IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 39718-1-III

On review from the Superior Court of Grant County, no. 22-1-00393-13

STATE OF WASHINGTON, Respondent,

v.

JOSHUA KENNETH LEONARD, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

The trial court found Joshua Leonard indigent at the time of his sentencing and imposed a $500 crime victim penalty assessment under RCW 7.68.035 and a $100 DNA collection fee under RCW 43.43.7541. Subsequently, the statutes authorizing those financial obligations were revised, prohibiting imposition of the crime victim penalty assessment on defendants who are indigent at the time of sentencing and eliminating the DNA collection fee. Because the legislative revisions apply to Mr. Leonard's case while it is pending on appeal, both assessments should be stricken from the judgment and sentence. In addition, the trial court imposed a condition of custody requiring prior approval of "romantic relationships" that is unconstitutionally vague and must be stricken or modified.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The $500 crime victim penalty assessment should be stricken from the judgment and sentence due to Mr. Leonard's indigency.

ASSIGNMENT OF ERROR NO. 2: The $100 DNA collection fee should be stricken from the judgment and sentence because it has been eliminated.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing condition of community custody no. 16 requiring prior approval of "romantic" relationships.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether revisions to RCW 7.68.035 and 43.43.7541 made effective July 1, 2023 apply to Mr. Leonard's case.

ISSUE NO. 2: Whether a community custody condition requiring prior approval of "romantic relationships" is unconstitutionally vague and invites arbitrary enforcement.

IV. STATEMENT OF THE CASE

A trial court convicted Joshua Leonard of attempted rape of a child in the second degree and communicating with a minor for immoral purposes.[1] CP 136, 147-48, 266. At

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[1] Because the facts giving rise to conviction are not pertinent to the issues raised on appeal, this brief will not set them forth in detail. Briefly, the convictions arise from a Net Nanny operation conducted in Grant County in August 2022. I RP 76-77, 167, 182, 200, 212, 225, 248, 263, 279, 284, 295, 316-17, 404. Law enforcement officers set up a social media profile named "Crystal" with a listed age of 32, using the photograph of a female Washington State trooper. I RP 319, 324. "Crystal" began communicating with a user called DeepImpact509 and provided a cell phone number so they could speak offline. I RP 79, 326, 330. During offline text messaging, "Crystal" told "DeepImpact509," who had self-identified as "Josh," that she was 12 years old. I RP 82, 334. Mr. Leonard called police dispatch that night to report that he had been messaging someone in their thirties who portrayed herself as 12 years old and he believed it was a sting. I RP 180-94. However, he continued to message and had video calls with "Crystal" and eventually they discussed meeting up. I RP 83, 100, 110, 115, 338-39, 341. The "Crystal" account repeatedly sexualized the conversation, with minimal commitment from

sentencing, the trial court found that he was indigent. CP 270. It imposed a $500 crime victim penalty assessment pursuant to RCW 7.68.035 and a $100 DNA collection fee pursuant to RCW 43.43.7541. CP 274. It also imposed a condition of community custody requiring "that you do not enter a romantic relationship without the prior approval of the CCO and Therapist, to ensure that there are no minors at risk." CP 292. Mr. Leonard timely appealed and was again found indigent for that purpose. CP 293, 323.

Mr. Leonard. I RP 96, 111, 113, 116-17, 355, 370, 371, 396. However, police followed Mr. Leonard to the residence where he was supposed to meet "Crystal" and arrested him when he entered. I RP 124-27, 214-21, 226-31, 248-49. Mr. Leonard contended that he was unsure whether "Crystal" was an adult role-playing as a child or an actual child and denied that he had any intention to have sex with a child. I RP 451, 456, 475-77. Defense counsel specifically declined to assert an entrapment defense, contending the defense was that Mr. Leonard lacked the requisite intent. I RP 59. The trial court rejected Mr. Leonard's explanations and convicted him of attempted second degree rape of a child and communicating with a minor for immoral purposes. CP 138, 141, 147, 148. It imposed a standard range sentence of 96 months to life. CP 269, 271.

Subsequently, the Washington Legislature introduced and passed H.B. 1169, amending several statutes that govern legal financial obligations in criminal cases. The bill came into effect on July 1, 2023. Laws of Wash. c. 449 (68th Leg. 2023).

V. ARGUMENT

Two sentencing errors require reversal. First, Mr. Leonard's indigency precludes imposition of the crime victim penalty and the DNA collection fee has been abolished under recent changes to the law. Those changes apply to Mr. Leonard's case on appeal and require that the fees be stricken. Second, under well-established precedent, community custody terms restricting "romantic" relationships are unconstitutionally vague. Consequently, that term must be stricken or modified.

A. Subsequent changes to the law that apply to Mr. Leonard's case on appeal require the crime victim penalty and the DNA collection fee to be stricken from the judgment and sentence.

At issue in this appeal is whether H.B. 1169 applies to Mr. Leonard's judgment and sentence, which was entered before its effective date. The amendments applicable in this case are:

- A new subdivision was added to RCW 7.68.035, the crime victim penalty assessment statute, prohibiting the court from imposing the penalty if it finds the defendant indigent at sentencing. Laws of Wash. c. 449 § 1; RCW 7.68.035(4).
- The $100 DNA collection fee established by RCW 43.43.7541 was eliminated. Laws of Wash. c. 449 § 4; RCW 43.43.7541.

Because Mr. Leonard was found to be indigent at the time of sentencing, if the statutory amendments apply to his case, then both assessments are unauthorized and should be stricken.

The Supreme Court has held that the precipitating event for application of a prospective statute concerning attorney fees and costs is the termination of the case. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). Because a case is not terminated until it is final on appeal, the statute applies prospectively to cases that are pending on appeal at the time the statute was enacted. *Id.* The Court of Appeals has specifically concluded that the amendments at issue in this case apply to cases pending on appeal following the reasoning of *Ramirez*. *State v. Ellis,* 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Thus, under *Ramirez* and *Ellis*, the revisions to the crime victim penalty and DNA collection statutes apply to Mr. Leonard's case on appeal. Under the revisions, the crime victim penalty may not be imposed due to Mr. Leonard's indigency and the DNA collection fee is no longer authorized. Accordingly, both obligations should be stricken from the judgment and sentence.

B. The community custody condition requiring prior approval of "romantic" relationships is unconstitutionally vague and must be stricken or modified.

A judge's authority to impose community custody conditions is circumscribed by statute. *State v. Geyer*, 19 Wn. App. 2d 321, 325, 496 P.3d 322 (2021). Community custody conditions can be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008). The Court of Appeals considers the decision to impose particular community custody conditions for abuse of discretion. *Geyer*, 496 P.3d at 326. Unlike statutes and ordinances, community custody conditions are not presumed to be constitutional, and unconstitutional conditions are an abuse of the sentencing court's discretion. *Bahl*, 164 Wn.2d at 753.

As a matter of fundamental personal liberty, the Fourteenth Amendment to the U.S. Constitution protects a person's freedom of intimate association. *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 618, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *City of Bremerton v. Widell*, 146 Wn.2d 561, 575, 51 P.3d 733 (2002). This freedom encompasses the intimate relationships associated with marriage, childrearing, and cohabitation with relatives. *Roberts*, 468 U.S. at 617-19.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution also prohibit vague laws as a component of due process. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). Due process requires that citizens have fair warning of conduct that is proscribed. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). To ensure that citizens receive fair warning of proscribed conduct, violations must be described with sufficient definiteness that ordinary people can understand what is prohibited and to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

Condition of community custody no. 16 reads,

> That you do not enter a romantic relationship without the prior approval of the CCO and Therapist, to ensure that there are no minors at risk.

CP 292. At issue here is the characterization of relationships requiring prior approval as "romantic."

The distinction between romantic relationships and ordinary friendships is not easily ascertainable or definable and varies significantly as a matter of culture, generational expectations, and individual opinion. *See U.S. v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010). Some individuals may engage in sex without romantic attachment, while others may develop romantic feelings with only minimal contact. Some individuals may cohabitate while remaining friends, while others may be emotionally committed to each other while living apart. It is unrealistic to expect consistent alignment of views on such issues, and different community custody officers and therapists may have sharply differing opinions about where the line is

drawn between acceptable and unacceptable attachments. Consequently, the provision invites arbitrary enforcement and fails to give Mr. Leonard adequate forewarning of what conduct will constitute a violation of the condition.

For these reasons, Washington courts have held that restrictions on "romantic" relationships in community custody conditions are unconstitutionally vague. *State v. Peters*, 10 Wn. App. 2d 574, 591, 455 P.3d 141 (2019). However, less subjective standards characterized more by actions than by sentiment may be imposed to restrict certain types of relationships, including dating relationships. *State v. Nguyen*, 191 Wn.2d 971, 983, 425 P.3d 847 (2018).

Accordingly, the condition requiring prior approval of Mr. Leonard's romantic relationships is insufficiently definite to pass constitutional muster. As such, its imposition is an abuse of the sentencing court's discretion, and the condition should be stricken or modified.

VI. CONCLUSION

For the foregoing reasons, Mr. Leonard respectfully requests that the court STRIKE the $500 crime victim penalty assessment and the $100 DNA collection fee from his judgment and sentence, and STRIKE or MODIFY condition of community custody no. 16.

RESPECTFULLY SUBMITTED this 6 day of December, 2023.

This document contains 2,113 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by placing it in the U.S. mail, first-class postage prepaid thereon, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 6 day of December, 2023 in Kennewick, Washington.

Andrea Burkhart