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AUGUST 28, 2015
Court of Appeals
Division III
State of Washington

No. 33186-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PATRICK WINTERS,

Appellant.

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

The Honorable Alex Eckstrom

BRIEF OF APPELLANT

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A. INTRODUCTION

Patrick Winters was convicted and sentenced for one count of first degree child molestation that involved his fiancée's child but did not involve his newborn biological child who had the same mother as the victim. Nevertheless, the trial court imposed a condition of his sentence barring contact with any of the victim's immediate family. The trial court did not determine whether the condition was reasonably necessary to protect Mr. Winters's child, nor did it consider any less restrictive alternatives. Mr. Winters submits this Court must modify the condition as an impermissible infringement on his fundamental right to parent.

B. ASSIGNMENT OF ERROR

The trial court violated Mr. Winters's fundamental right to parent in imposing a lifetime order prohibiting contact between Mr. Winters and his child.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The trial court's power at sentencing is statutory. By statute, the court may impose "crime-related" prohibitions as a condition of the sentence. Sentencing prohibitions that inhibit or infringe on a fundamental constitutional right, such as the right to parent, may be

imposed but only where the prohibition is reasonably necessary to accomplish the essential needs of the State and to maintain public order. Less restrictive alternatives must be considered. Here, the trial court imposed a lifetime prohibition on contact between Mr. Winters and his fiancée's child and the victim's immediate family members, which included Mr. Winters's biological child, without making any finding the prohibition was reasonably necessary and without considering less restrictive alternatives. In light of the trial court's failures, must this Court modify the prohibition as impermissibly infringing on Mr. Winter's fundamental right to parent?

D. STATEMENT OF THE CASE

Patrick Winters pleaded guilty to one count of first degree child molestation for an act involving the child of his live-in fiancée. CP 3-5. Mr. Winters was sentenced to an indeterminate sentence of 67 months to life. CP 23. At sentencing, the victim's mother, Mr. Winters's fiancée, told the court she did not object to Mr. Winters having contact with his biological child who's mother was Mr. Winter's fiancée:

I know that the courts are putting a protection order in place for you to never have any contact with [K.R.A.] again, and I respect the court's decision to do this. However, I was also informed [sic] that there may be a protection order in place where you may never have contact with myself or [L.W.] either. As for [L.W.], I

don't feel it would be fair for us to decide that she would never have a chance to know her dad. By the time that you are released from prison [L.W.] will be of almost legal age to make the decision as to whether she wants you to be part of her life or not. I feel that the decision should be left up to her. Meanwhile you can write her letters that she can read when she is older.

RP 7-8.

In the Judgment and Sentence, the court imposed the sentencing conditions contained in Appendix F, including subsection 7, which stated:

Have no contact, either direct or indirect, with the victim and the victim's immediate family members, unless otherwise deemed appropriate by the court

CP 29.

The court's imposition of sentence was short and succinct:

Criminal history includes rape of a child in the first degree January '95. Victim assessment \$500. Cost pursuant to the bill. DNA fee \$100. DNA testing pursuant to paragraph 4.2. Sixty-seven months minimum, maximum sentence for life. Same reminder regarding the firearms and offender statute. I have signed that as well as the sexual assault. Good luck.

RP 11.

Subsequently, on February 10, 2015, Mr. Winters filed a motion pursuant to CrR 7.8, to modify Appendix F of the Judgment and Sentence to allow him to have contact with L.W., his biological child.

CP 33-37. Despite the lack of an objection by the State to Mr. Winters's proposed modification, and despite a lack of an objection by L.W.'s mother, the court refused to modify the blanket prohibition or consider any less restrictive alternatives:

I'm, going to deny the motion to strike as to seven. He can readdress that if he wishes at a later date. But at this point it appears to be within the Court's authority. There appears to be some question as to whether or not initial contact is granted so I will leave it at that. I've signed the order as presented but indicated I've not granted number seven.

RP 14-15.

Mr. Winters appeals from the court's refusal to allow him contact with L.W., his biological child. CP 84.

E. ARGUMENT

The imposition of the condition of his sentence barring Mr. Winters from contact with his own minor child effectively terminated his parental rights, thus violating his fundamental right to parent

1. *Sentence conditions which infringe fundamental rights must be "reasonably necessary" to accomplish the State's need.*

Under the Sentencing Reform Act (SRA), a court has the authority to impose "crime-related prohibitions" and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8). "Crime-related prohibition" means an order of a 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 court may order compliance “with any crime-related prohibitions” as a condition of community custody. RCW 9.94A.703(3)(f). Courts review the imposition of community custody conditions for an abuse of discretion, and will reverse where the decision is manifestly unreasonable or based on untenable grounds. *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). A condition is manifestly unreasonable if it is beyond the court’s authority to impose. *See State v. Jones*, 118 Wn.App. 199, 207-08, 76 P.3d 258 (2003) (striking the condition pertaining to alcohol counseling as unauthorized under applicable statutes). There is no need to demonstrate that the condition has been enforced; a preenforcement challenge is ripe for review. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

2. *Sentence condition seven barring Mr. Winters from contact with his biological child was not reasonably necessary to protect the victim.*

If the sentencing condition infringes a constitutional right (such as the right to the care, custody, and companionship of one’s children), that condition can only be upheld if the condition is reasonably necessary to accomplish the essential needs of the State and public

order. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009) (“More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.”).

The right to the care, custody, and companionship of one’s children constitutes such a fundamental constitutional right. *In re Rainey*, 168 Wn.2d 367, 374, 299 P.3d 686 (2010). Thus, sentencing conditions burdening this right “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Rainey*, 168 Wn.2d at 373, *quoting Warren*, 165 Wn.2d at 32.

For instance, in *State v. Letourneau*, the defendant was convicted of second degree rape of a child. 100 Wn.App. 424, 427, 997 P.2d 436 (2000). The victim was a minor to whom the defendant was not related. *Letourneau*, 100 Wn.App. at 428-29. As a condition of her sentence, Letourneau was prohibited from unsupervised contact with her biological children until they reached the age of majority. *Id.* at 437-38. Because there was no evidence that the defendant might molest her own children, the condition was reversed as not reasonably necessary to accomplish the State’s compelling interest. *Id.* 441-42.

Similarly, in *Rainey*, the Supreme Court struck a lifetime no-contact order prohibiting the defendant from all contact with his biological child. 168 Wn.2d at 381-82. The Court based its decision on the fact that the sentencing court did not articulate any reasonable necessity for the lifetime duration of that order. *Id.* at 381-82. Recognizing the “fact-specific nature of the inquiry,” the court remanded to the trial court for resentencing so that the court could “address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” *Id.*

As in *Rainey*, the trial court here provided no explanation as to whether the no-contact order was reasonably necessary to serve a compelling state interest. Although the State has a compelling interest in protecting children from harm, the State did not demonstrate how prohibiting all contact between Mr. Winters and his biological child was reasonably necessary to protect that interest, especially in light of the fact that his child was not a victim of Mr. Winters’s offense. *Letourneau*, 100 Wn.App. at 441-42.

In addition, the trial court completely failed to consider any less restrictive alternatives to a lifetime no-contact order, especially given the fact any visits between Mr. Winters and his child would occur in

the tightly controlled and monitored institutional setting or would happen through telephone or written contact. Because the sentencing condition implicated Mr. Winters's fundamental constitutional right to parent his children, the State was required to show that no less restrictive alternative would prevent harm to the children. It failed to do so. This Court should modify condition seven of Appendix F to allow Mr. Winters to have contact with his child.

F. CONCLUSION

For the reasons stated, Mr. Winters asks this Court to modify Condition 7 to allow him to have contact with his biological child.

DATED this 28th day of August 2015.

Respectfully submitted,

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DIVISION THREE**

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RESPONDENT,)	
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v.)	NO. 33186-5-III
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PATRICK WINTERS,)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] ANDREW MILLER [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341</p>	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2015.

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