

68239-3

68239-3

NO. 68239-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN LITTLEBEAR,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

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REPLY BRIEF OF APPELLANT

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JENNIFER J. SWEIGERT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2372

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2019 JAN 22 PM 4:41

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A. ARGUMENT IN REPLY

1. THE NO-CONTACT ORDER IS PROPERLY CONSIDERED ON THIS APPEAL BECAUSE IT WAS REIMPOSED WHEN LITTLEBEAR'S SSOSA WAS REVOKED AND BECAUSE AN ERRONEOUS CONDITION OF SENTENCE MAY BE CORRECTED AT ANY TIME.

The constitutional violation caused by prohibiting Littlebear from contacting his own children is an issue that can be raised for the first time on this appeal from the revocation of his SSOSA for two reasons. First, revocation of a special sex offender sentencing alternative (SSOSA) involves reimposing the original sentence. See CP 6-21 (“Order Revoking SSOSA and Imposing Sentence” with original judgment and sentence attached). The State argues review is limited to issues raised by the order from which the appeal was taken. This appeal was taken from an order which expressly reimposes the terms and conditions of the original judgment and sentence. CP 2, 6. Therefore, the terms and conditions of the original sentence are within the scope of this appeal.

Second, the court may correct an unauthorized condition of a sentence (such as the one at issue here) whenever the error is discovered. A court may impose only those sentences authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). “When a sentence has been imposed for which there is no authority in law,

the trial court has the duty and power to correct the erroneous sentence, when the error is discovered.” In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (quoting McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), overruled in part on other grounds by State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973)). Constitutional challenges to conditions of a sentence may also be argued for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (striking condition of community custody as unconstitutionally vague).

The no-contact order with Littlebear’s own children is an erroneous portion of his sentence in violation of his constitutional rights and should be stricken. See In re Pers. Restraint of West, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) (holding imposition of an unauthorized sentence is grounds for reversing the erroneous portion of the sentence) (quoting State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980)).

2. THE APPROPRIATE REMEDY IS TO STRIKE THE UNLAWFUL CONDITION OF LITTLEBEAR’S SENTENCE.

After the opening Brief of Appellant was filed, counsel for the State suggested moving directly to a trial court hearing on the appropriateness of the no-contact order. That hearing occurred on December 3, 2012, and the trial court entered an amended revocation order and findings of fact specifically prohibiting Littlebear from having contact with his biological

children for the rest of his life. State's Motion to Permit Entry of Order Pursuant to RAP 7.2(e).

No live testimony was taken. Id. at Appendix B; Supp. CP<sup>1</sup> \_\_\_\_ (sub no. 119, Motion Hearing 12/3/2012). The findings of fact were based on affidavits from the prosecutor and the Community Corrections Officer (CCO). Id. Neither of them had personal knowledge of Littlebear's conduct and neither is an expert qualified to propound on whether there is a need to separate Littlebear from his children. Supp. CP \_\_\_\_ (sub no. 115, Affidavit of Eric Richey, 10/31/2012); Supp. CP \_\_\_\_ (sub no. 116, Affidavit of Richard DeBay, 11/1/2012). There is still no affirmative showing that Littlebear is a pedophile or would otherwise be a danger to his own children as required by State v. Letourneau, 100 Wn. App. 424, 442, 997 P.2d 436, 446 (2000). In other words, the State again failed to present evidence that the no-contact order is narrowly tailored to prevent harm to his children.

This Court should do as the Court did in Letourneau, and simply strike the portion of Littlebear's sentence prohibiting contact with his biological children: "We strike the provision from Letourneau's judgment and sentence that restricts unsupervised in-person contact with her biological minor children following her release from total confinement." Letourneau, 100 Wn. App. at 442. The State has already had two chances to present the

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<sup>1</sup> A supplemental designation of clerk's papers was filed on January 22, 2013. The court minutes and affidavits designated are also attached as an appendix to this brief.

requisite evidence supporting its proposed condition of sentence and twice it has failed to do so. This Court should decline to offer the State a third bite at the apple and should instead simply strike the no-contact order.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Littlebear requests this Court strike the condition of community custody prohibiting contact with his own children.

DATED this 22<sup>nd</sup> day of January, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

JENNIFER J. SWEIGERT  
WSBA No. 38068  
Office ID No. 91051

Attorney for Appellant

# Appendix

SCANNED 1

Docketed W MTHRG X STAHRG    EVIHRG    HSTKIC    SCVHRG   

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

STATE OF WASHINGTON, Plaintiff

No. 03-1-01094-7

JUDGE UHRIG

vs.

REPORTER PEACH

CLERK LONG

STEVEN RAY LITTLEBEAR, Defendant

DATE DECEMBER 3, 2012 @ 9:00

This matter comes on for MOTION TO CLARIFY REVOCATION ORDER RE:  
COMMUNITY CUSTODY TERM AND NO-CONTACT WITH MINORS

State represented by DARRIN HALL / HILARY THOMAS

Defendant appeared: Yes / No In custody: Yes / No

Defendant Represented by DARRIN HALL

Mr. Richey made argument.

Mr. Hall responded and stated that the Public Defender's Office or himself are he attorney of record, but will appear on behalf of the defendant for this hearing.

Hilary Thomas of Appellate Division stated matter is not back on a remand or a mandate.

Mr. Hall stated he is prepared for today's hearing and court proceeded.

Mr. Richey made argument for no-contact with any children, including defendant's own children.

Mother of children made statement to the court.

Mr. Hall responded and made argument to amend order to allow defendant contact with his own children.

Mr. Richey made rebuttal argument.

Court granted State's motion and denied defendant contact with his own children.

No order signed in court.

DATE: DECEMBER 3, 2012

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SCANNED 2

FILED IN OPEN COURT  
10/31 2012  
WHATCOM COUNTY CLERK  
By [Signature]  
Deputy

WASHINGTON STATE DEPARTMENT OF CORRECTIONS

THE STATE OF WASHINGTON, )  
 )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 STEVEN RAY LITTLEBEAR, )  
 )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

No. 03-1-01094-7

AFFIDAVIT OF ERIC J. RICHEY

STATE OF WASHINGTON )  
 ) ss.  
 COUNTY OF SNOHOMISH )

I, ERIC J. RICHEY, hereby swear or affirm, I am the Prosecuting Attorney in the above matter;

1. That Mr. Littlebear pled guilty and was allowed a special sentence for sex offenders (SSOSA).
2. In the Judgment and sentence, Mr. Littlebear was ordered to have no contact with any minor males or females.
3. The sentence required that Mr. Littlebear would complete a treatment program.
4. Mr. Littlebear failed to complete his treatment.
5. Mr. Littlebear's SSOSA was revoked and he was sent to prison.
6. Mr. Littlebear has appealed the no contact order that states he shall not have contact with any minor males or females alleging a fundamental parental right.

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7. Mr. Littlebear has minor 3 minor children.
8. He has two boys ages 12 and 12 from two different mothers.
9. He has one girl age 6 who he denies being the parent.
10. He has had little or no contact with any of these children.

DATED THIS 30 October 2012



ERIC J. RICHEY, #22860  
Deputy Prosecuting Attorney

SUBSCRIBED and SWORN to before me this 30 day of October ~~September~~ 2012.



NOTARY PUBLIC in and for the State  
Of Washington. My commission expires:  
6/29/14

SCANNED 3

FILED  
COUNTY CLERK  
2003-03-11 PM 4:16  
WHATCOM COUNTY  
WASHINGTON  
BY [Signature]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON, )  
 )  
 ) Plaintiff, )  
 vs. )  
 )  
 STEVEN RAY LITTLEBEAR, )  
 )  
 ) Defendant. )

No. 03-1-01094-7

AFFIDAVIT OF RICHARD DEBAY

STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF WHATCOM )

I, RICHARD DEBAY, swear under the penalty of perjury that the following is true and correct:

I am a Community Corrections Officer employed with the Washington State Department of Corrections and started supervising Steven Ray Littlebear on March 7<sup>th</sup>, 2003 on the above listed cause, a Sex Offender Special Sentencing Alternative sentence.

This case stems from Mr. Littlebear molesting an eight year old female who was the daughter of a friend of his. This crime cause long lasting negative effects on the victim.

Mr. Littlebear has two sons by two different women and they are currently aged about 11 and 12 respectively. He did not even know the existence of one of his sons for about three years. He has also made reference to a daughter Kaliel (sp?) approximately age 6 however I have no direct knowledge of Mr. Littlebear being listed as the father of that child.

Affidavit of RICK DEBAY

Whatcom County Prosecuting Attorney  
311 Grand Avenue, Suite #201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 Fax

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At the time of Mr. Littlebear starting his supervision I went over Mr. Littlebear's conditions of supervision that were imposed by the Whatcom County Superior Court and Mr. Littlebear was given copies for his records and referral and said that he understood his obligations to the court. Of note were the conditions from appendix "H".

One condition in particular states that Mr. Littlebear will avoid all contact with minors (to include your own children) and adhere to the instructions of the Community Corrections Officer concerning residence and employment, unless otherwise authorized by the Department of Corrections and treatment provider with an adult sponsor approved by the provider and Department of Corrections. On July 23, 2008 Brien Kier, who was Mr. Littlebear's fiancée at the time was approved to be a sponsor for Mr. Littlebear on advanced approved outings. To obtain sponsor status Ms. Kier had attended sex offender non-offender groups with Dr. Coleman, passed a background check, participated in his reporting and supervision then had interviews with myself.

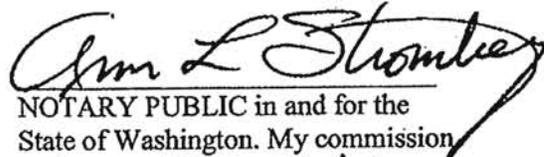
Within two months of receiving a sponsor Mr. Littlebear started having violations. He had been failing to attend sex offender treatment classes as directed. Mr. Littlebear had become very ill and had provided verification of that illness. About a year later, in November 2009, Mr. Littlebear had a violation report sent to the court as he had submitted two urinalysis samples to the Department which showed positive results for drugs tested (methamphetamines). The violation report also indicated that Mr. Littlebear had not attended his sex offender treatment in about a year. As Ms. Kier was living with Mr. Littlebear and had to have known about the violations she was terminated as being a sponsor for Mr. Littlebear so now no minor contact was allowed in any circumstance.

In December of 2009 I received information from Detective Campos of the Ferndale Police Department that Mr. Littlebear did have contact with minor females recently. When confronted with this information Mr. Littlebear denied the allegations. A couple of months later Mr. Littlebear finally admitted that he had contact with minor females but he had not been alone with them. Mr. Littlebear also admitted to me that he had used his ongoing illness as an excuse to not attend sex offender treatment and submit to polygraphs when at times he had been well enough to comply with those conditions.

Over the course of the five years I supervised Mr. Littlebear he has shown that he is not willing to comply with his conditions of supervision, conditions of sex offender treatment and be honest with people he has to deal with. I would not recommend that Mr. Littlebear have contact with minors, including his own children, as he is an untreated sex offender who victimized a minor child who called him "Uncle" and has not demonstrated through actions his willingness to follow directions of the rules set forth to him.

  
RICHARD DEBAY

SUBSCRIBED AND SWORN to before me this 1st day of November 2012.

  
NOTARY PUBLIC in and for the  
State of Washington. My commission  
expires on: ~~6/29/14~~ 6/9/14

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68239-3-1
	)	
STEVEN LITTLEBEAR,	)	
	)	
Appellant.	)	

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**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 22<sup>nd</sup> DAY OF JANUARY 2013, 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] WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE  
BELLINGHAM, WA 98227
  
- [X] STEVEN LITTLEBEAR  
DOC NO. 818841  
MONROE CORRECTIONS CENTER  
P.O BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>nd</sup> DAY OF JANUARY 2013

X *Patrick Mayovsky*

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 JAN 22 PM 4:41