

FILED

Sep 12, 2016

Court of Appeals
Division III
State of Washington

No. 336484

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Respondent

v.

MARIO TORRES, Appellant

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it entered a no contact order preventing Mr. Torres from having contact with his minor child until 2020.
- B. The trial court erred when it did not make an individualized inquiry into Mr. Torres's ability to pay discretionary legal financial obligations.
- C. This Court should not award appellate costs in the event the State substantially prevails on appeal.

Issues Relating to Assignments of Error

- A. Without determining whether the order was reasonably necessary to serve a compelling state interest, did the trial court err when it interfered with Mr. Torres's constitutional right to parent his minor child by imposing a no-contact order which would not expire until 2020 ?
- B. Did the trial court err when it imposed discretionary legal financial obligations without making an individualized inquiry as to Mr. Torres's current and future ability to pay before imposing LFOs?

C. Should the State substantially prevail on appeal, should this Court deny appellate costs if the State submits a cost bill?

II. STATEMENT OF FACTS

Benton County prosecutors charged Mario Torres with tampering with a witness, RCW 9A.72.120(1)(c);(CP 5). The state believed Mr. Torres had spoken with his eleven year old child who might have been called as a witness in a criminal investigation or the abuse or neglect of a minor child. (CP 5; 2/4/15 RP 5-6).

Mr. Torres entered an Alford plea to the charge of attempting to induce another he had reason to believe was about to be called as a witness to withhold from law enforcement information that is relevant to a criminal investigation regarding abuse or neglect of a minor child. (CP 23; 31).

At the sentencing hearing the court did not inquire into Mr. Torres's financial resources or consider the burden payment of LFOs would impose on him. Rather, the court asked, "Sir, are you capable of working?" Mr. Torres answered in the affirmative and the court imposed the mandatory legal financial obligations, along

with \$860 in court costs and a \$500 fine, for a total of \$1,960.

(2/25/15 RP 23; CP 36;43).

The Judgment and Sentence contained the following language:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS

The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 35.

The state recommended a no-contact order for six months, while other cases before the court involving Mr. Torres were determined as well as a case from Yakima County. (2/25/15 RP 22). The defense asked that the court not enter a no-contact order preventing Mr. Torres from seeing his child, as he had been an active and involved caretaker for his child since birth. (2/25/15 RP 21). However, if the court were inclined to disallow contact, defense asked to allow him to send letters to his child. (2/25/15 RP 21). Without analysis, and over defense objection, the court imposed the no-contact order, preventing any contact except by mail. The letters were to be screened by the child's mother. (2/25/15 RP 23-24; Supp. CP 1). The order was set to expire on its

own terms in February 2020 unless modified or terminated sooner.
(2/25/15 RP 24).

Mr. Torres makes this appeal. (CP 47-48).

III. ARGUMENT

A. The Trial Court Violated Mr. Torres Fundamental Right To Parent When It Entered A Five-Year No Contact Order Preventing Him From Having Contact With His Child.

Parents have a fundamental liberty and privacy interest in the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.E.2d 49 (2000); *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001). The constitution requires a fair process before limiting a parent's rights and prohibits government intrusion absent a compelling state interest that must be as narrowly tailored as possible. *Troxel*, 530 U.S. at 65. Wash. Const. Art. I, §§ 3, 7.

The authority of a criminal sentencing court to impose a no-contact order between parent and child originates from its statutory power to order crime-related prohibitions. RCW 9.94A.505(9); *State v. Warren*, 165 Wn.2d 17, 32, 195 P. 3d 940 (2008). Generally, crime related prohibitions, including no-contact orders are reviewed for abuse of discretion. *State v. Ancira*, 107 Wn.App. 650, 653, 27

P.3d 1246 (2001). Sentencing conditions that interfere with a fundamental right, such as the right to parent, are more closely scrutinized to ensure that they are ‘sensitively imposed’ and ‘reasonably necessary to accomplish the essential needs of the State.’” *In re Rainey*, 168 Wn.2d 367, 374;377-78, 229 P.3d 686 (2010). A court abuses its discretion where it applies the wrong legal standard. *Id.* at 367.

The court must analyze the scope and duration of the prohibition in light of the court record under the ‘reasonably necessary’ standard. *Rainey*, 168 Wn.2d at 381-82. If a trial court fails to address the issue using the proper standard, a reviewing court strikes the no-contact order and remands to either affirm or amend the provision as necessary. *Id.*

Here, the trial court imposed a five-year no contact order preventing Mr. Torres from having any contact with the exception of sending mail that would be screened by the child’s mother. The no-contact order implicated Mr. Torres’s fundamental right to the care, custody and companionship of his child. For the sentencing condition to be valid, there must be no reasonable alternative way to achieve the State’s interest. *Rainey*, 168 Wn.2d at 379.

The State has a compelling interest in protecting children from harm, and an obligation to intervene and protect children when a parent's "actions or decisions seriously conflict with the physical or mental health of the child." *In re Welfare of Sumei*, 94 Wn2d 757, 762, 621 P.2d 108 (1980). However, reviewing courts must analyze the scope and duration of the no contact orders in light of the facts of the record. *Rainey*, 168 Wn.2d at 378-82.

In *Rainey*, the Supreme Court determined that a trial court should have addressed Mr. Rainey's argument that a lifetime no contact order with the young daughter he had abducted would be detrimental to her. *Rainey*, 168 Wn.2d at 382. The Court remanded to the trial court to address the length of the no-contact order under the 'reasonably necessary' standard. *Id.*

Similarly, in *Howard*, the trial court imposed a lifetime no contact order prohibiting contact with Howard's wife and children. *State v. Howard*, 182 Wn. App. 91, 328 P.3d 969 (2014). Howard was convicted of first degree attempted murder of his wife. *Id.* The Court concluded there was no on the record explanation as to why a lifetime no contact order was necessary to accomplish the State's interest, other than "generally recognizing the impact on the children when Mr. Howard discharged his weapon." *Id.* at 102.

The Court remanded for the trial court to reconsider the scope of the order under the “reasonably necessary” standard. *Id.* at 105.

Here, the court did not address the reasons for the length or scope of the five-year no-contact order. Mr. Torres’s child was already eleven years old at the time the order was entered and Mr. Torres had been involved in providing custodial care for his child since birth. The trial court should have addressed whether it would be detrimental to his child’s interest to have not have any contact with Mr. Torres with the exception of supervised mail. Because the sentencing prohibition implicated his right to parent his child, the State must show there is no less restrictive alternative that would prevent harm to the child. The State did not show that less draconian measures, such as supervised visitation with the child would jeopardize its goal. Moreover, there was no reason given for the five year length of time.

Whether a crime-related prohibition satisfies the “reasonably necessary” standard is a fact-specific inquiry. The trial court here did not conduct a ‘reasonably necessary’ analysis. This is an abuse of discretion. This Court should strike the sentencing condition prohibiting Mr. Torres’s contact with his child, and remand for further proceedings.

B. The Trial Court Erred When It Did Not Conduct An Individualized Inquiry Into Mr. Torres's Financial Status.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court may order the payment of a legal financial obligation. RCW 10.01.160(1) authorizes the superior court to require a defendant to pay costs; these costs must be limited to expenses specially incurred by the state in prosecuting the defendant. RCW 10.01.160(2). A court may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. RCW 10.01.160(3); RCW 9.94A.760(2). The authorizing statute requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay. RCW 10.01.160(3)

In *State v. Blazina*, the Washington Supreme Court held that the authorizing statute means "that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015). Where the trial court has failed to conduct this inquiry, the remedy is remand for a new sentencing hearing. *Id.*

Here, the judgment and sentence contains boilerplate language that the trial court “has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” (CP 35). However, the court did not mark whether it determined the defendant had the ability or likely future ability to pay any LFOs. (CP 35). The court did not make a “finding” by checking the box. Moreover, nothing in the oral record shows that the trial court took into account Mr. Torres’s financial resources or the potential burden of imposing LFOs on him. The inquiry regarding ability to pay also requires the court to consider factors such as incarceration and defendant’s other debts. *Blazina*, 344 P.3d at 685. Here, the court simply asked if Mr. Torres was capable of working.

The *Blazina* court directed trial courts to look to the comments in court rule GR 34 for guidance. *Id.* GR 34 allows a waiver of filing fees and surcharges on the basis of indigent status, providing a list of ways a person may prove their indigent status. *Id.* Specifically, the courts must find a person indigent if his household income falls below 125 percent of the federal poverty level guideline. *Id.* In an earlier hearing, before a different judge,

Mr. Torres told the court he had not worked in a few months, but the last time he had worked he made \$1,800 a month. He supports four people, including himself. This meant his income was below 100% of the federal poverty level¹.

Despite the boilerplate language in the judgment and sentence, the record does not show the trial court took into account Mr. Torres's financial resources or the considered the potential burden of imposing LFOs on him. This matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Torres's current and future ability to pay before imposing LFO's.

Blazina, 344 P.3d at 685.

C. Mr. Torres Asks This Court To Not Impose Appellate Costs Should The State Substantially Prevail On Appeal And Submit A Cost Bill.

RAP 14.2 authorizes the State to request the Court to order an appellant to pay appellate costs if the State substantially prevails on appeal. The appellate courts may deny awarding the State the costs of appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn.App. 380, 382, 367 P.3d 612 (2016). The indigent appellant must object,

¹<https://aspe.hhs.gov/poverty-guidelines>

before the Court has issued a decision terminating review, to any such cost bill that might eventually be filed by the state. *Sinclair*, 192 Wn.App. at 395-394.

In exercising its discretion, a defendant's inability to pay appellate costs is a significant factor to consider when deciding whether to impose such costs. *Sinclair*, 192 Wn.App. at 382. The Washington Supreme Court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include an interest rate of 12 percent, court oversight until LFOs are paid, and long term court involvement which "inhibit re-entry" and an increase in the chance of recidivism. *Blazina*, 182 Wn.2d at 836. An appellate court should deny an award of costs to the State if the defendant is indigent and lacks the ability to pay. *Sinclair*, 192 Wn.App. at 382.

In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied award of those costs. *Sinclair*, 192 Wn.App. at 392.

Mr. Torres supports a family of four on wages that are at or below the federal poverty level. No evidence supports a finding that Mr. Torres has a realistic possibility of being able to pay

appellate costs in a timely manner and before accruing massive debt on the interest. Mr. Torres respectfully asks this Court to exercise its discretion and rule that an award to the State of appellate costs is not appropriate.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Torres respectfully asks this Court to remand to the trial court to vacate the no-contact order. He asks this Court to instruct the trial court to make an individualized inquiry into his current and future ability to pay discretionary legal financial obligations. He also asks this Court to exercise its discretion and deny an award of appellate costs in the event the State substantially prevails on appeal.

Dated this 12th day of September 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Mario Torres, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on September 12, 2016

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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Benton County Prosecuting Attorney at prosecuting@co.benton.wa.us

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