SUPREME COURT NO. 95804-1

NO. 75902-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL FABIAN SANCHEZ,

Petitioner.

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

The Honorable William L. Downing, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Israel Fabian Sanchez, the appellant below, seeks review of the Court of Appeals decision in State v. Fabian Sanchez, noted at 2 Wn. App. 2d 1014, 2018 WL 500150, No. 75902-7-I (Jan. 22, 2018) (Appendix A), following the denial of his motion for reconsideration on March 29, 2018 (Appendix B).

B. ISSUE PRESENTED FOR REVIEW

The trial court wished to hear the mother's wishes as to whether she approved of limited written communications between Fabian Sanchez and his biological children, and stated it would defer to the mother's wishes. However, for the sole reason that the State had not inquired into the mother's wishes, the trial court denied the less restrictive alternative. Given that the State bears the burden of proof and production to demonstrate that no less restrictive alternative would prevent harm in light of the fundamental right to parent, was the burden improperly placed on Fabian, requiring remand for the trial court to consider the less restrictive alternative with the burden properly placed on the prosecution?

C. STATEMENT OF THE CASE

Fabian Sanchez was convicted of two counts of first degree child rape for having sexual intercourse with his seven-year-old stepdaughter, J.F. CP 7-20. He appealed and the Court of Appeals affirmed his convictions. CP 21, 39-48.

On appeal, Fabian also challenged the lifetime no-contact order the trial court imposed prohibiting contact between Fabian and "other family members," including his two biological children, J. and A. CP 13, 47-48. The State conceded this no-contact order was overbroad, the Court of Appeals agreed, and the case was remanded for the trial court to "address on the record the parameters of the no-contact order under the 'reasonably necessary' standard" pursuant to In re Personal Restraint of Rainey, 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010). CP 47-48.

On remand, the State argued that the no-contact order was reasonably necessary given evidence presented at trial that Fabian "raped [J.F.] in the same bedroom as at least one of the children." RP 7. The State also argued that Fabian "used his biological son, [J.], essentially as a pawn to manipulate his mother to try to maintain her relationship with [Fabian] despite the mother's knowledge that [Fabian] was sexually abusing her daughter . . . ." RP 7.

Fabian, in contrast, requested limited written contact with his biological children, such as birthday cards. RP 11-12.

The trial court inquired whether the State had asked the mother whether she had "thoughts on the written communication as opposed to contact," but the State had not discussed written communications with her.

RP 8. And the State opposed any contact regardless of the mother's wishes. RP 9.

The trial court stated it was understandable that the mother might "think that it would be good for [A.] and [J.] to know that they have a dad out there somewhere who cares about them and sends birthday cards and that that would offset the negative feelings that they might get from knowing where he is and why he's there." RP 49. On the other hand, the trial court opined, "she may also feel no, it's better for us to make a totally new life" and "it would create more emotional harm for the children to have that contact made from out of the blue." RP 13. The trial court indicated it would defer to the mother's wishes on the subject. RP 13. Ultimately, however, the trial court concluded, "In the absence of present input from [the mother] as to which way she views it, I'm reluctant to overstep in terms of the children's emotional well-being." RP 13.

The trial court thus entered an order amending the judgment and sentence finding that a "no-contact order prohibiting the defendant from having any contact with his aforementioned biological children is reasonably necessary to protect their emotional and physical safety until they are 18-years-of-age." CP 50.

Fabian appealed. CP 56-58. His principal contention was that the trial court's analysis of the less restrictive alternative of limited written

communications was incorrect. Br. of Appellant at 3-7. Fabian asserted the trial court shifted the burden to Fabian to prove that the less restrictive alternative was not harmful:

> Although the trial court had a viable less restrictive alternative before it, it refused to consider this less restrictive alternative because the State had not obtained the appropriate input from the children's mother. It is the State that must demonstrate that the prohibition on all contact was reasonably necessary to protect the children from harm and that no less restrictive alternative would prevent harm. Rainey, 168 Wn.2d at 381-82. Yet the trial court shifted this burden to Fabian to show that a less restrictive alternative was not harmful. Given this burden-shifting and the admitted lack of information that might have altered the trial court's ruling, the trial court failed to consider whether its no-contact order was properly narrowly tailored. Considering the fundamental right to parent, this error requires reversal and remand so that the trial court may consider appropriate less alternatives as the law requires.

Br. of Appellant at 6-7.

The Court of Appeals did not address or even acknowledge Fabian's claim that the trial court shifted the pertinent burden. Neither did the State. Rather, the Court of Appeals stated, "The record shows the court considered but rejected the request to write letters to his children," completely ignoring how the court considered the request and why the request was rejected.

D. ARGUMENT IN SUPPORT OF REVIEW

THE COURT OF APPEALS APPROVED OF UNLAWFULLY SHIFTING THE BURDEN TO FABIAN SANCHEZ TO PROVE HIS LESS RESTRICTVE ALTERNATIVE OF LIMITED WRITTEN COMMUNICATIONS WAS NOT HARMFUL, CONFLICTING WITH THE CONSTITUTIONAL DECISIONS OF THIS COURT AND THE COURT OF APPEALS

Parents have a fundamental liberty interest in the "care, custody, and management" of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). While the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, courts "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." Rainey, 168 Wn.2d at 374 (citation omitted). "Such conditions must be 'sensitively imposed' so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" Id. (quoting State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)).

State interference with the fundamental right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. Sentencing "conditions that interfere with fundamental rights must be sensitively imposed" with "no reasonable alternative way to achieve the State's interest." Id. at 32, 35. Sentencing courts must therefore consider whether a condition, such a no-contact order, is reasonably necessary in scope and duration to prevent harm

to children. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives to contact, such as indirect contact or supervised visitation, may not be prohibited unless there is a compelling State interest in barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). The State bears the burden to prove that no less restrictive alternative would prevent harm to the children. Rainey, 168 Wn.2d at 381-82; Ancira, 107 Wn. App. at 654.

The trial court, when considering Fabian's proposal to write to his children, incorrectly applied the burden of proof. The trial court was open to the possibility that the children's mother might approve of some contact, such as letters or birthday cards. RP 13. The trial court said it was an "understandable point of view" that the children's mother "might think that it would be good for [the children] to know that they have a dad out there somewhere who cares about them and sends birthday cards . . . ." RP 13. But, for the sole reason that the State had not inquired into the mother's wishes, the trial court denied Fabian's request to have limited written correspondence with his biological children. RP 13.

Although the Court of Appeals decision claims that the "record shows the court considered but rejected the request to write letters to his children," the trial court's "consideration" required Fabian to disprove that harm would result from extremely limited written communications. The State, not Fabian,

bears the burden to show that less restrictive alternatives would fail to prevent harm. Rainey, 168 Wn.2d at 381-82; Ancira, 107 Wn. App. at 654. Such restrictions on familial relations must be "sensitively imposed" such that they are "reasonably necessary to accomplish the essential needs of the State and public order." Warren, 165 Wn.2d at 34. Yet the State was never asked to nor did it carry any burden of proof to show an absolute ban on contact met these standards. The Court of Appeals approved of this burden-shifting by refusing even to acknowledge Fabian's arguments that burden-shifting occurred.

Because the Court of Appeals decision conflicts with Rainey, Warren, and Ancira on the constitutional question of who bears the burden to prove that a less restrictive alternative would not prevent harm, review is warranted under RAP 13.4(b)(1), (2), and (3).

RAP 13.4(b)(4) review is also appropriate. This case illustrates a disturbing trend in the Court of Appeals, particularly in Division One. Fabian clearly raised a burden-shifting argument in the Court of Appeals. Br. of Appellant at 5-7. His reply brief was devoted entirely to the burden-shifting claim (given that the State opted not to acknowledge or respond to his burden-shifting claim either). Reply Br. at 1-3. Yet the Court of Appeals did not address this issue and its opinion reads as though Fabian raised no burden-shifting argument. The Court of Appeals decision therefore appears driven by

results, not the rule of law. The Court of Appeals' choice not to address or even acknowledge the constitutional arguments raised by a criminal appellant demonstrates serious dysfunction in the legal system and undermines respect for the judiciary as an independent check on executive power. This concern is a matter of substantial public importance that merits RAP 13.4(b)(4) review.

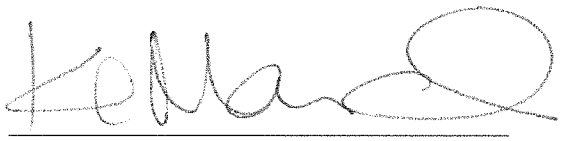
E. CONCLUSION

Because he meets every RAP 13.4(b) review criterion, Fabian Sanchez asks that his petition for review be granted.

DATED this 30th day of April, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent,	)	No. 75902-7-I
v.	)	UNPUBLISHED OPINION
ISRAEL FABIAN SANCHEZ, Appellant.	)	FILED: January 22, 2018

SCHINDLER, J. — A jury convicted Israel Fabian Sanchez of two counts of rape of a child in the first degree. The court imposed a lifetime no-contact order prohibiting Sanchez from having any contact with his stepdaughter and "other family members." We remanded to address the parameters of the no-contact order. On remand, the court amended the no-contact order to prohibit Sanchez from any contact with his children until the age of 18. Sanchez challenges the amended no-contact order. We affirm.

FACTS

The State charged Israel Fabian Sanchez with two counts of domestic violence rape of a child in the first degree. At trial, extensive testimony

established Sanchez raped his stepdaughter J.F. when she was six-years-old and seven-years-old. J.F. testified that Sanchez "put down my pants" and "put[ ] his thing in my bottom" two different times.

J.F.'s mother M.H.-A. testified that on March 7, 2013, she saw Sanchez in their bedroom anally raping J.F. M.H.-A. said their five-year-old son J.F.-H. was playing with a toy car in the bedroom and their two-year-old daughter A.F.-H. was "[w]atching what [Sanchez] was doing to [J.F.]."

M.H.-A. testified that Sanchez "got mad" and "was telling my little boy that I was throwing him out and that it was my fault that the family was going to be destroyed, so my little boy started to cry and said that's not right." M.H.-A. testified that J.F.-H. begged her to forgive Sanchez because he "promised [J.F.-H.] that he would never do anything bad again." M.H.-A. stayed with Sanchez. M.H.-A. told J.F. that "if it happened again, I would have to leave him."

M.H.-A. testified that on March 29, 2014, she noticed J.F. sitting with her hands "between her legs," looking "[a]fraid." M.H.-A. asked J.F. if "something bad had happened." M.H.-A. told J.F., "[T]he promise that I had made to her before I would fulfill this time." J.F. told M.H.-A. she did not want to tell her what had happened because Sanchez threated "to hit her." After M.H.-A. told J.F. that she would not allow Sanchez to "go anywhere near her," J.F. told her mother that Sanchez raped her while M.H.-A was at work. M.H.-A. took the three children to a community center to get help and contact the police.

The jury found Sanchez guilty of two counts of rape of a child in the first degree. By special verdict, the jury found that Sanchez and J.F. were "members of the same family or household" when he committed the crimes.

The State recommended a lifetime no-contact order to protect M.H.-A. and J.F. M.H.-A. asked the court to "grant a protective order for life, for me and my [three] kids." M.H.-A. said Sanchez abused her and the three children. M.H.-A. told the court, "I am very afraid of [Sanchez] because he threatened to take my kids away. I am fearful that he may fulfill his threat and may hurt my kids more. They are also fearful of him."

The court imposed a 160-month sentence and entered a no-contact order for "LIFE" that prohibits Sanchez from having contact with M.H.-A., J.F.,[1] and "other family members."

On appeal, Sanchez challenged imposition of the no-contact order as to "other family members." The State conceded the court did not "address on the record the 'reasonably necessary' standard with respect to Sanchez's two biological children" and "the phrase 'other family members' is overbroad."[2] We remanded to address the no-contact order.[3]

On remand, the State requested the court impose an order prohibiting any contact between Sanchez and his biological children J.F.-H. and A.F.-H. until

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[1] In the judgment and sentence, J.F. is referred to as "J.H." with her date of birth. We use J.F. for consistency.

[2] State v. Sanchez, No. 72807-5-I, slip op. at 9 (Wash. Ct. App. June 13, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/728075.pdf.

[3] Sanchez, No. 72807-5-I, slip op. at 9.

they reach the age of 18. The State argued the evidence established the two biological children were in the bedroom when Sanchez raped J.F. The prosecutor also argued the evidence showed:

> [T]he defendant used his biological son, [J.F.-H.], essentially as a pawn to manipulate his mother to try to maintain her relationship with the defendant despite the mother's knowledge that the defendant was sexually abusing her daughter, [J.F.].
>
> The two children were intricately a part of this abuse [and] in close proximity to it.

Sanchez's attorney agreed the court "is well within its discretion to impose physical no contact with . . . Sanchez's children" but asked the court to allow written communication with J.F.-H. and A.F.-H. The State had not "specifically addressed that question" with M.H.-A. but relied on her previous request to "protect my children" to argue Sanchez should be prohibited from having any contact with his biological children. The State also argued, "[T]he State would frankly take the very paternalistic or maternalistic approach to this because of the domestic violence relationship that was evident in this family."

The court agreed with the State's position as "fully consistent" with the testimony at trial. The court amended the no-contact order to delete "other family members" and instead, "specifically identify the defendant's two biological children, [J.F.-H.] . . . and A.F.-H." The order states why imposition of the no-contact order with J.F.-H. and A.F.-H. is necessary:

> According to testimony at trial, A.F.-H. was present in the same bedroom sleeping a very short distance away from J.F. when the defendant anally raped J.F. Moreover, the defendant used J.F.-H. as a pawn to manipulate his mother to staying in her relationship with the defendant despite the mother's knowledge that the

> defendant was sexually abusing her daughter J.F. Evidence showed that these two biological children were in extraordinarily close proximity to the sexual abuse that the defendant subjected J.F. to.
>
> Because of the nature and circumstances of the offense, the court has imposed a condition that the defendant may not have any contact with minors for the statutory maximum period of time. Thus, the court finds a no-contact order prohibiting the defendant from having any contact with his aforementioned biological children is reasonably necessary to protect their emotional and physical safety until they are 18-years-of-age.

ANALYSIS

Sanchez argues the court violated his fundamental constitutional right to parent by imposing a no-contact order prohibiting contact between Sanchez and A.F.-H. and J.F.-H. until they reach the age of 18.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the court to impose "crime-related prohibitions" as a condition of a sentence. RCW 9.94A.505(9). A "crime-related prohibition" prohibits "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). We review the imposition of crime-related prohibitions for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

We will uphold a condition if it is reasonably related to the crime. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). But where the sentencing condition affects a constitutional right and interferes with a fundamental constitutional right, such as the right to parent, a "[m]ore careful review" is required. Warren, 165 Wn.2d at 32.

> More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional

> right. Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order.

Warren, 165 Wn.2d at 32.[4] To the extent a sentencing condition affects a constitutional right, we apply strict scrutiny. Rainey, 168 Wn.2d at 374.

> Nevertheless, because the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard of review remains abuse of discretion.

Rainey, 168 Wn.2d at 374-75.

We conclude the no-contact order is reasonably necessary to achieve a compelling State interest of protecting J.F.-H. and A.F.-H. See Warren, 165 Wn.2d at 34-35.

State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001), is distinguishable. In Ancira, the State did not "explain[ ] why prohibiting Ancira from contacting his wife would not protect the children from the harm of witnessing domestic violence between their parents." Ancira, 107 Wn. App. at 655.

Sanchez also argues the court did not "consider less restrictive alternatives to a blanket no-contact order." The record does not support his argument. The record shows the court considered but rejected the request to write letters to his children.

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[4] Citations omitted.

We conclude the court did not err in entering the no-contact order prohibiting Sanchez from having any contact, including letters, with his children until they reach the age of 18, and affirm the amended no-contact order.

WE CONCUR:

APPENDIX B

FILED
3/29/2018
Court of Appeals
Division I
State of Washington

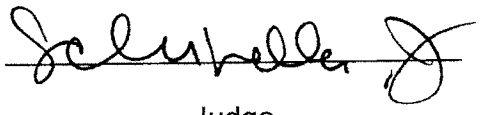
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. ISRAEL FABIAN SANCHEZ, Appellant.	)	No. 75902-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Israel Fabian Sanchez filed a motion for reconsideration of the opinion filed on January 22, 2018. Respondent State of Washington filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

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