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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ATALANI TILI,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-00748-1
The Honorable Kitty-Ann van Doorninck, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a sentencing and community custody condition that Appellant have “no contact with any child under 5 after release from custody whether related or unrelated.”
2. The trial court erred in imposing a sentencing and community custody condition that Appellant have “no contact [with] unrelated minors under age 13.”

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Are the conditions that Appellant have no contact with any unrelated child under the age of 13 and no contact with any child under the age of five unconstitutionally overbroad and a violation of Appellant’s first amendment right to free association and assembly? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The State charged Atalani Tili with one count of murder in the first degree and one count of assault of a child in the first degree. (CP 6-7) The State alleged that the crimes were aggravated because Tili used her position of trust to facilitate the crimes and because the victim was particularly vulnerable. (CP 6-7)

According to the declaration of probable cause, Tili was caring for two-year old K.P., the child of a family friend, when he bit her hand and would not let go. (CP 8-9) Tili threw K.P. against a dresser and he hit his head on an exposed hinge. (CP 8-9) K.P. had trouble standing after the incident and was not acting normally that evening, but Tili put him to bed without seeking medical attention. (CP 8-9) When Tili tried to dress K.P. the next morning, he collapsed. Tili contacted K.P.'s mother and called 911. (CP 8-9) K.P. had suffered a head injury, a stroke, and severe swelling in the brain, and passed away 10 days later. (CP 8-9)

Tili agreed to plead guilty to an amended information charging one count of manslaughter in the first degree. (CP 36, 37-38) Tili acknowledged the above facts, and also stated the following in her written plea statement:

In reacting as I did in pushing K.P. as I did in response to him biting me, I knew of and disregarded a substantial risk that his death might occur. My disregard of this risk was a gross deviation from conduct that a reasonable person would exercise in the same situation.

(CP 47) At the plea hearing, the trial court engaged in the standard colloquy, and found that the plea was knowingly, voluntarily and intelligently made. (04/17/18 RP 5-9)

The trial court adopted the agreed recommendation for a 102-month standard range sentence and 36 months of community custody. (CP 42, 58, 59; 04/17/18 RP 14, 16-17)

Tili has minor children under the age of 13, and gave birth to a child while her case was still pending. (06/26/17 RP 22; CP 100) She asked that she be allowed to have supervised contact with her children during her incarceration, and supervised contact with her children and child relatives (nieces and nephews) after her release. (04/17/18 RP 15) But the trial court ordered that she have “no contact with any child under 5 after release from custody whether related or unrelated.” (CP 57, 59, 64; 14/17/18 RP 17) The trial court also ordered that she have “no contact [with] unrelated minors under age 13.” (CP 57, 59, 64)

Tili filed a timely Notice of Appeal. (CP 74)

IV. ARGUMENT & AUTHORITIES

The conditions prohibiting contact with any unrelated minor under the age of 13 and prohibiting contact with any minor under the age of five, whether related or unrelated, exceed the trial court’s sentencing authority and are unconstitutional under the First Amendment. The trial court’s order is so broad as to bear no reasonable relation to the goal of promoting safety and public order.

The conditions must be stricken.

The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in the sentencing statutes. *State v. Johnson*, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Erroneous or illegal sentences, including unauthorized community custody conditions, may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).¹

RCW 9.94A.505(9) provides that, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." And, as a condition of community custody, the trial court 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).

Conditions that interfere with fundamental rights must be sensitively imposed and narrowly drawn. *Bahl*, 164 Wn.2d at 757;

¹ See also *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (holding that the right to challenge the conditions of community placement is not waived by the failure to object below). Issues of constitutional magnitude may also be raised for the first time on appeal. *State v. Llamas-Villa*, 67 Wn. App. 448, 454-55, 836 P.2d 239 (1992) (citing RAP 2.5(a); *State v. Scott*, 110 Wn. 2d 682, 757 P.2d 492 (1988)).

State v. Riley, 121 Wn.2d 22, 29, 37, 846 P.2d 1365 (1993). A reviewing court looks to whether the order prohibits “a real and substantial amount of protected conduct, in contrast to its legitimate sweep.” *State v. Riles*, 135 Wn.2d 326, 346-47, 957 P.2d 655 (1998).² Discouraging further criminal conduct is a goal of community placement. *Riley*, 121 Wn.2d at 38; *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000).

Under both the First Amendment to the United States Constitution and Wash. Const., art. 1, § 4 and art. 1, § 5, Tili has the right to freely associate and assemble with others. Her freedom of association may be restricted only to the extent it is reasonably necessary to accomplish the essential needs of the state and public order. *Riles*, 135 Wn.2d at 347 (quoting *Riley*, 121 Wn.2d at 37-385).

For example, in *State v. Hearn*, Division 3 rejected a constitutional challenge to a condition that an offender convicted of methamphetamine possession refrain from associating with known drug offenders. 131 Wn. App. 601, 128 P.3d 139 (2006). The court noted that “discouraging further criminal conduct is a goal of

² *Abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010).

community placement, “and concluded that “[r]ecurring illegal drug use is a problem that logically can be discouraged by limiting contact with other known drug offenders.” 131 Wn. App. at 608-09.

Conversely, in *State v. Ancira*, the defendant was convicted of violating a no-contact order requiring him to stay away from his wife, and the trial court imposed a condition prohibiting the defendant from contacting his wife and his children. 107 Wn. App. 650, 652, 27 P.3d 1246 (2001). Division 1 reversed, finding that the condition “was not reasonably necessary to protect the children against the harm of witnessing domestic violence between their parents” and therefore infringed on Ancira’s constitutional right to parent. 107 Wn. App. at 653-57.

And in *Riles*, co-petitioner Gholston was convicted of raping a 19-year old woman. 135 Wn.2d at 349. The sentencing court included a condition prohibiting Gholston from having contact with “any minor-age children.” 135 Wn.2d at 349. Because there was no showing that children were at risk and thus required special protection from Gholston, the Court found that particular restraint upon Gholston’s freedom of association “bears no reasonable relationship to the essential needs of the state and public order” and “the provision [was] not justified.” 135 Wn.2d at 350.

Here, the sentencing conditions infringe upon Tili's fundamental right to free association and assembly. It prohibits all contact, of any type whatsoever, with any unrelated children under 13, and any children under the age of five at all times, regardless of whether the children are supervised by other adults or whether Tili is in a public or private environment. Because the condition prohibits Tili from interacting in any way with a large segment of the population, it reaches a substantial amount of constitutionally protected conduct. Yet there is no basis in the record to conclude that this condition is necessary to rehabilitate Tili or to protect the public safety.

The victim in this case was a two-year old child who was placed in Tili's exclusive care. Tili did not engage in predatory behavior involving K.P. or children at large in the community. There is no history of abusive or violent behavior towards other children. The broad prohibition on any contact with unrelated children under 13 and with any child under five is overbroad and unnecessary to protect the public from any risk Tili might pose.

The prohibition on all contact is so broad it essentially prohibits Tili from going anywhere or doing anything with her own children or extended family. Children are omnipresent in our

society, and a person always runs the risk of encountering children. This especially true when one is a parent of minor children—Tili cannot attend events that her children may take part in, such as school music performances or after-school sports competitions, because other unrelated minors will be there. Tili cannot attend holiday events with her extended family because her minor nieces and nephews will be there. Tili cannot attend church, go to a mall, or even ride a bus without running the risk of contact with an unrelated minor.

It is evident in this case that a prohibition could be more narrowly drawn. Tili could be prohibited from contact with children in the absence of other adults. This more narrowly drawn prohibition would not sweep quite so broadly as to seriously impinge on Tili's fundamental rights.

There is no evidence in the record that Tili presents any danger whatsoever to children not in her exclusive care. Prohibiting any contact with unrelated minors under the age of 13 and with related or unrelated minors under the age of five, even when supervised or in the presence of other adults, is not reasonably necessary. The conditions improperly infringe on Tili's right to freedom of association and freedom of assembly. These

conditions are arbitrary and unreasonable, and the conditions should be stricken.

V. CONCLUSION

For the reasons set forth above, the community placement conditions discussed in this brief must be stricken. Tili respectfully requests that this court grant that relief.

DATED: April 30, 2019



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CERTIFICATE OF MAILING

I certify that on 04/30/19, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Atalani Tili, DOC# 407287, WCCW, 9601 Bujacich Road NW, Gig Harbor, WA 98332-8300.



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