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NO. 52527-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL MCGUIRE,

Appellant.

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

The Honorable Frank Cuthbertson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The sentencing court erred in entering a 10-year no-contact order between appellant and his former girlfriend, to the extent it interferes with appellant's fundamental right to parent their shared child.

Issue Pertaining to Assignment of Error

Did the sentencing court err in entering a 10-year no-contact order, prohibiting all contact, direct or indirect, between appellant and his former girlfriend where the no-contact order interferes with appellant's fundamental right to parent their shared child, necessitating remand for the sentencing court to consider whether the order is narrowly tailored in both scope and duration?

B. STATEMENT OF THE CASE

On May 9, 2017, the State charged Israel McGuire with one count of residential burglary and one count of fourth degree assault, both designated as crimes of domestic violence. CP 3-4. The State alleged that, on May 8, 2017, McGuire broke down the door to his grandfather's house, where McGuire's former girlfriend, C.P., was also living. CP 1-2. C.P. was 13 weeks pregnant with their child at the time. CP 1. Inside, McGuire struck C.P. in the face and then fled in her vehicle. CP 1-2. McGuire turned himself in to the police shortly thereafter. CP 1.

McGuire pleaded guilty to second degree burglary – domestic violence, a class B felony with a maximum term of 10 years. CP 5 (amended information), 6-15 (plea statement); RCW 9A.52.030(2); RCW 9A.20.021(1)(b). The plea specified McGuire understood the State would recommend a 22-month sentence and no-contact with the victim, C.P. CP 9. At the plea hearing on June 15, 2017, McGuire informed the court, “I take full responsibility,” and the court accepted McGuire’s plea as voluntary, knowing, and intelligent. 1RP 4.¹

The parties proceeded immediately to sentencing. 1RP 4-5. Along with 22 months of confinement, the State recommended “no contact with the victim in this case for 10 years.” 1RP 5. Defense counsel noted the sentence was “a joint recommendation.” 1RP 5. With regard to the no-contact order, defense counsel explained:

The victim in this case is now living, I believe, in West Virginia. I don’t know her attitude about the no contact order. I do know that the State requested that; that was our agreement in reaching this plea agreement. I anticipate the Court’s going to sign it. She’s not present today. I anticipate in the future she may address the Court in some other forum to have this either lifted or modified. One of the reasons for that is she is pregnant with Mr. McGuire’s child, and so Mr. McGuire wants to have contact with that child, although he understands he can’t have contact with the victim, the victim in this case, so that’s going to complicate things going forward.

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – June 15, 2017; 2RP – May 18, 2018.

1RP 8-9. During allocution, McGuire informed the court, “I do love [C.P.] and I do care about her. She’s going to have my child.” 1RP 10.

The trial court followed the agreed recommendation and sentenced McGuire to 22 months of confinement. 1RP 11; CP 25. The court imposed no-contact with C.P. for 10 years as a condition of sentence, “including, but not limited to, personal, verbal, telephonic, written or contact through a third party.” CP 24. The court also entered a separate order prohibiting contact, “directly or indirectly, in person, in writing, by telephone, or electronically, either personally or through any other person,” with C.P. for 10 years. CP 62. No exceptions were made for McGuire to contact C.P. in regards to their child.

On April 6, 2018, McGuire filed a timely pro se CrR 7.8 motion to modify the order prohibiting contact with C.P.² CP 38-39 (motion), 40-46 (memorandum in support). McGuire argued the trial court imposed the no-contact order without considering his fundamental right to parent his child. CP 38-46. He contended the 10-year order barring all contact with C.P. was not narrowly tailored or reasonably necessary to accomplish the essential needs of the State and public order. CP 41.

² CrR 7.8(b) allows the trial court to “relieve a party from final judgment, order, or proceeding” for several reasons, including “(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order”; and “(5) Any other reason justifying relief from the operation of the judgment.” CP 38 (McGuire alleging both).

McGuire explained C.P. is the primary custodial parent for their daughter, who was born on November 4, 2017, after sentencing. CP 41-42. McGuire wrote he “has not been able to enjoy any of his parental rights for fear he might violate the order of the court.” CP 42. McGuire emphasized he “does not seek to diminish culpability for his actions by filing this motion, and he concedes some restraint is necessary, at least until he can demonstrate that he is trustworthy.” CP 42.

Specifically, McGuire conceded restrictions on physical contact with C.P. were appropriate, but argued prohibiting all telephonic, electronic, or written correspondence was excessive, as it also interfered with contacting his daughter. CP 42-45. McGuire pointed out “today’s technology provides a reasonable sense of security while allowing for a means of contact,” giving C.P. the power “to determine what contact is appropriate by a simply refusal to answer the device.” CP 45. McGuire agreed C.P. should have the opportunity to respond to his motion. CP 45-46.

The trial court held a hearing on May 18, 2018. 2RP 1. McGuire reiterated his request, “I’m only seeking to modify the order which prohibits contact. I’m not seeking any retrial.” 2RP 1. The State asserted, “It’s my understanding, and I was not privy to those negotiations, but my understanding is that as part of the plea agreement the defendant did agree to a no contact order.” 2RP 3.

The court denied McGuire's motion to modify the no-contact order, reasoning:

Yeah. I'm going to deny the motion. Number one, the child wasn't born when you were convicted and the child isn't listed in the no contact order.

Number two, you have a remedy. Your remedy is to get a lawyer, get a parenting plan, and seek visitation with your kids. There's nothing in that judgment and sentence that precludes you from having contact with your children other than you can't contact your wife, but you have other remedies, so I'm going to deny the motion.

2RP 3. The court entered a written order the same day. CP 52. McGuire filed a timely notice of appeal. CP 56.

C. ARGUMENT

BARRING ALL CONTACT BETWEEN MCGUIRE AND THE MOTHER OF HIS CHILD FOR 10 YEARS IMPERMISSIBLY INTERFERES WITH HIS FUNDAMENTAL RIGHT TO PARENT.

Sentencing courts may impose crime-related prohibitions “[a]s part of any sentence.” RCW 9.94A.505(9). A crime-related prohibition is one “prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Following a domestic violence conviction, courts may also prohibit “any contact with the victim.” RCW 10.99.040(2)(a), (3). No-contact orders may extend up to the statutory maximum for the crime committed. State v. Armendariz, 160 Wn.2d 106, 119-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); see also State v. Crawford, 164 Wn. App. 617, 621, 267 P.3d 365 (2011) (noting a trial court’s denial of a CrR 7.8 motion is reviewed for abuse of discretion). But courts more carefully review conditions that interfere with a fundamental constitutional right. Rainey, 168 Wn.2d at 374. A court necessarily abuses its discretion by violating an accused’s constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion “if it bases its ruling on an erroneous view of the law.” Crawford, 164 Wn. App. at 621.

Sentencing conditions that interfere with the fundamental right to parent are subject to strict scrutiny—they “must be reasonably necessary to accomplish the essential needs of the State and public order.”³ State v. Warren, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008). They must be “sensitively imposed,” with “no reasonable alternative way to achieve the

³ Courts apply this high standard to all manner of fundamental rights. See, e.g., Rainey, 168 Wn.2d at 377 (fundamental right to parent); State v. Bahl, 164 Wn.2d 739, 757-58, 193 P.3d 678 (2008) (freedom of speech); Warren, 165 Wn.2d at 32-34 (fundamental right to marriage); State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993) (freedom of association).

State's interest." Id. at 32, 35. Thus, a court may not, as a matter of routine practice, impose a no-contact order that interferes with the fundamental right to parent. Rainey, 168 Wn.2d at 377-82. Instead, the court must consider whether the order is reasonably necessary in scope and duration to prevent harm. Id. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001).

For instance, Ancira violated a no-contact order to see his wife and children. Ancira, 107 Wn. App. at 652. He drove away with his four-year old child, whom he refused to return until his wife agreed to talk with him. Id. The court imposed a five-year no-contact order with his children. Id. at 652-53. This violated Ancira's fundamental right to parent. Id. at 654. Although the State had a compelling interest in preventing the children from witnessing domestic violence, it failed to show how supervised visitation without the mother's presence, or indirect contact by telephone or mail, would jeopardize this goal. Id. at 654-55.

Similarly, Rainey was convicted of a violent crime against his daughter (first degree kidnapping). Rainey, 168 Wn.2d at 371. The court imposed a lifetime no-contact order. Id. at 374. In addition to kidnapping, Rainey inflicted measurable emotional damage on his daughter and

attempted to leverage her to inflict emotional distress on the mother. Id. at 379-80. This included letters Rainey sent his daughter from jail blaming her mother for breaking up the family. Id. These facts were sufficient to establish that a no-contact order, including indirect or supervised contact, was reasonably necessary to protect the child. Id. at 380.

Nevertheless, the Rainey court reversed because the sentencing court provided no justification for the order's lifetime duration and the State failed to show why the lifetime prohibition was reasonably necessary. Id. at 381-82. The court explained:

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restriction's length must also be reasonably necessary.

Id. at 381. The court therefore struck the no-contact order and remanded for resentencing, "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." Id. at 382.

Even more recently, the court of appeals specified what a sentencing court must consider before imposing a no-contact order that interferes with the defendant's fundamental right to parent:

On remand, the trial court shall first address whether a no-contact order remains reasonably necessary in light of the State's interests in protecting [the child] from harm. If it is, then the court shall endeavor to narrowly tailor the order, both in terms of scope and duration. When it comes to the order's scope, the court shall consider less restrictive alternatives, such as supervised visitation, prior to restricting all personal contact between Mr. Torres and his child. In addition, the court's order should recognize that "what is reasonably necessary to protect the State's interests may change over time." Accordingly, the court shall consider whether the scope of the no-contact order should change over time. The court shall also reconsider whether the ultimate length of the no-contact order remains appropriate.

State v. Torres, 198 Wn. App. 685, 690, 393 P.3d 894 (2017) (citation omitted) (quoting Rainey, 168 Wn.2d at 381).

The Torres court further noted sentencing courts "should keep in mind that a sentencing proceeding is not the ideal forum for addressing parenting issues." Id. Instead, "[o]ur juvenile and family courts are better equipped to resolve custody questions, including whether restrictions should be placed on parent-child contact." Id. at 690-91. Remand was therefore appropriate for the sentencing court to reconsider the scope and duration of a five-year no-contact order prohibiting all contact between Torres and his child, except by written mail first screened by the child's mother. Id. at 689.

Here, as a condition of sentence, the sentencing court prohibited McGuire from contacting C.P. for 10 years, including "personal, verbal,

telephone, written or contact through a third party.” CP 24. The court also entered a separate 10-year domestic violence no-contact order, pursuant to RCW 10.99.040. CP 62-63. This order likewise bars McGuire from contacting C.P. “directly or indirectly, in person, in writing, by telephone, or electronically, either personally or through any other person.” CP 62. It also prohibits McGuire from coming within 1,000 feet of C.P.’s home, school, or place of employment. CP 62. Willful violation of the chapter 10.99 RCW no-contact order is a gross misdemeanor. CP 62-63; RCW 10.99.050(2)(a); RCW 26.50.110(1)(a).

The cases discussed above address no-contact orders directly prohibiting contact between defendants and their children. By contrast, the no-contact order here prohibits contact between McGuire and the mother of his child. It is readily apparent, however, that the order interferes with McGuire’s fundamental right to parent. There is no reason the cases discussed should not apply with equal force here.

In his CrR 7.8 motion, McGuire explained C.P. gave birth to their child on November 4, 2017 and is the primary custodial parent. CP 41-42. McGuire emphasized he “has not been able to enjoy any of his parental rights for fear he might violate the order of the court.” CP 42. The breadth of the no-contact order makes this plain. McGuire is prohibited from any contact whatsoever with C.P., including in writing, indirect contact, or

contact through a third party. No exception was made for McGuire and C.P. to communicate in family court, through their attorneys, or through another third party to arrange visitation or adhere to a parenting plan.

Such a restrictive no-contact order is not narrowly tailored in scope or duration. As McGuire correctly conceded in his CrR 7.8 motion, some amount of restriction is appropriate, such as physical proximity. CP 42-45; see Rainey, 168 Wn.2d at 380 (“[A] sentencing condition may prohibit a defendant’s access to a means or medium through which he committed a crime.”). But the State at no point attempted to demonstrate how prohibiting all written, indirect, or third party contact is reasonably necessary to achieve a compelling State interest.

The court could allow some contact while still protecting C.P. For instance, the court could permit written contact only for the purposes of McGuire arranging visits with his child. Or, the court could specify contact is prohibited unless otherwise directed by the family court. Alternatively, the court could allow contact through attorneys or another third party, limiting that communication solely to discussions regarding their shared child. There are numerous forms of narrowly tailored contact that would both protect C.P. and allow McGuire to have a relationship with his child, without fear of violating the no-contact order.

The sentencing court failed to engage in any narrow tailoring analysis, as required by Rainey. At McGuire's original sentencing hearing, the court stated only, "I'm going to follow the agreed recommendation," noting "I'm handing the no contact order forward for [the prosecutor] to serve on the defendant in open court." 1RP 11.

Then, at the CrR 7.8 hearing, the court again refused to consider the duration or scope of the no-contact order, explaining "the child isn't listed in the no contact order." 2RP 3. But this reasoning did not take into account how the broad no-contact order interfered with McGuire's ability to contact and parent his child, who is in C.P.'s care.

The court also reasoned the child had not been born yet at the time of sentencing. 2RP 3. But CrR 7.8(b)(5) allows the court to relieve a party from a final judgment or order for "[a]ny other reason justifying relief from the operation of the judgment." Nothing prohibited the court from modifying the scope of the no-contact order to facilitate contact with McGuire's now-born child.

The court further believed McGuire's remedy was "to get a lawyer, get a parenting plan, and seek visitation with your kid[]." 2RP 3. On this point, the court was incorrect, given the plain terms of the no-contact order, prohibiting even indirect contact or contact through a third party. There is no exception for contact through attorneys or family court. Moreover, the

chapter 10.99 RCW order prohibiting contact specifies “[o]nly the court can change this order.” CP 63. A family court, operating in a different case and under a different cause number, would have no authority to modify the no-contact order. McGuire would still be in violation of its terms, subjecting himself to arrest and criminal penalty.

Finally, any argument by the State that McGuire agreed to a blanket no-contact order should be rejected. The certification of probable cause stated C.P. was 13 weeks pregnant with McGuire’s child at the time of the burglary. CP 1. Defense counsel addressed the no-contact order at sentencing, explaining “Mr. McGuire wants to have contact with that child, although he understands he can’t have contact with the victim, the victim in this case, so that’s going to complicate things going forward.” 1RP 8-9. McGuire likewise noted, “She’s going to have my child.” 1RP 10.

Thus, the sentencing court was well aware C.P. and McGuire would soon share a child in common. Any agreement to a no-contact order, in general, did not negate the court’s duty to consider whether the scope and duration of the order interfered with McGuire’s fundamental right to parent. At the very least, the court was required to consider whether the order was narrowly tailored when the issue was brought to its attention by way of McGuire’s CrR 7.8 motion.

Furthermore, “there is no justification for a court to impose an unlawful, indeed unconstitutional, sentence.” State v. Wences, 189 Wn.2d 675, 683 n.4, 406 P.3d 267 (2017). Courts likewise recognize “[w]aiver does not apply where the alleged sentencing error is a legal error.” State v. Crawford, 164 Wn. App. 617, 624, 267 P.3d 365 (2011) (citing In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 873-84, 50 P.3d 618 (2002)). The cases discussed above demonstrate that failure or refusal to consider the Rainey factors is constitutional error. Thus, McGuire has not waived the issue by pleading guilty and agreeing to some form of no-contact order, to which he still agrees. CP 42 (conceding “some restraint is necessary”).

This Court should strike the no-contact orders and remand for the sentencing court to reconsider whether the orders are narrowly tailored in both scope and duration, in light of McGuire’s fundamental right to parent his child. Rainey, 168 Wn.2d at 382.

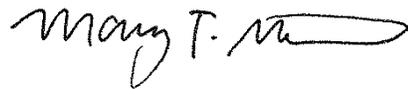
D. CONCLUSION

For aforementioned reasons, this Court should remand for the trial court to consider whether the no-contact orders are narrowly tailored in scope and duration to facilitate McGuire's relationship with his child.

DATED this 29th day of October, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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