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NO. 51565-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD FISHER,

Appellant.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a condition of sentencing that Fisher have no contact with any linear relatives including adult children.

2. The trial court erred in failing to strike all of the discretionary legal financial obligations (LFOs) from Fisher's judgment and sentence after it determined Fisher did not have the ability to pay discretionary LFOs.

3. The trial court erred in imposing an unconstitutionally vague community custody condition that Fisher not enter into or frequent locations where children tend to congregate.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court exceeded its authority and interfered with Fisher's right to parent by imposing a sentencing condition prohibiting Fisher from ever having contact with any linear relative including his adult children?

2. Whether the trial court improperly imposed discretionary legal financial obligations (LFOs) after finding Fisher indigent with no ability to pay discretionary LFOs?

3. Whether the trial court imposed an unconstitutionally vague community custody condition by prohibiting Fisher from entering or

frequenting places where minor children are catered to or known to congregate?

C. STATEMENT OF THE CASE

Richard Fisher met his future wife, Dixie, at a historical reenactment event in 2003. RP8¹ 934. After dating for a time, they married and moved in together in a house built by Fisher. RP8 935-36. Dixie had three children from a previous relationship: daughter SB², born May 7, 1999, and younger sons SaB, and JB. RP4 432-33. Fisher and Dixie had three more children together. RP5 544. Fisher was 24 years older than Dixie. RP8 946.

SB was four years old when Fisher moved in with the family. RP5 545.

Fisher was about 20 years older than Dixie and already had three children from prior marriages. CP 301.

In 2016, when she was in the 11th grade, SB told her boyfriend that Fisher had sexually abused her. RP5 496. The abuse started when

¹ There are nine volumes of verbatim. The number after "RP" specifies the volume where the specific page is found.

² The children are referred to by their initials for the sake of privacy. "SB" is the daughter, the oldest of Fisher's three step-children. Another step-child, a son, was also a named victim. Because he has the same initial as his sisters, he is referred to herein as "SaB."

she was in grade school and stopped when she was a high school junior. RP5 494-96, 499. In December 2016, SB phoned her mother from the boyfriend's house in Eugene and told her about the abuse. RP5 500-01, 572; RP6 716.

Dixie called the police. RP5 573-74. The police arrived at a chaotic scene. RP6 739. Fisher came out of the house and told the police he had molested his daughter and had had sex with his daughter and wanted to be taken to jail. RP6 740-41.

Fisher, once at the Battleground Police Department and advised of his rights per *Miranda*, gave a recorded statement admitting to engaging in sexual conduct with SB. Supplemental Designation of Clerk's Papers, Exhibit 2, CrR 3.5 hearing. RP3 354-58; RP6 746-48.³

After further investigation, the State charged Fisher with 16 sex offenses over a range of dates from 2008 to 2016.⁴ CP 140-46. Added to the allegations was a complaint that Fisher abused his position of trust to gain access to SB and that some offenses specifically occurred before SB was 15 years old. CP 140-46.

³ The audio recording of the interview was admitted but not transcribed for the trial record.

⁴ Fisher was convicted of the charges in the Corrected Fourth Amended Information. CP 140-46.

At trial, SB and other witnesses testified to multiple instances of Fisher sexually abusing SB from when she was in elementary school until the abuse stopped when she was in 11th grade. RP 100. The abuse alleged included many instances of penile-vaginal intercourse and oral sex between SB and Fisher when SB was in elementary school, middle school, and high school. RP4 437-48; RP5 494-503. Also alleged were instances of Fisher requiring SB to have intercourse with a teenage cousin when he visited from California, her brother SaB, and the family dog. RP 4 467; RP 598-613; RP7 795-811, 814-828.

Fisher testified that none of the abuse allegations were true. RP8 957-58. He only claimed they occurred because when interviewed by the police he was worn down by the large family and their recent financial misfortunes. RP8 956-57. A succession of heart attacks and a rotator cuff injury caused him to lose his well-paying job at Tetra Pac. RP5 582-83; RP8 941-44. Dixie had to return to college and train to become a pharmacy technician. RP5 577. She got a job, but it barely kept the family afloat. RP5 577. They declared bankruptcy. RP5 585. They lived on child support from Dixie's three older children. RP8 944. None of the children abided by his directions, and he liked to run a tight ship. RP8 947-49, 964.

He tried to take his own life. RP8 967-68. He had nothing to lose by agreeing with the abuse allegations. RP8 949, 956.

The jury found Fisher guilty on all counts. RP9 1116; CP 256-86.

At sentencing, the court dismissed count 8, animal cruelty, at the State's request. RP9 1125. Before imposing sentence, the court reviewed a Department of Corrections pre-sentence investigation. CP 291-307. The PSI provided the court information about Fisher's other, adult, children to include an allegation that Fisher had molested the daughter born in his second marriage. CP 301.

The court imposed long concurrent sentences on each count. CP 300. The longest of the sentences is an indeterminate sentence of 480 months to life. CP 330.

The court imposed community custody for any portion of Fisher's sentence when he was not in custody. CP 330. The community custody included a condition prohibiting Fisher from entering into or remaining at places where children are known to congregate. CP 340. Fisher did not object to the conditions. RP 9 1136-40.

The court also found at sentencing that Fisher had no ability to pay discretionary legal financial obligations. RP9 1140; CP 329. Yet the court still imposed several discretionary LFOs. CP 332-33.

Fisher appeals all portions of his judgment and sentence. CP 350-51.

D. ARGUMENT

Issue 1: The community custody condition prohibiting Fisher from contact with all linear family is overbroad and unconstitutionally interferes with Fisher's right to parent.

The trial court erred in imposing an overboard and unconstitutional community custody condition concerning Fisher's contact with any of his children. The condition should be stricken.

As a condition of community custody, courts may order an offender to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Likewise, courts may impose crime-related prohibitions, including "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). No-contact orders may extend up to the statutory maximum for the crime committed. *State v. Armendariz*, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). However, Washington law requires more than simple

crime-relatedness for sentencing conditions that interfere with fundamental rights. *State v. Bahl*, 164 Wn.2d 739, 757, 193 P.3d 678 (2008). A parent has a fundamental liberty and privacy interest in the care, custody, and enjoyment of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

For instance, a court may not impose a no-contact order between a defendant and his or her biological child as a matter of routine practice, given the fundamental right to parent. *Rainey*, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the child. *Id.* Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless a compelling State interest bars all contact. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); *Ancira*, 107 Wn. App. at 655.

In the context of the fundamental right to parent, Washington courts hold that no-contact orders are not automatically appropriate simply because the child is a victim of the parent's crime. *Rainey*, 168 Wn.2d at 378. For instance, *Ancira* violated a no-contact order to see his

wife and children. *Ancira*, 107 Wn. App. at 652; *see also Rainey*, 168 Wn.2d at 378 (recognizing *Ancira* is authoritative). He drove away with his four-year-old child, whom he refused to return until his wife agreed to talk with him. *Ancira*, 107 Wn. App. at 652. The court imposed a five-year no-contact order with his children. *Id.* at 652-53. On review, the court found the order violated *Ancira's* fundamental right to parent. *Id.* at 654. Although the State had a compelling interest in preventing a child from witnessing domestic violence, it failed to show how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. *Id.* at 654-55.

Similarly, *Rainey* was convicted of a serious violent crime against his daughter— first-degree kidnapping. *Rainey*, 168 Wn.2d at 371, 379. *Rainey* inflicted measurable emotional damage on his daughter and attempted to leverage her to inflict emotional distress on the mother. *Id.* at 379-80. This included letters *Rainey* sent his daughter from jail blaming her mother for breaking up the family. *Id.* The trial court imposed a lifetime no-contact order. *Id.* at 374. The Supreme Court acknowledged the State generally “has a compelling interest in preventing future harm to the victims of the crime.” *Id.* at 378. These facts would, therefore, establish

that a no-contact order, including indirect or supervised contact, was reasonably necessary to protect the child. *Id.* at 380.

But the *Rainey* court reversed because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. *Id.* at 381-82. The court explained:

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restriction's length must also be reasonably necessary.

Id. at 381. The court therefore struck the no-contact order and remanded for resentencing, "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." *Id.* at 382.

The *Rainey* court emphasized "the interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules." 168 Wn.2d at 377. A "more nuanced look" at the facts of each particular case is necessary. *Id.*

By contrast, in *Warren*, the supreme court considered a lifetime condition barring all contact between the defendant, Warren, and his wife, Lisa. 165 Wn.2d at 31. Warren was convicted of molesting his stepdaughters—Lisa’s children. *Id.* Though she disbelieved the allegations at first, Lisa ultimately cooperated with the investigation and testified against Warren. *Id.* at 31-32. Warren had also previously been convicted of assaulting Lisa and of murder. *Id.* at 31, 34. The trial court imposed a lifetime no-contact order, emphasizing that Lisa testified against Warren, her children were the victims of his crimes, and Warren’s controlling behavior towards Lisa. *Id.* at 32.

The supreme court upheld the lifetime no-contact order, concluding it was “reasonably necessary to achieve a compelling state interest, namely, the protection of Lisa and her daughters.” *Id.* at 34. The court emphasized Lisa was directly related to the crimes: “She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and Lisa testified against Warren resulting in his conviction of the crime.” *Id.*

This brings us to the facts of Fisher’s case. Fisher is the biological father of three young children with Dixie, the mother of SB. RP 300. He also

has adult children from prior marriages. CP 291-306. As a condition of sentence, the trial court ordered Fisher not have any contact with any linear relatives which would include his adult children. CP 341. A no-contact order can be valid for the statutory maximum for the offense of convictions. RCW 9A.20.021(1)(b); RCW 9A.36.021(2)(a).

At sentencing, regarding this broad no-contact provision, the trial court stated, “[Y]ou have victimized enough of your family members for the rest of your life. You won’t be doing it again if I have anything to do with it.” RP9 1140. The court did not engage in any other analysis.

The no-contact order indisputably interferes with Fisher’s fundamental right to parent. For the purposes of this analysis only, this brief assumes the truth of the State’s case. The State’s evidence showed Fisher sexually engaged with his non-biological children, SB and SaB, and a teenage cousin of the children related through Dixie. But the trial court’s complete lack of analysis regarding the no-contact order fails the *Rainey* standard. This also distinguishes Fisher’s case from *Warren*, where the trial court pointed to several compelling factors that warranted no contact. The court did not consider whether barring all contact between Fisher and all of his children was reasonably necessary to achieve the State’s interests. Notably, the court did not distinguish between his very

young children and the much older children from his prior marriages. The trial court also failed to consider whether less restrictive alternatives could adequately protect the children particularly given Fisher's long prison sentence and his age. CP 330.

This failure to apply the appropriate legal standard constitutes an abuse of discretion. *Rainey*, 168 Wn.2d at 375. Although the State has a compelling interest in protecting victims of sexual abuse, it did not demonstrate how prohibiting all contact between Fisher and all of his children is reasonably necessary to effectuate that interest. At sentencing, the court said only, "You can't be trusted with any of your family." RP9 1140.1400. This is plainly insufficient under *Rainey*. The State must show that no less restrictive alternative would prevent harm to the children swept up in the broad no contact provision. *Rainey*, 168 Wn.2d at 381-82. Any limitations must be narrowly drawn. *Id.*

Some amount of restriction may be appropriate. But the specific facts of Fisher's case suggest less restrictive alternatives than barring all contact whatsoever for the balance of Fisher's life would be suitable. For instance, the trial court could limit Fisher's contact to e-mail, the telephone, via a letter, or through a counselor.

The *Rainey* court recognized “a sentencing condition may prohibit a defendant’s access to a means or medium through which he committed a crime.” 168 Wn.2d at 380. Here, the “means or medium” is Fisher’s physical proximity to a person, so barring unsupervised in-person contact may be appropriate. But no evidence in the record showed electronic or telephonic harassment. These alternative forms of communication would still allow for Fisher to maintain a parent-child relationship if any of his children wanted the relationship.

The lifetime no-contact orders barring all contact between Fisher and his minor and adult children and any grandchildren impermissibly and unnecessarily interferes with Fisher’s fundamental right to parent. This Court should strike the broad no contact provision and remand for resentencing “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” *Rainey*, 168 Wn.2d at 382.

Issue 2: The court erred in imposing discretionary legal financial obligations after determining Fisher had no ability to pay them and it should not impose them.

The trial court held Fisher had no ability to pay discretionary legal financial obligations yet failed to strike them all from the judgment and

sentence. Fisher's case should be remanded to the trial court to strike all discretionary LFOs.

The legislature has mandated that a court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)). This imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's ability to pay. *Id.* The *Blazina* court suggested that an indigent person likely could never pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

In his oral ruling, the sentencing judge indicated that he would impose only mandatory LFOs. RP9 1140. The court also noted on the judgment and sentence that Fisher was indigent and had no ability to pay discretionary LFOs. CP 329. Given Fisher's dire financial situation as described at trial and his lifetime DOC obligation, this was an accurate assessment. Although the court struck some of the discretionary costs from the judgment and sentence, several remained behind and should be stricken. CP 332-333.

By statute, the jury demand fee “may be imposed as costs under RCW 10.46.190.” (Emphasis added.) RCW 36.18.016(3)(b). This is a discretionary cost. *See, e.g., State v. Lundy*, 176 Wn. App. 96, 107, 308 P.3d 755 (2013) (describing jury demand fee as discretionary); RCW 10.01.160(2). The \$250 jury demand fee must be stricken on remand. *Blazina*, 182 Wn.2d at 838.

Similarly, the \$100 domestic violence fee is discretionary. RCW 10.99.080 provides that courts “may impose a penalty assessment not to exceed one hundred dollars on any person adult offender convicted of a crime involving domestic violence. As further evidence of its discretionary nature, the statute provides at (5),

When determining whether to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.

While the domestic violence penalty may not be a “cost” under RCW 10.01.160, it is still a discretionary LFO. *State v. Howland*, 196 Wn. App. 1031, ___ P.3d ___ (2016) (unpublished decision).

At the time of sentencing, the \$200 filing fee was statutorily mandated. CP 332. Under former RCW 36.18.020(2)(h), upon conviction, an adult criminal defendant was liable for a filing fee of \$200.

House Bill 1783 modified Washington's system of legal financial obligations. *State v. Ramirez*, 426 P.3d 714, 2018 WL 4499761 (September 20, 2018). It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on indigent defendants. LAWS OF 2018 ch. 269 §6 (3). The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018 269 § 17 (2)(h).

Our Supreme Court held that individuals whose case was not final at the statute's effective date were entitled to the benefit of the amended criminal filing fee statute. *Ramirez*, 426 P.3d 714. Fisher's case is on direct appeal and therefore, not final. He is entitled to the benefit of the amended statute, and the \$200 criminal filing fee should be stricken on remand.

Issue 3: The community custody condition preventing Fisher from being at places where children are known to congregate is constitutionally vague and must be stricken.

The trial court erred when it required as a condition of community custody that Fisher not be at places where children are known to congregate. CP 340. The condition should be stricken.

Vague community custody conditions violate due process under the Fourteenth Amendment to the United States Constitution and art. I. § 3 of the Washington Constitution. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). A community custody condition is unconstitutionally vague if either “(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Challenged community custody conditions are reviewed for an abuse of discretion and will reverse if they are manifestly unreasonable. *Id.* A trial court abuses its discretion by imposing an unconstitutional condition. *Id.* There is no presumption of validity for sentencing conditions. *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

This court recently reversed a similar community custody condition on vagueness grounds like the one challenged here. *State v.*

Wallmuller, __ Wn. App. __, 423 P.3d 282, 283–84 (2018). Following the logic of *Wallmuller*, the following community custody condition should be stricken as it too is too vague for enforcement.

You shall not enter into or frequent business establishments or locations that cater to minor children or locations where minors are known to congregate without prior approval of DOC. Such establishments may include but are not limited to video games parlors, parks, pools, skating rinks, school grounds, mall or any area routinely used by minors as area of play/recreation.

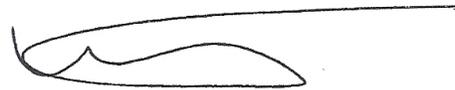
CP 340 (Condition 3).

E. CONCLUSION

The case should be remanded to the trial court for the court to reconsider its broad no lineal family no contact condition. The court can put reasonable limits on Fisher’s ability to contact all of his children.

On remand, the court should strike all discretionary LFOs, and the “where children congregate” community custody condition.

Respectfully submitted October 31, 2018.



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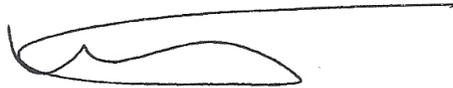
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Richard Fisher, DOC#943570, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 31, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Richard Fisher, Appellant

LAW OFFICE OF LISA E TABBUT

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