

NO. 65223-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RAMIZ COLAKOVIC,

Appellant.

2019
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD MCDERMOTT, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Colakovic violated a valid No Contact Order and assaulted his wife with a baseball bat. Colakovic's children witnessed the brutal assault and called 911. Colakovic entered a plea to Domestic Violence Assault in the Second Degree with a deadly weapon enhancement, Domestic Violence Felony Violation of a Court Order, and Domestic Violence Theft in the First Degree. Colakovic also admitted and pleaded to two aggravating factors: a history of domestic violence and committing the current offense in the presence of his children. At the sentencing hearing, the trial court considered the facts of the case, including the statements of Colakovic's children taken by a child interviewer. The trial court also considered the children's fear of Colakovic and their desire not to see Colakovic until he receives some counseling. Did the trial court abuse its discretion by imposing a No Contact Order which included Colakovic's children when it was necessary to prevent harm and protect the children?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Colakovic was charged by Information with Assault in the Second Degree in violation of RCW 9A.36.021(1)(a) and (c) with a deadly weapon enhancement pursuant to RCW 9.94A.602 and RCW 9.94A.533(4); Felony Violation of a Court Order in violation of RCW 26.50.110(1) and (4); and

Theft in the First Degree in violation of RCW 9A.56.030(1)(b) and RCW 9A.56.020(1)(a). All three offenses were domestic violence offenses. CP 1-7. The charges were later amended to include two aggravating factors. The aggravating factors were 1) committing the offenses within the sight or sound of his minor children pursuant to RCW 9.94A.535(3)(ii) and 2) evidence of ongoing pattern of psychological, physical or sexual abuse of the victim pursuant to RCW 9.94A.535(3)(h)(ii). CP 17-20. Colakovic entered a plea of guilty to the Second Amended Information. 1RP 4-27¹; CP 21-48. Colakovic's plea included the two aggravating factors listed above. CP 17-20, 30-31, 42. Colakovic was given a standard range sentence. 2RP 1-27; CP 49-56. Colakovic's sentence included an order prohibiting contact with his two children who were the subjects of the aggravating factor. 2RP 18-20; CP 49-56. Colakovic appealed. CP 58-59.

2. SUBSTANTIVE FACTS

According to the Supplemental Certification for Determination of Probable Cause,² Colakovic and his wife Esma had been married for twelve years. CP 11-14. They have two children, Adnan (DOB 7/12/97)

¹ 1RP refers to Report of Proceedings for 12/17/09 and 3/18/10. 2RP refers to Report of Proceedings for 4/9/10.

² The Certification for Determination of Probable Cause was incorporated by the Plea Agreement and was considered by the court in reaching its decision. 2RP 5-6; CP 42.

and Aldijana (DOB 3/20/00). On March 13, 2009, Colakovic was served with an order prohibiting him from contacting Esma or coming near her residence. On that same day, Colakovic came by Esma's residence and left a copy of the order on the front porch.

In the early morning hours of March 14, 2009, Esma was preparing to leave for work. As she walked to her vehicle, she looked for Colakovic. Because of his prior threats and physical abuse, Esma had her cell phone at the ready to call 911. Without warning, Colakovic approached Esma and repeatedly struck Esma in the head and arm with a baseball bat. Esma, thinking that Colakovic was about to kill her, screamed for help. Colakovic continued to strike Esma and she fell to the ground. Esma crawled on the ground, bleeding from the head, as she continued to scream for help.

Colakovic's child, Aldijana, heard her mother's screams. She woke her brother and told him that their father was killing their mother. They looked out the window and witnessed the assault. They first called their aunt for help. Their aunt told them to call 911. A neighbor, who also heard Esma's screams, yelled at Colakovic and came to Esma's assistance. Colakovic fled from the scene. CP 11-14.

The responding officers found Esma, bleeding from the head and swollen. Esma was sent to the hospital and treated for her injuries. CP

11-14. Shortly after the incident, Colakovic's children were interviewed by a child interviewer. The interviews were recorded on a Digital Video Disk (DVD). 2RP 5-6, 17-20; CP 42.

On March 18, 2010, Colakovic entered a plea of guilty to the Second Amended Information. 1RP 4-27; CP 17-48. Colakovic's plea included a plea to the deadly weapon enhancement, as well as the two aggravating factors.

On April 9, 2010, a sentencing hearing was held before the Honorable Richard McDermott. 2RP 1-27. Two DVDs of the child interviews were provided to the court for consideration at sentencing. 2RP 5-6, 17-20; CP 42. In addition to reviewing the DVDs of the child interviews and the facts contained in the Certification for Determination of Probable Cause, Judge McDermott heard from the parties. The deputy prosecuting attorney provided the court with information from Esma. The information included the fact that the children had gone through eight to ten weeks of counseling and that they were still scared of Colakovic. Esma wanted the court to know that if Colakovic received counseling and showed some signs of improvement, she did not wish to preclude him from having a relationship with his children. She added, however, that at the current time, they are scared of Colakovic and they do not want to have contact with him. 2RP 6-7, 18-19. Judge McDermott also heard

from a defense agency social worker. She addressed some of Colakovic's mental health issues and opined that counseling could help his parenting abilities. 2RP 10.

After imposing a standard range sentence, Judge McDermott entered a No Contact Order prohibiting Colakovic from having contact with his two children. 2RP 19-27; CP 49-56. Although the No Contact Order had a ten year expiration date, Judge McDermott tailored the order and informed the defendant that he would modify or terminate the order early, if Colakovic receives some counseling and a trained professional informs the court that it would be appropriate for the children to have contact with Colakovic. The court emphasized that its main consideration was the health of the children. 2RP 19-20.

C. ARGUMENT

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION
WHEN IT IMPOSED A NO CONTACT ORDER
PROTECTING THE APPELLANT'S CHILDREN AS A
CONDITION OF SENTENCE**

Colakovic claims that the trial court abused its discretion when it imposed a No Contact Order that included his two children. Colakovic is mistaken. The sentencing court was well within its discretion when it entered an order that was necessary to prevent harm and protect the children.

This Court reviews sentencing conditions, including crime-related prohibitions, for abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Under RCW 9.94A.505(8), the court may “impose and enforce crime-related prohibitions” as part of a sentence. A crime-related prohibition means “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(13). The existence of a relationship between the crime and the condition “will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.” State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989); State v. Riley, 121 Wn.2d at 28. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

Crime-related prohibitions which limit fundamental rights are permissible, provided that the restrictions are reasonably necessary and narrowly drawn. State v. Riley, 121 Wn.2d at 38. A reviewing court considers whether the order prohibits “a real and substantial amount of protected conduct in contrast to the statute's legitimate sweep.” State v. Riles, 135 Wn.2d 326, 346-347, 957 P.2d 655 (1998).

It is well recognized that parents have a fundamental liberty interest in the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). However, a sentencing court has the discretion to impose a no-contact order for a defendant's children when it is reasonably necessary to protect the children from harm and the appropriate nexus exists between the offense committed and the sentencing condition. State v. Ancira, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn. App. 424, 441-42, 997 P.2d 436 (2000). In fact, the State has an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or **mental health** of the child [emphasis added]." In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1981); State v. Ancira, 107 Wn. App. at 654.

This Court must determine whether the record supports the proposition that prohibiting Colakovic's contact with his two children is reasonably necessary to protect the children from physical or psychological harm. The record overwhelmingly supports the trial court's decision. As a result of prior abuse, Esma appeared to be in constant fear of Colakovic. This fear caused Esma to be vigilant in her efforts to protect herself and her children. Unfortunately, all of Esma's precautions did not help her avoid Colakovic's attack. Colakovic's attack on Esma was

particularly brutal. It did not simply involve the violation of a no contact order, a push, or loud voices. Colakovic repeatedly struck Esma with a baseball bat, driving her to the ground. Despite her screams and attempts to crawl away, Colakovic continued to strike Esma with the deadly weapon. The attack was heard and observed by their children, who believed that their father was about to kill their mother. They reach out for help by first calling their aunt and then the police.

Colakovic argues that the facts here are comparable to those in Ancira. Appellant's Brief at 8. This could not be farther from the truth. In Ancira, the defendant and his wife got into an argument in front of their children. The court entered a no contact order prohibiting Ancira from contacting the children because the children were present when Ancira violated the no contact order. Here, it is uncontested that Colakovic's brutal crime was committed within the sight or sound of Colakovic's children. He has pleaded guilty to the aggravating factor and admitted to supporting facts. The children were victims of his crime.³ Unlike the facts in Ancira, the trial judge considered the significant impact the crime had on the children. Not only did the court consider the input from the children's mother, the trial judge also personally reviewed the video

³ RCW 10.99.020 defines "victim" as "a family or household member who has been subjected to domestic violence."

recorded interviews of the children. In light of the facts of the case and children's fear of their father and desire not to see him, the court determined that the no contact order was necessary to avoid additional harm. The trial court was clearly in the best position to make this determination and the decision was not made in a vacuum. The trial court also did not write the order in stone. The judge expressed his willingness to modify or terminate the order when the court was satisfied that the contact would not harm the children.⁴

D. CONCLUSION

The trial court carefully considered the facts of this case, including the recorded statements of the children taken by a child interviewer. The facts supporting the court's decision are especially compelling not only because of the brutal nature of the assault witnessed by the children, but also because the court was able to see and hear the children as they discussed the incident with a trained professional. Moreover, the court specifically tailored the order and informed the defendant that the order could be modified or terminated once the court was satisfied that the children were safe from physical or mental harm. The court also set up a process for obtaining additional information by requiring the defendant to

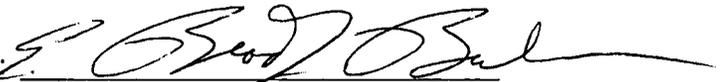
⁴ The court ordered the defendant to undergo a mental health evaluation and follow all treatment recommendations and to complete a batterer's treatment program. CP 49-56.

participate in mental health and batterer's treatment. For the reasons stated above, the court's decision to impose the no contact order should be affirmed.

DATED this 16th day of December, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Lind, the attorney for the appellant, at Neilsen, Broman & Koch, 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RAMIZ COLAKOVIC, Cause No. 65223-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Divina Tomasini
Done in Kent, Washington

12/16/10
Date

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