

FILED  
Court of Appeals  
Division II  
State of Washington  
11/5/2018 1:47 PM  
No. 51934-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA NICHOLAS DELEON,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 17-1-04458-1  
The Honorable Garold Johnson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it failed to conduct the required “fact-specific inquiry” into whether prohibiting all contact with Joshua DeLeon’s biological minor children was reasonably necessary.
2. Joshua DeLeon’s Judgment and Sentence contains cost provisions that are no longer authorized after enactment of House Bill 1783.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Whether prohibiting all contact with Joshua DeLeon’s biological minor children, including indirect or supervised contact, is reasonably necessary to realize the State’s interest in protecting minor children from harm?  
(Assignment of Error 1)
2. Did the trial court err when it failed to conduct the required “fact-specific inquiry” into whether prohibiting all contact with Joshua DeLeon’s biological minor children was reasonably necessary? (Assignment of Error 1)
3. Should Joshua DeLeon’s case be remanded to the trial court to amend the Judgment and Sentence to strike cost provisions that are no longer authorized after enactment of

House Bill 1783? (Assignment of Error 2)

### **III. STATEMENT OF THE CASE**

The State charged Joshua Nicholas DeLeon with six counts of first degree rape of a child, four counts of first degree child molestation, one count of second degree rape of a child, and three counts of sexual exploitation of a minor. (CP 4-9) DeLeon subsequently agreed to plead guilty to an Amended Information charging one count of first degree rape of a child and two counts of first degree child molestation. (CP 10-11, 12; RP 3)

DeLeon acknowledged committing each element of the crimes, and agreed that the trial court could review the probable cause declaration to find a factual basis for the offenses. (CP 20; RP 4) According to the probable cause declaration, DeLeon engaged in repeated acts of sexual intercourse and molestation with his three minor step-daughters, Sat.W., Sh.W., and Sah.W., over the course of several years beginning when each of the girls was around seven years old. (CP 1-3) The abuse began when DeLeon was married to their mother and they all lived together. (CP 1-3) It continued when the girls would visit DeLeon after he and their mother divorced. (CP 1-3)

The trial court accepted the plea, and entered a finding of

guilt. (RP15-16) The trial court imposed concurrent standard range sentences, for a term of confinement totaling 216 months to life. (RP 38; CP 35) The court imposed a number of crime-related prohibitions and community custody conditions, and ordered DeLeon to pay certain mandatory costs and fees. (CP 33, 34, 37, 41, 44, 45-46; RP 38-39)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE TRIAL COURT DID NOT CONDUCT THE NECESSARY FACT-SPECIFIC INQUIRY REQUIRED BEFORE INFRINGING ON DELEON'S CONSTITUTIONAL RIGHT TO PARENT HIS CHILDREN.

As a condition of his sentence and of community custody, DeLeon is prohibited from any direct or indirect contact with any minor children. (CP 36, 37, 40, 43, 46; RP 39) This condition is improper because the trial court did not conduct the necessary inquiry into whether a total ban on contact with his biological minor children was reasonably necessary.

At sentencing, the victims' mother addressed the court and explained that DeLeon has three biological children who were at the time six, five and three years old. (RP 28) She told the court that these children had been asking to see DeLeon and that they were upset that they could not see him. (RP 28)

DeLeon's attorney asked the court to allow DeLeon some sort of contact with his three children, if their mother and his therapist consented. (RP 33-34) The author of the pre-sentence investigation report also recommended that DeLeon be allowed contact with his biological children with "written approval from a licensed therapist, the courts, and community corrections officer." (CP 69)

The court was unmoved, and ordered that DeLeon have no contact, directly or indirectly, with any minor children. (CP 36, 37, 40, 43, 46; RP 39) The court stated:

You will not have contact with children at all, including your own until they're old enough to petition the Court or make their own decisions, which will be age of majority.

You are a danger. And I am not convinced at all that counseling is going to overcome that. I know they can do some wonderful things. I hope the best for you on that level. But I have to tell you, the danger here is unreal to society.

(CP 39)

RCW 9.94A.505(9) provides that the trial court may impose "crime-related prohibitions" as part of any sentence. A "[c]rime-related prohibition" is an order "prohibiting conduct that directly relates to the circumstances of the crime." RCW 9.94A.030(10). A trial court also has discretion to order that, during a term of

community custody, an offender “[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).<sup>1</sup>

On the other hand, “[p]arents have a fundamental liberty interest in the care, custody, and control of their children.” State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). This means that a parent has a constitutionally protected, fundamental right to raise children without State interference. State v. Letourneau, 100 Wn. App. 424, 438, 997 P.2d 436 (2000) (citing In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998)) This fundamental right to parent can be restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. Letourneau, 100 Wn. App. at 439.

Prevention of harm to children is a compelling state interest, and the State does have an obligation to intervene and protect a child when a parent’s “actions or decisions seriously conflict with

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<sup>1</sup> Impositions of crime-related prohibitions are reviewed for abuse of discretion. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). A trial court abuses its discretion when the decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Ancira, 107 Wn. App. at 653.

the physical or mental health of the child.” In re Dependency of C.B., 79 Wn. App. 686, 690, 904 P.2d 1171 (1995); In re Sumei, 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

But any condition that infringes on the right to parent “must be ‘sensitively imposed’” and “[t]here must be no reasonable alternative way to achieve the State’s interest.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); State v. Warren, 165 Wn.2d 17, 32, 34-35, 195 P.3d 940 (2008). A “fact-specific inquiry” must be conducted to determine whether a total ban on contact is reasonably necessary to realize the State’s compelling interest in protecting a child from harm. Rainey, 168 Wn.2d at 377;

In Ancira, after the defendant violated a no-contact order requiring him to stay away from his wife, the trial court entered a new no-contact order as a condition of sentencing, which included Ancira's two minor children as well as his wife. 107 Wn. App. at 652. On appeal, Ancira objected to the inclusion of his children in the order. Division 1 found that the order violated Ancira’s fundamental right to parent because it was not reasonably necessary to cut off all contact with the children to protect them from harm--the children could still be protected with indirect contact

by phone or mail, or supervised visitation. 107 Wn. App. at 655.

In Rainey, the defendant was convicted of telephone harassment of his wife and of first degree kidnapping of his three-year-old daughter. 168 Wn.2d at 371. The trial court imposed lifetime no-contact orders for both the wife and daughter. 168 Wn.2d at 371. Our State Supreme Court remanded, because it could not determine whether the trial court analyzed the scope and duration of the no-contact order according to the facts of the case in relation to the reasonable necessity of a lifetime total no-contact order. 168 Wn.2d at 381-82. “Given the fact-specific nature of the inquiry,” it was error for the trial court to not address the scope and duration of the no-contact order under the reasonably necessary standard before it imposed the no-contact order as a condition of Rainey’s sentence. 168 Wn.2d at 382.

Similarly here, the trial court did not engaged in the fact-specific inquiry required by Ancira and Rainey. The trial court simply found that DeLeon was a danger to society. (CP 39) But the trial court did not consider any less restrictive alternatives that would protect DeLeon’s children from harm while allowing some contact with DeLeon.

The trial court did not conduct a fact-specific inquiry into the

necessity of a complete ban on contact with DeLeon's biological children or consider any reasonable alternatives. This case should therefore be remanded for the trial court to address the parameters of the no-contact order under the "reasonably necessary" standard.

Rainey, 168 Wn.2d at 382.

B. DELEON'S JUDGMENT AND SENTENCE CONTAINS COST PROVISIONS THAT ARE NO LONGER AUTHORIZED AFTER ENACTMENT OF HOUSE BILL 1783.

DeLeon was sentenced on May 11, 2018. The trial court imposed the then-mandatory \$500.00 crime victim assessment fee, \$100.00 DNA database collection fee, and \$200.00 criminal filing fee. (CP 33) The Judgment and Sentence also includes a provision stating that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]" (CP 34) The trial court found that DeLeon did not have the financial resources to pay discretionary fees or pay for his appeal, and signed an Order of Indigency. (RP 39; CP 55-56)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As recently noted by our State Supreme Court:

House Bill 1783's amendments modify Washington's

system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction. For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, it establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and it provides that a court may not sanction an offender for failure to pay LFOs unless the failure to pay is willful. Laws of 2018, ch. 269, §§ 1, 18, 7. ... House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3). It also prohibits imposing the \$200 filing fee on indigent defendants. *Id.* § 17.

State v. Ramirez, \_\_\_ Wn.2d \_\_\_, 426 P.3d 714, 721-22 (2018).

House Bill 1783's amendments were effective as of June 7, 2018.

In Ramirez, the Court held that these amendments applied prospectively to Ramirez's case because it was still on appeal and his judgment was not yet final. 426 P.3d at 722. The Court remanded his case for the trial court to amend the Judgment and Sentence to strike the criminal filing fee and other improperly imposed LFOs. 426 P.3d at 723. Similarly, DeLeon's case is on appeal and his judgment is not yet final, so House Bill 1783's amendments apply to his case.

The trial court imposed a \$200.00 criminal filing fee, which can no longer be imposed on indigent defendants. (CP 33)

DeLeon was found to be indigent. (RP 39; CP 55-56) The Judgment and Sentence also states that interest shall begin accruing immediately. (CP 34) But House Bill 1783 eliminates interest accrual on all non-restitution portions of LFOs.

Like Ramirez, DeLeon was sentenced before House Bill 1783 became effective, and his case is still on direct appeal. Like Ramirez, DeLeon was subjected to LFOs that are no longer authorized under House Bill 1783. DeLeon's case should be remanded to the trial court to amend the Judgment and Sentence so the improper fees and the interest accrual provision can be stricken.

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**V. CONCLUSION**

This Court should reverse and remand the no-contact with minors orders contained in and appended to the Judgment and Sentence, as applied to DeLeon's children, so that the trial court can conduct the inquiries required by Rainey and Ancira. DeLeon is also entitled to relief from the statutory changes of House Bill 1783, and his case should be remanded so the trial court can amend the Judgment and Sentence.

DATED: November 5, 2018



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**CERTIFICATE OF MAILING**

I certify that on 11/05/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Joshua N. DeLeon, DOC# 407045, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

**November 05, 2018 - 1:47 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51934-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Joshua N. DeLeon, Appellant  
**Superior Court Case Number:** 17-1-04458-1

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