Supreme Court No. 100152-5

Court of Appeals No. 81741-8-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

KATHERINE FRAY obo E.F. (DOB 05/20/04),

Respondent,

v.

Z.C. (DOB 06/13/03),

Petitioner.

RESPONSE TO PETITION FOR REVIEW

Jesse O Franklin IV, WSBA #13755
Sungeun Julie Kim, WSBA #57175
SCHLEMLEIN FICK & FRANKLIN, PLLC
66 S. Hanford St, Suite 300
P: 206-448-8100 | F: 206-448-8514
E: jof@soslaw.com
E: jsk@soslaw.com

Attorneys for Respondent Katherine Fray obo E.F.

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I. IDENTITY OF THE RESPONDENT

Respondent Katherine Fray obo E.F. asks this Court to deny the Petition for Review.

II. INTRODUCTION

Petitioner Z.C.'s Petition for Review ("Petition") of the Division I Court of Appeals' decisions affirming the trial court's sexual assault protection order is replete with fatal flaws. There is no legitimate basis for further review, and the Court of Appeals properly affirmed. This Court should deny Z.C.'s Petition for Review.

III. ISSUES PRESENTED

A superior court's decision to grant a protection order is reviewed on appeal for abuse of discretion.[1] Under that standard the issue for this Court is:

1. Was the Court of Appeals correct in affirming the trial court's decision to grant the SAPO against Z.C., when

[1] *In re Knight,* 178 Wn. App. 929, 936, 317 P.3d 1068 (2014), citing *Hecker v. Cortinas,* Wn.App. 865, 869, 43 P.3d 50 (2002).

substantial evidence supports the trial court's findings that the sexual encounter on January 28, 2020, was nonconsensual based on the evidence presented?

IV. STATEMENT OF THE CASE[2]

Respondent generally accepts the Petitioner's recitation of the facts but adds specific notations for the Court's consideration.

The Court of Appeals opined that "[w]hen inferences from the evidence conflict, we will not reassign the weight given to the evidence by the fact finder." Slip Op. at 8. The fact finder – the trial court – conducted a full SAPO hearing, in which E.F. and Z.C. both testified, and considered all of the evidence presented including E.F.'s entire SAPO petition;

[2] *[NOTE: RAP 10.3(b) states: A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.]*

Z.C.'s respondent's brief and declaration; and several declarations from E.F.'s parents, therapist, and a friend. It was not until after E.F. and Z.C. both took the stand and had the opportunity to be heard, that the court found E.F. to be credible and the January 28, 2020, sexual encounter to be nonconsensual.[3]

V. ARGUMENT

Petitioner Z.C. must satisfy RAP 13.4(b)'s requirements before this Court will accept review. Petitioner argues that this case is appropriate for review by the Supreme Court because "the Court of Appeals is in conflict with a published decision of the Court of Appeals and the petition involves issues of substantial public interests…"[4]

As discussed below, the Court of Appeals opinion is entirely consistent with this Court's decisions on nonconsensual

[3] RP 73.

[4] Citing RAP 13.4(b)(2) and (4).

sexual encounter, and this appeal does not involve a matter of substantial public interest.

1. The Court of Appeals Opinion in this case is not in conflict with *Nelson v. Duvall* and the Petition fails to satisfy RAP 13.4(b)(2).

Z.C. argues that this case conflicts with the Court of Appeals' decision in *Nelson*, because E.F.'s conduct in "initiating" the sexual encounter is evidence of consent.[5] It does not.

In *Nelson*, the court reaffirmed that statutes which relate to the same subject matter must be construed together, and the terms of the SAPO statute must be read in harmony with the sex offense statutes in RCW 9A.44.[6] The *Nelson* court, however, was specifically focused on (1) whether the ability to freely give consent necessarily requires the SAPO petitioner to have the capacity to consent or freely agree, and (2) when there is

[5] Petition at 7-10.

[6] *Nelson*, at 454, citing *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 125, 146, 18 P.3d 540 (2001).

evidence of excessive alcohol, drug, or other impairment, the trial court has an obligation to determine and to enter a finding of capacity.[7] The court held that if a petitioner demonstrates a lack of mental capacity to consent at the time of sexual penetration, the court should enter the requested protection order.[8]

Here, unlike the trial court in *Nelson*, which failed to sufficiently consider the petitioner's evidence that due to the consumption of alcohol she lacked capacity to consent at the time of the sexual penetration, the issue of capacity is not at issue. The lack of freely given agreement in *Nelson* was raised due to the victim's intoxication,[9] whereas in this SAPO case, consideration of the lack of freely given agreement rested on petitioner's inability to remember particularities of the incident due to her mental and physical dissociation at the time.

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[7] *Nelson*, at 452.
[8] *Nelson*, at 460.
[9] *Nelson*, at 449.

Without explicitly stating how the Court of Appeals' decision in *Nelson* is in conflict with the decision in this case, Z.C. further argues that E.F. consented to the sexual encounter on January 28, 2020, because she "initiated" it through her conduct.[10] Nothing in the record shows that E.F. initiated the sexual encounter on January 28, 2020. The Court of Appeals correctly recites the facts in its Opinion, which stated,

> On January 28, 2020, Z.C. and E.F. were in E.F.'s living room. According to E.F., Z.C. told her that "I just want to stick it in you once" before going upstairs. E.F. testified that she began having a dissociative episode. E.F. followed Z.C. upstairs and into her bedroom in her dissociative state and they each undressed.

Although Z.C. argues that E.F. consented to the sexual encounter because her conduct of undressing herself first initiated the sexual encounter, both the trial court and Court of Appeals acknowledged that there are competing testimonies on the course of events.[11] The Court of Appeals opinions covers the

[10] Petition at 19.

[11] Slip Op. at 2.

issue of competing inferences and evidence in detail and the Respondent respectfully refers this Court to that opinion for reference.

The Petitioner's claim comes down to a disagreement with whether E.F.'s lack of verbal response coupled with her conduct, i.e., undressing herself, gave rise to implied consent.[12] Such a disagreement is not "in conflict with a published decision of the Court of Appeals," nor does such disagreement involve an issue of substantial public interest.[13]

This case is extraordinarily dependent on the particular facts involved. The Court of Appeals distinguished E.F.'s and Z.C.'s testimonies and laid out their respective course of events. On these facts, the Court of Appeals cited its standard of review, "Questions of credibility are left to the trier of fact…" Slip Op. at 6.

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[12] Z.C. cites to the Black's Law Dictionary to define "implied consent," while acknowledging that RCW 7.90.010(1) "does not require express consent." Petition at 8.

[13] RAP 13.4(b)(2) & (4).

The trial court properly entered a sexual assault protection order against Z.C. after conducting a full hearing. The trial court gave both Z.C. and E.F. a fair opportunity to testify and to clarify their respective course of events, and carefully weighed and analyzed all the evidence presented to the court. Petitioner's claims regarding E.F.'s conduct during the nonconsensual sexual encounter amount to simple disagreement with the way the trial court chose to weigh the evidence. As the Court of Appeals noted, citing *Burnside v. Simpson Paper Co.*,[14] "[w]hen inferences from the evidence conflict, [the Court of Appeals] will not reassign the weight given to the evidence by the fact finder."

The Court of Appeals properly affirmed, stating that "substantial evidence supports the trial court's finding that the incident on January 28 was nonconsensual."[15] The Petition for Review should be denied.

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[14] 66 Wn.App. 510, 526, 832 P.2d 537 (1992). Slip Op. at 6, 8.

[15] Slip Op. at 8.

2. This case does not involve an issue of substantial public interest.

Finally, the Petition should also be rejected because there is no issue of substantial public interest. As explained in *State v. Watson*[16] an issue of substantial public interest is generally one that would have widespread and sweeping affect.[17] Borrowing from the standard for hearing an otherwise moot issue, the Court also found a substantial public interest to be one that is of a "continuing and substantial interest, . . . presents a question of a public nature which is likely to recur, and ... is desirable to provide an authoritative determination for the future guidance of public officials."[18]

Here, none of those factors exist. The SAPO Act already requires the trial court to consider all evidence that can demonstrate nonconsensual sexual conduct or nonconsensual sexual penetration or lack of freely given agreement. Most

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[16] *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005).

[17] *Id.* at 577-8.

[18] *Id.* at 578.

importantly, **the rules of evidence do not apply to SAPO proceedings**.[19]

Z.C. argues that "the Court of Appeals erred in ruling that substantial evidence was presented to show the sexual encounter was nonconsensual, when the only evidence presented showed that at the time of the sexual encounter, E.F's conduct indicated freely given agreement to have sexual intercourse with Z.C."[20] However, the issue in this SAPO case is a matter of witness credibility and whether substantial evidence supports the findings of facts, and if so, whether the findings in turn support the trial court's conclusions of law.

The trial court addressed this issue by conducting a full hearing. E.F. consistently testified about the January 28, 2020, encounter, she remembered undressing herself but did not

[19] ER 1101(c)(4); *Duvall v. Nelson,* 197 Wn. App. 441, 459, 387 P.3d 1158 (2017)(trial court abused its discretion in applying rules of evidence at SAPO hearing).

[20] Petition at 19.

remember whether she guided Z.C.'s genitals to hers.[21] Even if the acts of kissing, sexual touching, and disrobing oneself may be consensual, the court found that act of penetration was not.[22] Prior display of affection between E.F. and Z.C. during the relationship does not suggest consent to sexual intercourse. The court clarified that "things [sic] stop being consensual the moment that consent is not clear."[23]

The Court of Appeals also addressed this issue, when it stated,

> On appeal, Z.C. argues that testimony that he asked E.F. "Are you sure that you want to do this?" prior to the intercourse indicates that E.F. did not consent. However, there is nothing in the record indicating that E.F. answered that question. Without an answer, Z.C.'s inquiry gives rise to reasonable but competing inferences. A fair-minded person could infer that Z.C. asked this question because it was not his intention to have sexual intercourse with E.F. without her consent. However, to the contrary, a fair-minded person could instead infer that Z.C. asked this question because he was unsure about whether E.F.

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[21] CP 131.

[22] RP 73.

[23] *Id.*

> wanted to have sexual intercourse based on her words and conduct up to that point.[24]

Petitioner Z.C.'s disagreement with the court's reasoning and his far-reaching efforts to discredit E.F.'s sworn testimony and declaration do not rise to an issue of substantial public interest that should be determined on review by the Supreme Court.

VI. CONCLUSION

The trial court acted within its discretion to grant the SAPO. The Court of Appeals' opinion to affirm the trial court's decision is entirely consistent with this Court's decisions regarding abuse of discretion. There are no grounds for review of this case under RAP 13.4(b). Further, the issues raised in the Petition do not conflict with an existing Supreme Court Case or the Court of Appeals. Nor does the Petition raise issues of substantial public interest, or questions involving a significant question of law. Ultimately, the Petition comes down to a

[24] Slip Op. at 8

disagreement with the factual findings and the trial court's discretion of finding credibility, but such a disagreement, based on trial court's interpretation of the facts provided at the hearing differently that the Petitioner wanted, does not provide this case appropriate for review by this Court.

I certify that this memorandum contains 1,940 words in compliance with RAP 18.17(c).

Respectfully submitted this 30th day of September, 2021.

By: */s/ Sungeun Julie Kim*
Jesse O Franklin IV, WSBA #13755
Sungeun Julie Kim, WSBA #57175
Attorneys for Respondent Katherine Fray obo E.F.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of SCHLEMLEIN FICK & FRANKLIN, PLLC.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On the date shown below, I served one true and correct copy of the foregoing on the following parties via the method(s) indicated:

ATTORNEYS FOR APPELLANT Z.C. Jason B. Saunders Kimberly N. Gordon The Law Offices of Gordon & Saunders, PLLC 1000 Second Ave., Suite 3140 Seattle, WA 98104 T: 206-332-1280	☐ ☐ ☐ ☐ ☒	Certified U.S. Mail Legal Messenger U.S. Mail Email Via Court of Appeals E-Filing

DATED this 30th day of September, 2021.

/s/ Lisa R. Werner
Lisa R. Werner, Legal Assistant

SCHLEMLEIN FICK & FRANKLIN, PLLC

September 30, 2021 - 4:53 PM

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