

68239-3

68239-3

No. 68239-3-I

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

**STATE OF WASHINGTON,
RESPONDENT,**

v.

**STEVEN RAY LITTLEBEAR.
APPELLANT.**

BRIEF OF RESPONDENT

**DAVID S. MCEACHRAN,
Whatcom County Prosecuting Attorney
BY HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007
ADMIN #91075**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

2012 Dec 20 10:11:41
8

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. FACTS 1

D. ARGUMENT 4

1. Littlebear’s appeal regarding his fundamental right to parent is untimely as the court imposed the no contact order at the time the judgment and sentence was entered, over five years before the SSOSA revocation hearing, and he never raised the issue at the time of the revocation hearing. 4

2. Should this court determine that Littlebear may raise the no contact order issue at this time on appeal, the matter should be remanded for a hearing to determine whether a no contact order should be entered since he did not object at the time of its imposition..... 7

E. CONCLUSION 11

TABLE OF AUTHORITIES

Washington State Court of Appeals

<u>Kemmer v. Keiski</u> , 116 Wn. App. 924, 68 P.3d 1138 (2003)	5
<u>State v. Berg</u> , 147 Wn.App. 923, 198 P.3d 529 (2008)	8, 9, 10
<u>State v. Collins</u> , 6 Wn. App. 922, 496 P.2d 542 (1972)	5
<u>State v. Corbett</u> , 158 Wn. App. 576, 242 P.3d 52 (2010)	9, 10
<u>State v. Gaut</u> , 111 Wn. App. 875, 46 P.3d 832 (2002)	4, 5
<u>State v. Moon</u> , 130 Wn. App. 256, 122 P.3d 192 (2005)	6
<u>Wlasiuk v. Whirlpool Corp.</u> , 76 Wn. App. 250, 884 P.2d 13 (1994)	5

Washington State Supreme Court

<u>Adkins v. Aluminum Co. of America</u> , 110 Wn.2d 128, 750 P.2d 1257 (1988)	6
<u>In re Rainey</u> , 168 Wn.2d 367, 229 P.3d 686 (2010)	8, 9
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007)	10
<u>State v. Liliopoulos</u> , 165 Wash. 197, 5 P.2d 319 (1931)	5
<u>State v. Thiefault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007)	11
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008)	8
<u>Weaver v. Stinson</u> , 177 Wash. 140, 31 P.2d 510 (1934)	5

Rules and Statutes

RAP 2.2(a)	4
RAP 2.4(b)	5, 7
RAP 18.8(b)	6

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether an appellant may assert, on appeal from a revocation of a Special Sex Offender Sentencing Alternative, an issue regarding the imposition of a no contact order with the appellant's biological children where the no contact order was imposed as part of the judgment and sentence five years before the SSOSA was revoked and where the issue was never raised at the time of the revocation hearing or in the order.
2. Whether the remedy for the court's failure to address a defendant's fundamental right to parent his children in imposing a no contact order at sentencing should be vacation of the order or remand where the defendant never raised the issue below.

C. FACTS

On August 15, 2003 Appellant Steven Littlebear was charged with Child Molestation in the First Degree for his actions on or about July 3, 2003. CP 46-47. The information was subsequently amended to enlarge the time period to between May 1st and July 3rd 2003. Supp. CP __, Sub. Nom 35. On October 21, 2005 Littlebear pleaded guilty to the Child Molestation in the First Degree charge. CP 64-72; 1RP 5. That same day the prosecutor moved for dismissal of hit and run and false reporting

charges filed under another cause number. 1RP 3. Littlebear didn't have any questions about his guilty plea. 1RP 3-5. 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; Supp CP ___, Sub. Nom. 111.

The PSI report indicated that Littlebear was the child victim's favorite person and that he was like an uncle to her. CP 49. The child was 8 years old at the time of the offense. Id. According to the PSI Littlebear had one son by a Shauna Rudy, who was 5 years old at the time of the report and whom he had not seen for four years because the mother would not let him. CP 55. Littlebear indicated he was very bonded to his then fiancée's sons. Id. While awaiting sentencing he violated his treatment condition of no contact with minors by having contact with his then fiancée's sons. CP 58.

The sexual deviancy evaluation indicated that Littlebear had two sons, by different mothers, who were similar ages at the time of the evaluation, around 4-5 years old. Supp CP ___, Sub. Nom. 111 (at 5). Apparently he did not know of the existence of one of the children for three years. Id. At the time of the evaluation only one of the two children

lived in Bellingham, and Littlebear only paid minimal child support regarding one child. Id. Apparently one of the mothers would not allow him to have contact with his son due to the sex offense charges. Id.

On March 1st, 2006 defense counsel and the deputy prosecutor jointly recommended that Littlebear receive a SSOSA. 2RP 3-4. Littlebear indicated to the judge that he fully understood what was expected of him under the SSOSA. 2RP 9. He never inquired about the proposed no contact order regarding his children and never objected to it. CP 62, 2RP 8-9. The judge imposed a SSOSA along with the no contact order regarding Littlebear's own children. CP 29-43.

Littlebear's SSOSA was extended for an additional two years in March of 2010. CP 27-28. In November 2011, the State moved to revoke Littlebear's SSOSA. Supp CP __, Sub. Nom. 74-78, 86-88. At the hearing on January 10, 2012 the judge revoked Littlebear's SSOSA. CP 6-21; 3RP 60-63. Littlebear did not raise any issue regarding the no contact order with his biological children at the hearing. 3RP 3-64. Littlebear filed a notice of appeal on January 31st, 2012 designating the decision appealed as

“Order Revoking SSOSA and Imposing Sentence” entered on January 10, 2012.¹

D. ARGUMENT

- 1. Littlebear’s appeal regarding his fundamental right to parent is untimely as the court imposed the no contact order at the time the judgment and sentence was entered, over five years before the SSOSA revocation hearing, and he never raised the issue at the time of the revocation hearing.**

Littlebear seeks review of the court’s imposition of a no contact order with his biological children that was imposed at sentencing and was not raised at the revocation hearing. The no contact order is not properly before this Court on appeal at this time. His appeal should therefore be denied.

Generally an appellate court will review only those decisions that are designated in the notice of appeal. RAP 2.2(a). The scope of appellate review is limited to the issues that were raised by the motion and order from which the appeal was taken. State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). It is well settled that appealing a post-judgment order

¹ The State has filed a Motion to Permit Entry of Order Pursuant to RAP 7.2(e) along with this brief. A hearing was held in Whatcom County Superior Court December 3rd to address the issue of Littlebear’s contact with his biological children. Subsequent to the hearing the judge signed an amended revocation order as well as findings of fact and conclusions of law.

does not permit review of a judgment previously entered in the same case, particularly where the appeal period for the judgment has expired.

Wlasiuk v. Whirlpool Corp., 76 Wn. App. 250, 260, 884 P.2d 13 (1994);

see also, Kemmer v. Keiski, 116 Wn. App. 924, 932, 68 P.3d 1138 (2003)

(a judgment precludes all further proceedings if not appealed within 30

days except clarification and enforcement proceedings); Weaver v.

Stinson, 177 Wash. 140, 31 P.2d 510 (1934). Dismissal of an appeal is the

appropriate remedy where the assignments of error are not related to the

order that is being appealed. Gaut, 111 Wn. App. at 880-81.

A judgment is a final appealable order even if a portion of the

sentence is suspended. State v. Liliopoulos, 165 Wash. 197, 5 P.2d 319

(1931). “A fact that a sentence is suspended does not affect its finality.”

State v. Collins, 6 Wn. App. 922, 924, 496 P.2d 542 (1972).

RAP 2.4(b) provides for limited review of certain orders not designated in the notice of appeal but only if:

- (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling made before the appellate court accepts review.

RAP 2.4(b). This provision was intended to allow for prior appealable orders to be included in the scope of review of a notice from a final

judgment. Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 134, 750 P.2d 1257 (1988).

RAP 18.8 does permit an untimely appeal to be heard but only if necessary to prevent a gross miscarriage of justice. RAP 18.8(b) provides:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b). This test is applied rigorously. State v. Moon, 130 Wn. App. 256, 260, 122 P.3d 192 (2005). It is the appellant's burden under this rule to demonstrate "sound reasons to abandon the judicial preference for finality" and to provide an adequate excuse for failing to appeal in a timely manner. *Id.*

First, the notice of appeal Littlebear filed was from the order revoking his SSOSA. The order revoking his SSOSA does not address, nor did the underlying hearing address in any manner, the no contact order with Littlebear's biological children. The no contact order with his biological children was imposed by the sentencing court on March 1, 2006, almost six years before Littlebear's SSOSA was revoked. If Littlebear had wanted to contest the no contact order, he should have

appealed from entry of the judgment and sentence. He did not. Therefore, he is precluded from raising this issue on appeal at this time.

In addition, the no contact order entered in the judgment and sentence does not prejudicially affect the order revoking Littlebear's SSOSA. Thus, RAP 2.4(b) does not provide a basis for him to contest the order prohibiting contact with his children that was imposed at the time of his judgment and sentence. Finally, Littlebear has not provided the court with any excuse for failing to appeal this issue for almost 6 years that would meet the rigorous test of demonstrating a "gross miscarriage of justice." Littlebear's issue regarding the no contact order with his biological children is untimely and is not properly before this Court.

- 2. Should this court determine that Littlebear may raise the no contact order issue at this time on appeal, the matter should be remanded for a hearing to determine whether a no contact order should be entered since he did not object at the time of its imposition.**

Littlebear asserts that the no contact order should be stricken because it was not narrowly tailored or reasonably necessary to protect his children from harm. Should this Court determine that Littlebear can raise an issue regarding the no contact order imposed in the judgment and sentence in this appeal from the order revoking his SSOSA, the State requests that this Court not strike the no contact order, but remand the

matter for a hearing to address the reasonable necessity for the no contact order. Littlebear never objected to the imposition of the no contact order at sentencing, therefore the judge did not address on the record the reasonable necessity for it. As Littlebear did not bring this issue to the sentencing court's attention, the court should have an opportunity to conduct the necessary analysis to determine if the no contact order should be imposed and the scope of it.

The court may impose crime-related prohibitions that prohibit conduct directly related to the circumstances of the crime for which the defendant was convicted. State v. Berg, 147 Wn.App. 923, 942, 198 P.3d 529 (2008). Crime-related prohibitions impacting a defendant's fundamental rights must be narrowly drawn. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). A defendant's fundamental right to parent limits a sentencing court's ability to impose a condition limiting the defendant's ability to have contact with his child. In re Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010). 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." *Id.* (*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 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. *Id.* at 943. 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. He also didn't raise any issue with it at the hearing to revoke his SSOSA. While the fundamental right to parent is a constitutional issue, he never raised an objection to the no contact order below and never brought it to the court's attention so the court perform the required analysis of the issue. *See, State v. Kirkman*, 159 Wn.2d 918, 923, 155 P.3d 125 (2007) (objecting below gives the trial court the opportunity

to prevent or cure the error). It is possible that he never raised the issue because he had no significant contact or relationship with his biological sons.

Moreover, his sons appear to be of a similar age as the child victim in this case albeit a few years younger. Littlebear's relationship with the child apparently was close enough such that she considered him to be her uncle. Whether to prohibit a defendant from having contact with his own children is a fact dependant inquiry. Where, as here, the no contact order was never contested, such that a factual record was not sufficiently developed, remand for such a hearing would be appropriate. *Cf., State v. Thiefault*, 160 Wn.2d 409, 417 n.4, 158 P.3d 580 (2007) (remand to trial court proper remedy where defense did not object to erroneous legal comparability ruling such that the State did not have to establish facts to show factual comparability). If Littlebear has not forfeited his ability to raise this issue at this time, the matter should be remanded to the sentencing court to conduct a hearing and perform the necessary analysis.

E. CONCLUSION

The State has pending before this Court a Motion to Permit Entry of Order Pursuant to RAP 7.2(e). The orders sought to be entered pertain to a hearing held below the purpose of which was to address the no contact

order with Littlebear's biological children. Those orders do not necessarily moot the appeal in this case. If this Court denies that motion, the State respectfully requests that this Court deny Littlebear's appeal or remand this matter to the sentencing court.

Respectfully submitted this 19th day of December, 2012.

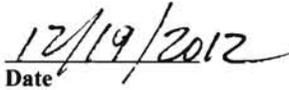

HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecutor 6314
Attorney for Respondent
ADMIN #91075

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:

JENNIFER SWEIGERT
Nielsen, Broman & Koch, PLLC
1908 E. Madison St.
Seattle, WA 98122


Legal Assistant


Date