

03566-2

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NO. 63566-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TURNER,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 APR - 11 PM 4:03

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

The Honorable John M. Mayer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE NO-CONTACT ORDER IS STATUTORILY INSUFFICIENT AND CANNOT SUSTAIN THE CHARGE.

Michael Turner contends the state failed to sustain the charge of violation of a no-contact order because the order did not comply with RCW 10.99.040 and .045(5). Brief of Appellant (BOA) at 3-9. The state responds by citing State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005), for the proposition that validity of the order is not an element of the offense. Brief of Respondent (BOR) at 8-10.

Turner does not dispute the state's assertion. Indeed, Turner cited Miller for the proposition that only applicable no-contact orders support a conviction. Brief of Appellant (BOA) at 4 (citing Miller, 156 Wn.2d at 31-32). This proposition is made clear by the Court's following conclusion: "As Miller has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged, his conviction is affirmed" Miller, 156 Wn.2d at 32.

Turner instead maintains the order did not comply with RCW 10.99.040(4)(b) because the mandatory "legend" appeared on the back of the two-page document containing the order and after the signature line. BOA at 3-9. The state asserts the order is sufficient. BOR at 11-15. Turner disagrees.

The state first suggests this Court should not review the applicability of the no-contact order, citing footnote 4 of Miller, which states:

We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.

Miller, 156 Wn.2d at 31. BOR at 11-12.

But at the same time, the Miller Court held, "An order is not applicable to the charged crime if it . . . is not statutorily sufficient, . . . or otherwise will not support a conviction of violating the order." Miller, 156 Wn.2d at 31; BOR at 8-9. If the trial court errs by finding the order statutorily sufficient, as the trial court did in Turner's case, the proper recourse is to challenge the court's error in this Court. And because this involves a question of law, this Court reviews de novo. State v. Gray, 134 Wn. App. 547, 558, 138 P.3d 1123 (2006), review denied, 160 Wn.2d 1008 (2007). Miller, therefore, does not procedurally prohibit Turner's challenge in this Court.

On the merits, Turner asserts the legend should not be considered part of the order because GR 14 prohibits two-sided "pleadings, motions, and other papers filed with the court."¹ The state urges this Court to reject

¹ GR 14 provides:

Turner's reliance on GR 14 because he did not rely on it in the trial court, the rule was not intended to apply to court generated documents, and GR 14 provides no remedy for failure to comply. BOR at 14-15.

First, Turner did not waive his reliance on GR 14 by failing to cite it in the trial court. In his pretrial motion, Turner challenged the order specifically because the legend appeared on the back side of the two-sided document. Turner now merely cites authority to support the assertion he made pretrial. This is the purpose of an appeal and the obligation of appellate counsel. Indeed, the "argument" section of the appellant's brief should contain "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Nowhere does the rule limit the citations to legal authority to authority raised in the trial court. Turner urges this Court to summarily reject the State's implicit waiver claim.

All pleadings, motions, and other papers filed with the court shall be legibly written or printed. The use of letter-size paper (8-1/2 by 11 inches) is mandatory. The writing or printing shall appear on only one side of the page. The top margin of the first page shall be a minimum of three inches, the bottom margin shall be a minimum of one inch and the side margins shall be a minimum of one inch. All subsequent pages shall have a minimum of one inch margins. Papers filed shall not include any colored pages, highlighting or other colored markings. This rule applies to attachments unless the nature of the attachment makes compliance impractical.

Second, Turner acknowledges the "author's comments" section to GR 14 states the "requirements were "not intended to apply to court generated documents." 2 Wash. Prac. GR 14; BOR at 12. Had the drafters wished to exempt court-generated documents, however, they could have articulated the exemption in the rule. In any event, Turner sets forth several reasons why the rule should apply to no-contact orders, especially that the Legislature has clearly expressed a desire that the legend be made part of the order. BOA at 5-9. In addition, the legend is neither conspicuously displayed nor incorporated by reference such that an offender's attention would be drawn to the legend.

The legend serves an important purpose in the statutory scheme:

The consent warning serves an important function in deterring individuals from violating the order. Absent the warning, one might mistakenly believe that consent to contact by the person protected under the order invalidates the order's otherwise mandatory prohibition. Consequently, the mandatory language is consistent with the legislative intent to increase protection for victims of domestic violence and punish persons who violate such orders by eliminating the consent defense.

State v. Marking, 100 Wn. App. 506, 511-512, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), overruled on other grounds, Miller, 156 Wn.2d 31. This important notice function is frustrated when the legend, which contains the consent warning, is on the reverse side of a two-sided document, after the signature line, with no incorporation by reference.

For these reasons, this Court should find that the trial court erred by applying the no-contact order to Turner's charge. Without the order, the state cannot sustain the charge. Turner's conviction, therefore, should be remanded for dismissal with prejudice.

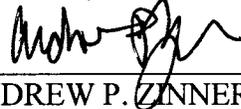
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Turner requests this Court to reverse his conviction for violation of a no-contact order and remand for dismissal with prejudice.

DATED this 1 day of April, 2010.

Respectfully submitted,

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DIVISION ONE**

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v.)	COA NO. 63566-2-1
MICHAEL TURNER,)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF APRIL 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
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- [X] MICHAEL TURNER
DOC NO. 756346
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P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF APRIL 2010.

x. 