

NO. 42222-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN JAMES BABNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 08-1-01549-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the sentencing court properly prohibit defendant from having contact with children when he was a convicted child molester who posed a continuing risk to children?

2. Did the sentencing court properly revoke defendant's suspended sentence when he violated the conditions of his sentence and was terminated from treatment?

B. STATEMENT OF THE CASE.

On December 9, 2010, the Pierce County Prosecutor's Office alleged appellant JOHN JAMES BABNER ("defendant") violated four conditions of his suspended sentence by having prohibited contact with two children, engaging in unauthorized internet use, improperly registering his vehicle, and being terminated from treatment. CP 1-15, 40-43, 45-47, 123-130. Defendant's conditions began on January 23, 2009, when he was sentenced to 89 months to life in custody with 79 months to life suspended pursuant to the Special Sex Offender Sentencing Alternative ("SSOSA") after pleading guilty to two counts of first degree child molestation. CP 1-15, 143-144, 191-218.¹

¹ The designated Clerk's Papers end at page 190; citations to pages 191 and above reflect the anticipated numbering of the State's supplemental designation.

Evidence in support of defendant's violations was presented in court on May 12, 2011. RP (May 12) 19-104.² Department of Corrections began surveilling defendant after receiving information he was having prohibited contact with children. RP (May 12) 24 -30, 37-38, 60-61. Officer Grabraski found defendant in a car with two small children. *Id.* The one month old child was biologically related to defendant; the one year old child was not. RP (May 12) 24 -30, 37-38, 60-61, 83-88; (Aug. 14) 5. Defendant initially claimed he did not know the children were in the car, but subsequently admitted to initiating an avoidable contact with them. RP (May 12) 39, 83-84, 86-87. The prohibited contact occurred ten days after the court warned defendant that it would result in the revocation of his suspended sentence. *Id.* The evidence adduced at the hearing also showed defendant's vehicle was improperly registered. RP 44, 72-74; Ex. 6. Officer Williams established defendant's internet account had been used to communicate with defendant's friend and family; defendant admitted to directing the internet use while maintaining he did not physically access the internet. RP (May 12) 40-44, 77-80, 88; Ex. 4. Defendant's treatment provider (Dr. Gollogly) testified it was no longer feasible to continue treating defendant due to his dishonest disregard for

² Review hearings held on 8/14/09, 7/23/10, and 5/12/11 are consolidated chronologically in one volume of a two volume transcript. All citations to the record will be identified by date.

his conditions. RP (May 12) 61. Dr. Gollogly expressed similar sentiments in a letter to the court, stating:

“[Defendant] is ignoring and not addressing his sex offender and mental health issues. He has been persistent in deception and demonstrates an unwillingness to comply with the treatment rules of this agency. He is a risk to be at large in the community.”

Ex. 2.

The court concluded the prohibited contact with children, unauthorized internet use and termination from treatment violated the conditions of defendant’s sentence. RP (May 12) 96-97. The court imposed a sentence of 89 months to life and gave defendant credit for the ten months he already served in custody. CP 131-132; RP (May 12) 101-102. Defendant filed a timely notice of appeal. CP 133-135.

C. ARGUMENT.

1. THE SENTENCING COURT PROPERLY PROHIBITED DEFENDANT FROM HAVING CONTACT WITH CHILDREN BECAUSE HE WAS A CONVICTED CHILD MOLESTER WHO POSED A CONTINUING RISK TO CHILDREN.

The government’s important interest in protecting minors is served by imposing stringent conditions on convicted child molesters. See *State v. McCormick*, 166 Wn.2d 689, 702, 213 P.3d 32 (2009). “[A defendant’s] rights are already diminished significantly [when] he [i]s convicted of a sex crime and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. Those

conditions... sever an important societal purpose in that they are limitations on ... rights that relate to the [offender's] crimes..." *Id.* at 702-703. A convicted sex offender's constitutional right to raise children without State interference is equally subject to the infringements authorized by the SRA³ when it is reasonably necessary to further the State's compelling interest in protecting children. *See State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998) (*citing State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)); *State v. Berg*, 147 Wn. App. 923, 942-943, 198 P.3d 529 (2008).

"The SRA gives sentencing courts authority to order offenders not to have direct or indirect contact with a specified class of individuals." *Riles*, 135 Wn.2d at 347-349 (*citing* RCW 9.94A.120(9)(c)(ii) (internal quotation marks and ellipses omitted). "The specified class of individual ...require[s] some relationship to the crime. "Determining whether relationship exists between the crime and the condition will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008) (quotation marks and citations omitted). The sentencing court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds for untenable reasons." *Id.* (*citing State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

³ "SRA:" Sentencing Reform Act

In *State v. Riles*, the sentencing court properly issued an order prohibiting Riles from having contact with any minor-age children after he was convicted for raping a six year old boy. 135 Wn.2d at 347. Similar to defendant, Riles complained that the court's order was unconstitutionally broad. *Id.* The Supreme Court held that “[p]rohibiting [Riles] from having contact with minor age children for the period of his community placement ... [wa]s a reasonable restriction imposed upon him for protection of the public—especially children” as “[i]t [is] logical for a sex offender who victimizes a child to be prohibited from contact with ...other children.” *Id.* at 347, 350.

Defendant pleaded guilty to two counts of first degree child molestation after directing a developmentally delayed five year old child to touch his penis on two occasions when he lived as a guest in her home. CP 191-204, 143-144, 205-218. Defendant also admitted to pulling the child's pants down and swearing her to secrecy. *Id.* Defendant exploited his knowledge the family's routines to molest the child while her mother was occupied elsewhere in the home. *Id.* The Department of Corrections concluded the conditions set forth in the Judgment and Sentence Appendix H—which prohibited contact with children—would reduce defendant's risk of reoffense. CP 145-147, 211-218. Defendant's treatment provider also listed contact with minors as one of defendant's many risk factors. CP 219-221. The sentencing court imposed the conditions recommended by the Department of Corrections. CP 1-15, 145-147.

The court did not abuse its discretion when it prohibited defendant's access to children. Defendant's crimes proved he was willing to betray close relationships and endanger his own livelihood to pursue his prurient desire to sexually abuse children under his care. CP 143-144, 205-218. Defendant demonstrated that parental supervision was insufficient to deter him as he identified a way to molest his victim while her mother was occupied in the home. Department of Corrections and defendant's treatment provider perceived defendant to be a continuing risk to children. CP 145-147, 211-221. As in *Riles*, it was reasonable for the sentencing court to prohibit defendant from having contact with children while he remained on community custody until it was satisfied he had made sufficient progress with treatment. 135 Wn.2d at 347-348.

The facts of defendant's case are highly distinguishable from the cases he relies upon to avoid the challenged condition. *State v. Ancira* is inapposite as it addressed an order prohibiting contact with children based on Ancira's act of domestic violence against his adult wife. 107 Wn. App. 650, 656, 27 P.3d 1246 (2001). Defendant molested a child and the challenged condition only prohibited contact with members of that narrowly defined class. *State v. Letourneau*⁴ is dissimilar in that defendant exploited a quasi-parental relationship of trust when he used his status as an adult residing in his five year old victim's home to commit his

⁴ 100 Wn. App. 424, 997 P.2d 436 (2000).

crimes. Compare *Letourneau*, 100 Wn. App. at 429, 437-444 with *Berg*, 147 Wn. App. at 942. Defendant also differs from Letourneau because defendant has been consistently identified as a sexual deviant with mental health issues who poses a continuing risk to children. 100 Wn. App. at 429, 437-444; CP 143-144, 205-221; Ex. 2. The challenged condition was reasonably necessary to further the State's compelling interest in protecting children from sexual abuse and should be affirmed.

2. THE COURT PROPERLY REVOKED
DEFENDANT'S SUSPENDED SENTENCE
BECAUSE HE VIOLATED HIS CONDITIONS
AND WAS TERMINATED FROM TREATMENT.

“Under the Sentencing Reform Act ... the trial court may revoke a SSOSA sentence whenever the defendant violates the conditions of the suspended sentence or the court finds the defendant is failing to make satisfactory progress in treatment.” *McCormick*, 166 Wn.2d at 698, see also RCW 9.94A.670. “Once a SSOSA is revoked, the original sentence is reinstated. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457 (2011) citing *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

a. The court properly exercised its discretion when it revoked defendant's suspended sentence.

“A trial court's decision to revoke a SSOSA suspended sentence is reviewed for an abuse of discretion.” *State v. Miller*, 159 Wn. App. at 918. “A trial court abuses discretion only where the trial court's decision

is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* at 918, citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Defendant’s suspended sentence was revoked because he had prohibited contact with two children, participated in unauthorized internet use and was terminated from sex offender treatment for dishonesty. RP (May 12) 96-97, 101-102. Those violations were proved in an adversarial hearing in which defendant was represented by counsel. RP (May 12) 19-102. Defendant attempted to explain but did not dispute the facts underlying his violations. *Id.* Each violation was independently sufficient to justify the revocation of defendant’s suspended sentence. *McCormick*, 166 Wn.2d at 698; RCW 9.94A.670. The authority vested in the trial court by RCW 9.94A.670 empowers it to tailor its tolerance for noncompliance according to the societal risks posed by the offender before it. In defendant’s case it was reasonable for the court to interpret his violations as precursors to reoffense making it unsafe for defendant to remain in the community. During sex offender treatment defendant explained his sex offense cycle begins when his “poor decisions” diminish his impulse control by depressing his self esteem. CP 219-221. Defendant characterized the prohibited contact with the children underlying his violation as a “poor choice[;]” he similarly attributed his sex offenses to “a poor lapse in judgment.” RP (May 12) 83-84; 209-210. Meanwhile defendant’s treatment provider advised the court defendant

had become a risk to society by ignoring his sex offender and mental health issues. Ex 2. Revocation was a reasonable consequence for defendant's noncompliance.

The revocation was further justified by defendant's dubious history of compliance with the conditions of his sentence. Within six months of beginning sex offender treatment for molesting a five year old child defendant sought to move into a residence occupied by another person's child. RP (Aug. 14) 1-8. Less than one year later defendant purchased a prohibited camera device and began living out of his car in a shopping mall parking lot he knew to be frequented by children. RP (Jul. 23) 12-14. Defendant apologized for that noncompliance, yet quickly demonstrated he remained undeterred by his conditions as he initiated prohibited contact with two children ten days after the court told him it would result in the revocation of his suspended sentence. RP (Jul. 23)16-17; (Oct. 22) 3; (May 12) 83-84. The revocation hearing was also the second time the court addressed defendant's unauthorized use of prohibited technology. RP (Jul. 23) 13, 16-17; (May 12) 101-102. Defendant's deceptive behavior was similarly reoccurring. Defendant provided law enforcement two irreconcilable accounts of his sex offenses. CP 143-144, 205-218. When defendant was subsequently caught with the two children in his car his initial response was to feign ignorance of their presence before admitting that he initiated the contact. RP (May 12) 39, 83-84, 86-87. The sentencing court recalled defendant had falsely represented the extent

of his relationship with the mother of those children and his treatment provider stated defendant's persistent deception demonstrated an unwillingness to comply with his treatment. RP (May 12) 101; Ex. 2. It was reasonable for the court to determine defendant could not be trusted to remain in the community. The revocation should be affirmed as it was a proper exercise of the sentencing court's discretion.

- b. The sentencing court did not compromise its appearance of fairness when it admonished defendant for making poor decisions during his SSOSA.

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (citation omitted). “Before [appellate courts] can find a violation of this doctrine ... there must be evidence of a judge's actual or potential bias.” *Id.* (citing *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172 (1992); *State v. Carter*, 77 Wn. App. 8, 888 P.2d 1230 (1995); *State v. Easterbrook*, 58 Wn. App. 805, 816, 795 P.2d 151, *review denied*, 115 Wn.2d 1031, 803 P.2d 325 (1990)); *see also* The Code of Judicial Conduct 3(C)(1). “[A]ll jurisdictions agree that a defendant should not benefit from his or her own misbehavior and that recusal lies within the sound discretion of the trial court.” *Bilal*, Wn. App. at 722 (citing *e.g.*, *Bisignano v. Municipal Court*

of Des Moines, 237 Iowa 895, 23 N.W.2d 523 (1946), *cert. denied*, 330 U.S. 818, 67 S. Ct. 674, 91 L. Ed. 1270 (1947) (judge not required to recuse after being assaulted by defendant while court was in session); *Wilks v. Isreal*, 627 F.2d 32 (7th Cir. 1980), *cert. denied*, 449 U.S. 1086, 101 S. Ct. 874, 66 L. Ed. 2d 811 (1981).

Defendant claims the sentencing judge improperly revoked his suspended sentence because she personally disapproved of his decision to father a child. App.Br. 21.⁵ Defendant's claim should be rejected because it is not supported by the record.

On July 23, 2010, the court responded to the news of the pregnancy by telling defendant the combined burden of his legal and financial obligations made it impossible for him to raise a child. RP (Jul. 23) 17. On October 22, 2010, the court reminded defendant he was not in a position to be in a relationship involving minor children and that he had compromised his ability to provide for himself. RP (Oct. 22) 4. At defendant's revocation hearing the court summarized the poor decisions defendant had made during the pendency of his SSOSA, to include: (1) entering an intimate relationship when he was subject to an extended period of incarceration; (2) moving into an apartment with a woman who was similar to his victim in that she was also vulnerable person whose first pregnancy was reportedly the result of a rape; and (3) choosing to put his

⁵ Appellant's Brief ("App.Br.")

girlfriend in the position of having to care for two small children without adequate resources to provide for their welfare. RP (May 12) 101-102.

Defendant's criticism of the challenged colloquy ignores the substantive link between the court's admonishments and the risk factors associated with defendant's propensity to reoffend. The sentencing judge was charged with monitoring a convicted child molester with mental health issues who had continually tested the limits of his conditions. The presentence investigation determined negative relationships, financial stressors, and unstable residence were all factors that increased defendant's likelihood of reoffense. CP 205-218. Defendant's treatment provider similarly identified financial stress and contact with children among defendant's risk factors. CP 219-221. During treatment defendant demonstrated an inability to read normal social cues pertaining to the affect of his behavior without specific guidance from others. CP 219-221. Defendant attributed his sex crimes to an emotional chain reaction that began when poor decisions lowered his impulse control by depressing his self esteem. CP 205-221. Defendant's crimes occurred when he was homeless living as a temporary guest in another's house. CP 143-144; 205-218. By the time of the revocation hearing the court had already seen defendant attempt to recreate the living arrangement that facilitated his sex offenses before choosing to sleep in a shopping mall parking lot frequented by children. RP (Aug. 14) 1-8; (Jul 23) 11-17. The circumstances of defendant's involvement with a vulnerable mother of

two young children was worthy of the court's attention because it had disturbing similarities to his crimes. RP (May 12) 101-102. Defendant's return to homelessness on account of poor financial decisions was equally worrisome as Department of Corrections already warned the court defendant's homelessness posed an unacceptable risk to the community. CP 215. Defendant is not a healthy law abiding adult whose personal decisions were beyond the purview of the court; he is a mentally ill sex offender who poses a significant risk to the community when his decisions are not closely monitored. CP 205-221; Ex. 2. The court did not compromise its impartiality by making defendant aware of how his reckless decisions were increasing the stressors associated with his risk of reoffense. Defendant's claim that the sentencing judge unfairly revoked his deferred sentence is without merit and should be rejected.

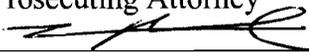
D. CONCLUSION.

Defendant violated three conditions of his suspended sentence after receiving repeated warnings from the court. The court's decision to return

defendant to prison was a sound exercise of its discretion and should be affirmed.

DATED: January 3, 2012

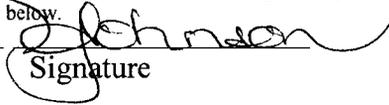
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