

FILED  
Court of Appeals  
Division II  
State of Washington  
12/26/2018 1:28 PM

NO. 51702-7-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

CHAD KAAIHUE,  
Appellant.

---

---

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

The Honorable Kathryn J. Nelson, Judge

---

---

BRIEF OF APPELLANT

---

---

LISE ELLNER, WSBA No. 20955  
ERIN SPERER, WSBA No. 45931  
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER  
Post Office Box 2711  
Vashon, WA 98070  
(206) 930-1090

## TABLE OF CONTENTS

	<b>Page</b>
A. ASSIGNMENTS OF ERROR.....	1
B. ISSUES PRESENTED ON APPEAL.....	1
C. STATEMENT OF THE CASE.....	2
1. Procedural History.....	2
2. Substantive Facts.....	2
D. ARGUMENT.....	4
1. THE TRIAL COURT ERRED WHEN IT ADDED TO KAAIHUE’S JUDGMENT AND SENTENCE A FIVE-YEAR NO CONTACT PROVISION WITH THREE PROTECTED PARTIES BECAUSE THE ADDITION CONSTITUTED AN IMPERMISSIBLE MODIFICATION .....	4
(i) Not a clerical error fix.....	7
(ii) The original no contact provision in Kaaihue’s judgment and sentence was void because it was unconstitutionally vague and adding two protected parties after the original provision is deemed void constitutes an unauthorized change to Kaaihue’s judgment and sentence under the SRA.....	8

**TABLE OF CONTENTS**

	<b>Page</b>
2. THE LEGAL FEE OBLIGATIONS IMPOSED IN 2015 WERE SUBJECT TO REVIEW AND THE TRIAL COURT ERRED IN UPHOLDING THEM .....	11
a. The \$100 DNA fee imposed against Kaaihue is unlawful and should be stricken.....	11
b. The \$200 criminal filing fee imposed against Kaaihue is unlawful and should be stricken.....	12
E. CONCLUSION.....	13

**TABLE OF AUTHORITIES**

**Page**

**WASHINGTON CASES**

*City of Spokane v. Douglass*,  
115 Wn.2d 171, 795 P.2d 693 (1990) ..... 9

*Post Sentence Review of Wandell v. State*,  
175 Wn. App. 447, 311 P.3d 28 (2013), review denied 179 Wn.2d  
1009, 316 P.3d 495 (2014) ..... 5

*Presidential Estates Apartment Assoc. v. Barrett*,  
129 Wn.2d 320, 917 P.2d 100 (1996) ..... 7

*State v. Acevedo*,  
159 Wn. App. 221, 248 P.3d 526 (2010)..... 4

*State v. Bahl*,  
164 Wn.2d 739, 193 P.3d 678 (2008) ..... 4, 9, 10

*State v. Brown*,  
108 Wn. App. 960, 33 P.3d 433 (2001).....5, 6, 10, 11

*State v. Johnson*,  
180 Wn. App. 318, 327 P.3d 704 (2014)..... 4

*State v. Klump*,  
80 Wn. App. 391, 909 P.2d 317 (1996)..... 7

*State v. Padilla*,  
190 Wn.2d 672, 416 P.3d 712 (2018) ..... 9, 10

*State v. Ramirez*,  
\_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2018 WL 4499761 (September 20, 2018)  
..... 12, 13

*State v. Rooth*,  
129 Wn. App. 761, 121 P.3d 755 (2005)..... 7

**TABLE OF AUTHORITIES**

**Page**

**WASHINGTON CASES, continued**

*State v. Shove*,  
113 Wn.2d 83, 776 P.2d 132 (1989)..... 5, 6

*State v. Valencia*,  
169 Wn.2d 782, 239 P.3d 1059 (2010)..... 4

**RULES, STATUTES, AND OTHERS**

House Bill 1783..... 12

LAWS OF 2018..... 12

RCW 10.01.160 ..... 12

RCW 36.18.020 ..... 12

RCW 43.43.7541 ..... 11, 12, 13

RCW 9.94A.120..... 5, 6

RCW 9.94A.200..... 6

RCW 9.94A.505..... 5, 6

RCW 9.94B.040..... 6

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it added to Kaaihue's judgment and sentence a five-year no contact provision with three protected parties instead of simply striking the unconstitutionally vague provision.

2. The legal financial obligations should be stricken from Kaaihue's judgment and sentence.

B. ISSUES PRESENTED ON APPEAL

1. Whether the trial court erred when it added to Kaaihue's judgment and sentence a five-year no contact provision against three protected parties instead of striking the no contact provision when the provision was so vague an ordinary person could not discern what conduct was proscribed and the original sentencing court did not specify the names of the protected parties or the duration of the no contact provision on the record?

2. Whether the \$100 DNA fee and the \$200 criminal filing fee should be stricken when certain provisions of Kaaihue's judgment and sentence is pending direct review and the legislature has made the proscription against these

legal fee obligations remedial?

C. STATEMENT OF THE CASE

1. Procedural History

Chad Kaaihue pled guilty on two counts of assault in the third degree on June 22, 2015. CP 17. On March 1, 2018 Kaaihue moved the court to either strike the no contact provision from his judgment and sentence or specify the individuals to whom the provision applies, and to specify the length of time the provision shall remain in effect. CP 43. The trial court ordered the state to appear and show cause why Kaaihue's motion should not be granted but labeled the order "Order on Defendant's Motion to Modify J&S." CP 57-58. Kaaihue timely appealed that order. CP 64.

The state and Kaaihue both appeared at the scheduled show cause hearing, but the trial court entered the state's Motion and Order Correcting Judgment and Sentence. RP 3 (6/1/18); CP 70-72. Kaaihue timely appeals that order. CP 75.

2. Substantive Facts

Kaaihue's judgment and sentence ordered Kaaihue to pay a \$100 DNA fee and a \$200 criminal filing fee. CP 29. At the time of his sentence, Kaaihue had already been previously convicted of a

felony. CP 28.

Paragraph 4.3 of Kaaihue's judgment and sentence does not provide any information about the protected parties. CP 28. Below paragraph 4.3 a box is checked stating that "Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence. CP 28. Paragraph 4.4 states, "No contact w/victims in NCOs". CP 28.

The trial court changed the judgment and sentence as follows:

1) Page 5 of the Judgment and Sentence, Section 4.3 is corrected as follows:

a) It should be indicated that the defendant is to have no contact with Michael Walter Lappen (7/2/59), Bobby L. Janzen (2/24/86), or Wardell Deas (2/8/60) for a period of five years (not to exceed the statutory maximum); and

b) The box that was checked, in reference to Domestic Violence No Contact Orders, Antiharassment Orders, or Sexual Assault Protection Orders, should be un-checked.

2) All other terms and conditions of the original Judgment and Sentence shall remain in full force and effect as if set forth in full herein.

CP 71.

D. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT ADDED TO KAAIHUE'S JUDGMENT AND SENTENCE A FIVE-YEAR NO CONTACT PROVISION WITH THREE PROTECTED PARTIES BECAUSE THE ADDITION CONSTITUTED AN IMPERMISSIBLE MODIFICATION.

The trial court erred when it added to Kaaihue's judgment and sentence a five-year no contact provision with three protected parties because the addition constituted an impermissible sentencing modification.

This Court reviews de novo whether the trial court had statutory authority to modify a sentencing condition. See *State v. Johnson*, 180 Wn. App. 318, 325–26, 327 P.3d 704 (2014) (the Court of Appeals reviews de novo whether the trial court had statutory authority to impose a community custody condition) (citing *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010) (legal rulings are reviewed de novo)). If the trial court had statutory authority, review is for an abuse of discretion. *State v. Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010) (quoting *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008)).

“Modification of a judgment of sentence is not appropriate

under the Sentencing Reform Act merely because it appears, wholly in retrospect, that a different decision might have been preferable.” *Post Sentence Review of Wandell v. State*, 175 Wn. App. 447, 451, 311 P.3d 28 (2013), *review denied* 179 Wn.2d 1009, 316 P.3d 495 (2014) (*quoting, State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989)).

“SRA permits modification of sentences only in specific, carefully delineated circumstances.” *Shove*, 113 Wn.2d at 86. One of those circumstances is a crime related condition. *State v. Brown*, 108 Wn. App. 960, 962, 33 P.3d 433 (2001) (interpreting former RCW 9.94A.120(20)) previously codified at RCW 9.94A.505(8)(now codified at RCW 9.94A.505(9)).

RCW 9.94A.505(9) provides:

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. “Crime-related prohibitions” may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

However, after the judgment and sentence is final, the sentencing court may only modify a judgment to impose further punishment if the offender has violated a condition or requirement

of a sentence. *Brown*, 108 Wn. App. at 961, 963 (citing *Shove*, 113 Wn.2d at 86) (citing former RCW 9.94A.200) (now codified at 9.94B.040(2008 but only applicable to post-2000 cases)). Any other modifications are outside the scope of the trial court's authority as delineated by the Legislature in the SRA. *Brown*, 108 Wn. App. at 963.

In *Brown*, the trial court modified Brown's final judgment and sentence to add a permanent no contact order to prohibit contact with a witness who had testified in his trial, and added a no contact order with the witness's husband. The court held that the SRA does not allow the court to modify a sentence to add names to a no contact order, even though during initial sentencing, the court may impose a crime related no contact order. *Brown*, 108 Wn. App. at 962. While former RCW 9.94A.120(20) (2001) (now codified at RCW 9.94A.505(8)) allows a court to impose a no contact order as part of a sentence, the statute does not permit modification of the no contact order at a later date to add other names to the no contact order at a later date.. *Brown*, 108 Wn. App. at 962-63.

By contrast, a trial court may correct a clerical error in a judgment and sentence document. *State v. Klump*, 80 Wn. App.

391, 397, 909 P.2d 317 (1996). The test for clerical error is the same in both civil and criminal cases. *State v. Rooth*, 129 Wn. App. 761, 770, 121 P.3d 755 (2005) If “the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial” then it is a clerical error and the trial court should either correct the language to reflect the court’s intention or add the language the court inadvertently omitted. *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). If the amended judgment does not reflect the trial court’s intention, as expressed in the sentencing record the error is judicial and the court cannot amend the judgment and sentence. *Presidential*, 129 Wn.2d at 326.

(i) Not a clerical error fix

Adding the protected parties’ names and the duration of the no contact provision, did not correct a clerical error, but impermissibly modified Kaaihue’s sentence. As required by *Presidential*, this court looks to the sentencing record to determine whether the sentencing court intended to prohibit contact with the now named victims for five years, but inadvertently left it out of the judgment and sentence, or whether the trial court added a new

provision the original sentencing court did not address.

Here, the original sentencing court did not mention or identify the added parties. RP 6 (7/14/15). The court made no express indication of its intent to include the three new-named protected parties in Kaaihue's judgment and sentence. Because there is no evidence that the sentencing court initially intended to include the newly protected parties, the modification cannot be considered a clerical error, but rather constitutes an impermissible sentence modification. *Presidential*, 129 Wn.2d at 326. Accordingly, this court must reverse and remand to remove the added no contact orders.

- (ii) The original no contact provision in Kaaihue's judgment and sentence was void because it was unconstitutionally vague and adding two protected parties after the original provision is deemed void constitutes an unauthorized change to Kaaihue's judgment and sentence under the SRA

In Kaaihue's case, the judgment and sentence did not name the protected parties or the duration of the no contact order. It simply stated, "No contact w/victims in NCOs". CP 28. The provision not even specify which "NCOs" were referenced. CP 28.

“NCOs” could refer to no contact orders previously entered or no contact orders entered at a later date. This sentence condition is unconstitutionally vague.

A legal prohibition is unconstitutionally vague if (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) (citing *Bahl*, 164 Wn.2d at 752-53) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

In *Padilla*, the Supreme Court held a community custody provision that prohibited Padilla from possessing and accessing pornographic material was unconstitutionally vague because the definition of pornographic materials unnecessarily encompassed movies and television not intended for the sole purpose of sexual gratification. *Padilla*, 190 Wn.2d at 682. Therefore, it did not “provide adequate notice of what behaviors Padilla was prohibited from committing.” *Padilla*, 190 Wn.2d at 682.

Here, as in *Padilla*, paragraphs 4.3 and 4.4 of Kaaihue’s judgment and sentence did not provide adequate notice of what

behaviors Kaaihue was prohibited from committing. The judgment and sentence simply stated, “No contact w/victims in NCOs”. CP 28. “NCOs” could refer to no contact orders previously entered or no contact orders entered at a later date. This is as vague or more so than the unconstitutional sentencing provisions in *Padilla* because it is impossible for Kaaihue to know what contact is prohibited. *Padilla*, 190 Wn.2d at 682.

During the resentencing hearing, the state conceded that relief was appropriate because section 4.3 of Kaaihue’s judgment and sentence did not name the protected parties. RP 5 (6/1/18). Once the no contact provision was deemed unconstitutionally vague, that provision became unenforceable. *Bahl*, 164 Wn.2d at 761-62; *Padilla*, 190 Wn.2d at 685.

Adding names was not permissible, because as previously argued, *supra*, the addition of the unknown, un-named protected parties was not part of the original sentence and impossible to determine that those names were intended as part of a crime-related provision. In Kaaihue’s case, adding the names of the protected parties to an unenforceable provision, is analogous to the trial court in *Brown* adding two protected parties for the first time

because it impermissibly changed Kaaihue's sentence after it was final. *Brown*, 108 Wn. App. at 961.

The sentencing court exceeded its authority under the SRA. This court must remand for vacation of the impermissibly added no contact orders. *Brown*, 108 Wn. App. at 961.

2. THE LEGAL FEE OBLIGATIONS  
IMPOSED IN 2015 WERE  
SUBJECT TO REVIEW AND  
THE TRIAL COURT ERRED IN  
UPHOLDING THEM.

The legal fee obligations imposed in 2015 are subject to review by this court because the trial court reinstated the legal fees in its order correcting Kaaihue's judgment and sentence.

a. The \$100 DNA fee imposed against  
Kaaihue is unlawful and should be  
stricken

At sentencing, the court imposed a DNA fee of \$100, previously a discretionary legal financial obligation. CP 29. Because Kaaihue had previously been convicted of a felony, DNA had previously been collected. CP 28; see RCW 43.43.7541 (mandatory DNA fee upon felony conviction).

Since Kaaihue was sentenced, the legislature amended RCW 43.43.7541. This statute now only allows the government to collect a DNA fee one time. In this case, the trial court authorized a

second collection contrary to RCW 43.43.7541.

The legislature's decision to eliminate this fee is remedial and applies prospectively to cases pending on appeal. Here, Kaaihue's case was pending on appeal and/or initiated after the effective date of RCW 43.43.7541. *State v. Ramirez*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2018 WL 4499761 at \*6 (September 20, 2018) ("We hold that House Bill 1783 applies prospectively to Ramirez because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez's case was pending on direct review and thus not final when the amendments were enacted.").

Accordingly, the DNA fee imposed must be stricken from the judgment and sentence.

b. The \$200 criminal filing fee imposed against Kaaihue is unlawful and should be stricken

The Legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h) (2015), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF

2018, ch. 269, § 17(2)(h).

The legislature's decision to eliminate this fee is remedial and applies prospectively to cases pending on appeal. Here, appellant's case was pending on appeal and/or initiated after the effective date of RCW 43.43.7541. *Ramirez*, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2018 WL 4499761 at \*6.

Accordingly, the criminal filing fee imposed must be stricken from the judgment and sentence.

#### E. CONCLUSION

Chad Kaaihue respectfully requests that this court strike the no contact provision of his judgment and sentence. Kaaihue also respectfully requests the imposition of the \$100 DNA fee and the \$200 criminal filing fee be stricken.

DATED this 26th day of December 2018.

Respectfully submitted,



---

LISE ELLNER, WSBA No. 20955  
Attorney for Appellant



---

ERIN SPERGER, WSBA No. 45931  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office [pccpatcecf@co.pierce.wa.us](mailto:pccpatcecf@co.pierce.wa.us) and Chad Kaaihue/DOC#704817, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on December 26, 2018. Service was made by electronically to the prosecutor and Chad Kaaihue by depositing in the mails of the United States of America, properly stamped and addressed.



---

Signature

**LAW OFFICES OF LISE ELLNER**

**December 26, 2018 - 1:28 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51702-7  
**Appellate Court Case Title:** State of Washington, Respondent v Chad Manu Alexander Kaaihue, Appellant  
**Superior Court Case Number:** 15-1-00447-8

**The following documents have been uploaded:**

- 517027\_Briefs\_20181226132715D2121940\_0983.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Kaaihue AOB .pdf*
- 517027\_Other\_Filings\_20181226132715D2121940\_3319.pdf  
This File Contains:  
Other Filings - Appearance  
*The Original File Name was Kaaihue Notice of Appearance.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@co.pierce.wa.us
- erin@legalwellspring.com

**Comments:**

---

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net  
Address:  
PO BOX 2711  
VASHON, WA, 98070-2711  
Phone: 206-930-1090

**Note: The Filing Id is 20181226132715D2121940**