NO. 44026-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant/Cross Respondent,

Vs.

TERESA LYNN CLINE,

Respondent/Cross Appellant

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. CROSS APPELLANT'S ASSIGNMENT OF ERROR

Cross Appellant Teresa Cline assigns as error that portion of the trial court's written opinion wherein the court indicated that it appeared that the State may have sufficient evidence to show that she had the intent to deprive the father of the child of contact with the child for some period of time.

II. ISSUES PERTAINING TO CROSS APPELLANT'S ASSIGNMENT OF ERROR.

On August 16, 2012, the Cowlitz County Prosecutor's Office filed a motion to amend their initial information, charging the Respondent/Cross Appellant, Teresa Lynn Cline, who will hereafter be referred to as Teresa, with having committed the crime of Custodial Interference in the First Degree in violation of RCW 9A.40.060(3). The trial court granted the motion, and then proceeded to hear Teresa's Knapstad motion, which contended that there was no evidence that Teresa either intended to deny access to the child by a parent of the child, or that she intended to do so permanently or for a protracted period. The trial court ruled that while there was some evidence that there was an intent to deprive the father of access to the child for a weekend, there was

no evidence of any intent to deprive the father of access to the child permanently or for a protracted period of time. The issue pertaining to the cross appellant's assignment of error is whether or not there is any evidence, even when such evidence is construed in the light most favorable to the State, that Teresa had any intent to deprive the father of access to the child for any period of time whatsoever?

III. STATEMENT OF THE CASE

Respondent would agree that the State's statement of facts in its opening brief, is accurately derived from CP 13, "affidavit of State's attorney re: material facts". In addition, the affidavit of Ranee Cline, CP 12, contains background information about the relationship of the parties, including the fact when the child was born, there was a safety plan put into effect by CPS due to the child's condition, and that the safety plan provided for supervisors which included her mother, Teresa Cline, the Respondent/Cross Appellant herein. The affidavit describes how both Ranee and the boy's father resided with Teresa during the sixteen days before the boy was released from the hospital, and that afterwards, Ranee, the boy, and the boy's father continued to live with Teresa for about six months. Her affidavit reflects that on June 6, 2012, there was a meeting about another safety plan, because Teresa had called

CPS due to her concern about Bentley; at that time due to a conflict between Rene and the boy's father, Rene had moved back in with her mother. At that meeting, Teresa was again included as a supervisor in that safety plan. Her affidavit describes how when she went to the home of the boy's father, Joel Galvino, on June 15, 2012, she made observations of the interior of the residence that caused her some concern for the boy's safety, which prompted her to contact her mother who was waiting outside, and instructed her mother to take the boy home; she indicates in her affidavit that she was living with her mother at the time, and she knew that as long as her mother was there to supervise her while she was with Bentley, that was approved by the plan. She also indicates that Jamie Nance, a Washington State employee, was also outside the Galvino residence when Ranee made this statement to Teresa. In her affidavit, which is designated CP 11, Jamie Nance confirmed that she worked for Parent Child Assistance Program, a Washington State agency, and was indeed present outside the Galvino residence at that time. In her affidavit, she indicated that while she was outside with Ranee, Teresa Wiper, who is described in CP 16 as a CPS worker, informed Ranee that it was okay for her to have contact with the child as long as that contact was

supervised. Ms. Nance indicates that at the time she, Teresa and Ranee were outside the residence and she heard Ranee tell Teresa to take Bentley and leave.

According to CP 12, the affidavit of Rosemary Cline, who will hereafter be referred to as Rosemary, she indicated that she is the mother of Teresa, the grandmother of Ranee Cline, and the great grandmother of Rene's son. She indicated that the family had been very active in taking care of the boy and taking him on trips to the beach and also to places such as Silver Cove Resort at Silver Lake, Washington. She also indicated that Teresa often had the role of primary caretaker with regard to the boy when he and Ranee were residing with Teresa. She confirmed that on June 15, 2012, it was her understanding that Ranee could have contact with the boy as long as the contact was being supervised by family members. She describes how when she got off work at 4:00, she called Teresa to see if she wanted to go up to the Resort for dinner, which was a usual activity for family members, and Teresa indicated that she would like to go, that she had the boy at her house, and she was waiting for Ranee. Her affidavit describes how she picked up Teresa, the boy and Ranee and drove up to the Silver Cove Resort. She indicated that at that time, the plan was to have a BBQ dinner

and picnic up at the lake for a few hours, and then everyone was going to be going home. She describes this as a very common activity. All of this evidence is uncontroverted, except that at argument, and in his appellate brief, the prosecutor has contended that whether Rosemary intended to have the child at the lake for a few hours, or the weekend, was an issue of material fact which deprived the court of the ability to grant the Knapstad motion. The trial court posed the question to the prosecutor as to why the court should care what Rosemary Cline wanted to do (RP 14, lines 15-24), but also accepted defense counsel's assumption for the sake of argument that the time period in question was the weekend. (RP 13, lines 5-25, RP 14, lines 1-14)

IV. ARGUMENT OF RESPONDENT

THE TRIAL COURT WAS CORRECT IN HOLDING AS A MATTER OF LAW THAT EVEN WHEN THE EVIDENCE WAS CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS NO EVIDENCE THAT THE RESPONDENT INTENDED TO DEPRICE THE FATHER OF ACCESS TO THE CHILD FOR A PROTRACTED PERIOD OF TIME.

In State v.Bauer 295 P 3rd 1227 Division II (2013), the court held that in order to prevail on a Knapstad motion, the defendant must show that there are no material facts in dispute and that the undisputed facts do not establish a prima facie case of guilt, citing

State v. Knapstad 107 WA 2nd 346, 356, 729 P 2nd 48 (1986). A trial court may dismiss a criminal charge under Knapstad if the State's pleadings in evidence fail to establish prima facie proof of all elements of the charged crime, citing State v. Sullivan 143 WA 2nd 162, 171, 19 P 3rd 1012 (2001). The court indicated that the trial court shall view all evidence and make all reasonable inferences in the light most favorable to the State, and the court may not weigh conflicting statements or base its decision on the statement it finds most creditable. The court indicated that it would uphold a trial courts dismissal of a charge on a Knapstad motion if no rational fact finder could have found the elements of the charged crime beyond a reasonable doubt, citing State v. O'Meara, 143 WA APP 638, 641, 180 P 3rd 196 (2008).

The evidence presented by the State at the trial court level, was to the effect that Rosemary intended to have her great grandchild over Father's Day weekend, and the State argued that somehow the defendant was complicit with that intent. The issue raised by the State on appeal is whether the trial court was correct in holding as a matter of law that the period of time in this case, a weekend, in view of the facts and the applicable law, could not be considered to be a protracted period. Consequently, it appears that

the propriety of that portion of the court's decision depends largely on the meaning of the word "protracted".

In the case of State v. Veliz 2013WL 865413(Wash), March 7, 2013, the Supreme Court addressed a case involving a charge of first degree custodial interference under RCW 9A.40.060(2)(a). In that case, the court was focused on determining the meaning of the term "court-ordered parenting plan" as it is stated in RCW 9A.40.060(2). The court indicated that it reviewed questions of statutory interpretation de novo, and cited the case of State v. Morales 173 WA 2nd 560, 269 P 3rd 263 (2012) to the effect that the court's fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature. The court stated that "we construe the meaning of the statute by reading it in its entirety and consider the entire sequence of all statutes relating to the same subject matter", citing State v. Morales 173 WA 2nd at 567. The court noted that the first degree custodial interference statute did not define "court-ordered parenting plan", and noted that neither was the term defined in RCW 9A.40.010, which defines kidnapping, unlawful imprisonment, and custodial interference terms. The court stated that when a statutory term is undefined, "we typically apply the terms plain and ordinary meaning unless a contrary legislative

intent is indicated", citing State v. Jones 172 WA 2nd 236, 242, 257 P 3rd 616 (2011). The court also noted that there is an exception to this general rule that when a technical term or term of art is used, the court turns to the technical definition of a term of art even where a common definition is available, citing City of Spoke v. Department of Revenue 145 WA 2nd 445, 452, 38 P 3rd 1010 (2002).

Applying those standards to the present case, it can safely be concluded that the term "protracted period" is not a term of art. Also, this term is not defined in either RCW 9A.40.060, nor is it defined in RCW 9A.40.010. Consequently, according to the court in State v. Veliz, supra, when this statutory term is undefined, the courts typically apply the terms "plain and ordinary meaning unless a contrary legislative intent is indicated". This fairly general guidance is suggestive of an approach where we simply use common sense to arrive at a meaning of the term. We can also look at dictionary definitions of the term, as well as how the term is used in statutes and in case law.

The prosecutor's reference to the Merriam Webster dictionary definition of the term "protracted" on page 8 of his brief, wherein the term protracted is defined as "prolonged in time or space", and "to extend forward or outward", is accurate. The

Merriam Webster definition of the word "protract" is "to make longer". Listed synonyms are draw out, elongate, lengthen, outstretch, prolong, protract, stretch. In RCW 26.09.410, the term has been used in defining the term "relocate" as meaning "a change in principal residence either permanently or for a protracted period of time". In RCW 26.09.191(3), the legislature allowed a court to limit any provision of a parenting plan if the court found a parent's involvement or conduct may have an adverse effect on the child's best interests based on a number of factors, including "(f) a parent has withheld from the other parent access to the child for a protracted period without good cause".

The term has also been used in some cases that involved other types of criminal offenses. In State v. Rotko, 116 WA AP 230, 67 P 3rd 1098 (2003), the records show that the defendant and a co-defendant had withheld food from an eleven month old infant for most of his short life. The trial court had found that the defendants had withheld adequate food, nutrition, and necessary medical care over a lengthy or "protracted" period of time; the trial court's finding that this behavior occurred over a lengthy or protracted period of time was not contested and was accepted at the appellate level. In State v. Vaughn 83 WA AP 669 924 P 2nd

27 (1996), the term was utilized by the court in addressing the issue as to whether the evidence justified the imposition of an exceptional sentence in that case. The court indicated that Vaughn's activity prior to the crime clearly involved more than simple fantasy about sexual contact with children; he admittedly spent a protracted period of time in the child's neighborhood watching children, learning her mother's and sibling's names, told numerous lies to facilitate the crime, identify the place where the rape took place as a potential site if he acted out his fantasy, had outfitted his car in a manner that facilitated the commission of the crime, and took numerous steps to hide what was in the car, his pornography and his whereabouts during the crime, something that clearly would have required an extended or protracted period of time, in terms of weeks or months.

All of the above resources, whether they be dictionary references, statutory terms, or references in case law, all point to only one rational and reasonable conclusion, which is that a protracted period of time must exceed forty-eight hours, as the term is used in the statute. In the statutes referenced above, it is clearly used to describe extended periods of time, such as in defining the term "relocate" as meaning a change in residence either

permanently or for a protracted period. The above cases also use the term to describe what is obviously an extended period of time, contemplating at a minimum weeks or months. However, perhaps the most compelling consideration is the context in which the term "protracted period" is utilized in RCW 9A.40.060, "...with intent to deprive the other parent from access to the child permanently or for a protracted period". It is clear that the legislative intent was to criminalize criminal behavior under that statute which either was permanent in nature, meaning forever, or that lasted for a lengthy period of time. The term short-time, or weekend, is conspicuously absent from the statute. The State's argument would have this court accept that the way this term is utilized in the statute would allow us to conclude that the period of time sufficient to support such a change could be forever, or forty-eight hours, whichever comes first. That would be patently unreasonable, since it would render the inclusion of the term "permanently" to be entirely surplusage and meaningless on its face.

Consequently, when we follow the admonition of the court in State v. Veliz, to apply common sense to understanding the meaning of this term in the context of the statute in which it is used, it is clear that no reasonable, rational tryer of fact could possibly

find that a period of forty-eight hours as argued by the State, could possibly support this charge against the respondent. Therefore, the trial court's ruling to that effect was correct, and should be upheld by this court.

V. ARGUMENT OF CROSS APPELLANT

The following argument pertains to the trial court's reference in its written opinion that it appeared that the State may have sufficient evidence to show that the defendant had the intent to deprive the father of the child of contact with the child for some period of time. Teresa cross appeals with regard to that portion of the ruling, since the record appears to be completely devoid of any evidence that would support that conclusion.

The above authorities cited by the State and Teresa all stand for the proposition that a Knapstad motion on an issue should be granted when there are no substantial issues of material fact, and that as a matter of law, the motion should be granted; this is widely recognized as the criminal law counterpart of a Cr56 motion for summary judgment.

There is no evidence in this case that Teresa was acting with the criminal intent necessary to constitute a violation of RCW 9A.40.060. We start with consideration of whether Ranee, who

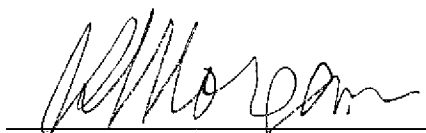
clearly was the parent of the child who gave the child to Teresa, had the legal right to do so. There was discussion of an "action plan" or a "safety plan" that was enacted by DSHS, but nowhere is it indicated that such a plan had the force or effect of law, such as court ordered parenting plan, but even if it did, it is also clear that at the time Ranee provided the child to her mother, it was clearly understood by everyone that she had the power to do so. The evidence is uncontroverted that when this occurred, Ms. Nance, a social worker, was present and heard Teresa Wiper, one of the CPS formulators of the action plan or safety plan, inform Ranee that she could have the child as long as she was with an approved supervisor, and Teresa was one of the approved supervisors in this plan. Ms. Nance and Teresa were standing there listening to Ms. Wiper when this statement was made, and it was thereafter that Ranee provided the child to Teresa, requesting her to take him home, where Ranee was residing with Teresa at the time. Even assuming this action plan had the force of law, which is not supported by any evdience, Ranee had an equal right to have time with the child under the plan since she was with an authorized supervisor, and this clearly was Teresa's perception at the time as well, after hearing Wiper's statement. The only evidence available

on the record as to what Teresa did afterwards was that she was at her home, waiting for Ranee to arrive when she received a phone call from her mother Rosemary inviting her for dinner up at the resort, and that thereafter Rosemary picked up Teresa, the child, and Ranee and took them up to the picnic at the lake.

With regard to the period of time in question in this case, there was some evidence that Rosemary may have wanted to have the child for the weekend, based on a request which she had made two days prior to June 13. However, when this point was argued by the prosecutor, the trial court quite appropriately asked the relevant question, which was why should the court care about what Rosemary may have intended. This was an appropriate question, since whether or not Rosemary intended to have the child for the weekend, there is no evidence whatsoever in this record that Teresa had any knowledge of anything that was going on except that she was accompanying her mother and daughter and grandson to the lake for a picnic. The record reflects that the problems all started when after Ranee asked Teresa to bring the child home, the father became angry at Ranee and since Ranee was fearful of being assaulted, she lied and pretended that Teresa had made off with the child without permission. However, very

soon thereafter and certainly it is undisputed at this time, that it became clear that Ranee was lying when she indicated that her mother had absconded with the boy; certainly the State's own representation of the facts of the case concedes that this is true. Consequently, the record in this case reflects that Teresa never acted with any criminal intent as the term is understood in the context of RCW 9A.40.060, and the trial court should also have held as a matter of law that there was no evidence of any intent on the part of Teresa to deprive the father of the child of contact with the child for any period of time.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Karen Legette, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER THE PENALTY OF PERJURY UNDER THE LAWS OFO THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Longview, Washington, this 3RD day of April, 2013.

Karen Legette

MORGAN LAW FIRM

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CERTIFICATE OF SERVICE

Karen Legette, certifies that a copy of the Brief of Respondent/Cross Appeallant was mailed to the Respondent, Teresa Cline, at the below address:

Teresa Cline
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Kelso, WA 98626

I CERTIFY UNDER THE PENALTY OF PERJURY UNDER THE LAWS OFO THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Longview, Washington, this 4 day of April, 2013.

Karen Legette