No. 95530-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FERNANDEZ
Petitioner.

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

The Honorable Mary Sue Wilson, Judge
Cause No. 15-1-01423-8

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether this Court should accept review after the Court of Appeals correctly applied existing law in Upholding the condition of Fernandez' sentence restricting contact with minors, including his own.

B. STATEMENT OF THE CASE.

On Sept. 25, 2015, the Appellant, Robert Fernandez hosted a birthday party for his wife at their home in Lacey, WA. 1 RP at 88-89. Among those in attendance was his daughter's best friend, thirteen year old L.V.[1] 1 RP at 86. Long after the other guests had left, L.V.; Fernandez' daughter; a third friend, Maya; and Fernandez remained in the living room, watching television. 1 RP at 94, 96. Eventually, Fernandez' daughter and Maya fell asleep on the floor, though L.V. and Fernandez laid on the couch. 1 RP at 100.

According to L.V., at some point, Fernandez began touching her inner thigh; placed a blanket over her lap; pulled down her pants and underwear; touched her vagina; and finally put his head under the covers, making oral contact with her privates. 1 RP at 104-10. L.V. testified that at first, she didn't know how to react, but

[1] L.V. and Fernandez' daughter met at a dance studio at age six, and became fast friends. 1 RP at 87. In the ensuing years, their parents followed suit, becoming close friends as well. 1 RP at 88. Together the families took several trips together and were close enough that L.V. was considered a second daughter, as evidenced by the shirt she was wearing the night of the party, which designated her as "Daughter #2." 1 RP at 90.

once Fernandez put his head under the blanket, she got up. 1 RP at 106, 111. She then woke up her mother,[2] who was also spending the night at Fernandez' home, and told her what had occurred. 1RP at 125-26. As L.V. was relaying the events to her mother, Fernandez repeatedly apologizing and asked them not to tell his wife. 1 RP at 112; 2 RP at 93-94.

Following the incident, Fernandez messaged L.V.'s father, apologizing and stating that he deserved to die. 2 RP at 157. Shortly thereafter, Fernandez was taken into custody, and in an interview with Detective Al Stanford of the Lacey PD, Fernandez admitted that he had removed L.V.'s pants, but claimed he couldn't remember any other details. 2 RP at 195-99. When pressed further, he stated that L.V. was a good girl, and if she said it happened, then it probably happened.[3] 3 RP at 207. Finally, while in custody, Fernandez called his wife, and in the course of their conversation, he admitted that "it happened." 3 RP at 247. Based on these facts,

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[2] Before waking up her mother, L.V. first called her older sister. 1 RP at 115-16. When her sister did not answer, she called her father, who told L.V. to wake up her mother. 1 RP at 116-17. L.V.'s mother had attended the party and was sleeping in one of the bedrooms. 1 RP at 117.

[3] Fernandez' statement to Det. Stanford contained a number of additional incriminating statements such as "I'm the one who did it," "I know [L.V.] can't trust me anymore," and "I'm going to hell for this." 3 RP at 208-13.

Fernandez was convicted of child molestation in the second degree. CP 125.

At sentencing, the court imposed a 17.5 month sentence, and 36 months of community supervision. CP 129. In addition, the court barred Fernandez from consuming alcohol, and required him to adhere to a curfew; undergo counseling; register as a sex offender; and forego contact with minors, including his own children. CP 130, 137. Fernandez appealed. In an unpublished opinion, the Court of Appeals affirmed Fernandez's conviction and upheld the condition of his sentence restricting contact with minors, including his own children. The Court of Appeals remanded for the trial court to strike the sentencing condition imposing a curfew. Fernandez now seeks review of this Court.

C. ARGUMENT.

1. The Court of Appeals correctly applied existing law in upholding the condition of Fernandez's sentence restricting contact with minors, including his own.

Fernandez only seeks review of the community custody condition prohibiting him from having contact with his own children. A petition for review will be accepted by this Court only for the reasons set forth in RAP 13.4(b). Fernandez focuses his argument on RAP 13.4(b)(3) and RAP 13.4(b)(4), which require that

Fernandez demonstrate that he either presents a "significant question of law under the Constitution of the State of Washington or of the United States" or an "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3); RAP 13.4(b)(4). While the fundamental right to parent is a significant Constitutional right, this Court has already provided guidance in this area and there is no need for this Court to readdress the issue based on the facts of this case.

The sentencing reform act allows the trial court to order that a defendant on community custody "refrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). On appeal, sentencing conditions are reviewed for abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Sentencing conditions that interfere with a fundamental constitutional right are reviewed more carefully. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Sentencing conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public Order. Riles, 135 Wn.2d at 342. Conditions that interfere with fundamental rights must also be sensitively

imposed. Riley, 121 Wn.2d 37 (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir, 1975). The right to the care, custody, and companionship of one's children is a fundamental constitutional right and state interference is subject to strict scrutiny. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Parental rights are not absolute and may be subject to reasonable regulation. Prince v. United States, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed.645 (1943).

The State has a legitimate interest in protecting children in cases where a defendant is convicted of sexual assault of a minor. State v. Riles, 135 Wn.2d at 350 ("It would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children"). In this case, it is difficult to imagine a situation in which the defendant's children could be more closely in the same class of persons as the victim. As the Court of Appeals noted, the victim and Fernandez's children are all "children whom Fernandez held a position of parental trust over." State v. Fernandez, Unpublished Opinion, No. 49564-3-II, at 12. In fact, the evidence at trial demonstrated that the victim was thought of as a second daughter. 1 RP 90.

This Court has clearly provided the test for whether a community custody condition that interferes with a fundamental right is valid. State v. Riles, 135 Wn.2d at 342; State v. Warren, 165 Wn.2d at 32. The Court of Appeals properly applied that test. It is clear that Fernandez's children are in the same class of persons as the victim of his crime. In Warren, this Court upheld a no contact condition with the defendant's wife following his convictions for sex offenses involving her children. 165 Wn.2d at 34. Much like the spouse in Warren, Fernandez's children are directly related to the crimes in this case. His daughter was the victim's best friend and the victim was considered like a second daughter. The order prohibiting contact does not violate Fernandez's right to parent because it is reasonably necessary to achieve a compelling state interest, namely, the protection of Fernandez's children who are members of the same class of person as the victim.

The Court of Appeals correctly followed the existing precedent and further noted that the trial court's order was narrowly tailored to accomplish the State's interest. In fact, the limitation specifically stated, "Have no direct and/or indirect contact with minors absent supervision by a responsible adult aware of the

conviction, informed consent of the minor's parent(s), approval of deviancy treatment provider and either the CCO or the Court." CP 137. The order was clarified, hand written into the document, "This includes the Defendant's minor children, except that he may have contact with his minor children via letters, email, phone calls, and/or video communication such as Skype. This condition may be modified in the future by the Court." Id.

The specific condition was narrowly tailored and reasonably necessary to accomplish a compelling State interest. The Court of Appeals correctly noted that the trial court's order met the test set forth by this Court.

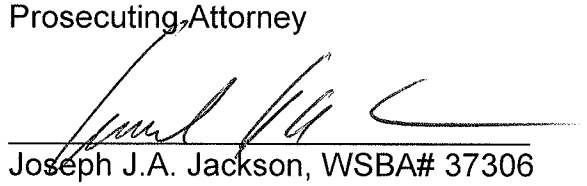
D. CONCLUSION.

The Court of Appeals correctly upheld the trial court's community custody condition regarding contact with minors using the test set forth by this Court. While the State recognizes that the fundamental right to parent is a recognized and significant constitutional right, there is no reason for this Court to accept review under RAP 13.4(b)(3) or (4). The strict scrutiny test is well defined by precedent set by this Court. As such, the State

respectfully request that this Court deny Fernandez's petition for review.

Respectfully submitted this 14 day of March, 2018.

JON TUNHEIM
Prosecuting Attorney



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Answer to Petition for Review on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of March, 2018, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

March 14, 2018 - 2:20 PM

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