IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27762-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JORDAN C. MARSHALL,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — In February 2003, Jordan Marshall entered a guilty plea to two counts of first degree child rape. The court sentenced Mr. Marshall to 131 months' confinement, but gave a special sexual offender sentencing alternative (SSOSA), suspending the prison sentence and allowing conditional release on community supervision. In August 2007, the State filed a notice of violation, alleging that Mr. Marshall violated five of the conditions of community supervision. The court found that Mr. Marshall violated four of these conditions and revoked Mr. Marshall's SSOSA. On appeal, Mr. Marshall contends that the condition prohibiting him from owning or possessing any form of pornography is unconstitutionally vague and that the judgment

and sentence documents fail to set a specific term of community custody.

The judgment and sentence documents and order modifying the sentence together show no ambiguity and, thus, there is no need for clarification. However, the pornography condition is unconstitutionally vague. Therefore, we affirm the court's revocation of Mr. Marshall's SSOSA, but we remand the pornography condition to be stricken or amended for proper specificity.

FACTS

On February 18, 2003, Mr. Marshall entered a guilty plea to two counts of first degree rape of a child. Mr. Marshall received a 131-month sentence but was given a SSOSA sentence that suspended his 131-month sentence and allowed conditional release on community custody. The community custody condition prohibiting pornography stated: "That you don't own or possess any form of pornography as defined by statute, your community corrections officer and/or therapist." Clerk's Papers (CP) at 21.

Appendix H to the judgment and sentence notified Mr. Marshall that the term of community custody was determined by the date when the charged crime was committed. Mr. Marshall was found guilty of two counts of first degree rape of a child occurring within the commission period of 1994 through 2001. This commission term spanned two

legislative enactments with regard to community custody: two years for crimes committed prior to 1996 and three years for crimes committed after 1996.

In August 2007, the State filed a notice of violation. In November, the State sought a warrant for Mr. Marshall's arrest, alleging that Mr. Marshall had violated five conditions of his community custody. After a hearing, the court entered written findings of fact in the revocation order showing that Mr. Marshall had committed four of the five violations.

In its revocation order, the court found that Mr. Marshall had violated allegations 1, 3, 4, and 5. Allegation 2 was crossed out. Allegation 2 alleged that Mr. Marshall violated the pornography prohibition of his community custody. At the resentencing hearing, the court explained that even if the pornography violation was set aside, there were other significant bases to revoke Mr. Marshall's SSOSA.

Mr. Marshall appeals the trial court's revocation of his SSOSA.

ANALYSIS

Revocation of a suspended sentence is reviewed for an abuse of discretion. *State v. Kuhn*, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). A court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271, 796

P.2d 737 (1990).

Pornography Condition. Mr. Marshall's condition of community custody prohibits him from owning or possessing "any form of pornography as defined by statute, your community corrections officer and/or therapist." CP at 21. Mr. Marshall argues that the condition prohibiting possession or perusal of "pornographic" materials should be stricken because it is unconstitutionally vague.

The due process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct must be avoided. Second, it protects from arbitrary, ad hoc, or discriminatory conduct. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

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. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). When deciding whether a term is unconstitutionally vague, terms are considered

in the context in which they are used. *Id.* at 180.

In its oral ruling, the court mentioned the alleged violation of the condition prohibiting pornography, and indicated that Mr. Marshall had violated that condition. However, in its written findings, the court did not find that Mr. Marshall violated this condition. Specifically, in the order of revocation, the court found that Mr. Marshall had committed allegations 1, 3, 4, and 5. Allegation 2 was crossed out. Allegation 2 alleged that Mr. Marshall had violated the pornography prohibition.

Here, the court's oral ruling conflicts with the written ruling. A trial court's oral ruling "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). Although we can look to a trial court's oral ruling to interpret its written findings to the extent the oral ruling and written findings are consistent, we cannot rely on the oral ruling if it is inconsistent with the written findings. *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987).

Even though the written findings show that the court did not base the revocation of Mr. Marshall's SSOSA on the prohibition against pornography, a *pre-enforcement* vagueness challenge can be brought to challenge conditions of community custody if the challenges are ripe. *Bahl*, 164 Wn.2d at 761.

Bahl is similar to the case here. In *Bahl*, the court considered whether it should decline to address Eric Bahl's vagueness challenges because he had not been charged with a violation of those conditions. *Id.* at 745. The court examined the condition dealing with "pornographic materials" that prohibited Mr. Bahl from "'possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.'" *Id.* at 754. The court concluded that the prohibition on possessing and accessing pornographic materials was unconstitutional and the fact that the condition allowed Mr. Bahl's community corrections officer to determine what falls within the prohibition made the vagueness problem worse by acknowledging that the condition did not provide ascertainable standards. *Id.* at 758. The court also found that the vagueness challenges were ripe. *Id.* at 761.

Here, Mr. Marshall challenged the vagueness of the condition prohibiting him from owning or possessing any form of pornography as defined by statute, his community corrections officer, and/or his therapist. Mr. Marshall's challenge is ripe because it involves legal questions that can be resolved on this record. The pornography condition is unconstitutionally vague because it defines pornography to include materials allowed by the community corrections officer and/or therapist. This condition contains no ascertainable standards.

In *State v. Sansone*, 127 Wn. App. 630, 634-35, 111 P.3d 1251 (2005), the court found the following condition of community custody unconstitutionally vague:

> "[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer."

(Alteration in original). The case was remanded to the trial court to impose a condition containing the proper specificity. *Id.* at 643.

Similarly here, we conclude that the pornography condition is unconstitutionally vague. We remand to the trial court to strike this condition or to impose a condition with the proper specificity.

Community Custody Term. The court sentenced Mr. Marshall to a SSOSA. The court found that Mr. Marshall's offenses had been committed "between May 04, 1994 and June 02, 2001." CP at 26. The court imposed 131-month concurrent sentences for both counts. The court also imposed community custody by directing Mr. Marshall to "follow all conditions in Appendix H and Appendix I." CP at 31.

Appendix H imposed conditions of community custody as follows:

> The court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.
>
> COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after June 6, 1996 to community

> placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement. Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

CP at 20.

The court suspended the confinement and community custody portions of the sentence.

Mr. Marshall points out that the term of custody for these offenses was amended during the charging period. Before June 6, 1996, there was a two-year period, and after that date it was a three-year term. Laws of 1996, ch. 275, § 2; former RCW 9.94A.120(8)(b) (1994). Mr. Marshall maintains that the failure of the judgment and sentence to specify the two-year sentence applicable here requires that the sentence be remanded for clarification. We disagree.

Mr. Marshall relies on *State v. Nelson*, 100 Wn. App. 226, 996 P.2d 651 (2000).

Under *Nelson*, the sentence contained boilerplate language identifying the statutory period of community custody for two separate categories of offenses. The references were ambiguous and the applicable period could be determined only after ascertaining whether Artis Nelson's conviction was for a serious violent offense and then calculating his maximum potential release award. The court concluded that a sentence containing a community custody requirement must specify the actual term of community custody. *Id.* at 231.

Nelson recognized that the use of the actual term of community custody is important because it may assist the sentencing court in assessing the overall sentence, and it may permit the defendant to appeal an erroneous term of community custody. *Nelson* also found it equally important to know the actual term of community custody at the time the defendant is required to comply with the conditions of community custody, an event that may not occur for many years after sentencing. The court noted that the parties should not have to search through an oral decision or years of statutory amendments to determine the term of community custody when that information could have been entered at the time of sentencing. *Id.*

In *State v. Mitchell*, 114 Wn. App. 713, 718-19, 59 P.3d 717 (2002), the court held that a sentence specifying the statutory range and stating the contingent nature of the

earned early release award without further explanation was sufficiently definite to comply with *Nelson*. Similarly, in *State v. Pharris*, 120 Wn. App. 661, 665-66, 86 P.3d 815 (2004), the court found no ambiguity comparable to *Nelson* when Steven Pharris's sentence was stated without ambiguity and without reference to outside sources.

Mr. Marshall's argument is based on the initial judgment and sentence and appendix H. When revoking Mr. Marshall's sentence, the court entered an order modifying sentence, order revoking sentence, order of confinement, and order of commitment. The court stated that the SSOSA sentence was vacated and that Mr. Marshall was sentenced to two years of community custody upon the completion of the term of confinement or at such time that the defendant was transferred to community custody in lieu of earned early release.

Reading the judgment and sentence and order modifying sentence together, there is no ambiguity similar to that found in *Nelson*. The order modifying sentence, revoking sentence, and order of confinement clearly states that Mr. Marshall is sentenced to two years of community custody. There is no ambiguity about this order modifying the sentence; a litigant would not have to search through years worth of oral ruling to determine his or her sentence because the document clearly states that it is an order modifying the sentence. There is no need to remand for the entry of another document

modifying the sentence to state that Mr. Marshall is sentenced to two years of community custody. The judgment and sentence documents are not ambiguous.

We affirm the court's revocation of Mr. Marshall's SSOSA, but we conclude that the pornography condition is unconstitutionally vague. Therefore, we remand the pornography condition to be stricken or for the imposition of a condition with the proper specificity.

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, C.J.

WE CONCUR:

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Sweeney, J. Brown, J.