

**FILED
Court of Appeals
Division II
State of Washington
2/6/2019 11:12 AM**

NO. 51565-2-II

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

STATE OF WASHINGTON, Respondent

v.

RICHARD ARLEY FISHER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02748-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State concedes that the Court must conduct further analysis prior to imposing a lifetime no contact order with all linear relatives.**
- II. **The State concedes that all discretionary legal financial obligations should be stricken.**
- III. **The Court did not err in imposing a community custody condition prohibiting the Appellant from entering in to or frequenting locations where minors congregate.**

STATEMENT OF THE CASE

A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner. RAP 10.3(b). For the purposes of this responsive brief only, and due to the specific assignments of error alleged, the State is satisfied with the Appellant's statement of the case. To the extent any other facts are relevant to the issues discussed, they will be addressed below.

ARGUMENT

- I. **The State concedes that the Court must conduct further analysis prior to imposing a lifetime no contact order with all linear relatives.**

At the time of sentencing, the Court entered a lifetime Sexual Assault Protection Order protecting the three named victims, M.R.M., S.R.B. Jr., and S.L.B. from the Appellant (Fisher). CP 308-313. In

addition, the Court imposed a community custody condition prohibiting contact with all minors. CP 340, 342. Finally, the Court imposed a restriction prohibiting the defendant from having “contact with any linear relatives (children, grandchildren) including adult children.” CP 341, RP 1140. Fisher asserts that the Court erred in prohibiting contact with all linear family and states that this provision is overbroad and unconstitutional. The State concedes that prior to imposition of a lifetime no contact order with all linear relatives, the Court must consider any less restrictive measures and conclude that any less restrictive measure would be insufficient to protect the community.

The SRA authorizes trial courts to impose crime-related prohibitions as conditions of a defendant’s sentence. RCW 9.94A.505(8). When the conditions of a defendant’s sentence “interfere with a fundamental constitutional right . . . such as the fundamental right to the care, custody, and companionship of one’s children,^[1] [s]uch conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *In re Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010) (quoting *State v. Warren*, 165 Wn.2d 17, 34, 195 P.3d 940 (2008)).

^[1] Otherwise known as the “right to parent.” *Id.* at 377.

On the record, a trial court must balance the State's interest in protecting a defendant's child against the defendant's fundamental right to parent when deciding whether to impose contact restrictions and, if so, the duration and scope of those restrictions. *Rainey*, 168 Wn.2d at 377–82; *State v. Torres*, 198 Wn.App. 685, 689–91, 393 P.3d 894, 896–97 (2017). Trial courts must consider less restrictive alternatives, such as supervised visitation, prior to restricting all contact with a defendant's child and must consider whether the scope should change over time. *Torres*, 198 Wn.App. at 690.

In this case, due to the nature of the crimes, the amount of victims, and the length of time of the abuse, the State believes there are no less restrictive measures that would ensure that future children are not victimized or re-victimized by Fisher. If the Court feels that a lifetime no contact order is the only measure that would adequately protect linear relatives of Fisher, the Court must conduct further inquiry on the record. The Court must: 1) determine whether the order is reasonably necessary in scope and duration to prevent harm to the protected persons, 2) consider any less restrictive alternatives such as indirect or supervised contact and finally, 3) analyze whether the less restrictive alternative would be outweighed by a compelling State interest toward barring all contact.

Warren, 165 Wn.2d at 32; *State v. Ancira*, 107 Wn.App. 650, 27 P.3d 1246 (2001).

The State concedes that the record requires further analysis regarding lifetime no contact order provisions for all linear relatives. There are sufficient facts to establish a compelling State interest in protecting the community and entering a no contact order barring all contact, but less restrictive alternatives must be explored and dismissed prior to entry.

II. The State concedes that all discretionary legal financial obligations should be stricken.

House Bill 1783 (HB 1783) amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendants who are indigent at the time of sentencing. *State v. Ramirez*, 191 Wash. 2d 732, 748, 426 P.3d 714 (2018). Mr. Fisher's case is pending on direct appeal, thus the changes resulting from HB 1783 prospectively apply and Mr. Fisher is eligible for relief. *Id* at 722. The State concedes that this case should be remanded for resentencing and all discretionary legal financial obligations should be stricken.

III. The Court did not err in imposing a community custody condition prohibiting Fisher from entering in to or frequenting locations where minors congregate.

The Court properly prohibited Fisher from entering in to or frequenting locations where minors congregate. This provision of his community custody conditions is constitutional and provides Fisher with sufficient notice of the places he is not allowed to frequent. Fisher's argument fails.

Community custody conditions are reviewed for an abuse of discretion. *State v. Magana*, 197 Wn.App. 189, 200, 389 P.3d 654 (2016) (internal citations omitted). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or for untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615, 624 (1995) (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984)). The imposition of community custody conditions is within the discretion of the sentencing court and will be reversed if the conditions are manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution requires that sentencing conditions provide "fair warning of proscribed

conduct.” *Bahl*, 164 Wn.2d at 752-53. A sentencing condition is unconstitutionally vague if it ““does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed”” or if it ““does not provide ascertainable standards of guilt to protect against arbitrary enforcement.”” *Bahl*, 164 Wn.2d at 752-53 (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). However, a condition need not identify prohibited conduct with complete certainty. *State v. Padilla*, 190 Wash.2d 672, 677, 416 P.3d 712 (2018).

While a condition that orders a defendant not to frequent areas where minor children are known to congregate without specifying the exact off-limits locations is unconstitutionally vague, it is not unconstitutional to prohibit a defendant convicted of crimes against children from being in certain, specified locations where minors congregate. *State v. Irwin*, 191 Wn.App. 644, 655, 364 P.3d 830 (2015); *State v. Nguyen*, 2017 WL 3017516 (Div. 1, 2017).¹ In *Nguyen*, the Court of Appeals ruled a trial court can preclude a defendant from entering parks, playgrounds, or schools where children congregate, but that the

¹ GR 14.1(a) allows for citation to unpublished opinions of the Courts of Appeals that were filed after March 1, 2013. Such opinions are non-binding and may be accorded such persuasive value as this Court deems appropriate.

order must be specific as to the locations in order to survive a vagueness challenge. *Id.*, slip op. at 6.

Here, the Court imposed the following condition on Fisher regarding his proximity to children:

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 areas of play/recreation.

CP 340.

Fisher relies heavily on *State v. Wallmuller*, 4 Wn.App. 698, 423 P.3d 282 (2018), *review granted*, to argue that this condition is unconstitutionally vague and should be stricken. The Washington Supreme Court has recently granted review of the *Wallmuller* case, as there is currently a split amongst Divisions I, II and III regarding whether or not a community custody condition prohibiting proximity to locations where minors congregate is unconstitutionally vague.

The State concurs with recent Division II cases that hold that where a community custody condition contains an illustrative list of places where children might congregate, the court has given ordinary people fair warning of the conduct proscribed. *Irwin*, 191 Wn.App. at 655. *State v. Dossantos*, 200 Wn.App. 1049, (Div. 2, 2017) slip op. at 14,

(unpublished), *review denied*, 190 Wash.2d 1002, 413 P.3d 9 (2018).

Division III has similarly rejected a vagueness claim where the court provided an illustrative, although not exhaustive, list of locations where minors might congregate. *State v. Johnson*, 4 Wn.App.2d 352, 360–62, 421 P.3d 969, 973–74 (2018).

The Court provided Fisher with an illustrative, not exhaustive, list of places where minors are known to congregate and prohibited him from entering those areas. CP 340. This list is sufficient to provide Fisher with notice and clarity regarding where he should and should not be. Locations such as video game parlors, parks, pools, skating rinks, school grounds, and the mall are not vague and are within an ordinary person's understanding of prohibited locations. Fisher's claim fails for this reason.

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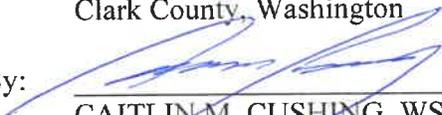
CONCLUSION

The State respectfully requests this Court remand this case to resentence Fisher to strike all discretionary legal financial obligations, and conduct further analysis regarding imposition of a lifetime no contact order with all linear relatives. However, the State respectfully requests this Court uphold the prohibition on entering in to or frequenting locations where minors congregate.

DATED this 6 day of February, 2019.

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February 06, 2019 - 11:12 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51565-2
Appellate Court Case Title: State of Washington, Respondent v. Richard A. Fisher, Appellant
Superior Court Case Number: 16-1-02748-2

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