

68239-3

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No. 68239-3-I

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

**STATE OF WASHINGTON,
RESPONDENT,**

v.

**STEVEN RAY LITTLEBEAR.
APPELLANT.**

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DAVID S. DIVI
COURT OF APPEALS
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a no contact order prohibiting the defendant's contact with his biological sons should be upheld where the defendant has had minimal contact with his sons, the defendant is an untreated sex offender and offended against a child of similar age who considered the defendant like an uncle, where the defendant had previously violated provisions regarding not having contact with minor children and where the state has a compelling interest in protecting defendant's biological children from any potential abuse.

C. FACTS

After Littlebear pleaded guilty to Child Molestation in the First Degree, a Pre-Sentence Investigation ("PSI") Report was ordered and Littlebear obtained a sexual deviancy evaluation in order to pursue a Special Sex Offender Sentencing Alternative ("SSOSA"). CP 49-63, 67; CP 92-109. On March 1st, 2006 when the judge imposed a SSOSA sentence, Littlebear indicated to the judge that he fully understood what was expected of him under the SSOSA and never inquired about the proposed no contact order regarding his biological children and never objected to it. CP 62, 2RP 8-9. The SSOSA treatment rules required that he not have contact with any minor unless supervised by an adult who had

been preapproved by the treatment provider. The recommended conditions of community supervision likewise required that he avoid contact with all minors including his own children unless supervised by an adult who had been preapproved by the treatment provider and the community corrections officer (“CCO”). CP 62, 108. The judge imposed the recommended no contact order regarding Littlebear’s children. CP 29-43.

Almost six years later, Littlebear’s SSOSA was revoked. CP 6-21; 3RP 60-63. Littlebear did not raise any issue regarding the no contact order with his biological children at the revocation hearing. 3RP 3-64. After Littlebear filed a notice of appeal regarding the no contact order with his biological children, appellate counsel for Littlebear and the State reached an agreement to hold a hearing regarding the no contact order, which hearing was held on Dec. 3rd, 2012. Prior to the hearing the State filed a memorandum and attached affidavits of the deputy prosecutor and the CCO. CP 111-15.

The information before the court at the time of the hearing, including the PSI report, Sexual Deviancy Evaluation and the affidavits, indicated that Littlebear was the child victim’s favorite person and that he

was like an uncle to her. CP 49. The victim was 8 years old at the time of the offense. Id.

Littlebear has two biological children, by two different mothers, both of whom would have been around 12 years old at the time of the hearing. CP 55, 97, 111-15. Littlebear hadn't seen one of the boys for four years at the time of the PSI report because the mother would not let him. CP 55. He did not know of the existence of one of the boys until the boy was three years old. CP 97, 113-15. One of the mothers would not allow him to have contact with her son because of the sex offense charges. Id.

At the time he was sentenced Littlebear indicated he was very bonded to his then fiancée's¹ sons. Id. While awaiting sentencing he violated his no contact with minors condition by having contact with those boys. CP 58, 97. At the December hearing regarding the no contact order, it was the prosecutor's understanding that Littlebear had had minimal contact with his biological sons. CP 111-12. Littlebear provided no information to the court about his contact with his sons. RP 10, 12-16.

The CCO who had supervised Littlebear for five years summarized his position:

¹ This was Littlebear's fiancée at the time of the PSI report. Littlebear apparently had a different fiancée who was the person approved to supervise him during his sex offender treatment.

[Littlebear] 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 had 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.

CP 113-115.

D. ARGUMENT

- 1. The trial court's imposition of a no contact order with Littlebear's biological children should be upheld because the no contact order is reasonably necessary to protect his sons from an untreated sex offender who previously violated rules against no contact with minor children, particularly where Littlebear has had minimal contact with those sons.**

Littlebear asserts that the no contact order should be stricken because it is not narrowly tailored to protect his children from harm. While Littlebear has indicated a desire to have contact with his children, he never suggested any alternatives to the complete no contact order that the judge imposed. Littlebear has done little to assert any interest in having contact with his biological children, never objecting to imposition of the no contact order until appeal from his SSOSA revocation order. Littlebear is an untreated sex offender who offended against a child who considered him like an uncle and who has previously violated conditions

about not having unsupervised contact with minors. The no contact order is reasonably necessary to protect Littlebear's sons from the risk of harm he presents as an untreated offender, particularly where his contact with those sons has been minimal.

If a sentencing condition impacts a defendant's fundamental right to parent, the sentencing court must make a determination that the condition is "reasonably necessary to accomplish the essential needs of the State and public order." In re Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010) (*quoting* State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). The State has a compelling interest in protecting children, such that the court can restrict a defendant's fundamental right to parent if the crime-related prohibition is reasonably necessary to prevent further harm to children and to protect them. State v. Corbett, 158 Wn. App. 576, 598, 242 P.3d 52 (2010).

A prohibition on a defendant's contact with his own child must be reasonable in scope as well as duration. Rainey, 168 Wn.2d at 378-81. Whether such a prohibition is reasonably necessary is fact dependent. *Id.* at 377. The inquiry is based on the judge's evaluation of the defendant and the evidence produced at trial. *Id.* at 374-75.

In State v. Berg, the court upheld a no contact order prohibiting the defendant from having any unsupervised contact with his biological daughter where he had been convicted of molesting another female child with whom he had lived and whom he had parented. The court found that the order restricting contact with other female children with whom the defendant had resided was reasonably necessary to protect those children from the same type of harm. State v. Berg, 147 Wn. App. 923, 943, 198 P.3d 529 (2008). The court also found that the scope of the no contact order was reasonable because it prevented the defendant from exploiting the kind of trust he had previously developed as a parental figure in a similar manner with his own daughter. Id. at 944.

State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010) followed the rationale of Berg in upholding a similar no contact order in a child rape case. In Corbett, the defendant sexually abused his stepdaughter with whom he was living and whom he was parenting. The court found the no contact order was reasonably necessary to prevent the defendant from again using the trust he had engendered as a parental figure in order to sexually abuse minor children. Id. at 599. The court therefore imposed a no contact order regarding all of the defendant's children, male and female, because all the children were at risk where there was evidence the

defendant had raped a child he had parented while the other children were in the home and where the method of rape was not gender specific. *Id.* at 600.

Here, Littlebear never objected or raised an issue regarding the court's imposition of a no contact order with his biological children at the time of sentencing or revocation. It is likely that he never raised the issue because he has no significant contact or relationship with his biological sons. Like the defendants in Berg and Corbett, it appears Littlebear exploited his relationship of trust with the child victim in molesting her. While he was not in a parental role with the child, she did consider him to be like an uncle to her. Littlebear is a sex offender who failed treatment, who violated terms of his supervision and was dishonest with his community corrections officer. Here, a no contact order with Littlebear's children is reasonably necessary to meet the State's compelling interest in protecting the children from potential sexual abuse, particularly where Littlebear has had minimal contact with his biological children. The no contact order is only with minor children, so the order will cease to have effect once his sons turn 18 years of age.

Littlebear's reply requests that the State not be given a "third bite at the apple." The State is not requesting remand: the trial court has now

held a hearing and has addressed the no contact order, so this Court should either affirm or vacate the no contact order regarding Littlebear's biological children.

E. CONCLUSION

The State requests that the order prohibiting Littlebear from having no contact with his biological children be upheld. If the Court should decide to strike the provision, the provision stricken should be limited to the one regarding his biological children and should leave the no contact order regarding other minors in place.

Respectfully submitted this 11th day of February, 2013.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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02/12/2013
Date