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NO. 69021-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR SAN-JOSE,

Appellant.

REC'D

FEB 26 2013

King County Prosecutor
Appellate Unit

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The condition of community custody prohibiting appellant from having contact with any minor child without the approval of his treatment provider and community corrections officer violates his fundamental constitutional rights as a parent.

Issue Pertaining to Assignment of Error

Must the community custody condition prohibiting contact with any minor, which necessarily includes appellant's minor daughter, without the approval of his treatment provider and community corrections officer be stricken to allow appellant to have contact with his minor daughter without preconditions?

B. STATEMENT OF THE CASE

The King County prosecutor initially charged appellant Salvador San-Jose with three counts of third degree rape of a child. CP 1-9. On January 3, 2012, an amended information was filed charging San-Jose with two counts of third degree child molestation and one count of third degree rape of child. CP 26-28. The named victim, who was not related to San-Jose, was the same in all three counts. CP 1-9, 26-28.

On January 4, 2012, a second amended information was filed charging San-Jose with one count of third degree assault with sexual motivation. CP 34-35. That same day San-Jose pleaded guilty as charged

in the second amended information. CP 36-55; RP 47-59 (January 3 - 4, 2012).

After San-Jose entered his plea he contacted Carlos Gonzales, his court appointed counsel, and he told Gonzales he wanted to withdraw his plea. San-Jose eventually moved to withdraw his plea without Gonzales' assistance. RP 35-36 (May 18, 2012). New counsel was appointed to represent San-Jose on his motion to withdraw his plea.

On May 18, 2012 a hearing on the motion was held. San-Jose testified he agreed to accept the State's plea offer because trial counsel, Gonzales, assured him there would be no immigration consequences and no restrictions on his ability to see his children and grandchildren. RP 11 (May 18, 2012). He also testified it was not explained to him that if he pleaded guilty there was a mandatory 12 month sentence enhancement based on the sexual motivation allegation. RP 12 (May 18, 2012).

Gonzales testified that after the court initially allowed San-Jose to proceed pro se, San-Jose contacted him and asked if Gonzales would help him negotiate with the State. RP 24-25 (May 18, 2012). The State offered to allow San-Jose to plead to third degree assault with sexual motivation. RP 26 (May 18, 2012). San-Jose asked Gonzales to seek the advice of attorney Lynn Forrestal regarding the immigration consequences if he pleaded guilty. RP 29 (May 18, 2012). Gonzales arranged for Forrestal to

visit San-Jose in the jail before San-Jose entered his plea. RP 30 (May 18, 2012). Gonzales said he did not tell San-Jose that if he pleaded guilty that he would be safe from any immigration consequences. RP 31 (May 18, 2012).

The morning Jose entered his plea Gonzales spent approximately two hours with San-Jose reviewing the plea. Gonzales explained to San-Jose he would be required to serve a mandatory 12 month sentence enhancement. RP 34-35 (May 18, 2012). Gonzales also explained to San-Jose that if he pleaded guilty the State would request the court order that he have no contact with minor children, including his own, without the permission of the community corrections officer. RP 32 (May 18, 2012). Gonzales told San-Jose he would obtain funding for a sexual deviancy evaluator, and based on a favorable evaluation San-Jose could argue the court should not place any restrictions on contact with his minor children and grandchildren. San-Jose, however, refused to meet with the evaluator. RP 33 (May 18, 2012).

The court denied San-Jose's motion to withdraw his plea. CP 69. In its written findings of fact, the court found San-Jose's testimony that Gonzales told him if pleaded guilty to the assault with sexual motivation charge he would be safe from immigration consequences was not credible. CP 67-68 (findings of fact 8 and 9). The court also found San-Jose's

testimony that Gonzales did not explain there was a mandatory 12 month sentence enhancement was not credible, and Gonzales' testimony that he explained the sentence enhancement to San-Jose was credible. CP 67 (finding of fact 10).

On June 8, 2012, San-Jose was sentenced to a standard range sentence of 13 months, which included the 12 month sexual motivation sentence enhancement. CP 76-86; RCW 9.94A.533(8)(a)(iii). San-Jose requested that he be allowed contact with his 16 year old minor daughter and his three year old granddaughter. RP 8-9 (June 8, 2012). As a condition of community custody, however, the court prohibited San-Jose from having any contact with any minors without approval of his treatment provider and community corrections officer. CP 84.

C. ARGUMENT

THE COURT VIOLATED SAN-JOSE'S FUNDAMENTAL RIGHT TO THE CARE AND CUSTODY OF HIS CHILD WHEN IT IMPOSED A SENTENCING CONDITION THAT UNJUSTIFIABLY RESTRICTED CONTACT WITH HIS CHILD.

A trial court may impose and enforce crime-related prohibitions. RCW 9.94A.505(8) (general sentencing); former RCW 9.94A.700(5)(e) (2009) (community custody); State v. Valencia, 148 Wn. App. 302, 323, 198 P.3d 1065 (2009). A "crime-related prohibition" is "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(10). Crime-related prohibitions may include orders prohibiting contact with specified individuals for the statutory maximum term. RCW 9.94A.700(5)(b); State v. Armendariz, 160 Wn.2d 106, 116, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is reviewed for abuse of discretion. State v. Letourneau, 100 Wn. App. 424, 431, 997 P.2d 436 (2000). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). The range of discretionary options is a legal question and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Community custody conditions may be challenged for the first time on appeal. See, e.g., State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or incorrect sentence may be attacked for the first time on appeal); State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (various challenged to sentencing conditions reviewable despite failure to

object in trial court); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (sentence imposed without statutory authority can be challenged for first time on appeal).

Parents have a fundamental right to the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001); Letourneau, 100 Wn. App. at 438. State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 60-61, 109 P.3d 405 (2005). Strict scrutiny requires that the infringement be narrowly tailored to serve a compelling state interest. C.A.M.A., 154 Wn.2d at 61.

Prevention of harm to children is a compelling state interest, but crime-related prohibitions 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), where court concluded prohibition on convicted sex offender's contact with minors was unjustified because 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 is instructive. In that case, the defendant, a schoolteacher, was convicted of raping a 13-year-old student. Letourneau,

100 Wn. App. at 428-29. This Court held a condition prohibiting the defendant from unsupervised in-person contact with her biological minor children was not reasonably necessary to prevent her from sexually molesting them, where there was no evidence that she was a pedophile or posed a danger of molesting her children. Letourneau, 100 Wn. App at 442. "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." Letourneau, 100 Wn. App at 442. This Court found, "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." Letourneau, 100 Wn. App. at 442. This Court struck the no-contact prohibition because there was insufficient evidence showing it was reasonably necessary to protect the defendant's biological children. Letourneau, 100 Wn. App at 441-42.

Here, there is no evidence San-Jose harmed his biological children. There was no evidence he had a generalized sexual interest in pre-teen or teenaged children. There is no evidence San-Jose is a pedophile. San-Jose's offense was victim-specific. The prohibition on contact with his biological child, without the approval of his treatment provider and

community corrections officer is, therefore, not reasonably necessary to protect the child from being molested. The condition is invalid and should be stricken.

D. CONCLUSION

There was no evidence that San-Jose posed a danger to his own children. He therefore requests this Court reverse the community custody condition prohibiting him from any contact with his own child absent approval of his treatment provider and community corrections officer.

DATED this 25 day of February 2013.

Respectfully submitted,

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COA NO. 69021-3-1

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 26TH DAY OF OCTOBER 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] SALVADOR SAN-JOSE
122 NE 158th STREET
SHORELINE, WA 98155

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER 2012.

X Patrick Mayovsky

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