

68239-3

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NO. 68239-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LITTLEBEAR,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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STATE OF WASHINGTON
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DIVISION ONE
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A. ASSIGNMENT OF ERROR

The condition of community custody prohibiting appellant from having any contact with his own children violates his fundamental constitutional rights as a parent.

Issue Pertaining to Assignment of Error

Must the community custody condition prohibiting contact with appellant's own children be stricken because the prohibition was not narrowly tailored or reasonably necessary to protect the children from harm?

B. STATEMENT OF THE CASE

In 2003, the Whatcom County prosecutor charged appellant Steven Littlebear with one count of first-degree child molestation. CP 46. Littlebear pled guilty and received a Special Sex Offender Sentencing Alternative (SSOSA). CP 29, 34. Littlebear admitted he molested the daughter of a family friend. CP 49, 70. There is no indication in the record that he has ever touched his own children. CP 24, 44-45, 49-63. During his SSOSA time in the community, there has been no sign of unauthorized contact with children or unapproved sexual contact. 3RP¹ 34.

¹ There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Oct. 27, 2005; 2RP – Mar. 1, 2006; 3RP – Jan. 10, 2012.

In September, 2011, Littlebear's Community Corrections Officer apparently became frustrated with Littlebear's inability to find a job. Littlebear had been reporting to his CCO weekly, but on Monday September 12, 2011, the CCO directed him to fill out four new employment applications daily and to report daily with the completed applications. CP 24. At this point, after roughly six years without a violation, Littlebear failed to report daily as directed for the remainder of that week. CP 24. The CCO filed a violation report, and recommended a six-month sanction. CP 22; 3RP 36.

However, on January 10, 2012, the court instead revoked Littlebear's SSOSA and reinstated the original sentence of 51 months to life. CP 6-7. Under former RCW 9.94A.712, Littlebear will be on community custody for any period of time he is released before the expiration of his maximum term. That maximum term is life. As a crime related prohibition, the court required Littlebear to "avoid all contact with minors (to include your own children)." CP 39. Littlebear filed notice of appeal. CP 2.

C. ARGUMENT

THE ORDER PROHIBITING CONTACT WITH LITTLEBEAR'S CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27

P. 3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). “Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.” In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (citations omitted), aff’d sub nom Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Prevention of specific harm to children is a compelling state interest, but limitations on parental rights are constitutional only if reasonably necessary to accomplish the essential needs of the State. State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000). Thus, the State may not burden the fundamental right to parent via a criminal sentence condition unless the condition is reasonably necessary to prevent specific harm to the child. Ancira, 107 Wn. App. at 654; Letourneau, 100 Wn. App. at 439. Littlebear pled guilty to molesting a friend’s daughter. CP 29. Nevertheless, the court imposed as a crime-related prohibition, that he have no contact with any children, even his own. CP 39. This prohibition violates his fundamental constitutional right to raise his children.

Because the order prohibiting contact with his children involves substantial state regulation of a fundamental right, the State has the burden of showing it is narrowly tailored to meet a compelling state interest. See, e.g.,

Smith, 137 Wn.2d at 15 (state must show statute regulating parental rights is narrowly drawn). The State cannot do so here.

Prevention of harm to children is a compelling state interest, but conditions of a sentence that limit fundamental rights are valid only if they are “reasonably necessary to accomplish the essential needs of the state.” Ancira, 107 Wn. App. at 653-54 (quoting State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) (concluding that a prohibition on a convicted sex offender’s contact with minors was unjustified where the victim was not a minor). To withstand constitutional scrutiny, no contact orders relating to biological children must be reasonably necessary to protect them from harm. Letourneau, 100 Wn. App. at 439.

Letourneau illustrates the rule that contact with a person’s own children may not be restricted without a specific showing of danger to those children. In Letourneau, a schoolteacher was convicted of raping a 13-year-old student, and a sentencing condition prohibited her from unsupervised contact with her own children. Id. at 428-29. This Court held the condition was not reasonably necessary to prevent her from molesting her own children because there was no evidence she was a pedophile or posed a danger to her children. Id. at 442.

One expert opined Letourneau posed a danger to her biological children and observed “[m]any sex offenders have offended a victim other

than their biological child and later offend their own child of the same or opposite sex.” Id. at 439-40. This Court found this opinion insufficient to justify the no-contact order. Id. at 441-42. “The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights.” Id. at 442. The court explained, “There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.” Id.

The court struck the no-contact condition because there was insufficient evidence in the record showing it was reasonably necessary to protect Letourneau’s children. Id. at 441-42; cf. State v. Corbett, 158 Wn. App. 576, 599, 242 P.3d 52 (2010) (no contact order with biological children upheld where defendant offended against children for whom he acted as a parent); State v. Berg, 147 Wn. App. 923, 942-43, 198 P.3d 529 (2008) (same).

The State must demonstrate that prohibiting contact with biological children is reasonably necessary. Letourneau, 100 Wn. App. at 441; Ancira, 107 Wn. App. at 654 (striking no-contact provision because evidence did not show restriction was reasonably necessary to prevent child’s exposure to

domestic violence). Littlebear had no obligation to demonstrate the prohibition was not reasonably necessary. Rather, the Court must have before it affirmative evidence in the record that such a restriction is reasonably necessary before it may impose such a condition. Letourneau, 100 Wn. App. at 442. The record here contains no such evidence.

As in Letourneau, Littlebear's offense was committed against a child he was not related to. CP 49. There is no evidence Littlebear molested his own children. There was no evidence he had a generalized sexual interest in children or was a pedophile. In this case, there was not even an expert opinion on the issue. On this record, the prohibition on all contact with Littlebear's children is neither narrowly tailored nor reasonably necessary to protect them. A general fear that Littlebear would molest his own children because he molested a child to whom he was not related is not good enough to justify the prohibiting contact with his children. Letourneau, 100 Wn. App. at 441-42. The prohibition is therefore invalid. Id.

The prohibition is also invalid because it is not narrowly tailored. In re Parentage of C.A.M.A., 154 Wn.2d 52, 61, 109 P.3d 405 (2005). Indeed, the no-contact condition here is even broader than the condition struck down in Letourneau. The court here prohibited all unsupervised "all contact, with minors (to include your own children)," whereas the Letourneau condition only banned unsupervised in-person contact. CP 39;

Letourneau, 100 Wn. App. at 428-29. Even if a prohibition on unsupervised in-person contact were appropriate, there is no evidence to suggest Littlebear somehow posed a danger to his children by writing to them, speaking with them on the telephone, or communicating with them through third parties. For the reasons set forth above, the court's prohibition on contact with Littlebear's own children is neither narrowly tailored nor reasonably necessary to protect them from abuse. The condition should be therefore stricken. Letourneau, 100 Wn. App. at 427.

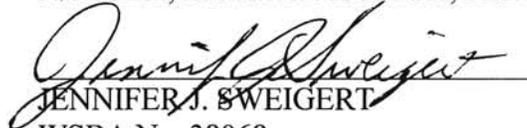
D. CONCLUSION

The court had no evidence before it that Littlebear posed a danger to his own children. He therefore requests this Court reverse the order prohibiting contact with his children.

DATED this 3rd day of August, 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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| STATE OF WASHINGTON |) | |
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| STEVEN LITTLEBEAR, |) | |
| |) | |
| 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 3RD DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **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 3RD DAY OF AUGUST 2012.

x *Patrick Mayovsky*

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COURT OF APPEALS
STATE OF WASHINGTON