SUPREME COURT NO. 101546-1
COA NO. 83278-6-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN MARSHALL BRIGGS,

Petitioner.

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

The Honorable Millie M. Judge, Judge

PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
(206) 623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER

John Briggs asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Briggs requests review of the decision in State v. John Marshall Briggs, Court of Appeals No. 83278-6-I (slip op. filed Nov. 14, 2022), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. When a post-conviction domestic violence protection order is entered at the original sentencing hearing and then the convictions are reversed on appeal, did the legislature intend for the start date of the protection order to begin anew upon resentencing following reconviction or did the legislature intend for the total combined duration of the no-contact period to not exceed the statutory maximum for the offense?

2. When a post-conviction domestic violence protection order is entered at the original sentencing hearing and then the convictions are reversed on appeal, must the expiration date for a subsequently entered protection order take into account the time already served to avoid violating due process and the right to equal protection?

3. Was defense counsel ineffective in not objecting to the expiration date in the protection order, as there was no legitimate reason not to object and his client was prejudiced by entry of an order exceeding the statutory maximum?

D. STATEMENT OF THE CASE

After the first trial, John Briggs was convicted of one felony violation of a no-contact order and two gross misdemeanor counts of attempted violation of a no-contact order committed against Flordelina Sullivan. CP 241, 247. The sentence was entered on March 5, 2020.

CP 241, 247. The court imposed a prison-based Drug Offender Sentencing Alternative on the felony count consisting of 30 months of confinement and 30 months of community custody. CP 252. For the gross misdemeanor counts, the court ordered 364 days of confinement. CP 242. At the sentencing hearing, the court entered a post-conviction domestic violence protection order set to expire "5 years from today's date," i.e., five years from March 5, 2020. CP 263-65.

The convictions were reversed on appeal due to a defective charging document. State v. Briggs, 18 Wn. App. 2d 544, 546, 492 P.3d 218 (2021).

On remand after a second trial, Briggs was convicted of the same offenses. CP 52, 54, 56. The court imposed a statutory maximum of 60 months of confinement on the felony count and 364 days confinement on the gross misdemeanor counts. CP 31, 41; RP 405-06. At the sentencing hearing, the court

entered a post-conviction domestic violence protection order set to expire "Five years from today," i.e., five years from October 19, 2021. CP 172-74.

Briggs appealed, arguing the five-year protection order starting from the date of resentencing violated the five-year statutory maximum cap on such orders because it did not take into account the time he already served under the yoke of the order before the convictions were reversed on appeal. Corrected Brief of Appellant at 5-21; Reply Brief at 1-35. The Court of Appeals rejected these arguments, finding no statutory or constitutional violation. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. AS A MATTER OF STATUTORY INTERPRETATION, THE DURATION OF THE POST-CONVICTION PROTECTION ORDER EXCEEDS THE MAXIMUM ALLOWED BY STATUTE.

This case raises a question of first impression. When a person is convicted, a no-contact order is

imposed as part of the sentence, the conviction is reversed on appeal, and then the person is convicted on retrial and resentenced, does the term of the no-contact order imposed upon resentencing start to run from the date of resentencing for purposes of computing its statutory maximum duration? The Court of Appeals held yes, it does. Slip op. at 3-4. That holding misconstrues legislative intent. Review is warranted because this issue is of substantial public interest under RAP 13.4(b)(4).

Under RCW 9.94A.505(9), the court has sentencing authority to order no contact with a person as a crime-related prohibition for the statutory maximum of the offense. State v. Armendariz, 160 Wn.2d 106, 108, 121, 156 P.3d 201 (2007). Felony violation of a no-contact order is a class C felony subject to the five-year statutory maximum. RCW 26.50.110(5); RCW 9A.20.021(1)(c). Briggs was sentenced to the five-year maximum. CP 41. As a condition of his felony sentence, he was ordered to

have no contact with Sullivan. CP 45

RCW 9.94A.505(9) must be read in conjunction with RCW 10.99.050(1), which pertains to domestic violence offenses: "When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." RCW 10.99.050(1).

A no-contact order issued under former RCW 10.99.050(1) cannot last longer than the sentence imposed by the court. State v. Granath, 190 Wn.2d 548, 554-55, 415 P.3d 1179 (2018). "The only no-contact order the statute authorizes is one that records a no-contact condition of the sentence. It follows that when the no-contact condition of sentence expires, there is no express legislative authority for the continued validity of the no-contact order." Id. at 554 (quoting State v.

Granath, 200 Wn. App. 26, 36, 401 P.3d 405, aff'd, 190 Wn.2d 548, 415 P.3d 1179 (2018)). [1]

The legislature intended for domestic violence victims to be protected from contact up to the statutory maximum term of the underlying conviction and sentence. An appeal that reverses a conviction does not permit a protection order to exceed the statutory maximum.

But as it stands now, Briggs is subject to a period of no contact that exceeds the five-year maximum duration because the second post-conviction protection order

---

[1] In response to Granath, the legislature amended the statute to expressly authorize courts to issue domestic violence no-contact orders that last up to the adult statutory maximum in felony cases established in RCW 9A.20.021 and up to five years for nonfelony cases. RCW 10.99.050(2)(c), (d) (Laws of 2019, ch. 263 § 303 (eff. July 28, 2019)); see also Laws of 2019, ch. 263 § 301 (statement of intent). The amendment took effect after the offense in Briggs's case. CP 36. Defendants must be sentenced in accordance with the law in effect at the time of offense. State v. Medina, 180 Wn.2d 282, 287, 324 P.3d 682 (2014); RCW 9.94A.345. Either version of the statute yields the same result in Briggs's case because Briggs was sentenced to the maximum term.

entered in the second sentencing erroneously begins to run from October 19, 2021, the day of the second sentencing. CP 173 ("Five years from today if no date is entered."). By the time Briggs was sentenced a second time, he had already started serving his sentence with its attendant post-conviction protection order on March 5, 2020, the date when the first sentence was entered. CP 247, 255, 263-65.

The Court of Appeals, though, claimed the first sentence and the second sentence following a successful appeal have no relationship with one another and therefore the clock on the no-contact order begins anew upon entry of the second sentence. The Court of Appeals dismissed the significance of Granath by observing the decision was "silent as to whether a court must give credit for any previous time served under an NCO." Slip op. at 4.

When the sentencing condition runs, the post-conviction no-contact order runs with it because it records a no-contact condition in the judgment and sentence. Granath, 190 Wn.2d at 556; RCW 10.99.050(1). The post-conviction no-contact order cannot exist without an underlying sentencing condition prohibiting contact. Because the post-conviction no-contact order merely records the sentencing condition, they must start and end at the same time. But under the Court of Appeals' holding, the post-conviction order lives on after the underlying sentencing condition expires.

The Court of Appeals made no attempt to grapple with legislative intent. "[O]verriding all technical rules of statutory construction must be the rule of reason upholding the obvious purpose that the legislature was attempting to achieve." Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 855, 774 P.2d 1199, 779 P.2d 697 (1989) (quoting State v. Coffey, 77 Wn.2d

630, 637, 465 P.2d 665 (1970)). To that end, "[i]t is a rule of such universal application as to need no citation of sustaining authority that no construction should be given to a statute which leads to gross injustice or absurdity." Coffey, 77 Wn.2d at 637 (quoting In re Horse Heaven Irrigation Dist., 11 Wn.2d 218, 226, 118 P.2d 972 (1941)).

The Court of Appeals' holding, laid bare, is that the legislature intended a defendant who has a conviction reversed on appeal and is then re-convicted must submit to a longer prohibition on contact than one who never appeals. That is the opposite of sensible. The rule of reason must prevail. Coffey, 77 Wn.2d at 637. Briggs cannot be singled out for a longer period of no contact simply because of the fortuity of a successful appeal. It is an unjust result that must be avoided.

To fully appreciate the absurd consequence of the Court of Appeals' interpretation of the statute, consider the following scenario. A person is convicted of a class C

felony and, after serving the entire five-year maximum sentence with attendant post-conviction no-contact order, has the conviction reversed on appeal. The defendant is retried and reconvicted and again sentenced to the five-year statutory maximum with attendant no-contact order. Despite having already served the entire statutory maximum sentence as part of the first sentence, the Court of Appeals' holding requires the no-contact order to remain in place for another five years. There would be no underlying sentence to be served anymore, the no-contact condition in the sentence would have necessarily expired, but the post-conviction order entered under RCW 10.99.050(1) would lurch on like a zombie.

Now take it a step further. Suppose the conviction is reversed on appeal a second time and, once again, the defendant is retried, reconvicted, and sentenced. Again, the Court of Appeals' holding requires the post-conviction no-contact order to persist for yet another five years,

despite the underlying sentence having been served and expired twice over. It is an affront to reason. "Statutes should receive a sensible construction which will effect the legislative intent and avoid unjust or absurd consequences." In re Welfare of Hoffer, 34 Wn. App. 82, 84, 659 P.2d 1124 (1983).

The time Briggs spent complying with the post-conviction no-contact order following entry of the first sentence cannot be ignored as if it never happened. The legislature did not intend a person to be subject to a longer duration of a post-conviction no-contact order simply because they were successful on appeal. It is an absurd consequence. The legislature intended a domestic violence victim to be protected from contact for a maximum period of time: five years, not over six years as in Briggs's case. The duration of the no-contact order cannot exceed five years total and the clock starts to run from the date of the first sentencing.

Even if this conclusion were not obvious, the rule of lenity operates in Briggs's favor. State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979) (the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant."); State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991) ("The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are."). The expiration date of the no-contact order must be corrected to ensure its total length does not exceed the five-year statutory maximum.

2. THE INCREASED DURATION OF THE NO-CONTACT ORDER VIOLATES DUE PROCESS AND THE RIGHT TO EQUAL PROTECTION.

This case also presents significant constitutional issues warranting review under RAP 13.4(b)(3).

a. The increased penalty following a successful appeal violates due process.

As a matter of due process, a defendant cannot be penalized for exercising the right to appeal. North Carolina v. Pearce, 395 U.S. 711, 723-24, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 104 L. Ed. 2d 865, 873, 109 S. Ct. 2201 (1989); U.S. Const. amend. XIV. Imposition of a more severe sentence following a successful appeal raises a rebuttable presumption of judicial vindictiveness. Pearce, 395 U.S. at 726; State v. Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990).

The Court of Appeals held "[t]here is no presumption of judicial vindictiveness in Briggs's sentencing after his second trial because the trial court

did not impose a 'more severe sentence'" but rather imposed "an identical five-year NCO sentencing condition upon Briggs's second conviction." Slip op. at 5.

By that logic, there would be no due process violation if a person served a five-year maximum term of confinement and then, following a successful appeal and reconviction and resentencing, was made to serve another five years in confinement. Reimposition of an identical sentence following a successful appeal does not avoid a due process problem when the first and second sentences, considered together, result in an overall increased penalty on the defendant.

Briggs's case illustrates how two sequentially imposed sentences can be "identical" but result in a different, increased penalty following an intervening appeal. Again, the post-conviction no-contact order records a no-contact condition in the judgment and sentence. Granath, 190 Wn.2d at 556; RCW

10.99.050(1). Instead of being subject to a no-contact prohibition of five years maximum length, Briggs cannot contact the protected party for over six years when the two sentences are considered together. The second post-conviction no contact order increased that portion of his sentence involving the no-contact order, subjecting him to an increased term of restriction and liability for its violation. Imposing the same five-year no contact period as part of the second sentence has the effect of actually imposing over a six-year period of no contact.

An increased penalty in the due process context is any "action detrimental to the defendant." United States v. Goodwin, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). In determining whether the sentence has become more severe, the relevant inquiry is "the actual effect of the new sentence as a whole on the total amount of punishment lawfully imposed by [the judge] on the defendant." State v. Carpenter, 220 Conn. 169, 174, 595

A.2d 881 (Conn. 1991) (quoting United States v. Markus, 603 F.2d 409, 413 (2d Cir. 1979)).

Briggs is subject to a longer total term of restriction and subject to being arrested, thrown in jail and ultimately convicted of a separate offense with its own term of confinement in the event he violates the no-contact order. RCW 10.99.050(2)(a). The actual effect — the detrimental impact — of the new sentence is to subject Briggs to a longer period of prohibition on contact than he would be subject to had he not appealed. Briggs is being penalized for appealing because he is exposed to criminal liability for a longer period of time. This is a due process violation because there are no new facts to justify the increased sentence. The only thing that changed between the first sentence and the second sentence was the appeal that resulted in retrial.

b. The right to equal protection does not abide a longer no-contact term for those who successfully appeal.

Subjecting Briggs to a longer no-contact order following his successful appeal also violates the constitutional right to equal protection. "Equal protection requires that similarly situated individuals receive similar treatment under the law." Harris v. Charles, 171 Wn.2d 455, 462, 256 P.3d 328 (2011) (citing U.S. Const. amend. XIV; Wash. Const. art. I, § 12). "A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." State v. Gaines, 121 Wn. App. 687, 705, 90 P.3d 1095 (2004).

Under rational basis review, the application of a law violates equal protection principles where "the law is irrelevant to maintaining a state objective" or "creates an arbitrary classification." Harris, 171 Wn.2d at 463 (quoting State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)).

Briggs is similarly situated to those who commit domestic violence crimes in all relevant respects. There cannot be one maximum expiration date for the no-contact order for those who do not appeal or who lose their appeal and another maximum expiration date for those who win their appeal and are ultimately resentenced following remand and reconviction. That disparity has no relation to any legitimate government objective and creates arbitrary classifications.

One indispensable part of the rational basis test is whether "there are reasonable grounds to distinguish between those within and those without the class." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (quoting Griffin v. Eller, 130 Wn.2d 58, 65, 922 P.2d 788 (1996)). "[T]he relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational." Id. at 149. While the legislature has "wide discretion in designating

classifications," these classifications may not be "'manifestly arbitrary, unreasonable, inequitable, and unjust.'" Johnson v. Tradewell Stores, Inc., 95 Wn.2d 739, 744, 630 P.2d 441 (1981) (quoting State ex rel. O'Brien v. Towne, 64 Wn.2d 581, 583, 392 P.2d 818 (1964)).

One class of individuals — those who do not appeal — are subject to a maximum of five years of no contact. The other class — those who successfully appeal — are subject to over five years of no contact simply because they successfully appealed and then received another sentence following re-conviction. There is no non-arbitrary basis for treating one class of individuals different from another. This is not an equal application of the law.

Briggs notes Pearce rejected an equal protection challenge in that case, but that was because "the result may depend upon a particular combination of infinite variables peculiar to each individual trial," and so determining an equal protection violation was "a task too

Procrustean to be rationally accomplished." Pearce, 395 U.S. at 722-23.

Briggs's case stands on a different footing. The start date and expiration date of a no-contact order is a purely mechanical calculation that is not dependent on infinite variables. Briggs's problem fits within the equal protection framework.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE EXPIRATION DATE IN THE NO-CONTACT ORDER.

At the second sentencing hearing, the prosecutor asked the court to "to issue a domestic violence no-contact order prohibiting Mr. Briggs from having contact with Ms. Sullivan for a period of five years." RP 389. Defense counsel stated: "we largely agree with the State in many aspects of their recommendation, Your Honor. Specifically in regards to a continuation or a reimposition of a five-year no-contact order between Mr. Briggs and

Ms. Sullivan adding that certainly would be appropriate and no objection there." RP 392.

Defense counsel did not object to the expiration date in the no contact order. The failure to object does not bar review of Briggs's statutory or constitutional claims on appeal. See State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) ("A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.").

Briggs's constitutional claims may also be raised for the first time on appeal under RAP 2.5(a)(3) as a manifest error affecting a constitutional right. To determine whether a constitutional error is manifest, there must be a "a plausible showing that the error resulted in actual prejudice, which means that the claimed error had

practical and identifiable consequences[.]" State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The actual prejudice to Briggs is that he is subject to a period of no-contact that exceeds the duration allowed by law.

The error can be raised for the first time on appeal. But in an abundance of caution, Briggs raises an alternative claim of ineffective assistance of counsel.

Every person accused of a crime is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. That right is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687. An ineffective assistance claim can be raised for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Deficient performance is that which falls below "an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Of importance in assessing deficiency, counsel has a duty to know the relevant law. Kyllo, 166 Wn.2d at 862; In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015). The relevant law, both as a statutory and constitutional matter, is that the length of the no-contact order cannot exceed the statutory maximum of the felony sentence imposed.

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Id. at 695. Had defense

counsel objected to the expiration date in the no-contact order, there is a reasonable probability that the expiration date would have been corrected by a trial court that reasonably applied the relevant law. Review of this ineffective assistance claim is warranted under RAP 13.4(b)(3).

F. CONCLUSION

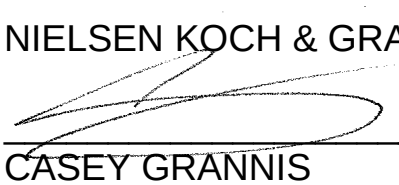
For the reasons stated, Briggs respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 3,666 words excluding those portions exempt under RAP 18.17.

DATED this 14th day of December 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

FILED
11/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN MARSHALL BRIGGS, Appellant.	No. 83278-6-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — Briggs argues that the trial court exceeded its statutory authority at his resentencing when it imposed a new, full five-year no-contact order (NCO), without giving him "credit" for the time that had elapsed under the NCO entered with the original sentence. Briggs additionally argues that this failure violated his due process, double jeopardy, and equal protection rights, and arose because of the ineffective assistance of his counsel. Briggs finally claims that his two judgments and sentences were ambiguous. We affirm Briggs's convictions and remand only for the trial court to clarify that all three of his convictions run concurrently.

I. FACTS

Briggs was found guilty of a felony violation of a court order (count I) and two attempted gross misdemeanor violations of a court order (counts II and III). In

March 2020, the trial court sentenced Briggs under a drug offender sentencing alternative (DOSA) and imposed 30 months of confinement and 30 months of community custody for the felony conviction. For each of the gross misdemeanor convictions, the trial court sentenced Briggs to 364 days, set to run concurrently with count I. As a condition of his conviction, the trial court also imposed a five-year post-conviction domestic violence NCO, which would expire in March 2025.

Briggs successfully appealed his convictions due to a defective charging document and we reversed. State v. Briggs, 18 Wn. App. 2d 544, 492 P.3d 218 (2021).

After his second trial, Briggs was convicted of the same charges. In October 2021, the trial court sentenced Briggs to 60 months confinement on count I and 364 days on count II and III, with credit for confinement time served. The trial court issued two judgment and sentence documents: one for count I and another for counts II and III, both under the same cause number. On the judgment and sentence for counts II and III, the court checked the box noting that "[t]erms on each count to run concurrently[.]"[1] The court again imposed a five-year post-conviction NCO, which would expire in October 2026.

Briggs appeals.

[1] The felony judgment and sentence was referenced only in a handwritten note alongside Section 4.3 "Legal Financial Obligations" where the court noted, "see felony J+S[.]"

II. ANALYSIS

A. Post-Conviction No-Contact Order

i. Exceeds Maximum Sentence Allowed by Statute

Briggs argues that the trial court erred in imposing the second post-conviction NCO in October 2021. We disagree.

The Sentencing Reform Act permits trial courts to impose "crime-related prohibitions" such as no-contact orders when sentencing defendants. State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). RCW 10.99.050 sets limitations on that authority, providing that where a court, as a "condition" of a felony sentence, restricts a defendant's contact with a victim, the resulting order may not exceed the defendant's maximum sentence. RCW 10.99.050(1), .050(2)(d). We review sentencing conditions for an abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Briggs does not dispute that the trial court had the authority to impose a five-year NCO where he was sentenced the statutory maximum sentence. But he claims that the October 2021 NCO was in excess of the statutory maximum because "[t]he duration of a post-conviction no-contact order starts to run from the date of the original sentencing, not the date of the second sentencing." According to Briggs, the October 2021 "resetting" of the NCO's start date, without providing

credit for the time that the original NCO was in effect, extended the NCO beyond five years.

Briggs, however, does not provide any legal authority for his claim that the duration of the NCO in 2021 was limited to five years from the previously issued NCO in 2020. 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)).

Briggs cites only to State v. Granath, 190 Wn.2d 548, 554-55, 415 P.3d 1179 (2018) for the general position that an NCO cannot last longer than the sentence imposed by the court. However, Granath is silent as to whether a court must give credit for any previous time served under an NCO.

Moreover, unlike RCW 9.94A.505(6), which provides a statutory basis for providing a defendant with credit for time served in confinement prior to sentencing, there is no comparable provision in the no-contact order statute RCW 10.99.050.

As the trial court did not impose an NCO longer than five years from the date of the effective[2] sentencing, and otherwise did not abuse its discretion, the

[2] As a result of Briggs's successful appeal his prior sentence was vacated and his convictions "dissolv[ed]." State v. Haggard, 195 Wn.2d 544, 560, 461 P.3d 1159 (2020) (citing In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 954,

court did not exceed its statutory authority by starting the NCO on the date of resentencing.

ii. Due Process Violation

Briggs next contends that the expiration date of his October 2021 NCO violates his due process rights because he was penalized with a more severe sentence after a successful appeal.

A trial court violates a defendant's due process rights when it penalizes the defendant for successfully pursuing an appeal or collateral remedy. State v. Brown, 193 Wn.2d 280, 288, 440 P.3d 962 (2019) (quoting North Carolina v. Pearce, 395 U.S. 711, 724, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). A defendant is entitled to a rebuttable presumption of judicial vindictiveness when, after a successful appeal, a trial court imposes a more severe sentence without explanation. State v. Parmelee, 121 Wn. App. 707, 708-709, 90 P.3d 1092 (2004).

There is no presumption of judicial vindictiveness in Briggs's sentencing after his second trial because the trial court did not impose a "more severe sentence." The court imposed an identical five-year NCO sentencing condition upon Briggs's second conviction. There was no due process violation.

---

162 P.3d 413 (2007)).

iii. Double Jeopardy Violation

Briggs suggests that his second NCO was a violation of double jeopardy because the duration of the NCO did not "account [for] the sentence that [he] served prior to the second sentencing."

Both the federal and state constitutions protect defendants from being punished multiple times for the same offense. U.S. CONST. amend. V; WASH. CONST. art. 1, § 9. Double jeopardy protections ensure that those convicted of crimes must be credited for time served in confinement prior to sentencing. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949 (1974). The legislature created a statutory basis for this constitutional protection in RCW 9.94A.505(6) which requires a sentencing court to "give [an] offender credit for all confinement time served before the sentencing[.]"[3]

While these constitutional and statutory bases for credit for time served apply to "confinement," they do not necessarily extend to a defendant's sentencing conditions. Instead, we apply a two-part test to determine whether government action is "sufficiently punitive" to trigger double jeopardy protections. State v. Medina, 180 Wn.2d 282, 293, 324 P.3d 682 (2014). We first ask whether the government intends the action to be punitive, and if not, where the effect is so

[3] The full statute reads: "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced."

punitive as to override the nonpunitive intent. Id. (citing Harris v. Charles, 171 Wn.2d 455, 467, 256 P.3d 328 (2011)). A petitioner bears the burden to prove the action is punitive. Id. at 294. "An action is not punitive simply because the defendant sees it as so; rather, a defendant must present clear proof that a sanction not labeled as punitive is nonetheless so punitive as to violate the prohibition against multiple penalties and therefore subject the defendant to double jeopardy." State v. McCarter, 173 Wn. App. 912, 918, 295 P.3d 1210 (2013).

Washington courts have previously held that many sentencing conditions are not punitive and do not violate double jeopardy. For example, in Medina, we concluded that a petitioner was not entitled to credit for time served in a supervised alternative community program. 180 Wn.2d at 293-94. In Harris, the petitioner was not entitled to credit for time spent on electronic home monitoring. 171 Wn.2d at 469-73. We have also concluded that other sentencing conditions are simply not punitive in nature. State v. Boyd, 1 Wn. App. 2d 501, 513, 408 P.3d 362 (2017) (weekly, in person check-in requirements); McCarter, 173 Wn. App. at 924 (warrant fees).

In a similar case, In re Arseneau, 98 Wn. App. 368, 989 P.2d 1197 (1999), the trial court prohibited the petitioner from having any contact with his step-daughter for a period of 10 years. Id. at 370. Later, the Department of Corrections (DOC) imposed a prohibition preventing Arsenau from corresponding with his

niece. Id. Arseneau challenged the DOC no-contact prohibition, arguing that it presented a double jeopardy issue by "enhanc[ing] the punishment for his original crime." Id. at 379. We concluded that the no-contact prohibition was not punitive: "[N]o-contact provisions have not traditionally been considered punishment. They are civil in nature and designed to protect third parties." Id. at 379-80.

Briggs fails to meet his burden to show with "clear proof" that the NCO, unlike his confinement, was punitive and thus triggered his constitutional double jeopardy protections. His NCO is similar to the DOC no-contact prohibition in Arseneau, which we concluded was not intended to be punitive for the offender, but designed to protect victims.

Finally, again Briggs provides no statutory authority, unlike RCW 9.94A.505(6), that he is entitled to credit for the duration of time he was under the 2020 NCO. That Briggs may be prohibited, as a result of two separate NCOs, for some period over five years from contacting his victim does not subject him to double jeopardy.

iv. Equal Protection Violation

Briggs asserts that the second NCO also violated his equal protection rights because he will be subjected to a longer duration under an NCO than another offender who does not appeal or loses their appeal.

The equal protection clause requires similarly situated individuals to receive similar treatment under the law. U.S. CONST. amend. XIV § 1; WASH. CONST. art. 1, § 12. Equal protection prohibits governmental classifications that discriminate between groups of similarly situated individuals. In re Pers. Restraint Petition of Silas, 135 Wn. App. 564, 570, 145 P.3d 1219 (2006). But while equal protection "provides equal application of the law" it does not ensure "complete equality among individuals or classes of individuals." Harris, 171 Wn.2d at 462 (citing State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)).

Briggs cannot show that there is any discriminatory government classification here, or that government applied RCW 10.99.050 differently to his case than any other defendant, whether they are subjected to one NCO or multiple NCOs as a result of a successful appeal and subsequent resentencing. Equal protection does not entitle Briggs to "complete equity" with those who were not resentenced or lost an appeal and were not subjected to multiple NCOs.

v. Ineffective Assistance of Counsel

Briggs next claims that he received ineffective assistance of counsel because his defense counsel did not object to the expiration date in the NCO.

To succeed on an effective assistance of counsel claim, an appellant must prove that his counsel's performance was both deficient and prejudicial. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (applying Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The failure to prove either prong ends our review. State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776 (2011).

As Briggs has failed to show that there was any error in the trial court imposing the 2021 NCO, he cannot show that his counsel was deficient or rendered him ineffective assistance during his sentencing hearing.

B. Ambiguity in Judgment and Sentence

i. Ambiguity as To Expiration Date of The Post-Conviction No-Contact Order

Briggs asks us to remand his judgments and sentences because the felony or gross misdemeanor documents do not specify the length of the NCO or when it expires and he is "left to guess" about the expiration date.

A defendant's judgment and sentence must be "definite and certain." State v. Mitchell, 114 Wn. App. 713, 716, 59 P.3d 717 (2002) (citing State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998)). Where a sentence is "insufficiently specific" about a sentencing condition, remand is proper to ensure the judgment and sentence states the correct period of time. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (referring to a community custody placement provision). We review de novo the sufficiency of sentencing conditions. Jones, 93 Wn. App. at 18.

In both of Briggs's 2021 judgments and sentences, the trial court noted that Briggs was ordered not to contact his victim, but did not write in a date of expiration. But in both documents the trial court noted right below the no contact provision that "[a] separate post-conviction Domestic Violence No Contact Order . . . was filed at the time of entry of the [verdict] [and] is filed contemporaneously with this Judgment and Sentence." As a result of this no contact condition in the judgment and sentence, the court was required to record the condition and provide a written certified copy of the order to the victim. RCW 10.99.050(1). The trial court issued the NCO, which stated that it expired in "[f]ive years from today if no date is entered." No date was entered by the trial court.

In the two main cases Briggs cites, Broadaway and Jones, the defendants' sentencing documents noted that they were ordered for community placement for "the period of time provided by law" and the "maximum period of time authorized by law." Broadaway, 133 Wn.2d at 135; Jones, 93 Wn. App. at 18. In Broadaway, the state Supreme Court concluded that the sentence was insufficient because the trial court was required by statute to impose a one-year term of community placement.[4] Broadaway, 133 Wn.2d at 135. In Jones, we concluded this sentence

[4] In that case the trial court also incorrectly stated that two years of community placement was required by law. Broadaway, 133 Wn.2d at 135.

was insufficient because the trial court was not limited to the two-year statutory terms of community placement. Jones, 93 Wn. App. at 19.

Briggs's case is distinct from Broadaway and Jones because the trial court left no ambiguity as to when Briggs's NCO ended. The judgment and sentencing documents referred to the contemporaneously filed NCO and the NCO plainly indicated that it expired in five years from the date of entry since no alternative date was entered. Briggs was not "left to guess" the expiration date of the NCO.

ii. Ambiguity as To Whether the Felony Runs Concurrently with Two Gross Misdemeanor Convictions

Briggs last claims that his judgments and sentences were unclear as to whether his felony convictions run concurrently with the two gross misdemeanor convictions. We agree with Briggs.

On the judgment and sentence for count I, the trial court did not indicate whether sentence ran concurrently with Briggs's other convictions. On the judgment and sentence for counts II and III, the court checked the box noting that "[t]erms on each count run concurrently[.]" Count I was not mentioned in this judgment and sentence, and in the section asking for the "[a]ctual term of total confinement ordered" was filled in as "364 days," the length of confinement ordered

for both counts II and III.[5] At Briggs's sentencing hearing, the court explained that "[a]ll counts [are] to run concurrent to each other."

Briggs's judgments and sentences could reasonably be interpreted to mean that only the two gross misdemeanor convictions run concurrently with each other for a term of 364 days, and consecutively with, the 60-month term of the felony conviction. However, it is clear from the record that the trial court ordered that all three counts to run concurrently with each other. Remand is appropriate simply to correct Briggs's sentence to reflect the court's oral ruling that all three terms run concurrently. See State v. Iniguez, 143 Wn. App. 845, 860, 180 P.3d 855 (2008), rev'd on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009).

III. CONCLUSION

We affirm Briggs's convictions and remand to the trial court to correct the aforementioned ambiguity in his judgments and sentences.

Díaz, J.

WE CONCUR:

Coburn, J.

Smith, A.C.J.

[5] The felony judgment and sentence was referenced only in a handwritten note alongside Section 4.3 "Legal Financial Obligations" where the court wrote "see felony J+S[.]"

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

December 14, 2022 - 1:13 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83278-6
Appellate Court Case Title:	State of Washington, Respondent v. John Marshall Briggs, Appellant
Superior Court Case Number:	19-1-01229-8

The following documents have been uploaded:

- 832786_Petition_for_Review_20221214131332D1540556_4154.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 83278-6-I.pdf

A copy of the uploaded files will be sent to:

- Amanda.campbell@co.snohomish.wa.us
- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org

Comments:

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Casey Grannis - Email: grannisc@nwattorney.net (Alternate Email:)

Address:
2200 Sixth Ave. STE 1250
Seattle, WA, 98121
Phone: (206) 623-2373

Note: The Filing Id is 20221214131332D1540556