SUPREME COURT NO. 102818-1
COA NO. 84086-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRYL KENNON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Darryl Kennon asks the Supreme Court to accept review of the Court of Appeals decision identified herein.

B. COURT OF APPEALS DECISION

Kennon requests review of the decision in State v. Darryl William Kennon, Court of Appeals No. 84086-0-I (slip op. filed January 22, 2024) (attached).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the imposition of a mandatory life sentence under the three strikes law constitutes cruel punishment under article I, section 14 of the Washington Constitution because of its racially disproportionate impact on Black people?

2. Should the no-contact orders be modified to comply with the trial court's stated intent, to clarify ambiguity, and to preserve Kennon's constitutional right to parent his children without undue hindrance?

D. STATEMENT OF THE CASE

1. Trial, First Sentencing, and First Appeal

Darryl Kennon and Zotica Kennon have three children, KK (born 2004), MK (born 2008) and VK (born 2010). RP[1] 1108. No-contact orders prevented Kennon from contacting Zotica and the children. RP 1122-24; Ex. 24-27. With Zotica's consent, however, Kennon continued to regularly spend time with his children. RP 734, 793-94, 846-47, 1111-13, 1124-25, 1190, 1229.

On August 14, 2018, Kennon walked through the open door of the apartment where Zotica and the children lived. RP 733-34. A physical altercation ensued wherein Kennon assaulted Zotica while the children were present. RP 776-77, 790-91, 815, 821, 1092, 1102, 1137, 1141-43.

[1] The verbatim report of proceedings transferred from the previous appeal under No. 80813-3-I is cited as follows: RP – twelve consecutively paginated volumes consisting of 7/19/19, 8/1/19, 8/5/19, 8/6/19, 8/7/19, 8/8/19, 8/12/19, 8/13/19, 8/14/19, 8/15/19, 8/16/19, 11/22/19.

A jury convicted Kennon of first degree burglary, second degree assault and four counts of felony violation of a no-contact order. RP 1414-16.

The State sought a sentence of life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). RP 1425. Citing the racially disproportional application of the POAA, defense counsel argued a life sentence would be unconstitutionally cruel and the court had discretion not to impose one. RP 1471-73. The court believed a life without parole sentence would be disproportionate to Kennon's actions, reversed its initial ruling that one of the previous convictions counted as a strike offense, and imposed an exceptional sentence upward rather than life without parole. RP 1482-83.

Kennon appealed and the State cross appealed. The Court of Appeals affirmed the convictions and remanded for resentencing, holding the trial court erred in

not imposing a mandated persistent offender sentence because prior strike offenses could not be collaterally attacked. State v. Kennon, 18 Wn. App. 2d 1062, 2021 WL 3619870, at *1, 10 (2021), review denied, 198 Wn.2d 1039, 501 P.3d 146 (2022). The Court of Appeals rejected Kennon's argument that a life without parole sentence is unconstitutionally cruel because it disproportionately impacts Black people on the basis that the argument was not supported by vetted data of the type presented in State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). Id. at *11-12.

The Court of Appeals further held the trial court erred in imposing no-contact orders pertaining to Kennon's children and remanded for reconsideration under the controlling legal standard. Id. at *9-10.

2. Resentencing and Second Appeal

On remand, defense counsel acknowledged the Court of Appeals decision but continued to argue the

POAA was unconstitutional as applied here. CP 78; RP[2] (5/20/22) 8-9. The judge expressed misgivings about the persistent offender statute but imposed a life sentence anyway, believing she had no discretion to do otherwise. RP (5/20/22) 25-28; CP 83. The court ordered Kennon to have no contact with the children for five years, except that he could make one phone call and write two letters per year to them, and that he have no contact with Zotica. CP 83; 142-49.

On appeal, the Court of Appeals declined to revisit Kennon's constitutional challenge to his life sentence and rejected his argument that the no-contact orders entered on remand needed to be modified. Slip op. at 1, 9-10.

[2] RP (5/20/22) is the verbatim report of proceedings for the resentencing hearing filed in the present appeal.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The persistent offender statute disproportionately impacts black people, making its imposition cruel punishment under the Washington Constitution.

The Persistent Offender Accountability Act (POAA), commonly known as the "three strikes and you're out" law, mandates a life without parole sentence upon conviction for a third "most serious" offense. State v. Thorne, 129 Wn.2d 736, 746, 921 P.2d 514, 518 (1996); RCW 9.94A.570. Article I, section 14 of the Washington Constitution, however, prohibits cruel punishment. The mandatory imposition of a life without parole sentence under the POAA violates article I, section 14 because it is administered in a racially disproportionate manner and does not comport with evolving standards of decency. This is a significant issue of constitutional law warranting review under RAP 13.4(b)(3).

The Court of Appeals declined to revisit the issue because "the constitutionality of the POAA, despite its numerical racial disproportionality, is settled law." Slip op. at 9. It treated its prior decision as the law of the case under RAP 2.5(c) because it was not clearly erroneous. Slip op. at 10.

As for the assertion of "settled law," racial disparity was not an issue decided in any of the cases where this Court has upheld imposition of a life sentence under the POAA against a cruel punishment challenge. See State v. Moretti, 193 Wn.2d 809, 818, 446 P.3d 609 (2019); State v. Witherspoon, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014); State v. Magers, 164 Wn.2d 174, 192-94, 189 P.3d 126 (2008); State v. Rivers, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996); State v. Manussier, 129 Wn.2d 652, 674-79, 921 P.2d 473 (1996); Thorne, 129 Wn.2d at 772-76. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case

where the legal theory is properly raised." Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

As for law of the case, that doctrine should not be applied in a manner that perpetuates error rendered in a prior appeal in the same case. Greene v. Rothschild, 68 Wn.2d 1, 8-9, 414 P.2d 1013 (1966). There is no procedural bar when "the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party." Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

Moreover, the Supreme Court has not yet decided the issue in Kennon's case, so there is no law of the case doctrine directly applicable to this Court. This Court denied Kennon's previous petition for review in the first appeal, but denial of review "has never been taken as an expression of the court's implicit acceptance of an appellate court's decision." Fast v. Kennewick Pub. Hosp.

Dist., 187 Wn.2d 27, 39, 384 P.3d 232 (2016) (citation omitted).

In 2012, the Task Force on Race and the Criminal Justice System, chaired by Justice Steven González, reported "[t]he fact of racial and ethnic disproportionality in our criminal justice system is indisputable." Research Working Group & Task Force on Race and the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. 1, 4 (2012). Race and ethnicity influence criminal justice outcomes over and above commission rates. Id. "[M]uch of the disproportionality is explained by facially neutral policies that have racially disparate effects." Id. at 4-5.

The indisputable fact of racial disproportionality manifests itself in the imposition of persistent offender sentences under the three strikes law. Black people are grossly over-represented in serving life sentences under the three strikes law in relation to their general population.

Black people constitute 4.4 percent of Washington's population but 38 percent of prisoners serving life without parole sentences under the three strikes law. Nina Shapiro, Washington's Prisons May Have Hit Pivotal Moment As They Eye Deep Cut In Their Population, Seattle Times, Sept. 17, 2020 (citing Dept. of Corrections, U.S. Census data).[3]

In State v. Gregory, 192 Wn.2d 1, 5, 427 P.3d 621 (2018), the Supreme Court held this state's death penalty was imposed in an arbitrary and racially biased manner and was thus unconstitutional as applied under article I, section 14 of the Washington Constitution. With the death penalty gone as a sentencing option, a life without

[3] Available at www.seattletimes.com/seattle-news/politics/a-transformational-moment-washingtons-prison-system-backs-reforms-as-it-faces-covid-19-budget-cuts-and-protests-over-racial-injustice/; see also Columbia Legal Services, Washington's Three Strikes Law: Public Safety & Cost Implications of Life Without Parole 7 (2010) (as of 2009, almost 40% of three strikes offenders sentenced to life without parole were Black, while comprising only 3.9% of the state's population).

parole sentence is now the harshest possible sentence in Washington.

In Moretti, Justice Yu, joined by two other justices, wrote that it was "important to recognize the disparate impacts that the criminal justice system has on people of color. This necessarily results in disparate impact in the imposition of life sentences. One size fits all approaches to sentencing reveal the institutional and systemic biases of our society. The effects of disproportionate enforcement of criminal laws against people of color, especially African-Americans, will continue — exaggerated by laws that limit the discretion of trial judges in sentencing decisions." Moretti, 193 Wn.2d at 839 (Yu, J., concurring) (citation to amicus brief omitted).

"The principles set forth in Gregory compel us to ask the same questions about a life sentence without the possibility of parole. Is it fairly applied? Is there a disproportionate impact on minority populations? Are

there state constitutional limitations to such a sentence?" Id. at 840.

The Court of Appeals refused to find the POAA unconstitutional in the absence of the type of regression analysis done in Gregory. That type of analysis is unneeded here. Unlike the small pool of death penalty inmates, those serving a POAA sentence number in the hundreds. The racial disparity is already indisputable. The only way a contrary conclusion could be reached would be to say that Black people commit third strike offenses at a disproportionate rate that accounts for the disproportionate imposition of the penalty. It is already known that overrepresentation of Black people in the Washington State prison system, and the extent of that racial disproportionality, is not explained by commission rates. Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. at 13, 15, 21.

This Court in Gregory took "judicial notice of implicit and overt racial bias against black defendants in this state"; it didn't need a fancy statistical analysis to recognize this plain reality. Gregory, 192 Wn.2d at 22-23.

Moreover, the sentence of death was discretionary, not mandatory, so a regression analysis was needed in Gregory to isolate independent variables and figure out whether the race of the defendant factored into the discretionary imposition of that penalty. Gregory, 192 Wn.2d at 19-21. Unlike the discarded death penalty scheme, the POAA permits no judge or jury to exercise discretion on the sentence. RCW 9.94A.570. As a result, there is no need to do a regression analysis to try to determine whether a life sentence is imposed in a racially disproportionate manner at the sentencing stage.

The lack of judicial discretion exaggerates and cements the racial disparity by rendering judges powerless to prevent racist outcomes. Judges, lacking

discretion, are forced to become complicit in a racist sentencing regime, without regard to the individual circumstances of the individual Black person being condemned to die behind bars.

Discretionary, and racially prejudiced, decisions that ultimately lead to three-strike sentences are front-loaded at the arrest, charging, and plea stages rather than backloaded at the sentencing stage. Police have broad discretion to arrest and refer charges and the tremendous discretion prosecutors wield at the charging and plea stages, which ultimately informs the stunning overrepresentation of Black people subject to POAA sentence.

While the POAA hogties the judge's sentencing authority, it does nothing to reign in the prosecutor's charging discretion. Thorne, 129 Wn.2d at 762, 768. The POAA effectively shifts authority to decide sentencing consequences from judges to prosecutors because the

three strikes charge, if proven, carries a mandatory life sentence. Daniel W. Stiller, Initiative 593: Washington's Voters Go Down Swinging, 30 Gonz. L. Rev. 433, 435 (1995). Prosecutors tasked with making those charging decisions, and in deciding what kind of plea deal may be offered or accepted to avoid the grim fate of death behind bars, are not immune from racial bias. See Preliminary Report on Race and Washington's Criminal Justice System, 87 Wash. L. Rev. at 25 (recognizing prosecutorial discretion leads to racially disparate outcomes). Research shows "prosecutorial charging decisions play out unequally when viewed by race, placing blacks at a disadvantage to whites. Prosecutors are more likely to charge black defendants under state habitual offender laws than similarly situated white defendants." Ashley Nellis, Sentencing Project, The Color Of Justice: Racial And Ethnic Disparity In State Prisons 10 (June 14, 2016).

What constitutes cruel punishment is subject to evolving standards of decency. State v. Fain, 94 Wn.2d 387, 396-97, 617 P.2d 720 (1980). The traditional legal framework for assessing whether a life without parole sentence is cruelly disproportionate under article I, section 14 does not take into account racial disparity. See Moretti, 193 Wn.2d at 819 (listing the four Fain factors). The scope of proportionality, however, is not static, but rather "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" Fain, 94 Wn.2d at 396-97 (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)). Proportionality "develops gradually in response to society's changes." Id. at 396. Courts "are free to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered." State v. Bassett, 192 Wn.2d 67, 85, 428 P.3d 343 (2018).

Racial disproportionality in the POAA calls for a new standard of proportionality that accounts for the sentencing law's racially disparate impact. The constitutional standard must adapt to meet an evolving standard of decency that does not turn a blind eye to the racist outcomes perpetuated by the POAA.

There can be no doubt the standard of decency for racial justice has changed since the POAA was enacted almost three decades ago. One need look no further than the Supreme Court's recent directive to all members of the judiciary and legal community, where it unequivocally stated "that we owe a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice." Henderson v. Thompson, 200 Wn.2d 417, 421, 518 P.3d 1011 (2022) (citing Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty., 1 (June 4, 2020)).

Kennon's case presents the opportunity to put that moral imperative into action. This Court has the power to make meaningful change. And it has a mandate to administer justice in a manner that brings greater racial justice to the carceral system. Courts have an obligation to take disproportional racial impact into account in deciding cruel punishment claims under the POAA. By doing so, courts can protect against sentencing based on factors contrary to society's evolving standard of decency, including the structural racism fostered by the POAA.

Once the defendant has shown the law has a racially disproportionate impact, as Kennon has shown here, the presumption should be that the disproportion is the result of racial prejudice infecting the decisions leading to that outcome. The burden should then shift to the State to rebut that presumption if possible.

The discomfort and frustration shown by the sentencing judge in Kennon's case, faced with the

prospect of condemning Kennon to die behind bars, is not at all surprising. The judge had a sense of fairness and a recognized the POAA's racially disproportional effects. RP (5/20/22) 8-9, 26-28; RP 1471-73, 1481-82. To comply with the prohibition against cruel punishment under article I, section 14, judges must at least have discretion to not impose a life sentence. Better yet, the POAA should be jettisoned altogether because it is irredeemably racist in application.

2. The no-contact orders must be modified to conform to the trial court's stated intent and to facilitate Kennon's fundamental right to parent his children.

Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); In re Welfare of Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Courts must

respect this right in sentencing someone for a crime by sensitively imposing any restriction on contact, both in terms of scope and duration, on the record. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); State v. DeLeon, 11 Wn. App. 2d 837, 841, 456 P.3d 405 (2020).

On remand, the trial court modified the scope and duration of the no-contact orders pertaining to Kennon's children. A few aspects of those orders, however, need to be fixed to avoid obstructing Kennon's right to parent his children. Kennon requests review under RAP 13.4(b)(3) and (4).

a. The orders must be reformed to reflect the court's stated intent to allow for future modification.

At the resentencing hearing, the court said "Once they reach their majority, of course, they're free to come to the Court, and ask for those no-contact orders to be

modified, or dropped altogether, so that they can come and visit you, if they wish to do that." RP (5/20/22) 29.

However, the orders as written do not allow Kennon or his children to take future action to modify or end the no-contact orders. CP 142-43. It is not enough that the court orally announced that modification could be sought in the future because "a trial judge's oral decision is no more than a verbal expression of his informal opinion at that time" and "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Moreover, the trial court lacks statutory authority to modify a sentencing condition regarding no-contact once a sentence becomes final, even where there is a change of circumstance down the road. State v. Hubbard, 1 Wn.3d 439, 441, 527 P.3d 1152 (2023). That is why it is important to carefully craft

the condition in the judgment and sentence at the outset, before it becomes locked in place. Id. at 452.

There is no Sentencing Reform Act provision that allows the court to modify a sentencing condition, including a no-contact condition, after the sentence becomes final. State v. Brown, 108 Wn. App. 960, 961-63, 33 P.3d 433 (2001) (court lacked authority to modify no-contact condition of sentence). The case should be remanded to allow the judge to follow through on her stated intent to allow future changes regarding contact by issuing appropriate written orders that carry the force of law.

b. The orders must be modified to make the frequency of allowed contact for each child clear.

The judgment and sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). On remand, the court orally specified:

"you can write to each child twice a year" and "I'm going to allow a phone call once a year, for each child; they don't have to accept it." RP (5/20/22) 28.

It is not clear from the no-contact condition in the judgment and sentence that Kennon is allowed to write to *each child* twice a year and call *each child* once a year. The condition, as written, could be erroneously read to mean Kennon is allowed to make one phone call per year and write two letters per year in total for the three children considered as a group. CP 83. Again, the court's oral ruling is not binding unless incorporated into the written order. Ferree, 62 Wn.2d at 566-67. The language of the condition in the judgment and sentence should be modified to clearly state that the frequency of contact through letters and phone calls applies to each child individually.

This is akin to a scrivener's error, where the court's stated intent is not accurately reflected in the written order.

"[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009). "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018).

c. The orders must be modified to allow for contact with the mother as an incident to having contact with the children.

In the first appeal, the Court of Appeals noted: "If the trial court decides that the no-contact orders are not appropriate and allows the children to visit Kennon, the court also should review the no-contact order protecting Zotica to accommodate any changes." Kennon, 2021 WL 3619870, at *10, n.7.

The trial court, in permitting contact with the children on remand, overlooked this aspect of the Court of Appeals decision and did not review or make any accommodating changes to the no-contact order pertaining to Zotica. CP 83, 144-45. This was error. "An appellate court's mandate is the law of the case and binding on the lower court and must be followed." Bank of America, N.A. v. Owens, 177 Wn. App. 181, 183, 311 P.3d 594 (2013), review denied, 179 Wn.2d 1027, 320 P.3d 718 (2014). While the trial court is free to exercise its discretion on remand when discretion is given, "the trial court must adhere to the appellate court's instructions and cannot ignore specific holdings and directions on remand." Pac. Coast Shredding, L.L.C. v. Port of Vancouver, USA, 14 Wn. App. 2d 484, 507, 471 P.3d 934 (2020).

The case must be remanded to enable the trial court to comply with the appellate mandate from the first appeal. Two changes are in order.

First, Kennon should be able to contact Zotica as an incident to contacting the children. The practicalities of the situation must be observed. When Kennon places a phone call to his child, he will be calling Zotica's phone number and Zotica may be the one answering the phone. Also, when Kennon sends letters to his children through the mail, they will be sent to Zotica's address and Zotica, as the parent of the household, will be the one to receive those letters in the first instance and may even read them before passing them on to the children. The no-contact order pertaining to Zotica must make it clear that Kennon is not in violation of the order prohibiting contact with Zotica in attempting to contact his children under these circumstances. Kennon should not be set up to violate

one aspect of the sentence while seeking to exercise his rights given by another.

Second, the no-contact provision in the judgment and sentence pertaining to Zotica must be modified to allow for contact as part of a court process. A no-contact order that prohibits contact with a parent must still allow for contact through the court or counsel sufficient to allow the other parent to seek contact with their shared child through the courts. State v. McGuire, 12 Wn. App. 2d 88, 90, 456 P.3d 1193 (2020).

To protect his fundamental right to parent, Kennon must be permitted to exercise his constitutional right to access to the courts. The no-contact provision in the judgment and sentence bars Kennon from contacting Zotica without exception. CP 83. A no-contact order that completely bars contact with his ex-wife by any means interferes with Kennon's right to parent because it prevents him from pursuing any parenting plan action in

the family court. McGuire, 12 Wn. App. 2d at 95-96. The post-conviction no-contact order states there is to be no contact "except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers." CP 144. But the no-contact condition in the judgment and sentence does not make that exception. CP 83. The no-contact condition in the judgment and sentence should be modified to make it consistent with the post-conviction order and the dictates of McGuire.

The Court of Appeals ignored McGuire. Slip op. at 8-9. Instead, it held "[l]imiting incidental contact between parents, though inconvenient for co-parenting, is not an unconstitutional infringement on the fundamental right to parent," citing State v. Phillips, 6 Wn. App. 2d 651, 676, 431 P.3d 1056 (2018), review denied, 193 Wn.2d 1007, 438 P.3d 116 (2019). Phillips held an order prohibiting contact with the defendant's wife and stepdaughter was

within the trial court's discretion, although it had the indirect effect of making access to his biological child more difficult. Phillips, 6 Wn. App. 2d at 675-76. This is a cavalier approach to the exercise of a fundamental right and this Court should reject it.

As a matter of strict scrutiny, conditions impacting the right to parent "must be narrowly drawn" and "[t]here must be no reasonable alternative way to achieve the State's interest." DeLeon, 11 Wn. App. 2d at 841 (quoting State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008)). Phillips turns that standard upside down. Phillips permits making access to a child more difficult even if a no contact order is not as narrowly drawn as it could be.

No-contact provisions must be "sensitively imposed." Rainey, 168 Wn.2d at 374 (quoting Warren, 165 Wn.2d at 32). The no-contact order pertaining to Zotica impacts Kennon's contact with his children and

therefore the trial court had an obligation to sensitively impose it. There is no sensitive imposition here, as the court overlooked this Court's mandate to reconsider the order pertaining to Zotica to accommodate changes permitting contact with the children.

F. CONCLUSION

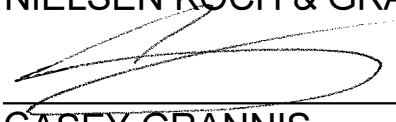
For the reasons stated, Kennon respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4378 words excluding those portions exempt under RAP 18.17.

DATED this 21st day of February 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRYL WILLIAM KENNON, Appellant.	No. 84086-0-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — A jury convicted Darryl William Kennon (Kennon) of burglary in the first degree and assault, as well as four counts of felony violation of a no-contact order (NCO), each with domestic violence designations. Following a partially successful first direct appeal, Kennon was resentenced to life without parole under the Persistent Offender Accountability Act (POAA). His sentence included a five-year NCO with his children and a lifetime NCO with his former wife, who was the victim of each crime. Kennon appeals, arguing the NCO with his children violated his constitutional right to parent, and that the POAA is unconstitutional because of its racially disproportionate impact. Kennon also challenges the imposition of the victim penalty assessment (VPA) and the accumulation of interest on restitution. We affirm the judgment and sentence, and remand to the trial court solely to strike Kennon's VPA and consider whether to

impose interest on restitution it had previously ordered.

I. BACKGROUND

A. Factual Background

This court's prior opinion in this matter laid out the facts of this case, so it is unnecessary to repeat them in their entirety. State v. Kennon, No. 80813-3-I, slip op. (Wash. Ct. App. August 16, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/808133.pdf. By way of summary, Z.K.,[1] formerly married to Kennon, sought a domestic violence protection order protecting her and their three children. Kennon, No. 80813-3-I, slip op. at 2. Kennon violated this first protection order, so the court ordered additional ones, including revoking Kennon's ability to see his children. Id.

On August 14, 2018, after contacting Z.K. in an increasingly aggressive manner, Kennon entered Z.K.'s apartment while the children were present. Id. at 3. He struck her and hit her in the eye with his head. Id. Kennon then chased Z.K. around the house with a hammer and threatened to kill her. Id. at 4. K.K. (one of the children) attempted to stop Kennon multiple times. Id. Z.K. and the children eventually escaped and Kennon drove away. Id.

Z.K. sustained an orbital wall fracture. Id. at 5. K.K. has since been treated for post-traumatic stress disorder and depression.

B. Procedural Background

A jury found Kennon guilty of several felonies including, relevantly, a "most serious offense" under RCW 9.94A.030(32)(a), namely the burglary in the first

[1] We refer to her and later, the children, by their initials to protect their privacy.

degree, and four counts of felony violation of an NCO. Kennon, No. 80813-3-I, slip op. at 23. At sentencing, the State offered Kennon's two prior convictions for child molestation in the first degree and rape of a child in the first degree, each of which were also most serious offenses. Id. at 23. The State argued the trial court must impose a life sentence without the possibility of release (LWOP) under the POAA (RCW 9.04A.570). Id. at 7.

Kennon argued the POAA was unconstitutional because it requires the imposition of a cruel and unusual punishment (LWOP), which is disproportionately inflicted upon Black men. Id. at 24-25. The trial court declined to impose LWOP under the POAA. Id. at 7. Instead, it imposed an exceptional sentence of 176 months and entered lifetime NCOs protecting Kennon's children and Z.K. Id. at 8.

Kennon appealed. Id. As part of his first appeal, he argued the NCOs' prohibition on contacting his children violated his fundamental right to parent. Id. at 20. The State cross-appealed the trial court's failure to impose a life sentence. Id. at 23.

In August 2021, this court partially agreed with Kennon and remanded the case for resentencing. Id. at 30. We ordered the trial court to reassess the parameters of the NCO to "(1) address whether the no-contact orders 'remain[ ] reasonably necessary in light of the State's interests in protecting' K.K., M.K., and V.K. from harm, (2) if they are, then the court must narrowly tailor the orders, 'both in terms of scope and duration,' and (3) the court should consider less restrictive alternatives when it comes to the orders' scope and duration." Id. at 22-23.

While noting that "there is substantial evidence that the POAA applies to men of color at alarmingly disproportionate rates," this court concluded that it "cannot revisit this issue" on the record before it because "our Supreme Court has concluded that the POAA does not constitute cruel and unusual punishment" and Kennon provided no data or "evidence to support 'a clear showing that the rule is incorrect and harmful.'" Id. at 26-28 (quoting State v. Gregory, 192 Wn.2d 1, 34, 427 P.3d 621 (2018)).

C. Re-sentencing and Present Appeal

On May 20, 2022, the trial court resentenced Kennon to LWOP. The court maintained the lifetime NCO for Z.K., but modified the children's NCO to five years. During this time, however, Kennon could call them once per year and write them two letters per year. The State referred to it as an "appropriate compromise" because if the children "do not wish to have that contact, they will not have it." Kennon timely appeals.

II. ANALYSIS

A. No Contact Order

Kennon argues the revised NCOs infringe upon his constitutional right to parent his children because (1) the written NCO did not comport with the trial court's stated intent in the resentencing hearing, and (2) by prohibiting incidental contact with Z.K, the NCO hindered his ability to contact his children. He made no objections to these provisions at his resentencing.

"[F]or an objection to a community custody condition to be entitled to review for the first time on appeal, (1) it must be manifest constitutional error or a

sentencing condition that . . . is 'illegal or erroneous' as a matter of law, and (2) it must be ripe." State v. Peters, 10 Wn. App. 2d 574, 583, 455 P.3d 141 (2019) (quoting State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015)).[2]

Parents have a fundamental constitutional right "to the care, custody, and companionship of their children." State v. DeLeon, 11 Wn. App. 2d 837, 841, 456 P.3d 405 (2020) (citing State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)).

"We generally review sentencing conditions for abuse of discretion." In re Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). "But we more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children." Id. (citing Warren, 165 Wn.2d at 32). "Such conditions must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Rainey, 168 Wn.2d at 374 (quoting Warren, 165 Wn.2d at 32). More specifically, courts may limit the fundamental right to parent when "reasonably necessary" to protect a child's physical or mental health. DeLeon, 11 Wn. App. 2d at 841 (quoting State v. Howard, 182 Wn. App. 91, 101, 328 P.3d 969 (2014)).

1. Clarity of the No Contact Order

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[2] The State argues this court should not consider this assignment of error because Kennon "has not established that they represent manifest constitutional error." While that may be true, we still may, under RAP 2.5 and Peters, 10 Wn. App. 2d at 583, consider whether the condition is "erroneous as a matter of law," such as those that implicate "principles of due process," which is itself a "narrow category." Blazina, 182 Wn.2d at 834 (citing "vague community custody requirements" as "creat[ing] this sort of sentencing error). Regardless, we choose to exercise our discretion, but will focus exclusively on whether any legal error occurred.

Kennon does not challenge the constitutionality of the NCO as a whole, however interpreted, but rather he raises legal challenges to how it will be implemented in practice unless it is remanded for modification.

Specifically, Kennon first argues the court's written NCO is legally erroneous unless it is modified (a) to reflect the judge's oral ruling that the order may be modified in the future, and (b) to more accurately or more definitively reflect the frequency of contact allowed for each child.

At Kennon's resentencing hearing, at the time of imposing the modified NCO, the court stated:

> I will impose the five-year no-contact order, with a provision that you can write to *each* child twice a year; and, you can pick the dates: whether you want to pick a birthday . . . I'm going to allow a phone call once a year, for *each* child; they don't have to accept it . . . [b]ut, I want to give them the opportunity, if they want to choose to accept it . . .

(emphasis added).

The court further specified:

> Once they reach their majority, of course, they're free to come to the Court, and ask for those no-contact orders to be modified, or dropped altogether, so that they can come and visit you, if they wish to do that.

The written NCO in Kennon's judgment and sentence contains a handwritten notation next to each child's name providing the duration of "5 years," and a second notation stating, "Defendant may make one phone call/year & write 2 letters/year (see RCW 10.99 orders)."

As told by Kennon, the trial court's handwritten note could "erroneously be read to mean Kennon is allowed to make one phone call per year and write two letters per year *in total* for the three children considered as a group." (emphasis added).

There is no dispute that the NCO provision of Kennon's judgment and sentence lists the duration of the term, the protected persons, and cross-references the contemporaneously-entered RCW 10.99, which imposes other obligations upon Kennon. Kennon alleges no legal error in any of those provisions. Kennon appears to suggest that the legal error is in the clarity of the details of the trial court's orders.

Kennon, however, offers no binding authority to support the assertion that a trial court must provide details, first, on how and when a protected person may seek to modify an NCO.[3] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). We will not create such an obligation here.

Similarly, Kennon offers no authority to support the proposition that it is legal error for a court to fail to anticipate (mis)interpretations of its written order, or to fail to identify and resolve any possible inconsistency between it and the court's verbal

[3] Kennon claims that State v. Brown, No. 75627-3-1, slip op. at 7 (Wash. Ct. App. Feb. 12, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/756273.pdf. set forth such a "requirement." That claim is simply factually wrong. This court held, in that unpublished opinion, that courts "should" describe how conditions limiting a parent's time with their children may be modified, but did not require it.

order. Kennon certainly cites no authority that a trial court abuses its discretion if it does not do so. Where a party fails to provide citation to support a legal argument, we assume counsel, like the court, has found none. State v. Loos, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) (citing State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)).

We find no legal error with that portion of the trial court's NCO.

2. Incidental Contact with Z.K.

Kennon asks us to remand the order to be clarified to allow incidental contact with Z.K., when Kennon contacts his children by phone, in writing, or through a future court process. Limiting incidental contact between parents, though inconvenient for co-parenting, is not an unconstitutional infringement on the fundamental right to parent.

The State has a compelling interest in preventing future harm to the victims of the crime and in protecting children. State v. Phillips, 6 Wn. App. 2d 651, 676, 431 P.3d 1056 (2018) (citing Rainey, 168 Wn.2d at 377). In both Foster and Phillips, the courts held that NCOs prohibiting the defendant's contact with the protected caregiving parent did not infringe on the defendant's fundamental right to parent their child. Phillips, 6 Wn. App. 2d at 676; State v. Foster, 128 Wn. App. 932, 939, 117 P.3d 1175 (2005).

Phillips is similar to the present case. There, Phillips' former spouse had an NCO protecting her from Phillips after he physically assaulted her while her child was present and while she was holding her infant. Phillips, 6 Wn. App. 2d at 656-57. The court imposed an NCO protecting the mother and the child, but not

the infant. Id. at 676. Phillips argued that preventing contact with the mother and child impermissibly infringed upon his right to parent the infant. Id. This court concluded "Although not having contact with [victim] will make access to his child more difficult, it does not necessarily restrict contact between Phillips and his child." Id.

Similarly, here, the State's interest in protecting the physical and mental well-being of the children is appropriately weighed against inconvenience toward Kennon. DeLeon, 11 Wn. App. 2d at 841. As Kennon implicitly concedes, it was not unreasonable for the trial court to conclude that an NCO protecting Z.K. was appropriate, particularly since Kennon attacked her in front of the children. See, e.g., Kennon, No. 80813-3-I, slip op. at 4. Further, K.K. explained her need for mental health treatment after the incident. The court did not abuse its significant discretion in not revising the NCO protecting Z.K. to accommodate the changes to her children's inter-related NCO.

In short, the trial court did not commit legal error in how it weighed the need for protection of Z.K. and the children against Kennon's ability to parent or how the NCOs structured or reflected that balance.

B. Persistent Offender Accountability Act

Kennon argues the POAA is unconstitutional because, in short, courts disproportionately impose LWOP against Black people. However, the constitutionality of the POAA, despite its numerical racial disproportionality, is settled law. State v. Moretti, 193 Wn.2d 809, 830, 446 P.3d 609 (2019) ("Regardless of any personal opinions as to the wisdom of this statute, we have

'long deferred to the legislative judgment that repeat offenders may face an enhanced penalty because of their recidivism'") (quoting State v. Fain, 94 Wn.2d 387, 390-91, 402, 617 P. 2d 720 (1980)). Thus, we decline to revisit this question as our prior decision is neither "clearly erroneous," under RAP 2.5(c), and there is no "clear showing that the rule is incorrect and harmful," as in State v. Gregory, 192 Wn.2d 1, 34, 427 P.3d 621 (2018). On the record before us, Kennon has not presented sufficient evidence or reason to revisit or reverse our prior holding.[4]

C. Victim Penalty Assessment and Interest on Restitution

After filing his opening brief, Kennon filed unopposed supplemental briefing to strike the VPA due to new legislation and caselaw. The State does not contest Kennon's right to seek remand to strike the VPA. We will accept that concession and remand this matter to strike the VPA fee.

The judgment and sentence also requires Kennon to pay restitution to the clerk of the court for costs associated with the victim's medical treatment. The judgment also indicated that "[r]estitution shall bear interest pursuant to RCW 10.82.090." After the trial court resentenced him, our legislature revised RCW 10.82.090(2)-(3). LAWS OF 2022, ch. 260 § 12. The statute now allows the trial court to waive the imposition of interest on restitution. RCW 10.82.090(2). Kennon, thus, also asks this court, not to disturb the imposition of the restitution order itself, but to "remand for the trial court to address whether to impose interest

[4] Among the compilation of third-party statements, reports, and non-peer-reviewed studies about the criminal justice system generally, Kennon provides a declaration from an attorney on an unrelated matter. The State asks us to disregard the declaration as procedurally improper. To the extent we construe this request as a motion to strike, it is denied as moot given the resolution of this matter.

on the restitution" or "to waive interest on restitution." In support, Kennon cites to a recent decision of this court, State v. Ellis, 27 Wn. App. 2d 1, 6, 530 P.3d 1048 (2023), which he seems to suggest stands for the proposition that all legal financial obligations pending on direct appeal are subject to remand.

For its part, the State argues that Ellis is wrongly decided because a restitution "obligation is of an entirely different character than litigation costs payable to the government" and, thus, precedent permitting "costs" to be reconsidered while a matter is pending on appeal is inapposite.

At this time, this court has held in two published opinions, in very similar circumstances, that, "Although this amendment did not take effect until after [appellant's] resentencing, it applies to [the appellant] because this case is on direct appeal." Ellis, 27 Wn. App. at 6; see also State v. Reed, _ Wn. App. 2d _, 538 P.3d 946 (2023). In Reed, this court rejected an argument identical to the one the State made here, holding that "restitution interest is analogous to costs *for purposes of applying the rule* that new statutory mandates apply in cases, like this one, that are on direct appeal." Id. at 947 (emphasis added).

In other words, while the State may be right that restitution may be different than other litigation costs in other contexts, nothing in the cases upon which Ellis and Reed rely suggests that, *for purposes of assessing the applicability of this amendment* to that small universe of cases on direct appeal, that distinction should matter. See, e.g., State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018) (finding that the "precipitating event" for the statute there "concerning attorney fees and costs of litigation" was the "termination" of the defendant's case and that

"Ramirez's case was on appeal as a matter of right and thus was not yet final under RAP 12.7 when" the amendment there passed). Our Supreme Court's decision in Ramirez did not turn on the fact that interest on restitution may not be a "cost" for other legal purposes.

Thus, we choose to follow this precedent, without adopting Kennon's sweeping view of Ramirez or Ellis.

III. CONCLUSION

We affirm Kennon's judgment and sentence and remand to the trial court solely to strike the VPA fee and to consider whether to impose interest on the restitution it previously ordered after consideration of the relevant factors under RCW 10.82.090(2).

Díaz, J.

WE CONCUR:

Bowman, J.

Smith, C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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