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Court of Appeals
Division II
State of Washington
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No. 50924-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

GEORGE CHAPA

REPLY BRIEF OF APPELLANT

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A. Argument in Reply

1. Mr. Chapa's sentence may be reviewed for the first time on appeal.

In its Brief of Respondent, the State argues that Mr. Chapa's sentence is not reviewable on appeal because there was not a timely objection. But the State concedes that "illegal or erroneous sentences may be challenged for the first time on appeal." Brief of Respondent, 5, citing *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). *State v. Bahl*, and the cases cited therein, clearly establish that an erroneous sentence may be challenged for the first time on appeal.

State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) has a lengthy discussion of the public policy reasons for allowing erroneous sentences to be reviewed for the first time on appeal. One of the cases cited by *Ford*, *State v. Hardesty*, 129 Wn.2d 303, 915 P.2d 1080 (1996), involved a prosecution motion to correct an erroneous sentence nearly two years after the sentencing hearing.

Another case cited by both *Bahl* and *Ford* goes even further and states, "A challenge to a sentence that is contrary to law may be raised on appeal for the first time." *State v. Paine*, 69 Wn.App. 873, 850 P.2d 1369 (1993), citing *State v. Anderson*, 58 Wn.App. 107, 791 P.2d 547 (1990). The Court in *Paine* looked at many cases and said the following:

In our research, we have found no cases explaining the distinction between the imposition of a sentence contrary to law-which is purportedly outside the court's jurisdiction-and other types of cases where a trial court acts without authority or contrary to existing law. . . Without deciding that issue, however, it appears to us that the cases addressing the review of sentencing errors on appeal have established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal.

Paine at 884. The “common law rule” identified by the *Paine* Court, and subsequently adopted by the Supreme Court in *Bahl* and *Ford*, establishes that a sentence that the “contrary to law,” for whatever reason, may be challenged for the first time on appeal.

In this case, Mr. Chapa argues the sentencing court denied his SSOSA sentence based upon an erroneous view of the law. Specifically, he contends the court relied on RCW 9.94A.670(4) that great weight should be given to the victim’s opinion whether a SSOSA is appropriate. Because Marisa Blair does not qualify as a “victim,” and it is clear the sentencing court gave great weight to her opinion, the sentence was “contrary to law” within the meaning of *Bahl*, *Ford* and *Paine*, and may be raised for the first time on appeal.

2. The opinion of a biological parent whose parental rights have been terminated is not entitled to “great weight” a SSOSA sentencing hearing.

Next the State argues that Ms. Blair qualifies as a statutory “victim” because she was the mother of the AMW at the time of the abuse. But sentencing issues are judged by what is true at the time of sentencing hearing, not at another time. *State v. Shilling*, 77 Wn.App. 166, 889 P.2d 948 (1995). In *Shilling*, the Court held, in reference to a disputed offender score issue, “The offender score includes *all* prior convictions (as defined by RCW 9.94A.030(9)) existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology.” *Shilling* at 175.

When the Court terminated Ms. Ms. Blair’s parental rights, her right to be a victim parent within the meaning of the SSOSA statute also terminated. In determining whether a person is a “parent” under the law, it is the legal relationship and not consanguinity that is the dispositive factor. A person whose parental rights have been terminated cannot be an “alleged parent” pursuant to RCW 26.26.011(3). They may not inherit from their biological offspring. *In re the Estate of Fleming*, 143 Wn.2d 412, 21 P.3d 281 (2001). In child abduction cases, the existence of a

termination order affects whether the biological parent is properly charged with kidnapping or custodial interference. *State v. LaCaze*, 95 Wn.2d 760, 630 P.2d 436 (1981). See, also, *People of Michigan v. Wambar*, 300 Mich.App. 121, 831 N.W.2d 891 (2013) (biological father whose parental rights had been terminated who abducted child was not entitled to be treated as “parent” for purposes of lesser penalties).

This principle also extends to Diane Blair, the maternal grandmother. In *Fleming*, the Court held that the termination of the mother’s parental rights also barred the decedent’s step-brother from inheriting. When Marisa Blair’s parental rights were terminated, the right of both Marisa Blair and Diane Blair to be treated as a “victim” terminated.

The sentencing court in this case erroneously believed it was required to give “great weight” to the wishes of Ms. Blair. Once her parental rights were terminated, Ms. Blair’s opinion of what an appropriate sentence was entitled to no more deference than the opinions of a random person who happened to be in the courthouse on August 28, 2017. This Court should remand for a new sentencing hearing.

3. Community custody condition #21 is unconstitutionally vague

In his Brief of Appellant, Mr. Chapa argued against multiple community custody conditions. The State concedes some of his

arguments and disputes others. It is not necessary to address all of the State's arguments, but the State's argument to proposed condition #21 deserves more analysis.

In his Brief of Appellant, Mr. Chapa argued the term "relationship" is unconstitutionally vague because it is unclear what relationships it applies to, citing possible dating relationships, familial relationships, work-colleague relationship, and student-teacher relationships. The State responds by "by answering 'yes.' That is, this prohibition should apply to all the permutations of relationships that Chapa identifies and any others he can think of." Brief of Respondent, 18.

The State's argument exemplifies why the unmodified term "relationship" is vague. Under the State's interpretation, Mr. Chapa in violation of his community custody in each of the following situations where the other person has care or custody of a child, regardless of whether the child is physically present: (1) he speaks to his sister on the phone; (2) he eats lunch with a work colleague during the appointed lunch hour; and (3) he attends a night class at the nearby community college and asks a question of the teacher.

A person on community custody does not surrender his First Amendment rights absent a compelling state interest. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a community custody

condition “concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms.” *Bahl* at 753. Mr. Chapa has a right of free association under the First Amendment and a broad restriction on his ability to form any relationships of any nature with a person with children unconstitutionally chills that right. It should be noted that community custody condition #12, prohibiting contact with children, is not challenged by Mr. Chapa and is sufficient to ensure community safety.

Community custody condition #21 suffers from the same infirmity as the condition at issue in *State v. Valencia*, 169 Wn.2d 782239 P.3d 1059 (2015). In *Valencia*, the court ordered the defendant to not possess or use “any paraphernalia.” The defendant argued, and the Supreme Court agreed, that the failure to modify the word paraphernalia rendered it unconstitutionally vague. “Any paraphernalia” could refer to multitude of innocent objects, such as “property of a married woman that she can dispose of by will, or personal belongings, or articles of equipment.” *Valencia* at 794. While it might be permissible to order a probationer to not use or possess “Drug paraphernalia,” the phrase “any paraphernalia” was unconstitutionally vague.

Nor is it permissible for the appellate court to read into the condition language that is not there. At the Court of Appeals, the

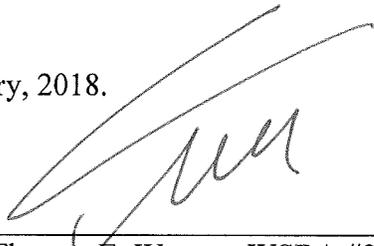
appellate court affirmed the condition on the ground that “any paraphernalia” referred to “any drug paraphernalia.” The Supreme Court reprimanded the Court of Appeals for “misreading the plain language of the condition.” *Valencia* at 794.

In sum, community custody condition #21 is vague as to what is meant by “relationship” and must be struck.

B. Conclusion

This Court should reverse and remand for a new sentencing hearing.

DATED this 9th day of February, 2018.



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

STATE OF WASHINGTON,)	Court of Appeals No.: 50924-5-II
)	
Plaintiff/Respondent,)	DECLARATION OF SERVICE OF REPLY
)	BRIEF OF APPELLANT
vs.)	
)	
GEORGE CHAPA,)	
)	
Defendant/Appellant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On February 9, 2018, I e-filed the Reply Brief of Appellant with the Washington State Court of Appeals, Division Two; and designated said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kepa@co.kitsap.wa.us through the Court of Appeals transmittal system.

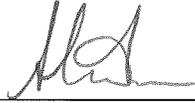
On February 9, 2018, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Reply Brief of Appellant to the defendant:

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///

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing
2 is true and correct.

3 DATED: February 9, 2018, at Bremerton, Washington.

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6 Alisha Freeman

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