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NO. 63147-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL E. TURNER

Appellant.

2009 DEC 18 PM 4:26  
FILED  
COURT OF APPEALS  
DIVISION ONE  
WASHINGTON

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

The Honorable Michael E. Rickert and John M. Meyer, Judges

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove every element of the charge beyond a reasonable doubt.

Issue Pertaining to Assignment of Error

To prove a violation of a no-contact order, the state must establish the existence of an applicable order beyond a reasonable doubt. In the appellant's case, was the order insufficient to sustain the conviction because the mandatory legend appeared on the back of the order and after the judge's signature?

B. STATEMENT OF THE CASE

The state charged the appellant, Michael E. Turner, with felony violation of a domestic violence no-contact order issued by a Mount Vernon Municipal Court judge. CP 1-2. Turner contended in a pretrial motion the no-contact order was invalid because it did not properly include the following "legend" as required by RCW 10.99.040(4)(b):

"Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

CP 11-14; 2RP 4-6.<sup>1</sup>

The document containing the no-contact order in Turner's case was two-sided. CP 19-20 (attached as an appendix). The front side included information such as the identity of the protected parties, the prohibited conduct, the date and the judge's signature. CP 19. Language including the essence of the legend appeared on the backside of the order. CP 20.

Turner maintained only language found above the judge's signature on the front of the document was part of the order. Because the legend appeared only on the back of the document and the order did not refer to or otherwise incorporate it, the order was invalid. CP 13-14; 2RP 4-6.

The trial court rejected the argument, finding the order included everything on both sides of the document, including the required legend. 2RP 6-8. Turner waived his right to a jury trial and stipulated to admission of the no-contact order, probable cause certificate and other documents. CP 15-45; 2RP 8-11. The trial court found Turner guilty as charged and imposed a 60-month standard range sentence. CP 46-56; 2RP 11; 3RP 7.

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<sup>1</sup> The three-volume report of proceedings is cited as follows: 1RP – January 28, 2009; 2RP – February 23, 2009; 3RP – February 26, 2009.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT VIOLATED AN APPLICABLE NO-CONTACT ORDER.

A charge of violation of a no-contact order must be based on an "applicable" order. State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005). A no-contact order is applicable only if it contains the mandatory legend set forth in RCW 10.99.040. RCW 10.99.045(5); Miller, 156 Wn.2d at 31, State v. Marking, 100 Wn. App. 506, 511, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), overruled on other grounds by Miller, 156 Wn.2d at 31. The question of an order's applicability is one of law to be decided as a threshold matter by the trial court. Miller, 156 Wn.2d at 31.

Turner does not challenge the adequacy of the contents of the information printed on the back side of the Mount Vernon Municipal Court no-contact order, but rather its placement. General Rule 14 generally forbids putting information on the back side of a court document. According to the rule, the writing or printing contained in "[a]ll pleadings, motions, and other papers filed with the court . . . shall appear on only one side of the page." GR 14(a). This "one side only" rule applies "to all proceedings in all courts" in Washington unless otherwise

specified by court rule. GR 14(c). GR 14 applies specifically to criminal courts of limited jurisdiction. CrRLJ 1.5.

Orders are "papers filed with the court." See CR 54(a)(2); Seattle-First Nat. Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352 (1976) ("Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order."), review denied, 89 Wn.2d 1007 (1977). The prohibition on double-sided documents therefore applies to orders, rendering the purportedly violated order inapplicable in Turner's case.

Application of GR 14 should apply with even greater force to domestic violence no-contact orders given that violation of the terms of such an order can result in a felony conviction. A felony conviction is obviously a more onerous consequence than is a waiver of the right to sue for money or other civil damages. Yet in contracts cases, exculpatory agreements are enforceable only if they are conspicuous and do not violate public policy. Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn. App. 334, 339, 35 P.3d 383 (2001). For example, a disclaimer that appeared in middle of a golf cart rental agreement was not sufficiently conspicuous to excuse the city from liability from injuries caused when the cart crashed. Baker v. City of Seattle, 79 Wn.2d 198, 202, 484 P.2d 405 (1971). In

contrast, this Court found sufficiently conspicuous a release that was placed apart from other language in a ski resort agreement, used capital letters for important words, and contained explicit waiver language just above the signature line. Chauvlier, 109 Wn. App. at 342. In Nelson v. Southland Corp.,<sup>2</sup> an employer's disclaimer that appeared at the beginning of the statement of corporate policies and procedures, and similar disclaimers that appeared in a variety of documents, at least two of which were signed by the employee directly below the disclaimer, were found to be effective as a matter of law. Nelson, 78 Wn. App. at 28-32 & n.2.

The order Turner allegedly violated did not conspicuously display the legend. The trial judge found "all of the pertinent information that someone would need to look at if they were looking in the file [appears] on the front page. The back of the page is directed to the defendant and nobody else." 2RP 7. This finding is correct in one sense: the information on the reverse side of the document is directed to the defendant. But it is incorrect in a more important sense: the front page does not contain all "pertinent information" because it does not include the legend, which the Legislature obviously determined was "pertinent" when it mandated the language be included in every no-contact order.

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<sup>2</sup> 78 Wn. App. 25, 894 P.2d 1385 (1995).

In any event, even if the front page contained all the "pertinent information," there would be no reason for a reasonable reader of the document to read the reverse side. In other words, the placement of the legend on the reverse side rendered it inconspicuous. The order is invalid for this reason as well.

Turner acknowledges that in certain circumstances, substantial compliance with statutory requirements for legal documents has been sufficient to validate a document. An example is Kim v. Lee,<sup>3</sup> a case that addressed compliance with laws governing the entry of civil judgments. Kim involved an interpretation of RCW 4.64.030(2)(a), which mandates that a succinct information summary appear “[o]n the first page of each judgment[.]”

The summary in Kim began on the first page but spilled over to the second because of the length of the caption. Kim, 102 Wn. App. at 590-91. This Court rejected a challenge to the summary's continuation on the second page of the judgment. Kim, 102 Wn. App. at 591. Applying the doctrine of substantial compliance with a statutory requirement, this Court found the judgment was effective in substantial part because the judgment

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<sup>3</sup> 102 Wn. App. 586, 590, 9 P.3d 245 (2000), reversed on other grounds, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001).

summary began on the first page of the judgment. Kim, 102 Wn. App. at 591-92.

Although the pertinent statute in Turner's case, RCW 10.99.040, does not required the legend appear on the first page of the order, GR 14 does prohibit two-sided court documents. Unlike in Lee, where at least part of the summary appeared on the required front page, the municipal court did not substantially comply with GR 14 or comply with the rule at all. Instead, the court disregarded the rule by placing the legend and other important information regarding the no-contact order wholly on the reverse side of the order itself. The doctrine of substantial compliance therefore does not excuse the court's violation of the rule here.

Turner also acknowledges that in other circumstances, courts have been willing to permit the incorporation into a legal document information contained in other documents or elsewhere in the same document by specific reference to the information. See State ex rel. Bloom v. Superior Court, 171 Wash. 536, 539, 18 P.2d 510 (1933) (trial court properly incorporated auditor's report into proposed findings of fact and conclusions of law).

Incorporating information by reference to attached appendices is a common characteristic of judgments and sentences in Washington criminal

cases. In Turner's case, for example, the form document gave the court the option of incorporating by reference additional current offenses "attached in Appendix 2.1" and additional prior convictions "attached in Appendix 2.2." CP 49-50. These references by incorporation appear in the main text of the "Findings" section of the judgment and sentence form document. They also appear above Turner's signature.

But the municipal court judge did not incorporate the mandatory legend or any other information from the reverse side of the no-contact order into the order itself. In fact, the front side of the order makes no reference to the information contained on the back side. The order is thus insufficient for this reason as well.

To summarize, GR 14 applies to the no-contact order, the legend is not conspicuous because it appears after the judge's signature and on the reverse side of the order, and the "order" portion of the document makes no reference to the reverse side. For all of these reasons, the no-contact order Turner purportedly violated is not valid. Under Miller, the order is therefore inapplicable to the charged offense. Without an applicable order, the state lacked sufficient evidence to sustain the charge. This Court should reverse the judgment and remand for dismissal with prejudice. State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

D. CONCLUSION

The state failed to prove each element of the charge beyond a reasonable doubt because allegedly violated no-contact order is insufficient. This Court should reverse Turner's conviction and remand for dismissal with prejudice.

DATED this 17 day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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## APPENDIX

IN THE DISTRICT COURT  
SKAGIT COUNTY, WASHINGTON

STATE OF WASHINGTON )  
CITY OF Mount Vernon )  
Plaintiff, )

No. CASE # MC 20901

ORDER PROHIBITING CONTACT

PURSUANT TO:

- RCW 10.99.040/.045 (Pretrial DVPA)
- RCW 10.99.050 (Post-Conv. DVPA)
- RCW 9A.46.040 (Pretrial Harassment)
- RCW 9A.46.080 (Post-Conv. Harassment)

CLERK'S ACTION REQUIRED

vs. )  
)  
)  
)  
)  
Turner, Michael Edward )  
Defendant )  
DOB: 7-29-77 )

The court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense or crime of harassment, and further finds that this Order Prohibiting Contact is necessary to prevent possible recurrence of violence and/or harassment. The person(s) protected by this order is/are

- (1) Michelle L Frydenlund H-75 Victim #1 (DOB) \_\_\_\_\_
- (2) Ryan G Frydenlund b-5-73 Victim #2 (DOB) \_\_\_\_\_

who reside(s) at:  
(1) 804 N 15th Mount Vernon

(2) Same as Vic 1

IT IS ORDERED THAT:

Defendant is PROHIBITED from:

Directly or indirectly causing or attempting to cause physical harm, bodily injury, assault, sexual assault, molesting, harassing, threatening, stalking, intimidating, keeping under surveillance, or otherwise interfering with the protected person(s).

Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3<sup>rd</sup> party or contact by defendant's lawyers with the protected person(s).

Entering or knowingly coming within or knowingly remaining within or upon (distance in feet) of the protected person(s)'s  residence  school  workplace  other: \_\_\_\_\_

- Defendant may pick up clothing and undisputed personal items with law enforcement officers present.
- The parties affected by this order have children in common and the court hereby orders that (1) Any exchange of said child(ren) for the purposes court-ordered or mutually agreed upon child visitation of shall be arranged through a third party; (2) The defendant shall not be present at the same time as the protected person(s) during said exchange; and (3) These conditions regarding child visitation shall apply to the conduct of the defendant only insofar as they are consistent with other court orders.
- The court makes findings pursuant to RCW 9A.1.800, and orders that the defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to the Mount Vernon  County Sheriff's Office  Police Department. The defendant is also prohibited from obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.

Other: \_\_\_\_\_

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to the Mount Vernon  County Sheriff's Office  Police Department, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

THIS ORDER SHALL REMAIN IN EFFECT FROM THIS DATE UNLESS MODIFIED, OR RESCINDED (Pre trial status to 2099) OR (if checked) FOR  ONE YEAR  TWO YEARS or  until \_\_\_\_\_ UNLESS MODIFIED, RESCINDED, OR UPON ACQUITTAL OR DISMISSAL.

Done in open court in the presence of the defendant this 15 day of May, 2008.

[Signature]  
JUDGE/COMMISSIONER

[Signature]  
Deputy Prosecutor

\_\_\_\_\_  
Attorney for Defendant  
\_\_\_\_\_  
Defendant  
\_\_\_\_\_  
Deputy Prosecutor  
\_\_\_\_\_  
Clerk of the Court

**WARNINGS TO THE DEFENDANT:**

**Orders issued pursuant to RCW 9A.46:**

Violation of this order is a criminal offense under Chapter 9A.46 RCW and will subject a violator to arrest. A violation of this order is a misdemeanor. A certified copy of the order shall be provided to the victim by the clerk of the court.

**Orders issued pursuant to RCW 10.99:**

Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

Willful violation of this order is punishable under RCW 26.50.110. Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first degree or second degree under RCW 9A.36 .011 or 9A.36.021 is a class C felony. Any conduct in violation of this order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony. Also, a violation of this order is a class C felony if the defendant has at least 2 previous convictions for violating a protection order issued under Titles 10, 26 or 74.

In addition to the state and federal prohibitions against possessing a firearm upon conviction of a misdemeanor, upon the court issuing a no-contact order after a hearing at which the defendant had an opportunity to participate the defendant may not possess a firearm or ammunition for as long as the no-contact order is in effect. 18 U.S.C. section 922(g). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government-issued firearms. 18 U.S.C. section 925(a)(1). If the defendant is convicted of an offense of domestic violence, the defendant will be forbidden for life from possessing a firearm or ammunition. 18 U.S.C. section 922(g)(9); RCW 9.41.040.

**Orders issued pursuant to either RCW 9A.46 or RCW 10.99:**

If the violation of the protection order involves travel across a state line or the boundary of a tribal jurisdiction, or involves conduct within the special maritime and territorial jurisdiction of the United States, which includes tribal lands, the defendant may be subject to criminal prosecution in federal court under 18 U.S.C. sections 2261, 2261A, or 2262.

Pursuant to 18 U.S.C. section 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

**YOU CAN BE ARRESTED EVEN IF THE PERSON OR PERSONS WHO OBTAINED THE ORDER INVITE OR ALLOW YOU TO VIOLATE THE ORDER'S PROHIBITIONS.** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.