Washington State Supreme Court No. 97869-7
Court of Appeals Division I No. 78963-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**STATE OF WASHINGTON,**

*Respondent,*

v.

**REGINALD FREEBERG-BASKETT,**

*Petitioner.*

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

THE HONORABLE JOHANNA BENDER

# PETITION FOR REVIEW

EDWIN ARALICA
JOSHUA KELLEMEN
King County Department of Public Defense—ACA Division
420 W. Harrison, Ste. 201
Kent, WA 98032
(206) 477-8996
FAX (253) 520-6635
edwin.aralica@kingcounty.gov
WSBA No. 35160
WSBA No. 44777

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Table of Cases



Washington Statutes

Court Rules

## I. IDENTITY OF THE PETITIONER

REGINALD FREEBERG-BASKETT, Petitioner in this Court and Respondent, through his attorneys Edwin Aralica and Josh Kellemen, King County Department of Public Defense—ACA Division, asks this Court to accept review of the Court of Appeals' decision reversing the trial court's decision and terminating review in an unpublished opinion, referred to in Section II, below. RAP 13.3; RAP 13.4(b).

## II. COURT OF APPEALS DECISION

Mr. Freeberg-Baskett seeks review of the unpublished Court of Appeals' decision dated 14 October 2019, a copy of which is attached as Appendix A. Further, the Court of Appeals denied the King County Prosecutor's office (hereafter "State") request to publish. (Appendix B).

## III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when the trial court correctly decided that the no contact order issued on 9 December 2016 was invalid at the time of arrest in May 2018 as the authority and jurisdiction to issue such an order was tied directly to the length of the suspended sentence?

2. Must the Washington State Supreme Court accept review per RAP 13.4(b)(1) & (3)?

    a. Mr. Freeberg-Baskett can challenge the validity and applicability of the no contact order. The issuing court could not bind him to the no contact order because it exceeded the duration of the suspended sentence. This called into question whether the no contact was void. It

was not an erroneous defect. The Court of Appeals' decision is in conflict with *Granath* and *May*.

i. Exclusion of the no contact order was an appropriate remedy. The Court of Appeals' decision is in conflict with *Granath* and *May*.

b. The Court of Appeals' decision involves an issue of substantial public interest that should be determined by the Supreme Court. The Washington State Supreme Court must accept review in order to harmonize the competing interests of victims and defendants.

## IV. STATEMENT OF THE CASE

The State charged Mr. Freeberg-Baskett with two counts of Domestic Violence Felony Violation for a Court Order in May 2018. The allegations stem from an alleged violation of a no contact order issued pursuant to RCW 10.99 from King County Superior Court cause number 16-1-07441-0 KNT. The no contact order stated it was valid for 24 months and expired on 9 December 2018. The actual sentence in 16-1-07441-0 KNT was a 12 month suspended sentence.

Mr. Freeberg-Baskett appeared before the trial court on 10 August 2018 requesting his case be either dismissed, or make a ruling that the no contact order was invalid at the time of arrest pursuant to the Washington State Supreme Court's decision in *State v. Granath*, 190 Wn.2d 548, 415 P.3d 1179 (2018). He argued that the no contact order was inapplicable to the charged crime. *Id.; State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005);

*City of Seattle v. May*, 171 Wn.2d 847, 256 P.3d 1161 (2011). The trial court excluded the no contact order relying on *Granath*.

On 6 September 2018, the State filed a motion for an order under RAP 2.2(b)(2), stating that the trial court's ruling had the practical effect of terminating the State's case. The State sought review in the Court of Appeals. On 14 October 2019, the Court of Appeals reversed the trial court, and on 19 November 2019 denied the State's motion to publish.

## V. ARGUMENT

1. The Court of Appeals erred when the trial court correctly decided that the no contact order issued on 9 December 2016 was invalid at the time of arrest in May 2018 as the authority and jurisdiction to issue such an order was tied directly to the length of the suspended sentence.

In 2018, the Washington Supreme Court made clear that the duration of a domestic violence no contact order is limited by the length of the underlying sentence. *Granath,* 190 Wn.2d at 549. A no contact order exceeding this length is not enforceable. *Id.* at 555. "Tying the length of a no-contact order to the length of the sentence actually imposed ensures that a defendant is not subject to criminal penalities for contacting the victim when the defendant is no longer subject to the sentencing condition that gave rise to the order." *Id.* This issue directly relates to the power of the court to bind the defendant to a no contact order. If the defendant is not bound to the no contact order, then the no contact order is void. This issue

is not an erroneous defect. The trial court in Mr. Freeberg-Baskett's case correctly interpreted and applied *Granath* to the undisputed facts of this case and excluded the no contact order.

RCW 10.99.050(1) authorizes a court to issue a domestic violence post-conviction no contact order and "record" it as a condition of judgment and sentence: "[w]hen 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." *Granath*, 190 Wn.2d at 552. *Granath* held the meaning of this and other provisions regarding the authority to issue the particular no contact order. *Id.* at 548. *Granath* rejected the contention that RCW 10.99.050(1) "independently authorizes" the issuance of such an order. *Id.* at 553-54. Instead, focusing on the "recording" language, the Supreme Court agreed with the Court of Appeals: "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. This is in contrast with civil domestic violence protection orders per RCW 26.50, sexual assault protection orders under RCW 7.90.150(6)(c), and stalking no contact orders under RCW 7.92.160(6)(c). These particular no contact orders explicitly provide "express statutory authority for these orders to last

longer than a defendant's sentence[]" noting such language was not present in the criminal misdemeanor sentencing context. *Id.*

Likewise, it is well settled law that "trial courts lack authority to suspend sentences without statutory authorization to do so." *State v. Bacon*, 190 Wn.2d 458, 463, 415 P.3d 207 (2018) *citing State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (further citations omitted). Combined with the lack of express statutory authority found elsewhere allowing for different lengths of suspended sentences and orders noted above, *Granath* focused on the trial court's legislatively granted authority to suspend sentences under RCW 3.66.068(1)(a). *Granath,* 190 Wn.2d at 551-52. This provision allows for suspension of a sentence up to five years on a domestic violence misdemeanor or gross misdemeanor. *Id.* at 552. The trial court can then ensure that the no contact order is enforceable by simply suspending a part of the defendant's sentence. *Id.*

The problem in Ms. Granath's case was that the District Court did not take proper steps to ensure enforceability of the no contact order. *Granath,* 190 Wn.2d at 557. "The no-contact order could not last longer than the no-contact condition of the sentence." *Id.* Ms. Granath moved to vacate the no contact order because it exceeded the duration of the sentence. The District Court denied her motion, which was in error. The District

Court erred because it did not exercise the appropriate requested remedy, which was to vacate the order. *Id.*

Like the District Court in Ms. Granath's case, the Superior Court has authority to suspend a misdemeanor sentence per RCW 9.92.060 and RCW 9.95.210. It is black letter law that the: "[SRA] applies only to felony sentences and does not limit a judge's discretion in imposing a sentence for a misdemeanor conviction." *State v. Whitney*, 78 Wn. App. 506, 517, 897 P.2d 374 (1995). This analysis led to the following statements:

> If a district court includes a condition of the suspended sentence that "restricts the defendant's ability to have contact with the victim," then "such condition shall be recorded" as a no-contact order. RCW 10.99.050(1).
>
> Without additional statutory language indicating otherwise, our inquiry ends here because RCW 10.99.050 is not an independent grant of authority to a district court to issue a no-contact order. The only reason a court is permitted to issue an order of no-contact in this context is to record a condition of the sentence.

*Granath,* 190 Wn.2d at 554-55.

Once the suspended sentence has run, the no contact order per RCW 10.99.050 is void because the no contact order cannot bind a defendant to it. *See May,* 171 Wn.2d at 852-53; *Granath,* 190 Wn.2d at 548. The court simply does not have the power (the jurisdiction) to issue an order longer than the duration of the suspended sentence. *Id. Granath* did not hold that this principle was merely an erroneous defect. *Id.*

Further, the temporal length of the no contact order is connected with the State's ability to criminally charge a defendant for contacting the victim. *Granath*,190 Wn.2d at 555. The State cannot charge a defendant with violating a no contact order when the defendant is not subject to the no contact order sentencing condition. *Id.* "It makes sense that a district court both imposes a no-contact condition of the sentence *and* issues a no-contact order with the same duration because allows the no-contact prohibition to be a separate enforceable condition." *Id.*

These legal principles were in play in Mr. Freeberg-Baskett's case. The no contact order was issued as part of a misdemeanor suspended sentence in Superior Court. The court "recorded" the no contact order condition per RCW 10.99.050. His sentence was suspended for 12 months, and the probationary period ended in February 2018. The no contact order was only enforceable during his suspended sentence, which was 12 months. *Granath,* 190 Wn.2d at 555. Once the 12 months ran the course, the no contact was no longer enforceable. The no contact order was void after February 2018 because the trial court did not have the power (jurisdiction) to bind Mr. Freeberg-Baskett to the no contact order. But, the State decided to criminally charge him for violating the no contact order in May 2018. Yet, he could not be bound to this no contact order condition in May 2018 because the suspended sentence ended in February 2018.

Keeping this in mind, the trial court interpreted and applied the legal principles from *Granath* to the uncontested facts in Mr. Freeberg-Baskett's case in deciding an appropriate remedy. An appropriate remedy was to exclude the no contact order. The Washington State Supreme Court supported such a remedy because defendants cannot be held criminally liable in these circumstances.

> A willful violation of a no-contact order is enforceable by *any* court through separate criminal prosecution without revoking the suspended sentence. RCW 10.99.050(2)(a). Tying the length of a no-contact order to the length of the sentence actually imposed ensures that a defendant is not subject to criminal penalties for contacting the victim when the defendant is no longer subject to the sentencing condition that gave rise to the order. This result, as the Court of Appeals noted, "is not absurd." *Granath,* 200 Wash. App. at 38, 401 P.3d 405.

*Granath,* 190 Wn.2d at 556.

The trial court's remedy in Mr. Freeberg-Baskett's case was not absurd. But, the Court of Appeals' decision will lead to absurd results. The result of their ruling below is that if a court can issue an order, the order, regardless of concerns that the order is void, must be enforceable. As an example, if a court issued an order stating that the defendant cannot contact the victim and their whole family for perpetuity, it would have the power to bind the defendant such an order despite the fact that the order would be void per the law and regardless of the void nature of the order, the defendant

could face criminal prosecution. Such a scenario would require the defendant to affirmatively move to lift the invalid order otherwise the defendant would be criminally liable in perpetuity. This would be an absurd result that the Court of Appeals' decision supports.

This discussion is a good transition to rationalize why this Court must accept review per RAP 13.4(b).

2. The Washington State Supreme Court must accept review per RAP 13.4(b)(1) & (3).

    a. Mr. Freeberg-Baskett can challenge the validity and applicability of the no contact order. The issuing court could not bind him to the no contact order because it exceeded the duration of the suspended sentence. This called into question whether the no contact was void. It was not an erroneous defect. The Court of Appeals' decision is in conflict with *Granath* and *May*.

The Court of Appeals' decision is in conflict with *Granath* and *May.* First, the decision suggested that: "Freeberg-Baskett's reliance on *Granath* is also misplaced." *State v. Freeberg-Baskett,* --Wn. App. 2d --, -- P.3d -- 2019 WL 5112467 at *3 (Wash. Ct. App., 14 October 2019). As discussed above, the trial court appropriately interpreted and applied *Granath* to the uncontested facts in Mr. Freeberg-Baskett's case. In addition, Mr. Freeberg-Baskett appropriately challenged the validity of the no contact order.

The Court of Appeals' decision misconstrued Mr. Freeberg-Baskett's arugment. Washington courts have consistently stated that a defendant can challenge the validity of a court order in a proceeding for a violation of that order when it is considered void for lack of jurisdiction. *Mead School Dist. No. 354 v. Mead Ed. Ass'n (MEA)*, 85 Wn.2d 278, 534 P.2d 561 (1975); *See May,* 171 Wn.2d at 847. A defendant can challenge the validity of a court order when there is an absence of jurisdiction 1) to issue the type of order, 2) to address the subject matter, or 3) **to bind the defendant**. *Mead,* 85 Wn.2d at 284 (emphasis added). In particular, a defendant can challenge a no contact order when the no contact order is void, but a defendant cannot challenge a no contact order that is factually inadequate. *May,* 171 Wn.2d at 853.

*May* distinguished a void no contact order from a factually inadequate no conatact order. *May,* 171 Wn.2d at 853. "Any defects within the order go to whether the order was 'merely erroneous, however flagrant' and cannot be collaterally attacked." *Id.* On the other hand, a no contact order is void if it binds the defendant to a no contact order that is no longer in effect. *Id.*; *See Mead,* 85 Wn.2d at 284. *May* provided an example of a no contact order that is NOT void, which is useful for Mr. Freeberg-Baskett's case. "The superior court possessed jurisdiction "to issue the type

of order," *i.e.,* that is to issue a permanent domestic violence protection order." *Id.*

In Mr. Freeberg-Baskett's case, the issuing court, the Superior Court, lacked the "express statutory authority" to issue a no contact order lasting longer than his suspended sentence. In other words, the issuing court lacked the temporal constraint essential to the court's authority. Mr. Freeberg-Baskett could not be bound to the no contact order after February 2018. The no contact order could not be enforced after February 2018 because it exceeded the duration of his suspended sentence.

Mr. Freeberg-Baskett challenged the no contact order when the State criminally charged him with violating it. He did not argue that the no contact order was factually inadequate. Instead, he argued that the no contact order could not be applied (could not bind him) to his alleged conduct from May 2018. This was not merely an erroneous defect, which cannot be challenged. *May,* 171 Wn.2d at 852-54. The no contact order in *May* was an RCW 26.50.060 order for which there is explicit authorization to issue a no contact order of any length. *Granath*, 190 Wn.2d at 548. The issue with the no contact order in Mr. Freeberg-Baskett's case was the same issue with the no contact order in Ms. Granath's case. The Supreme Court did not find that the issue with Ms. Granath's no contact order was merely an erroneous defect. *Id.*

*May* provides the circumstances when it is appropriate to challenge the no contact orders.[1] *May,* 171 Wn.2d at 852-54. *Granath* provides additional authority to challenge no contact orders in certain circumstances. *Granath*, 190 Wn.2d at 548. Mr. Freeberg-Baskett was clearly able to challenge the no contact order. The Court of Appeals' decision in this case is in conflict with *Granath* and *May.*

i. Exclusion of the no contact order was an appropriate remedy. The Court of Appeals' decision is in conflict with *Granath* and *May.*

The Court of Appeals in Mr. Freeberg-Baskett's case suggested that *Granath* did not address whether a no contact order may be excluded. *Freeberg-Baskett,* 2019 WL 5112467 at *3. It is a fact beyond change that Ms. Granath moved to vacate the no contact order. Mr. Freeberg-Baskett moved to exclude the no contact order. But, the basis to challenge the no contact order was the same for both individuals.

The Court of Appeals ignored the plain finding in *Granath* that defendants cannot be criminally liable for void no contact orders.

> A willful violation of a no-contact order is enforceable by *any* court through separate criminal prosecution without revoking the suspended sentence. RCW 10.99.050(2)(a).

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[1] *State v. Robinson,* 8 Wn. App. 2d 629, 439 P.3d 710 (2019) might be useful in this situation, but Mr. Freeberg-Baskett's case is different. In April 2019, the Court of Appeals, Division I, reversed a Felony Violation of a Court Order because the predicate convictions were invalid. Notably, the Court of Appeals held that defendants can attack the validity of the predicate convictions.

> Tying the length of a no-contact order to the length of the sentence actually imposed ensures that a defendant is not subject to criminal penalties for contacting the victim when the defendant is no longer subject to the sentencing condition that gave rise to the order. This result, as the Court of Appeals noted, 'is not absurd.' *Granath,* 200 Wash.App. at 38, 401 P.3d 405.

*Granath,* 190 Wn.2d at 556. *Granath* did not explicity assert that exclusion is a remedy. It is appropriate, however, to make sure that the State does not criminally charge defendants in these circumstances otherwise it will lead to absurd results. *Id.*

Ultimatey, the Court of Appeals acknowledges that *Granath* exists, but suggests that the trial court has no authority to exclude a no contact order in a criminal case. An appropriate remedy, however, is to challenge a void order. *May,* 171 Wn.2d at 852-54. A no contact order is void when it lasts longer than the suspended sentence. *Granath*, 190 Wn.2d at 552. If a no contact order is void, it cannot be the basis of a criminal accusation, which the Court of Appeals discounted. The trial court has authority in these circumstances to exclude a no contact order as an appropriate remedy.

As mentioned above, the reality is that the trial court's remedy in Mr. Freeberg-Baskett's case was not absurd. It was consistent with *Granath.* But, the Court of Appeals' decision will lead to absurd results. The result of their ruling is that if a court can issue an order, the order, regardless of concerns that the order is void, must be enforceable. As an

example, if a court issued an order stating that the defendant cannot contact the victim and their whole family for perpetuity, it would have the power to bind the defendant such an order despite the fact that the order would be void per the law and regardless of the void nature of the order, the defendant could face criminal prosecution. This would be an absurd result that the Court of Appeals' decision supports. The Court of Appeals' decision is in conflict with *May* and *Granath.*

b. The Court of Appeals' decision involves an issue of substantial public interest that should be determined by the Supreme Court. The Washington State Supreme Court must accept review in order to harmonize the competing interests of victims and defendants.

Protecting victims in domestic violence cases is vitally important in our society. No contact orders provide a level of protection. The Court of Appeals in Mr. Freeberg-Baskett's case discussed this important issue. "But these contentions ignore the competing interests of the victims of the "hundreds, if not thousands" of defendant-abusers to whom Freeberg-Baskettrefers." *Freeberg-Baskett,* 2019 WL 5112467 at *5. The Court of Appeals appeared concerned that victims would not have sufficient notice on how to continue to seek protection, for example. The Court of Appeals concluded that moving to vacate or modify the underlying order in the issuing court is a reasonable step in light of the victim's interests implying that victims would receive the necessary notice. It would also be reasonable

to conclude that the State and their victim advocate would notify a victim that a trial court excluded the no contact order in a criminal case.

The victim's interests are important. The defendant's interests are also important. Criminalizing the violation of a no contact order that is viold absolutely offends a defendant's due process rights. *Granath* discussed this concern. 190 Wn.2d at 556. It is just as important to make sure that "defendants are not subject to criminal penalities for contacting a victim when the defendant is no longer subject to the condition that gave rise to the order." *Id.* There are competing interests.

The Washington State Supreme Court also addressed the substantial public interest in protecting victims. *Granath,* 190 Wn.2d at 556. The Washington State Supreme Court, however, made clear that while these are valid concerns, this policy argument is inconsistent with the law. "Finally, while the State raises valid concerns regarding the need to protect victims of DV, its public policy argument is inconsistent with the plain language of the statute. The legislature's codified declaration of intent cannot "trump the plain language of the statute." *Id.*

It is quite clear that the Court of Appeals in Mr. Freeberg-Baskett's case values the policy argument over the plain reading of the law. It also appears that the Court of Appeals' reasoning is in conflict with *Granath.* Notice to defendants regarding their criminal liability is a substantial public

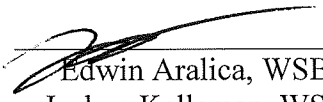
interest. Notice to victims regarding their ability to seek protection is a substantial public interest. The Washington State Supreme Court must accept review in order harmonize the competing interests of victims and defendants.

## IV. CONCLUSION

For the above reasons, the Washington State Supreme Court must accept review.

Dated 19 November 2019

King County Department of Public Defense—ACA Division




Edwin Aralica, WSBA No. 35160
Joshua Kellemen, WSBA No. 44777
Attorneys for the Petitioner/Respondent

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on___ November 2019, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

[ x ] email to Senior Deputy Prosecutor Amy Meclking.

[ x ] will provide a copy in person at the King County Prosecutor's office 401 4th Ave N Kent, WA 98032.

[ x ] will provide a copy via efiling.

19-11-19', Kent, WA
Date and place

Edwin Aralica

# APPENDIX
# A

2019 WL 5112467
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

STATE of Washington, Appellant,
v.
Reginald FREEBERG-BASKETT, Respondent.

No.
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FILED: October 14, 2019

**Attorneys and Law Firms**

Prosecuting Atty. King County, King Co. Pros/App Unit Supervisor, W554 King County Courthouse, 516 Third Avenue, Seattle, WA, 98104, Amy R Meckling, King County Prosecutor's Office, 516 3rd Ave. Ste. W554, Seattle, WA, 98104-2390, Counsel for Appellant(s)

Edwin Lee Aralica, King County Dept. of Public Defense ACA, 420 W. Harrison St. Ste. 201, Kent, WA, 98032-4491, Counsel for Respondent(s)

UNPUBLISHED OPINION

Smith, J.

*1 In December 2016, Reginald Freeberg-Baskett was convicted in superior court of domestic violence assault. He received a one-year suspended sentence, a condition of which required him not to have contact with the victim, Gisele Blanchet, for two years. The superior court entered a no-contact order to record the no-contact condition.

The State later charged Freeberg-Baskett with violation of the no-contact order, alleging that Freeberg-Baskett had prohibited contact with Blanchet on two occasions in May 2018, i.e., after the term of Freeberg-Baskett's suspended sentence but before the expiration of the no-contact order. On Freeberg-Baskett's motion, the trial court excluded evidence of the no-contact order, effectively terminating the State's case. The court relied on State v. Granath, 190 Wn.2d 548, 415 P.3d 1179 (2018), in which our Supreme Court concluded that a district court does not have authority under RCW 10.99.050 to issue a domestic violence no-contact order that lasts longer than the defendant's suspended sentence.

Because the no-contact order was expressly applicable to Freeberg-Baskett and to the crimes with which he was charged, the trial court erred by excluding evidence of the no-contact order. Therefore, we reverse and remand for further proceedings.

FACTS

In 2016, Freeberg-Baskett was convicted in King County Superior Court of assault in the fourth degree—domestic violence (count 1) and attempted theft in the third degree (count 2). On December 9, 2016, Freeberg-Baskett was sentenced to 364 days' imprisonment on count 1 and 90 days' imprisonment on count 2, to run concurrently. The court suspended the sentenced imprisonment on certain conditions. One of those conditions was that Freeberg-Baskett be on unsupervised probation for 12 months, i.e., through December 8, 2017. Another was that Freeberg-Baskett have no contact with the victim, Blanchet, pursuant to chapter 10.99 RCW. To that end, the court entered a domestic violence no-contact order with a stated expiration date of December 9, 2018. In other words, the term of the no-contact order was one year longer than the term of Freeberg-Baskett's suspended sentence.

In April 2017, Freeberg-Baskett was ordered to serve out his remaining sentence in custody after he failed to comply with another condition of his suspended sentence.

About a year later, according to probable cause statements, officers found Freeberg-Baskett and Blanchet together on two occasions in May 2018, i.e., after Freeberg-Baskett's suspended sentence would have expired but before the stated expiration of the no-contact order. The State subsequently charged Freeberg-Baskett

with two counts of domestic violence felony violation of a court order. Freeberg-Baskett moved to dismiss the charges, arguing that under Granath, the no-contact order was void and inapplicable to the charged crimes, which occurred after the term of Freeberg-Baskett's suspended sentence. The State countered that under the collateral bar rule, Freeberg-Baskett was barred from challenging the validity of the no-contact order in a proceeding for violation of that order.

*2 The trial court concluded that the no-contact order was not void and denied Freeberg-Baskett's motion to dismiss. But it excluded evidence of the no-contact order, reasoning that under Granath, the order was "'not enforceable'" and was therefore inapplicable to the crimes charged (quoting Granath, 190 Wn.2d at 557). The trial court later found, under RAP 2.2(b)(2), that "the practical effect of the Court's Order on Motion to Dismiss signed 8/31/18 is to terminate the case." The State appeals.

ANALYSIS

The State argues that the trial court erred by excluding evidence of the no-contact order. We agree.

We review rulings on the admissibility of evidence for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court abuses its discretion when it applies an incorrect legal analysis or commits another error of law. State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007).

The trial court serves a gate-keeping role in a proceeding for violation of a court order. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005); City of Seattle v. May, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011). "[T]he trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged ... and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct)." May, 171 Wn.2d at 854. Here, and as further discussed below, the trial court committed an error of law by excluding the no-contact order as inapplicable to the crimes with which Freeberg-Baskett was charged. Also, as discussed below, we are not persuaded by any of Freeberg-Baskett's proffered alternative justifications for the trial court's exclusion of the no-contact order. Therefore, reversal is required.

An order is inapplicable to the crime charged if "the order either does not apply to the defendant or does not apply to the charged conduct." May, 171 Wn.2d at 854. Here, the order was applicable to both Freeberg-Baskett and the conduct with which he was charged in that it expressly directed Freeberg-Baskett not to "knowingly enter, remain, or come within 500 ... feet ... of [Blanchet] or [her] residence, school, workplace, [or] vehicle" until December 9, 2018.[1] Therefore, the trial court erred by excluding it as inapplicable.

Freeberg-Baskett disagrees and offers a number of justifications for the trial court's exclusion of the no-contact order. None of them are persuasive.

Freeberg-Baskett first relies on Miller to argue that an order is inapplicable not just when it does not apply to the defendant or the charged conduct, but also when it "is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order." Miller, 156 Wn.2d at 31. He then relies on Granath to argue that the no-contact order was inapplicable within the meaning of Miller. But his reliance on Miller and Granath is misplaced.

In Miller, our Supreme Court held that the validity of a no-contact order is neither an express nor implied element of the crime of violating a no-contact order. Miller, 156 Wn.2d at 29. After reaching its holding, the court acknowledged that there were several Court of Appeals cases "which deemed validity an 'implied element.' " Miller, 156 Wn.2d at 29. Thus, "out of respect for the opinions of the Court of Appeals[,]" Miller, 156 Wn.2d at 29, the court engaged in a closer examination of two of those cases: City of Seattle v. Edwards, 87 Wn. App. 305, 941 P.2d 697 (1997), and State v. Marking, 100 Wn. App. 506, 997 P.2d 461 (2000). Although the Miller court overruled Edwards and Marking to the extent that they held that the validity of a no-contact order was an element of the crime of violating the no-contact order, it stated that it was "inclined to believe that the Court of Appeals reached appropriate results in Marking and Edwards." Miller, 156 Wn.2d at 31. It then characterized the issues with the no-contact orders in those cases as relating to the " 'applicability' " of the order to the crime charged and, as Freeberg-Baskett correctly points out, stated that "[a]n order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order." Miller, 156 Wn.2d at 31.

*3 But six years later, in May, our Supreme Court

clarified the meaning of "applicability." May involved application of the collateral bar rule, which generally "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." May, 171 Wn.2d at 852. The issue before our Supreme Court in May was whether the collateral bar rule prohibits a defendant from challenging the validity of a domestic violence protection order in a prosecution for violation of that order. May, 171 Wn.2d at 851. The court ultimately held that the rule *did* bar such a challenge with regard to the no-contact order at issue in May, which failed to expressly recite a statutorily required finding that the defendant was likely to resume acts of domestic violence. May, 171 Wn.2d at 855 & n.6.

The court then observed that although the collateral bar rule generally precludes challenges to the *validity* of an order in a proceeding for violation of that order, the rule does not bar challenges to the *applicability* of an order. May, 171 Wn.2d at 855. The May court explained, however, that Miller's "discussion of the applicability of orders ... was an effort to harmonize that case with the results in ... Edwards ... and Marking." May, 171 Wn.2d at 853-54. And, although it acknowledged that "some language in Miller may be capable of being read more broadly when viewed in isolation," the May court clarified that an order is inapplicable when it "either does not apply to the defendant or does not apply to the charged conduct." May, 171 Wn.2d at 854. In short, after May, an order is inapplicable only when it does not apply to the defendant or to the charged conduct. Therefore, Freeberg-Baskett's reliance on Miller to suggest that applicability refers to something broader is misplaced.

Freeberg-Baskett's reliance on Granath is also misplaced. In Granath, the defendant, Wendy Granath, was convicted in King County District Court of two domestic violence offenses. Granath, 190 Wn.2d at 550. The district court sentenced Granath to 364 days in jail with 334 days suspended for 24 months. Granath, 190 Wn.2d at 550. As a condition of her suspended sentence, Granath was prohibited from contacting the victim, her estranged husband. Granath, 190 Wn.2d at 550. The district court issued a separate no-contact order under RCW 10.99.050, reflecting its directive that Granath not contact her estranged husband. Granath, 190 Wn.2d at 550. The term of the no-contact order was five years, i.e., three years longer than Granath's 24-month suspended sentence. Granath, 190 Wn.2d at 550.

After Granath completed her sentence in December 2014, she moved to vacate the no-contact order, arguing that it ended when she was no longer subject to the underlying no-contact condition of the sentence. Granath, 190 Wn.2d at 550. The district court denied Granath's motion, reasoning that "it 'had lawful authority to issue a separate order under [chapter] 10.99 [RCW], which is a stand-alone provision.' " Granath, 190 Wn.2d at 550 (alterations in original).

Our Supreme Court ultimately disagreed with the district court. It explained that under the plain language of the relevant statute, RCW 10.99.050, "[t]he only reason a court is permitted to issue an order of no-contact in this context is to *record* a condition of the sentence." Granath, 190 Wn.2d at 555 (emphasis added). The court thus concluded that the district court should have granted Granath's motion to vacate, rejecting the State's argument that RCW 10.99.050 *independently* authorizes a district court to issue a domestic violence no-contact order. Granath, 190 Wn.2d at 554-55, 557.

In short, Granath held that the district court erred by failing to vacate its earlier no-contact order because, under the plain language of RCW 10.99.050, a district court does not have authority to enter a domestic violence no-contact order whose term exceeds the length of the underlying sentence. Granath, 190 Wn.2d at 557. But Granath did not address whether such a no-contact order may be excluded, based on inapplicability, in a proceeding for violation of that order. Therefore, Granath does not support Freeberg-Baskett's argument that the no-contact order entered in his case is "inapplicable" under May.

***4** Freeberg-Baskett next argues that the trial court properly excluded the no-contact order because it was void. He contends that the order was void because, under Granath, the issuing court lacked authority to issue a no-contact order exceeding the length of Freeberg-Baskett's suspended sentence. For the reasons that follow, we are not persuaded by Freeberg-Baskett's argument.

As discussed, the collateral bar rule "prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." May, 171 Wn.2d at 852. However, "[a]n exception exists for orders that are void[,]" and "the trial court's gate-keeping role includes excluding orders that are void." May, 171 Wn.2d at 852, 854.

But "a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 541, 886 P.2d 189 (1994). And, here, Freeberg-Baskett states that he "is not challenging the subject matter or personal jurisdiction of the court."

Therefore, the no-contact order was not void.

Freeberg-Baskett disagrees, relying on Mead School District No. 354 v. Mead Education Association, 85 Wn.2d 278, 534 P.2d 561 (1975), to argue that an order is void not only when the issuing court lacks jurisdiction, but also when it lacks authority to issue "the type of order." Although our Supreme Court did, in Mead, refer to a court's jurisdiction in terms of its authority to issue a particular *type* of order, Mead, 85 Wn.2d at 284, it has since explained that "[t]he ... distinction between 'jurisdiction of the subject matter' and 'the power or authority to render the particular judgment' rests on an antiquated understanding of subject matter jurisdiction." State v. Posey, 174 Wn.2d 131, 138, 272 P.3d 840 (2012). And, as discussed, it concluded in Marley that "a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." Marley, 125 Wn.2d at 541. Therefore, we are not persuaded by Freeberg-Baskett's argument that an order can be void even when the issuing court possesses jurisdiction.

To this end, Freeberg-Baskett argues, despite his claim that he "is not challenging the subject matter or personal jurisdiction of the court," that the issuing court lacked jurisdiction to enter a no-contact order whose term exceeded the term of his underlying sentence. He relies on Granath and on State v. Holmberg, 53 Wn. App. 609, 768 P.2d 1025 (1989), to support his argument. But because Freeberg-Baskett's argument ignores the distinction between statutory authority and subject matter jurisdiction, his reliance on these cases is misplaced.

In Holmberg, the question before the court was whether, under RCW 9.95.230, a trial court had authority to revoke probation based on a violation that occurred after the end of the probationary period but before an order terminating probation was entered. Holmberg, 53 Wn. App. at 612. And, as discussed, the issue in Granath was whether, under RCW 10.99.050, a district court has authority to enter a no-contact order whose term exceeds the term of the underlying sentence. Granath, 190 Wn.2d at 551. In both cases, the reviewing court held that the trial courts were without authority under the relevant statutes. Holmberg, 53 Wn. App. at 613; Granath, 190 Wn.2d at 557. But "[a] court does not lack subject matter jurisdiction merely because it may lack authority to enter a given order." In re Pers. Restraint of Smalls, 182 Wn. App. 381, 387-88, 335 P.3d 949 (2014). Rather, "[a] court lacks subject matter jurisdiction when it attempts to decide a type of controversy that it has no authority to decide." Smalls, 182 Wn. App. at 387; see also In re Marriage of Buecking, 179 Wn.2d 438, 448, 316 P.3d 999 (2013) (" 'Subject matter jurisdiction' refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case."). Here, Freeberg-Baskett does not contend that the superior court, which entered the original no-contact order, lacked authority to decide the type of controversy before it, i.e., a nonfelony criminal case. Therefore, Freeberg-Baskett's argument fails.

***5** Freeberg-Baskett next points to the following language from Granath to argue that the no-contact order was void: "The no-contact order issued in this case *was not enforceable after Granath completed her suspended sentence in December 2014*, and the district court should have granted her motion to vacate." Granath, 190 Wn.2d at 557 (emphasis added). But, as discussed, Granath was an appeal from a district court's denial of a motion to vacate. Granath did not hold that a no-contact order that exceeds the length of a suspended sentence is void such that it can be collaterally attacked in a later proceeding—it held only that such an order is erroneous. Therefore, Freeberg-Baskett's reliance on the Granath court's language regarding enforceability is misplaced. See May, 171 Wn.2d at 852-53 (explaining that an order can be collaterally attacked based only on an argument that it is absolutely void, not based on an argument that the order is merely erroneous).

Freeberg-Baskett next suggests that allowing the State to criminalize the violation of a no-contact order that is invalid under Granath would offend due process in that defendants would not have clear notice of how the law applies to them. Fie again attempts to analogize this case to Holmberg, where Division Two held that a court does not have statutory authority under RCW 9.95.230 to modify or revoke probation for violations occurring outside of the probationary period. Holmberg, 53 Wn. App. at 613. But the Holmberg court's analysis rested on its interpretation of the relevant statute. Holmberg, 53 Wn. App. at 612. Unlike this case, Holmberg did not involve an alleged violation of a court order that expressly applied to the defendant and to the charged conduct. Furthermore, although the no-contact order entered in this case may have been erroneous under Granath. it gave Freeberg-Baskett clear notice of what conduct was prohibited. Freeberg-Baskett's argument is unpersuasive.

As a final matter, Freeberg-Baskett contends that "each individual defendant should not have to specifically take additional steps [to] remove an invalid order when the court has lost jurisdiction" and that "[t]o adopt such a policy would mean that hundreds, if not thousands, of defendants ... would have [to] move to remove invalid orders." He asserts that "[t]his is an unreasonable ...

expectation given that many [are] indigent and have no legal education to know an order terminating probation must be rendered for a court to lose its ability to impose a suspended sentence" and that "[m]ost individuals would assume an order is unenforceable when the court has lost jurisdiction."

But these contentions ignore the competing interests of the victims of the "hundreds, if not thousands" of defendant-abusers to whom Freeberg-Baskett refers. These victims rely on no-contact orders for protection from their abusers and should be able to take those orders at face value. If we were to accept Freeberg-Baskett's argument that a no-contact order that is longer than the underlying sentence automatically becomes void or inapplicable as soon as the underlying sentence expires, victims would not know that affirmative steps must be taken to obtain continuing protection even though the no-contact order already entered by the court appears to remain in effect. Indeed, in light of victims' competing interests, it is not unreasonable to expect defendants like Freeberg-Baskett to do as the defendant in Granath did, i.e., move to vacate or modify a domestic violence no-contact order entered under RCW 10.99.050 to the extent that its term outlasts the term of the underlying sentence. Therefore, Freeberg-Baskett's argument is unpersuasive.

We reverse and remand for further proceedings.

WE CONCUR:

Appelwick, C.J.

Verellen, J.

**All Citations**

Not Reported in Pac. Rptr., 2019 WL 5112467

Footnotes

1 The no-contact order contains an exception for third-party contact for arranging child visitation, but that exception is not at issue here.

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# APPENDIX B

FILED
11/18/2019
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Appellant,

v.

REGINALD FREEBERG-BASKETT,

Respondent.

No. 78963-5-I

ORDER DENYING MOTION TO PUBLISH

The appellant, State of Washington, has filed a motion to publish. The respondent, Reginald Freeberg-Baskett, has filed a response. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed October 14, 2019 shall remain unpublished.

Judge

**EDWIN ARALICA, ATTORNEY AT LAW, KING COUNTY DEPARTMENT OF PUBLIC DEFENSE--ACA DIVISION**

**November 19, 2019 - 11:57 AM**

## Transmittal Information

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| **Appellate Court Case Number:** | 78963-5 |
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