

No. 44264-7-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

KRIS A. SAEGER, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni A. Sheldon, Judge

No. 12-1-00360-2

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**BRIEF OF RESPONDENT (Second Appeal)**

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A. INTRODUCTION

This brief is in response to Saeger's second appeal in this case. The State previously filed a brief in response to Saeger's first appeal. After the State filed its first brief, this Court consolidated this appeal with Saeger's prior appeal. Therefore, this brief is in response to Saeger's second appeal but has the same case number as the first appeal.

Because there are two appeals pending in the same case, there are two transcripts. For clarity, the State cites to the original transcript as "RP" and cites to the supplemental transcript as "SRP."

B. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

Saeger's residence at the time of sentencing was within 500 feet of the residence of the victims of the crimes for which Saeger was being sentenced. The State has a compelling interest in protecting the victims of Saeger's crimes from further crimes perpetrated by Saeger. Because Saeger has repeatedly harassed the victims in this case, the court did not abuse its discretion or otherwise err when it ordered as a part of the judgment and sentence that Saeger not go within 500 feet of the victims. The order was reasonably necessary to achieve the State's compelling interest in protecting the victims from further crimes perpetrated against them by Saeger, and there is no lesser restriction available

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with which to achieve the same purpose.

B. FACTS AND STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), with the addition of the following fact and the facts provided in the argument section of the State's brief, the State accepts Saeger's recitation of the facts for the purpose of reviewing the issue under review in the current appeal.

After the court erroneously said that the no contact order in the judgment and sentence expired on November 26, 2013, the court then corrected the record and said: "Well, there isn't actually -- yeah, but there isn't actually a no contact order. It's within the J and S, and it's November 26, 2017." SRP 3.

On appeal, Saeger contends that his right to choose his residence is a fundamental right and that the court's order, in effect, wrongfully infringes upon this right. Brief of Appellant at 3.

C. ARGUMENT

Saeger's residence at the time of sentencing was within 500 feet of the residence of the victims of the crimes for which Saeger was being sentenced. The State has a compelling interest in protecting the victims of Saeger's crimes from

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further crimes perpetrated by Saeger. Because Saeger has repeatedly harassed the victims in this case, the court did not abuse its discretion or otherwise err when it ordered as a part of the judgment and sentence that Saeger not go within 500 feet of the victims. The order was reasonably necessary to achieve the State's compelling interest in protecting the victims from further crimes perpetrated against them by Saeger, and there is no lesser restriction available with which to achieve the same purpose.

Sentencing conditions are reviewed for an abuse of discretion.

*State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or its decision is exercised on untenable grounds or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981). The facts of the instant case show that the trial court did not abuse its discretion.

After Saeger waived a jury trial, a bench trial was held and a Mason County judge convicted Saeger of three counts of felony harassment, as charged by the State. CP 16-17, RP 88-89. When Saeger was sentenced, the trial court included in the judgment and sentence an order that Saeger not go within 500 feet of the three victims' home, workplace, or school. CP 11 (page 7, para. 4.5 of Judgment and Sentence).

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Because he was living next door to the victims, the restriction that he not go within 500 feet of them prevented Saeger from continuing to reside at his residence. SRP 1-3. Saeger motioned the court to amend the order to reduce the restricted distance to 100 feet, but the court denied his motion. *Id.*

Saeger contends that because the right to travel is a fundamental right, the court may not impose a sentencing condition that impinges upon this right unless it is “reasonably necessary to accomplish the essential needs of the State and public order.” Brief of Appellant at 4, quoting *In re Rainey*, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). Saeger cites *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), to support his assertion that “[w]here sentencing conditions interfere with a fundamental constitutional right it is subject to strict scrutiny.” Brief of Appellant at 4.

The *Warren* Court’s only mention of strict scrutiny appears at page 34, where it wrote that: “The rights to marriage and to the care, custody, and companionship of one’s children are fundamental constitutional rights, and state interference with those rights is subject to strict scrutiny.” *State v. Warren*, 165 Wn.2d at 34.

The *Warren* Court also affirmed that, independent of conditions of community custody, trial courts have authority to impose crime related

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prohibitions as part of a judgment and sentence. *Id.* at 32. Those prohibitions may extend for the term of the maximum sentence for the crime of conviction. *Id.* This is what occurred in the instant case, where the trial court ordered as a part of the judgment and sentence that Saeger not go within 500 feet of the victims of the crimes of felony harassment for which he was convicted. CP 11 (page 7, para. 4.5 of Judgment and Sentence).

Recognizing that the right to marriage is a fundamental right, the *Warren* Court explained:

More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. *See State v. Riles*, 135 Wash.2d 326, 347, 957 P.2d 655 (1998). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. *Id.* Additionally, conditions that interfere with fundamental rights must be sensitively imposed. [Citations omitted].

*Warren*, 165 Wn.2d at 32.

At issue in *Warren* was whether the court erred when it included a sentencing condition that the defendant not have contact with his wife, who was not a victim herself, but was the mother of the victims. *Id.* at 33-34.

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We conclude the order prohibiting contact does not violate Warren's fundamental right to marry because it is reasonably necessary to achieve a compelling state interest, namely, the protection of Lisa [(defendant's wife)] and her daughters. We are mindful that crime-related prohibitions affecting fundamental rights must be narrowly drawn. *Riley*, 121 Wash. 2d 38, 846 P.2d 1365<sup>1</sup> (citing *Consuelo-Gonzalez*, 521 F.2d at 265.<sup>2</sup> There must be no reasonable alternative way to achieve the State's interest. *See Ancira*, 107 Wash.App. at 655, 27 P.3d 1246.<sup>3</sup>

*State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940, 948 (2008).

In the instant case, the court's no contact order protects the direct victims of Saeger's crimes. CP 11; SRP 3. There have been repeated incidents where Saeger has harassed these victims. SRP 3. At sentencing, Saeger had at least three prior convictions for violation of a court order. CP 6-7; RP 92-93. In addition, Saeger had prior gross misdemeanor convictions for making threats that involved the same victims as in the instant case. RP 93-96.

Thus, under the guidelines provided by *Warren*, the State's interest in protecting Saeger's victims is compelling, the order here is reasonably necessary to protect these victims, and there is no less restrictive alternative. Saeger has a fundamental right to travel, but the Washington

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<sup>1</sup> *State v. Riley*, 121 Wn.2d 22, 38, 846 P.2d 1365 (1993).

<sup>2</sup> *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

<sup>3</sup> *State v. Ancira*, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

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Supreme Court “has held that freedom of movement may not be used to impair the individual rights of others. [Footnote and citations omitted]. No travel rights of one individual can supersede the constitutional rights of other individuals. [Footnote and citations omitted].” *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998).

The Supreme Court has “previously recognized that a sentencing condition may prohibit a defendant’s access to a means or medium through which he committed a crime.” *In re Rainey*, 168 Wn.2d 367, 380, 229 P.3d 686 (2010). In the instant case, Saeger’s means or medium of harassing and threatening the victims is derived from the fact that he lives on property that adjoins the victims’ property and, when he becomes intoxicated, he becomes violent and has ready access to the victims. RP 14-61.

RCW 9.94A.505(8) states that a sentencing court “may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” A “[c]rime-related prohibition” is:

an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

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RCW 9.94A.030(10). Additionally, RCW 9.94A.703(3)(b) grants the trial court the discretion to order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals” as a condition of community custody. *See, State v. Armendariz*, 160 Wn.2d 106, 108-113, 156 P.3d 201 (2007); *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); *State v. Ancira*, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001).

The record of the instant case supports a finding that the trial court’s order is narrowly tailored, that it is reasonably necessary to achieve the State’s compelling interest in protecting the victims of Saeger’s crimes, and that there is no lesser alternative to the court’s order. Therefore, the trial court’s order should be upheld. *In re Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010); *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008).

D. CONCLUSION

The trial court’s order prohibiting Saeger from going within 500 feet of the victims of his crimes is reasonably necessary to protect the victims, who have been victimized by him in the past. The ordered is

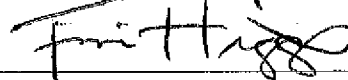
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narrowly tailored to achieve the State's compelling interest in protecting the victims, and there is no lesser alternative that will achieve this purpose. Therefore, the order passes constitutional strict scrutiny and is not an abuse of the trial court's discretion.

DATED: September 27, 2013.

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**MASON COUNTY PROSECUTOR**  
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**Transmittal Letter**

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**Comments:**

Mr. Saeger filed two appeals that arise out of the same conviction. After the State filed its brief in response to the first appeal, the Court combined the two cases. This brief is in response to the second appeal, which was filed as case no. 44770-3 but is now merged with 44264-7

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