

FILED

APR 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 29592-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellant,

v.

ELISEO CONTRERAS SANCHEZ,
Defendant/Respondent.

BRIEF OF APPELLANT

Gary A. Riesen
Chelan County Prosecuting Attorney

Roy S. Fore WSBA #19604
Deputy Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
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I. INTRODUCTION

The defendant was charged with Residential Burglary after he was found inside the residence of Maria Vera. A Domestic Violence No Contact Order prohibited the defendant from entering or approaching within 300 feet of Ms. Vera's residence. The trial court dismissed the charge pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

The sole issue presented is whether a no contact order prohibiting the defendant from entering a protected person's residence renders the defendant's entry unlawful for purposes of the Residential Burglary statute, irrespective of the victim's conduct.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred in holding the defendant's presence in the victim's residence was not unlawful for purposes of RCW 9A.52.025. (*See*, Finding of Fact 3, CP 37-38).

2. The trial court erred in granting the defendant's motion to dismiss the charge of Residential Burglary. (CP 37-38)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a Domestic Violence No Contact Order provision specifically prohibiting the defendant from entering the victim's residence renders his entry unlawful for purposes of RCW 9A.52.025?
2. Whether a *prima facie* case of unlawful entry pursuant to the Residential Burglary statute is presented where evidence establishes the defendant entered a residence in violation of a Domestic Violence No Contact Order restraint provision prohibiting his entry of said residence?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The defendant was charged with Residential Burglary and Domestic Violence Court Order Violation by an Information filed in the Chelan County Superior Court. *CP 10-12*. On December 29, 2010, the court entered Findings of Fact and Conclusions of Law granting the defendant's motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). *CP 38-38*. This timely appeal followed. *CP 39-41*.

B. RELEVANT FACTS

Sheriff's deputies responded to a possible domestic violence assault at 189 Viewdale St. in Wenatchee on August 28, 2010, at approximately 7:20 p.m. *CP 1-9 and 13-14*. On arrival, a boy, eight or nine years old, was contacted outside the open door of the residence. *Id.* Deputy Monica Haynes asked the boy where his mother was. *Id.* The boy pointed inside. *Id.* Looking inside, Deputy Haynes saw no one. *Id.* The

boy then pointed to a closed bedroom door. *Id.* Deputy Haynes confirmed that the boy's mother and father were in the bedroom. *Id.*

Deputy Haynes called out "policia." *Id.* From the bedroom, a female yelled something in Spanish. *Id.* Deputy Haynes announced that she was a deputy and was coming in. *Id.* Pushing the door open, Deputy Haynes found the defendant in bed with Ms. Vera. *Id.* A no contact order barred the defendant from contact with Ms. Vera and from *entering or knowingly approaching within 300 feet of Ms. Vera's residence*, place of employment, or any place she was known to be. *Id.*

The Domestic Violence No Contact Order was entered in the Chelan County Superior Court on February 9, 2009, following the defendant's conviction of a domestic violence offense. *CP 30-36.* The defendant knew about the order, having signed it at the time of entry. *Id.* The order expressly warned the defendant he could be arrested even if the victim invited him to violate its provisions. *Id.* Moreover, the order clearly advised that only the court could change the order. *Id.*

The defendant filed a Motion to Dismiss pursuant to *State v. Knapstad, supra*, alleging the State lacked a *prima facie* case because the victim had consented to the defendant's presence in the residence. *CP 15-29.* The State argued the defendant's entry was unlawful due to the no

contact order and that only the court could waive or modify the order. (*CP 30-36; see also, RP 5-8*). The trial court held that the defendant's presence in the residence was not unlawful in spite of the no contact order. *CP 37-38; see also, RP 10-11*.

IV. ARGUMENT

A. AN APPELLATE COURT REVIEWS *DE NOVO* A TRIAL COURT'S DISMISSAL OF A CRIMINAL CHARGE ON A *KNAPSTAD* MOTION.

The standard of review of a trial court's decision dismissing a criminal charge on a *Knapstad* motion is *de novo*. *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010).

B. A DOMESTIC VIOLENCE NO CONTACT ORDER PROHIBITING THE DEFENDANT FROM ENTERING THE VICTIM'S RESIDENCE RENDERS HIS ENTRY UNLAWFUL FOR PURPOSES OF RCW 9A.52.025.

Though a no contact order expressly prohibited the defendant from entering Ms. Vera's residence, the trial court found the entry lawful due to the victim's consent. The practical effect of this decision means that persons protected by no contact orders may independently alter or waive restraint provisions of no contact orders. In other words, domestic violence victims are authorized to permit that which a court has lawfully forbidden. In so holding, the decision of the trial court conflicts with well-settled law, legislative intent, and public policy.

To reduce occurrences of domestic violence, the Domestic Violence Prevention Act (Ch. 26.50 RCW) authorizes the issuance of protective orders restraining respondents from committing domestic violence, from entering or remaining in a protected person's residence or workplace, and from contacting protected persons. *See, State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). Exclusion of the defendant from Ms. Vera's residence, accordingly, was a lawful exercise of discretion by the Chelan County Superior Court.

Once entered, only the Chelan County Superior Court had authority to modify or waive its provisions. *State v. Dejarlais*, 88 Wn. App. 297, 304, 944 P.2d 1110 (1997), *affirmed*, 136 Wn.2d 939, 969 P.2d 90 (1998). The actions of the victim do not act as a waiver. *Id.* Even assuming,

therefore, that Ms. Vera's actions amounted to consent, she lacked authority to allow the defendant to violate the terms of the no contact order.

Legislative intent and public policy dictate that reconciliation and consent should not void a domestic violence protection order. *Id.* at 303.

Protective orders serve public and private purposes:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

Id. at 304, *quoting*, Laws of 1992, ch. 111, sec. 1. Moreover, protective orders help reduce an abuser's power over the victim. *See, Id.* at 302.

Allowing reconciliation to void a court order would ignore the role reconciliation plays in the cycle of violence. *Id.* at 303. Domestic violence victims are often "vulnerable and in a condition of 'learned helplessness'." *Id.*, *citing*, *State v. Allery*, 101 Wn.2d 591, 596-97, 682 P.2d 312 (1984); *State v. Riker*, 123 Wn.2d 351, 362, 869 P.2d 43 (1994); *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). Whether the issue

is contact with the victim, or entry into the victim's residence, these factors dictate that only the court may waive or modify a no contact order.

The decision below turned on the court's interpretation of *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007). In particular, the trial court noted the following language:

It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building.

Id. at 609. The trial court's focus was misplaced.

Wilson was charged with First Degree Burglary after assaulting his girlfriend in their shared residence. *Id.* at 600-1. Though a no contact order prohibited the defendant from contact with the victim, it did not exclude the defendant from entering or approaching the victim's residence. *Id.* at 604-5. Thus, as the *Wilson* court noted, the order criminalized the defendant's contact with the victim, but not his entry into the residence. *Id.* at 611.

The issue in *Wilson*, therefore, differed from the issue presented herein. In *Wilson* the court identified the legal issue as:

Whether entry or remaining in a jointly shared residence, from which neither party has been lawfully excluded, is unlawful for purposes of establishing this essential element of the crime of burglary.

Id. at 603-4. Nothing in *Wilson* indicates a court cannot lawfully exclude a party from a residence. Nor does *Wilson* hold that once a party has been lawfully excluded by a no contact order, that a victim's consent alone may waive the prohibition.

The defendant herein was not a cohabitant. There is no evidence that he cosigned a lease or that he ever lived in the residence. More importantly, the defendant had been lawfully excluded from the residence by a specific provision of a no contact order. Thus, while the victim may have acquiesced to the defendant's entry, she had no authority to waive the court's prohibition. Accordingly, the defendant's entry was "unlawful."

C. A *PRIMA FACIE* CASE OF RESIDENTIAL BURGLARY EXISTS WHERE IT IS SHOWN THAT A RESTRAINED PERSON ENTERED A PROTECTED PERSON'S RESIDENCE CONTRARY TO AN EXPRESS PROHIBITION IN A DOMESTIC VIOLENCE NO CONTACT ORDER.

The procedure created by the *Knapstad* case has since been codified in rule CrR 8.3(c). By this rule, the court may dismiss a criminal

charge where the undisputed facts fail to establish a *prima facie* case of guilt. CrR 8.3(c). The evidence shall be viewed in the light most favorable to the State and the court must draw all reasonable inferences in the light most favorable to the prosecuting attorney. *Id.* Finally, the court may not weigh conflicting statements or base its decision on the statement it finds most credible. *Id.*

A person commits the crime of Residential Burglary by unlawfully entering or remaining in a residence with intent to commit against a person or property therein. *State v. Stinton*, 121 Wn. App. 569, 573, 89 P.3d 717 (2004). The only question presented herein is whether, by virtue of the no contact order, the defendant's entry was unlawful, irrespective of any express or implied consent from Ms. Vera. The State submits the no contact order lawfully precluded the defendant from entering Ms. Vera's residence and that only the court, not Ms. Vera, nor the defendant, could say otherwise.

In this case the defendant was legally excluded from entering or approaching Ms. Vera's residence. This rendered his presence in the residence unlawful. Even assuming Ms. Vera in some way consented to his presence, the defendant's entry and presence in the residence was unlawful pursuant to the Residential Burglary statute.

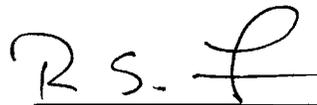
V. CONCLUSION

For the foregoing reasons the decision of the Chelan County Superior Court should be reversed and the matter remanded for trial.

DATED this 1st day of April, 2011.

Respectfully submitted,

Gary A. Riesen
Chelan County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "R S. Fore". The signature is written in a cursive style with a horizontal line extending to the right from the end of the signature.

By: Roy S. Fore WSBA #19604
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