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Court of Appeals
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NO. 51702-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHAD MANU ALEXANDER KAAIHUE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phil Sorensen, Judge and Gerald Johnson, Judge

No. 17-1-00447-8

Brief of Respondent

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Table of Contents

a. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Did the trial court properly modify defendant’s Judgment and Sentence under CrR 7.8(a) to correct a clerical error, where the court amended the document to list the duration and parties of the separately imposed no-contact orders? .. 1

 2. Was the provision of defendant’s Judgment and Sentence referencing the no-contact orders protecting the victims unconstitutionally vague? 1

 3. Are defendant’s legal financial obligations subject to House Bill 1783 where defendant’s case is not on direct appeal? . 1

b. STATEMENT OF THE CASE..... 1

c. ARGUMENT..... 5

 1. DEFENDANT’S JUDGMENT AND SENTENCE WAS PROPERLY MODIFIED TO CORRECT A CLERICAL ERROR UNDER CRR 7.8(A)..... 5

 2. DEFENDANT’S JUDGMENT AND SENTENCE IS NOT UNCONSTITUTIONALLY VAGUE..... 8

 3. DEFENDANT’S CASE DOES NOT FALL UNDER THE PROVISIONS OF RECENTLY INACTED HOUSE BILL 1783..... 9

d. CONCLUSION..... 11

Table of Authorities

State Cases

<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	8
<i>Presidential Estates Apartment Assoc. v. Barrett</i> , 129 Wn.2d 320, 326, 917 P.2d 100 (1996).....	6
<i>State v. Bahl</i> , 164 Wn.2d 739, 753, 193 P.3d 678 (2008).....	8
<i>State v. France</i> , 176 Wn. App. 463, 308 P.3d 812 (2013), <i>review den'd</i> , 179 Wn.2d 1015, 318 P.3d 280 (2014).....	5
<i>State v. Hardesty</i> , 129 Wn.2d 303, 315-16, 915 P.2d 1080 (1996).....	6
<i>State v. Howard</i> , 182 Wn. App. 91, 328 P.3d 969 (2014).....	5
<i>State v. Klump</i> , 80 Wn. App. 391, 397, 909 P.2d 317 (1996).....	6
<i>State v. Ramirez</i> , 191 Wn.2d 732, 747, 426 P.3d 714 (2018).....	10
<i>State v. Snapp</i> , 119 Wn. App. 614, 626, 82 P.3d 252 (2004)	6

Statutes

House Bill 1783	1, 9, 10, 11
Laws of 2018, ch. 269, §§ 1, 18.....	9
Laws of 2018, ch. 269, §§ 6, 17.....	10
RCW 10.01.160	9
RCW 36.18.020(h).....	9
RCW 9.94A.030.....	1
RCW 9.94A.030(10).....	5

RCW 9.94A.505(9).....	5
RCW 9.94A.530.....	1
Rules	
CrR 7.8.....	6
CrR 7.8(a)	1, 6, 7

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

1. Did the trial court properly modify defendant's Judgment and Sentence under CrR 7.8(a) to correct a clerical error, where the court amended the document to list the duration and parties of the separately imposed no-contact orders?
2. Was the provision of defendant's Judgment and Sentence referencing the no-contact orders protecting the victims unconstitutionally vague?
3. Are defendant's legal financial obligations subject to House Bill 1783 where defendant's case is not on direct appeal?

B. STATEMENT OF THE CASE.

On February 3, 2015, the State charged Chad Kaaihue, ("defendant"), with three counts of assault in the second degree against victims M. Lappen, B. Janzen, and W. Deas. CP 1-3. Each count of assault included a deadly weapon enhancement pursuant to RCW 9.94A.530. CP 1-3. The State also charged defendant with two counts of unlawful possession of a firearm in the first degree. CP 1-3.

Defendant was given notice on February 3, 2015, that these charges would constitute a "Most Serious Offense" as defined in RCW 9.94A.030,

and if defendant was convicted as charged, he would be sentenced to a Persistent Offender life without the possibility of parole sentence. CP 86.¹

Defendant was able to negotiate a plea deal with the State. CP 8; 06/22/15 RP 4.² The State entered an Amended Information charging two counts of assault in the third degree against victims M. Lappen, B. Janzen, and W. Deas. CP 6-7. The parties jointly recommended an exceptional upward sentence in exchange for defendant's guilty plea. 06/22/15 RP 5. Defendant entered guilty pleas to both charges, and the court accepted his pleas as being knowing, voluntary and intelligently made. 06/22/15 RP 9-10.

Sentencing was held on July 14, 2015. 07/14/15 RP 2.³ The State recommended a sentence of 120 months, \$500 victim crime assessment, \$200 court costs, and a \$100 DNA filing fee. 07/14/15 RP 5. The State also requested that no contact orders with the victims be entered. *Id.* Defense counsel addressed the court, stating "this is a stipulated and agreed exceptional sentence [...] we resolved this with a plea to two counts of assault in the third degree, naming all of the victims in the two counts and

¹ Clerk's Papers numbered above No. 85 reflect the State's estimate of how its supplemental designations will be numbered.

² The Verbatim Report of Proceedings are contained in dated volumes. The State will refer to the volume by date, followed by page number.

³ There are duplicate volumes transcribing the sentencing hearing, dated 07/14/15 and 07/15/15. The duplicates appear to be identical. The State will refer to the 07/14/15 volume for the sentencing proceedings.

stipulating to an exceptional sentence of the maximum on each[.]” 07/14/15 RP 6. Accordingly, the court imposed a sentence of 120 months, the above-mentioned fees, no contact orders with the victims, and law-abiding behavior. 07/14/15 RP 6.

The no-contact orders, three in total each listing one of the victims, were reviewed with defendant and signed in open court. CP 87-89; 07/14/15 RP 6. The State then served the no contact orders on the defense, who acknowledged receipt on the record. 07/14/15 RP 7.

Defendant subsequently challenged his sentence on other grounds in a Personal Restraint Petition filed on May 3, 2017, which this Court dismissed as untimely. CP 90-91.

Defendant then brought a motion to correct his Judgment and Sentence, asking the court to either “strike the no contact order(s) from defendant’s judgment and sentence” or “specify the individuals whom the order apply to, in addition to specifying the actual length of the no contact order, as it is unconstitutionally vague.” CP 43-53. The court entered an order for the State to “appear and show cause why the defendant’s motion should not be granted per court’s clarification (*See* Attachment A).” CP 57-59. Attachment A reads:

A motion was filed by Defendant Kaaihue on March 1, 2018. The motion asks for the court to strike the no contact orders from Defendant’s Judgment and Sentence [...] or specify the

individual whom the order apply (sic) to, in addition to specifying the actual length of the no contact order.

The above referenced section of the Judgment and Sentenced provides in pertinent part:

No contact w/ victims in NCO's.

This means that there shall be no contact with the victims that are named separately, one each, in the three Orders for Protection (commonly referred to as no contact orders or NCO's) which were all filed together with the Judgment and Sentence on July 14, 2015. Those orders, served on Defendant on the record that same date, provide for a five-year term of protection for [W.] Deas, [B.] Janzen, and [M.] Lappen.

CP 57-59.

Defendant's motion was addressed on June 1, 2018. 06/01/18 RP 3. Defendant appeared pro se. 06/01/18 RP 3. The State agreed with defendant's motion. 06/01/18 RP 4. The parties handed forward an agreed order that corrected defendant's Judgment and Sentence to be consistent with one of the forms of relief defendant sought: clarification. 06/01/1 RP 6. Stand-by counsel stated, "[...] that's correct. We're in agreement with that change." 06/01/18 RP 6.

The Order correcting defendant's Judgment and Sentence states that Page 5 of the Judgment and Sentence, Section 4.3 should be corrected to indicate that defendant is to have no contact with M. Lappen, B. Janzen, and W. Deas, for a period of five years (not to exceed the maximum statutory

sentence); and the box checked in reference to Domestic Violence No Contact Orders, Antiharassment Orders, or Sexual Assault Protection Orders, should be unchecked. CP 70-72. Defendant now appeals that order. CP 75-80.

C. ARGUMENT.

1. DEFENDANT’S JUDGMENT AND SENTENCE
WAS PROPERLY MODIFIED TO CORRECT A
CLERICAL ERROR UNDER CRR 7.8(A).

Sentencing courts may impose crime-related prohibitions as part of any sentence. RCW 9.94A.505(9). A “‘crime-related prohibition’ means an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). A no-contact order is a “crime-related prohibition” that may be imposed as part of a sentence or as a condition of a sentence. *State v. Howard*, 182 Wn. App. 91, 328 P.3d 969 (2014), *State v. France*, 176 Wn. App. 463, 308 P.3d 812 (2013), *review den’d*, 179 Wn.2d 1015, 318 P.3d 280 (2014). Here, no contact orders protecting the three victims of defendant’s assaults were entered as a condition of his sentence. CP 87-89. Defendant challenged the wording of his Judgment and Sentence, which did not specify the details of the orders. CP 43-56. The State agreed that the Judgment and Sentence had clerical mistakes that needed corrected. 06/1/18 RP 4. The court entered an order correcting the Judgment and Sentence

consistent with the agreed motion, specifying the names of the protected parties and the duration of the orders. CP 70-72. The no contact orders that had been entered at defendant's sentencing and served on him in open court remained unchanged.

A court has jurisdiction under CrR 7.8 to correct an erroneous sentence. *State v. Hardesty*, 129 Wn.2d 303, 315-16, 915 P.2d 1080 (1996). A trial court may correct a clerical error in the judgment and sentence document. *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252 (2004) (citing *State v. Klump*, 80 Wn. App. 391, 397, 909 P.2d 317 (1996)). CrR 7.8(a) specifically provides, "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or other the motion of any party and after such notice, if any, as the court orders." To determine whether an error is clerical or judicial, the reviewing court will look to "whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." *Snapp*, 119 Wn. App. at 627 (citing *Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). If it does, the amended judgment and sentence should either correct or add the language to reflect the court's intention. *Id.*

Here, the trial court properly modified defendant's Judgment and Sentence under CrR 7.8(a) to incorporate the information that was already

contained within the separately filed and served orders prohibiting contact. The record makes clear that the court intended for defendant not to have contact with the listed victims in the case, who have been named since the original information was filed. *See* CP 1-3.⁴

Defendant mischaracterizes the record below where he claims that the order “added to [defendant’s] judgment and sentence a five-year no contact provision with three protected parties[.]” Brief of Appellant, 9. The court’s order did not change defendant’s sentence or the conditions thereof. The no-contact orders protecting the same three victims have been in place, signed by and served upon defendant since his sentencing hearing. CP 87-89; 07/14/15 RP 6. The court did not add parties or time when it corrected the language on defendant’s Judgment and Sentence. The court’s amendment to defendant’s Judgment and Sentence is a patent example of the proper exercise of CrR 7.8(a). Accordingly, this Court should affirm the amended Judgment and Sentence and the unchanged no-contact orders.

⁴ Defendant claims these parties are “now named.” Brief of Appellant, 7. These victims have consistently been named throughout the record below and were specified yet again in the Amended Information defendant pleaded guilty to, and which defense counsel mentioned at sentencing. CP 6-7; 07/14/15 RP 5.

2. DEFENDANT’S JUDGMENT AND SENTENCE
IS NOT UNCONSTITUTIONALLY VAGUE.

Community custody conditions are reviewed for an abuse of discretion and will be reversed if they are manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). A trial court’s imposition of an unconstitutional provision is manifestly unreasonable. *Id.* The Fourteenth Amendment to the United States Constitution and article 1, section 3 of the Washington State Constitution require that citizens have a fair warning of the prohibited conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A community custody provision is unconstitutionally vague if it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass*, 115 Wn.2d at 178. Disputed terms are considered in the context used, and if people of ordinary intelligence can understand what the law proscribes, the law is sufficiently definite. *Douglass*, 115 Wn.2d at 179. Here, defendant challenges the vagueness of his original judgment and sentence with regard to the paragraphs describing the no-contact orders.

The original provision of defendant’s judgment and sentence read, “No Contact w/victims in NCOs.” CP 24-40. The no-contact orders were separately entered, listing each individual victim, along with their

birthdates, the duration of five years, and the exact contact prohibited. CP 87-89. Defendant signed these no-contact orders at his sentencing before they were formally served on him. CP 87-89; 07/14/15 RP 7.

Accordingly, defendant had sufficient notice that he is not to have contact with W. Deas, B. Janzen, or M. Lappen since sentencing. There is nothing vague about this community custody provision. Any vagueness of defendant's original Judgment and Sentence, which referenced the legally sufficient no-contact orders defendant was also served, was cured by the court's amendment as discussed above. Thus, the no-contact orders should be affirmed.

3. DEFENDANT'S CASE DOES NOT FALL
UNDER THE PROVISIONS OF RECENTLY
INACTED HOUSE BILL 1783.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, amended the legal financial obligation (LFO) system in Washington State. Particularly, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs as of June 7, 2018, and establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. Laws of 2018, ch. 269, §§ 1, 18. House Bill 1783 also amended the discretionary LFO statute, former RCW 10.01.160 and 36.18.020(h) to

prohibit courts from imposing discretionary costs or the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, §§ 6, 17.

Our Supreme Court recently held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018), that House Bill 1783 applies to cases that are pending on appeal. Because defendant's appeal is not a direct appeal, but rather an appeal from a CrR 7.8 motion, defendant's case does not fall within the scope of *Ramirez*.

Defendant pleaded guilty on July 14, 2015. CP 9-19. Defendant did not file a direct appeal. In May of 2017, defendant filed a Personal Restraint Petition. CP 90-91. This Court dismissed that PRP as untimely in October of 2017. CP 90-91. That ruling became final in March of 2018. CP 92. Defendant then filed the CrR 7.8 motion discussed supra in March of 2018. CP 43-56. His Judgment and Sentence was subsequently amended to correct a clerical error on June 1, 2018.⁵ CP 70-72. Defendant's original sentence and conditions remained unchanged.

Defendant now asks this Court to strike the \$100 DNA collection fee, as well as the \$200 criminal filing fee, pursuant to House Bill 1783 and *Ramirez*. Because defendant's sentence became final, at the very latest, when this court dismissed his PRP as untimely in March 2018, defendant's

⁵ Defendant refers to this proceeding as a "resentencing." Brief of Appellant, 10. Defendant was never "resentenced."

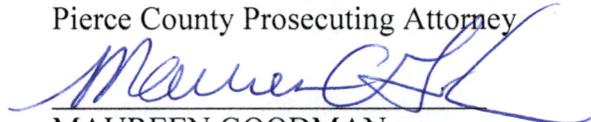
case is not “pending on direct appeal.” The provisions of House Bill 1783 do not apply to defendant’s legal financial obligations. Accordingly, this Court should affirm the imposition of the \$100 DNA collection fee and the \$200 criminal filing fee.

D. CONCLUSION.

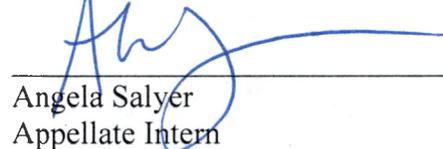
For the above stated reasons, the State respectfully requests this Court affirm defendant’s convictions, sentencing conditions, and legal financial obligations.

DATED: February 15, 2019.

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Angela Salyer
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/20/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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