recommendation cannot be considered because Mr. Henry's report was not created subsequent to the plea and because the defense concealed the report. Because we conclude that neither the PSI nor Mr. Henry's report was favorable, we will not address what recommendation is the subject of the agreement.

hearing. The State acted in good faith and did not breach the plea agreement by failing to recommend a SSOSA.

In addition, we do not find the State's promise to recommend a SSOSA to be illusory. A promise is illusory when it is so indefinite it cannot be enforced or makes performance entirely discretionary on the part of the promisor. *State v. E.A.J.*, 116 Wn. App. 777, 784, 67 P.3d 518 (2003). Performance by the State was not discretionary and did not rest on its subjective assessment of a favorable recommendation. The State was bound to honor the agreement if the evaluator recommended Mr. Wilkins for a SSOSA.

The State did not breach the plea agreement by failing to recommend a SSOSA. Mr. Wilkins failed to meet the condition precedent of receiving a favorable recommendation.

Knowing and Voluntary Plea. Mr. Wilkins contends that his plea was not entered knowingly and voluntarily because the court misinformed him of his maximum sentence.

The circumstances under which a defendant pleaded guilty are reviewed by this court under the de novo standard. *Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979).

Due process requires that a defendant enter a guilty plea knowingly, voluntarily, and intelligently. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390

(2004). The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. CrR 4.2(d). A guilty plea is not made knowingly if the defendant is misinformed about the direct consequences of sentencing. *Isadore*, 151 Wn.2d at 298. "Knowledge of the direct consequences of the plea can be satisfied through the plea documents." *State v. Codiga*, 162 Wn.2d 912, 923, 175 P.3d 1082 (2008).

The statutory maximum sentence and the applicable standard range sentence are both direct consequences of a guilty plea that must be disclosed to a defendant. *State v. Kennar*, 135 Wn. App. 68, 75, 143 P.3d 326 (2006).

At the plea colloquy, the trial court informed Mr. Wilkins, "You have an offender score of zero, a maximum possible sentence of life in prison, and a $50,000 fine, a standard range sentence of 93 to 123 months in prison, followed by 36 months of community custody. So, do you understand [that] once you enter this plea, Mr. Wilkins, you could be sentenced between 93 to 123 months in prison just based on entry of your plea and for no other reason other than the fact that you have pled guilty to this crime; do you understand that?" CP at 32. Mr. Wilkins answered affirmatively.

Mr. Wilkins also confirmed that he reviewed the guilty plea with his attorney and

that his attorney explained the consequences of entering the plea. The guilty plea signed by Mr. Wilkins informed him that the standard range sentence for his crime was 93 to 123 months and that the maximum sentence was life.

Based on the plea colloquy and the plea statement, we conclude that Mr. Wilkins was properly informed of his possible maximum sentence. The trial court told Mr. Wilkins that he had a possible maximum life sentence. Mr. Wilkins's confirmation that he reviewed the plea agreement and understood the consequences adds further support to the conclusion that Mr. Wilkins understood he faced a possible life sentence. Contrary to Mr. Wilkins's argument, the court did not provide misinformation or contradict itself when it advised Mr. Wilkins that his guilty plea resulted in a standard range sentence of 93 to 123 months. Mr. Wilkins was subject to a definite prison sentence. The trial court advised Mr. Wilkins of the standard range sentence that would be issued by the trial court, as well as the statutory maximum life sentence.

Mr. Wilkins entered his plea knowingly and voluntarily. The trial court properly advised Mr. Wilkins of the direct consequences of his crime, including the maximum sentence and the applicable standard range sentence.

Conditions of Community Custody Relating to Alcohol Use, Pornography, and Holding Positions of Authority. This court reviews crime-related prohibitions or

conditions imposed by the trial court for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). To be reversed, the sentence must be manifestly unreasonable so that "'no reasonable man would take the view adopted by the trial court.'" *Id.* (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)). Unauthorized conditions of a sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

As a part of any term of community custody, the court has the discretion to order an offender to comply with any crime-related prohibition. RCW 9.94A.703(3)(f). A "'crime-related prohibition' is defined as '[a]n order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.'" *State v. Letourneau*, 100 Wn. App. 424, 431, 997 P.2d 436 (2000) (quoting former RCW 9.94A.030(12)). "Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime." *Letourneau*, 100 Wn. App. at 432.

Sentencing courts may impose sentences only if the legislature had authorized the sentence by statute. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting *State v. Theroff*, 33 Wn. App. 741, 744, 657 P.2d 800 (1983)). Whenever a sentencing court exceeds its statutory authority, its action is void. *Id*. (quoting *Theroff*,

33 Wn. App. at 744).

Mr. Wilkins challenges three of the crime-related conditions imposed by the trial court. First, Mr. Wilkins challenges the condition that prohibits him from possessing alcohol. He maintains that possession of alcohol is not crime related. The State concedes that the provision that Mr. Wilkins "[s]hall not use or possess any alcohol" should be stricken. CP at 52. Accordingly, we remand to the trial court to strike this condition.

Second, Mr. Wilkins challenges the condition that prohibits him from participating in activities where he is in a position of authority. In the commission of his crime, Mr. Wilkins abused his position of authority over a child. Therefore, we remand for the trial court to revise the condition to prohibit Mr. Wilkins from participating in activities where he is in a position of authority over children.

Third, Mr. Wilkins challenges the condition that prohibits him from possessing any pornographic materials, including magazines, Internet sites, and videos. He contends that the condition is unconstitutionally vague.

"A statute is unconstitutionally vague if it '(1) . . . does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) . . . does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)

(quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A general restriction on accessing or possessing pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn.2d at 758.

As recognized in *Bahl*, the condition generally prohibiting Mr. Wilkins from possessing pornography is unconstitutionally vague. We remand to the trial court to narrowly tailor the condition. At resentencing, the State may recommend that the court revise the condition to prohibit Mr. Wilkins from using or possessing any depictions of "sexually explicit conduct" as defined in RCW 9.68A.011(4).

We affirm Mr. Wilkins's conviction. We strike the alcohol use condition, and remand the pornography and position of authority conditions for clarification consistent with this opinion.

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

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Kulik, J.

WE CONCUR:

_____ _____

Brown, J.

Korsmo, C.J.