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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000061-MR

KEITH JENNINGS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 15-CR-001000

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, KRAMER, AND L. THOMPSON, JUDGES.

KRAMER, JUDGE: Keith Jennings appeals from a judgment of the circuit court denying his request to modify his probation to strike the condition restricting his access to the internet as unconstitutional, as held in *Packingham v. North Carolina*, — U.S. —, 137 S. Ct. 1730, 198 L. Ed.2d 273 (2017). After careful review, we vacate and remand for proceedings not inconsistent with this opinion.[1]

[1] Due to errors in the Clerk's office, rendition of this opinion was delayed.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2004, Jennings was convicted of attempted use of a minor in a sexual performance (a misdemeanor) and distribution of matter portraying a sexual performance by a minor (a felony) in Jefferson County Circuit Court. Jennings had helped a third party (a juvenile) take a photograph of another naked juvenile in a shower. Jennings developed the photograph and had it in his possession. He also allegedly showed the developed photograph to another juvenile. The misdemeanor conviction required Jennings to register as a sex offender for twenty years.[2]

In 2015, Jennings was indicted by the Kenton County grand jury for failure to comply with sex offender registration (three counts) and persistent felony offender (PFO), second degree.[3] Authorities discovered that Jennings had reported his address as Latonia, Kentucky, but that he was actually living in Amelia, Ohio. In exchange for his guilty plea, the Commonwealth dismissed two counts of failure to comply with sex offender registration. At sentencing, the Commonwealth argued for ten years' incarceration. Jennings argued for probation. The circuit court sentenced Jennings to seven and one-half years' incarceration[4] and probated

[2] Jennings was initially required to register for ten years, but this was expanded to twenty years during his registration period (*see* KRS 17.520).

[3] This was originally charged as PFO, first degree, but was amended to second degree after the circuit court granted Jennings's motion to suppress a prior conviction.

[4] Five years' incarceration enhanced to seven and one-half years by the second-degree PFO.

his sentence for five years. One of the many conditions of probation imposed by the circuit court was "[n]o access to internet."

Approximately one month after sentencing, Jennings moved to modify his probation conditions, but he did not seek to modify the condition prohibiting his access to the internet. Jennings was successful on his motion, but remained subject to the condition that he not have access to the internet. The Division of Probation and Parole filed a violation of supervision in the circuit court several months later. The violation alleged that Jennings had an active Facebook account. Jennings also faced new criminal charges in Jefferson County as a result of the alleged Facebook account and unreported associated email addresses.

The new charges against Jennings in Jefferson County were eventually dropped, but the Commonwealth's Attorney in Kenton County moved forward to revoke Jennings's probation based on the same set of facts. The Commonwealth argued that Jennings had violated the probation condition of "[n]o access to internet." Jennings argued that the probation condition prohibiting his access to the internet was impermissible as a violation of the First Amendment to the United States Constitution under the recent United States Supreme Court decision in *Packingham.* Jennings wanted the condition stricken. Jennings did not stipulate to internet use and offered testimony that he was not the one who used the Facebook account that was registered in his name. The Commonwealth argued

that *Packingham* was inapplicable because it concerned a statute that restricted internet access for offenders who had served out their sentences, and Jennings's case was distinguishable because he was on actively supervised probation. In its "Memorandum of Law in Support of Affidavit of Violation of Probation," the Commonwealth argued that images of child pornography had been uploaded to an unregistered email address of Jennings. However, the record does not show that there were resulting child pornography-related charges stemming from said allegations. The Commonwealth did not present evidence that Jennings had uploaded child pornography to an unregistered email address at the probation revocation hearing.[5]

The circuit court declined to revoke Jennings's probation after a hearing. An order was entered modifying his probation, requiring him to serve four (4) months in the Kenton County Detention Center with credit for time served.[6] The circuit court also declined to modify the probation to remove the condition of "[n]o access to internet." Jennings orally moved the court to modify the condition to allow internet access at the discretion of his probation officer. The

[5] The same allegations did lead to indictments of counts of failure to comply with sex offender registration (related to failure to register email addresses), but the Commonwealth dismissed those charges in exchange for Jennings's guilty plea.

[6] Jennings had served the entire four months at the time of the hearing and therefore was not remanded to custody at the outcome.

circuit court denied his request. This appeal followed. Further facts will be developed as necessary.

II. STANDARD OF REVIEW

Whether a condition of probation violates a defendant's constitutional rights is a legal question that is reviewed *de novo*. *Wilfong v. Commonwealth*, 175 S.W.3d 84, 95 (Ky. App. 2004).

III. ANALYSIS

In *Packingham*, the United States Supreme Court invalidated a North Carolina statute that prohibited all registered sex offenders from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."[7] *Packingham*, 137 S. Ct. at 1733. Defendant/petitioner Packingham had been convicted in North Carolina in 2002 for having sexual intercourse with a thirteen-year-old girl.[8] As a result, he was required to register as a sex offender. As a registered sex offender, he was barred by the aforementioned statute from accessing commercial social networking sites. In 2010, Packingham was convicted for violating the North Carolina statute when he posted about a traffic ticket on a Facebook account registered in his name. Notably, the underlying

[7] N.C. Gen. Stat. Ann. §§ 14-202.5 (a), (e) (2015).

[8] Packingham was twenty-one years old at the time of the offense.

offense in 2002 did not involve use of the internet and at no point thereafter did the prosecution allege that Packingham had used the internet to contact a minor or commit any other illicit acts. *Id.* at 1734.

Using intermediate scrutiny, the Court held that the North Carolina statute was not narrowly tailored to serve a significant government interest and that the law burdened substantially more speech than is necessary to further the government's legitimate interests. *Id*. at 1736. The majority opinion, authored by former Justice Anthony Kennedy, explained that internet use is protected by the First Amendment. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular." *Id.* (internal citation and quotation marks omitted). The Court also pointed out the myriad of applications for social media (*e.g.*, knowing current events, checking ads for employment) and stated, "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, particularly if they seek to reform and to pursue lawful and rewarding lives." *Id.* at 1737.

The *Packingham* decision was rendered on June 19, 2017 (*i.e.*, after the Commonwealth moved to revoke Jennings's probation, but before the circuit court conducted a revocation hearing). Both parties briefed the circuit court prior

to the hearing. At the time, Kentucky's sex offender registration statutes were even less narrowly tailored than the North Carolina statute addressed in *Packingham*. KRS[9] 17.546(2) prevented anyone required to register as a sex offender from "knowingly or intentionally us[ing] a social networking Web site or an instant messaging or chat room program if that Web site or program allows a person who is less than eighteen (18) years of age to access or use the Web site or program."[10] Any violation of KRS 17.546(2) could have resulted in Class A misdemeanor charges. Additionally, KRS 17.510(10)(c) required registered sex offenders to provide all email addresses, instant messaging names, and all "other Internet communication name identities" to their local probation and parole office. Any violation of that statute could have resulted in Class D felony charges for the first offense and Class C felony charges for any subsequent offense.

Following the decision in *Packingham*, John Doe, a registered sex offender in Kentucky, sought to invalidate KRS 17.510 and KRS 17.546, arguing that the statutes abridged his right to free speech. *Doe v. Kentucky ex rel. Tilley*, 283 F.Supp.3d 608 (E.D. Ky. 2017). He asked the United States District Court to issue a permanent injunction. Doe's challenge was successful. The statutes at issue were declared facially unconstitutional and a permanent injunction was

[9] Kentucky Revised Statutes.

[10] The statute also included a set of definitions.

granted. In its decision, the United States District Court ruled that KRS 17.546 was ". . . flawed not only because it prohibits Doe from engaging in legitimate speech even on social networking platforms, but also because it fails to properly communicate what conduct, exactly, is criminal." *Id.* at 613. The Court also held that KRS 17.510 was void for vagueness because "the ambiguities in the statute may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report." *Id.* at 615 (internal citation and quotation marks omitted).

As a result of the decision in *Doe*, the Kentucky General Assembly made substantial changes to KRS 17.510 and KRS 17.546. KRS 17.546(1)(b) was amended to read, in relevant part, that ". . . a registrant who has committed a criminal offense against a victim who is a minor after July 14, 2018, shall not knowingly or intentionally use electronic communications for communicating with or gathering information about a person who is less than eighteen (18) years of age." KRS 17.510 was amended to completely do away with the requirement that sex offenders register email addresses, instant messaging names, and all "other Internet communication name identities" to their local probation and parole office.

Although *Packingham* resolved the issue of internet access for defendants who had served their sentences and were no longer subject to supervision, the issue relating to whether internet restrictions are permissible for

sex offenders who are on active supervision (*i.e.*, parole, probation, or supervised release) continues to show variation. In some instances, if internet restrictions are upheld for a defendant on active probation or parole, it is because the underlying crime(s) involved use of the internet and/or there is an "escape valve" because internet access is left to the discretion of the probation officer.[11] However, some jurisdictions have upheld internet and/or social media bans even when the underlying offense did not involve use of the internet.[12] Still other jurisdictions have rejected internet bans for defendants on probation, parole, or other supervision because the underlying crime did not involve use of the internet.[13]

[11] *See e.g.*, *United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017) (condition of supervised release prohibiting access to the internet was upheld where the defendant had used the internet to commit the crime of distribution of child pornography); *United States v. Halverson*, 897 F.3d 645 (5th Cir. 2018) (condition of supervised release that prevented the defendant from subscribing to any computer online service nor accessing any internet service unless approved in advance in writing by the probation officer was upheld where underlying crime of possessing images and video of child pornography involved use of the internet).

[12] *See e.g.*, *People v. Morger*, 103 N.E.3d 602 (Ill. App. Ct. 2018), *appeal allowed*, 108 N.E.3d 817 (Ill. 2018) (social media ban permissible as a condition of probation even though the underlying crimes of criminal sexual abuse and aggravated criminal sexual abuse did not involve use of the internet).

[13] *See e.g.*, *Mutter v. Ross*, 240 W. Va. 336, 811 S.E.2d 866 (W. Va. 2018) (condition of parole prohibiting the defendant from possessing or having contact with a computer or other device with internet access was not narrowly tailored and rendered unconstitutional where underlying offense was first-degree sexual abuse); *United States v. Eaglin*, 913 F.3d 88 (2nd Cir. 2019) (total internet ban was substantively unreasonable as a condition of supervised release where defendant was previously convicted of sexual assault and presently convicted of failing to register as a sex offender).

Finally, some jurisdictions have rejected total internet bans even when the underlying crime involved use of the internet.[14]

To avoid First Amendment violations, a probation condition must be "narrowly tailored" and "directly related" to the goals of protecting the public and promoting a defendant's rehabilitation. *United States v. Crandon*, 173 F.3d 122, 128 (3d Cir.), *cert. denied*, 528 U.S. 855, 120 S.Ct. 138, 145 L.Ed.2d 118 (1999). However, the United States Court of Appeals for the Sixth Circuit has acknowledged the varying outcomes across the circuits regarding internet bans for sex offenders on supervised release.[15] The Court also acknowledged that "there appears to be a consensus that internet bans are unreasonably broad for defendants who possess or distribute child pornography, but not those who use the internet to 'initiate or facilitate the victimization of children.'" *United States v. Wright*, 529 F. App'x 553, 558 (6th Cir. 2013) (internal citation and quotation marks omitted).[16]

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[14] *See e.g., United States v. Holena*, 906 F.3d 288 (3rd Cir. 2018) (condition of supervised release that banned the defendant, convicted of using the internet in attempting to entice a minor to engage in sexual acts, from possessing or using computers or other electronic communication devices without approval of his probation officer was not narrowly tailored to the danger posed by the defendant because it restricted his First Amendment freedoms without any resulting benefit to public safety).

[15] *See e.g., United States v. Lantz*, 443 F. App'x 135, 144 (6th Cir. 2011).

[16] *See e.g., United States v. Burroughs*, 613 F.3d 233, 243 (D.C. Cir. 2010) ("[R]estrictions on computer or Internet access are not *categorically* appropriate in [sex offender] cases where the defendant did not use them to facilitate his crime.")

Until now, neither this Court nor the Kentucky Supreme Court has ruled on the constitutionality of an internet ban for a defendant on probation or parole.

A trial court has immense discretion in criminal sentencing under Kentucky law, including whether to grant or deny probation,[17] but must give consideration to the defendant's risk and needs assessment, nature and circumstances of the crime, and the history, character, and condition of the defendant.[18] If the trial court grants the privilege of probation, it has broad discretion regarding the conditions that are imposed so long as the court deems the condition reasonably necessary.[19] If granted probation, the trial court then has broad discretion whether to revoke the probation or modify a defendant's conditions based on commission of a new crime or violation of one or more conditions.[20]

This Court has ruled that conditions imposed as a part of supervised-release are subject to the constitutional doctrines of vagueness and overbreadth. *Wilfong*, 175 S.W.3d at 97. The vagueness and overbreadth doctrines are related in that they both prohibit use of overly ambiguous language in penal provisions, which sometimes has the effect of limiting constitutionally-protected activity. *Id.*

[17] KRS 532.040.

[18] KRS 533.010.

[19] KRS 533.030.

[20] KRS 533.020(1).

at 95. To withstand a facial overbreadth challenge, a content-neutral statute regulating expression must be narrowly tailored to further a significant government interest. *Id.* at 96. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859, 144 L. Ed. 2d 67 (1999). However, because Jennings's probation conditions have a much narrower application than a statute, it is appropriate to review the probation condition of "[n]o access to internet" only on an as-applied basis, rather than as a facial challenge applicable to all hypothetical third parties. *Wilfong,* 175 S.W.3d at 98.

The condition of "[n]o access to internet" is not narrowly tailored because it restricts Jennings's First Amendment rights without any resulting benefit to public safety. The record before us contains a recording of Jennings's guilty plea in Jefferson County in 2004. Although Jennings entered a plea pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970), the circuit court asked the Commonwealth what evidence it intended to present had the matter gone to trial. The Commonwealth responded that Jennings had helped a third party (a juvenile) take a photograph of another naked juvenile in a shower. Jennings "had the photo developed" and in his possession. He also

allegedly showed the developed photograph to another juvenile. Based on the information provided by the Commonwealth as contained in the record, it does not appear that Jennings's underlying offense involved use of the internet. And, the current offense of failure to comply with sex offender registration did not involve use of the internet.

Under the probation condition of "[n]o access to internet," Jennings is unable to apply for employment online (or do any other online duties that an employer may require); read or respond to reviews regarding goods and services; read or respond to news stories; read about and respond to current events; or "speak and listen in the modern public square and otherwise explore the vast realms of human thought and knowledge." *Packingham*, 137 S. Ct. at 1732. He also does not have the "escape valve" provision of allowing internet access to be at the discretion of his probation officer. He is simply banned from any access to the internet whatsoever. Accordingly, the probation condition burdens more speech than is necessary to further the government's interests.

The probation condition of "[n]o access to internet" is also impermissibly vague. Any person in modern society is likely to have access to the internet many times throughout any given day, regardless of whether they seek that access. A person may not always *use* the internet when it is accessible, but the restriction at issue here, as written, is *access*, not *use*. For example, it is unclear

whether Jennings could live in a home with (or even visit) another person who owns an internet-capable computer. It is likely that any employer will have at least one computer or tablet with internet access in their place of business, yet it is unclear whether Jennings would be permitted to work for such an employer or perform any work-related tasks that might require internet access. Most public libraries have computers with internet access; hotels have business centers with computer access; as do retail businesses with computers, tablets, and smartphones for sale. It is unclear if Jennings is meant to avoid any place with access to the internet. It is also unclear whether the condition prevents him from owning a smartphone that can access the internet, even if he does not use it for that purpose. The prohibition does not provide the kind of notice that will enable ordinary people to understand what conduct it prohibits and is therefore impermissibly vague.

We hold that the probation condition of "[n]o access to internet" in the instant action is not narrowly tailored to serve a legitimate interest and is also unconstitutionally vague. We decline to establish a bright-line rule, and this holding should not be construed to mean that an internet ban for a defendant on probation would *never* be "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so."[21] In *United States v. Dotson*, 715 F.3d 576 (6th Cir. 2013), the Court ruled that some limitations on internet access,

[21] KRS 533.030(1).

as well as on the use of devices that can access the internet, is undoubtedly warranted based on the nature of the offenses of sexual exploitation of a minor and possession of child pornography. *Id.* at 585. However, under the facts of the instant case, the prohibition must fail.

IV. CONCLUSION

Because the probation condition of "[n]o internet access" is not narrowly tailored and is impermissibly vague, we vacate and remand to the Kenton County Circuit Court for proceedings not inconsistent with this opinion.

ALL CONCUR.

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