

FILED
NOV 11 2009
App

NO. 78452-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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A. ISSUES

This Court called for an answer to Armendariz's petition for review. The petition raises three issues: 1) whether the trial court may order no-contact for someone other than the named victim in the case, and whether the period of no-contact may be longer than the period of supervision; 2) whether a domestic violence treatment program was properly ordered; and 3) whether it was reversible error to admit into evidence a single statement of the defendant.

According to the rules of appellate procedure:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). None of Armendariz's issues meets the criteria set forth in RAP 13.4(b).

B. FACTS

Ismael Armendariz was ordered by a court to have no contact with Ms. Nonas-Truong. One night, police responded to a

911 call, apparently from Nonas-Truong's neighbor, reporting a broken window and possible domestic violence at Nonas-Truong's residence. 1RP 32-33. Armendariz had been at the residence earlier in the evening. 2RP 104-05, 108-09. Nonas-Truong did not know her bedroom window was broken because she had been in the shower. 2RP 95.

Uniformed Seattle Police Officer Chittenden responded to the call and, while other officers looked for Armendariz, Chittenden locked the front door and proceeded to interview Nonas-Truong. 2RP 140-43. Shortly thereafter, Armendariz returned to Nonas-Truong's apartment and began yelling at her, kicking and pounding on doors and windows in an apparent attempt to enter. 2RP 144. Armendariz shouted that he knew the police were there, and he didn't care if he went to jail. 2RP 144. When Officer Chittenden unlocked the door and started to open it, Armendariz kicked in the door, causing the door to hit the officer in the head. A protracted struggle ensued. When Chittenden called for "fast backup," Armendariz said "Yeah, you better call for help bitch." 2RP 154. When Chittenden felt Armendariz grab his holster, the officer called for "help," the most urgent request for assistance. 2RP 145-51.

Armendariz was eventually arrested through the collective efforts of several officers, a melee that five witnesses described in the same way. 2RP 155-57 (Chittenden); 1RP 36-36 (Deputy Innoyue); 2RP 100-04 (victim Nonas-Truong); 2RP 114-20 (SPD Officer Polhemus); 2RP 124-30 (SPD Officer Milstead).

Armendariz said that the officer grabbed him unexpectedly as he stood knocking at the front door, and that he did not resist the officer or commit an intentional assault. 1RP 39-46 (direct), 46-83 (cross).

Armendariz was convicted of felony assault in the third degree and a misdemeanor for violation of the no-contact order. State v. Armendariz, No. 55074-8-I, slip op. (Court of Appeals Division I, Feb. 13, 2006 -- unpublished). As part of the felony sentence, the trial court ordered Armendariz to have no contact for five years with Officer Chittenden and with Ms. Nonas-Truong, and to attend a domestic violence treatment program. Id. at 3. The same treatment requirement was imposed pursuant to the misdemeanor sentence. CP 37. Armendariz did not object to either the no-contact order or the treatment condition.

C. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH PRECEDENT AND DOES NOT PRESENT ISSUES OF SUBSTANTIAL PUBLIC INTEREST.

1. THE "NO-CONTACT" ISSUES WERE NEVER PRESERVED FOR REVIEW AND ARE NOT OF SUBSTANTIAL PUBLIC IMPORT.

At sentencing, the court ordered the defendant to refrain from contacting Nonas-Truong for five years, CP 34, but the court made clear that Nonas-Truong could petition the court to lift the order if she desired contact after a two-year period. 1RP 88-90. The court entered a separate order prohibiting contact as a "special condition" of community custody. CP 37. Although there was a fair amount of discussion on this subject, Armendariz was apparently satisfied with the court's order, since he did not object. Id.

This claim should not be reviewed for the first time on appeal, much less in the Supreme Court. RAP 2.5(a). This is purely a statutory matter to which Armendariz did not object in any way. Litigants should be encouraged to raise such objections at the trial court, so that precious judicial resources are not expended dealing with appellate arguments that easily could have been resolved in the trial court. Entertaining such issues for the first time on appeal provides the incentive to litigate issues where a defendant simply changes his mind regarding whether he agrees

with a trial court's sentence. The appellate courts should be used to correct errors the defendant brought to the trial judge's attention.

Moreover, Armendariz's legal argument has shifted even on appeal. To the Court of Appeals, he argued that Nonas-Truong was not a victim of the assault, that this was not a crime of domestic violence, and that both no-contact orders were unauthorized. Br. of App. at 22 (citing CP 34, 37). Yet, Armendariz's entire discussion of the law centered on the community placement and custody statutes, rather than the court's general authority to order no-contact. See Br. of App. at 19-22 (citing various statutes dealing with community custody conditions). He never addressed the court's authority to prohibit contact more generally.

Now, for the first time in his petition for review, he challenges that more general authority. That argument comes too late, and should not be considered. Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."); State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993).

In any event, his argument is meritless. The general order prohibiting contact appears in section 4.6 of the judgment and

stems from the court's general authority to impose crime-related conditions of sentence. See CP 34. RCW 9.94A.505(8) provides:

As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

A crime-related prohibition is “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(12). The imposition of crime-related prohibitions is reviewed for an abuse of discretion. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

The existence of a relationship between the crime and the condition “will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge.” State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989); State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). For example, in Parramore, the court affirmed a condition requiring urinalysis because the condition directly related to the defendant's conviction for selling marijuana,

despite the absence of evidence that the defendant actually used marijuana. Parramore, 53 Wn. App. at 533.

Witnesses to a crime are “directly connected to the circumstances of the crime.” Ancira, 107 Wn. App. at 656. Here, Nonas-Truong was clearly a witness to the crime. This provides a sufficient nexus to establish a direct relationship to the circumstances of the charged crime, and supports the imposition of a no-contact order. The trial court did not abuse its discretion in imposing the condition. And, discretionary rulings are not of general public interest, which warrant review by this court.

Armendariz suggests that the modern statute was “amended...to eliminate the provision concerning no-contact orders.” Pet. for Rev. at 9. This is not correct. In fact, the plain legislative intent shows otherwise. Prior to July 1, 2001, the Sentencing Reform Act (SRA) explicitly permitted the imposition and enforcement of an order prohibiting the offender from having contact with specified individuals as part of any sentence, so long as the term of the no-contact order did not exceed the maximum allowable sentence for the crime and the order related directly to the circumstances of the crime:

As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with *other specified individuals* or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

Former RCW 9.94A.120(20) (2000), recodified as RCW 9.94A.505 (Laws of 2000, ch. 10, § 6) (emphasis added). A review of the legislative history behind the consolidation and recodification of former RCW 9.94A.120 indicates the legislature changed this section to reorganize the SRA, correct incorrect cross-references and simplify codifications, and that the legislature did not intend to alter the court's power to impose and enforce no-contact orders beyond the limitations present in the pre-2001 SRA. See RCW 9.94A.015 ("The legislature does not intend ... to make, and no provision of [this act] may be construed as making, a substantive change in the sentencing reform act.").

It is also the view of the Sentencing Guidelines Commission that the trial court may still order no-contact up to the statutory maximum period:

A court may prohibit an offender from contacting with (sic) specified individuals or a specific class of individuals for a period not to exceed the maximum

allowable sentence for the crime, regardless of the expiration of the community supervision or community placement term. The order prohibiting contact must relate directly to the circumstances of the crime of conviction.

Adult Sentencing Guidelines Manual, 2005, at I-40 (citing RCW 9.94A.505(8)). Nothing in the history of the statute, or in logic, would support a contrary interpretation.

Armendariz also argues that a prohibition on contact was inappropriate as a condition of community custody. The Court of Appeals correctly held that this was not the case. Armendariz, slip op. at 7-8. There is an additional basis to support the court's order -- Nonas-Truong was a victim in this case. A "victim" is "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.010(44). Nonas-Truong was present when the defendant went berserk, tried to kick in her door, pounded on her windows, and attacked a police officer who was simply trying to assist her. It is not surprising that she would sustain emotional or psychological damage from witnessing this event. As she told the sentencing judge:

I am trying to get on with my life, trying to take care of my youngest son, and move forward through all of this. I have been traumatized in a lot of ways. And I

am trying to recover from the instances that I incurred in June. I am fearful and I am scared. And not only myself, my family, the place I work at, my co-workers. I don't want to have our doors locked. And for two days I couldn't even go to work.

1RP 86. Clearly, this condition of community custody could have been ordered because Nonas-Truong was a victim in the case. Yet, because Armendariz did not object below, the issue was never directly addressed.

In any event, if the court had authority to impose the general five year order, the community custody order is simply superfluous, so Armendariz's attack on that order makes no practical difference. Review is not warranted.

2. IT IS IMMATERIAL WHETHER DOMESTIC VIOLENCE TREATMENT COULD BE ORDERED PURSUANT TO THE FELONY BECAUSE THE SAME TREATMENT WAS ORDERED PURSUANT TO THE MISDEMEANOR, AND ARMENDARIZ DOES NOT CHALLENGE THE MISDEMEANOR ORDER.

Armendariz's second purported issue is also not appropriate for Supreme Court review. On the *misdemeanor* judgment and sentence, the trial court ordered that "[t]he defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program." CP 39. This order

is nearly identical to the order entered pursuant to the felony, where the court ordered "[t]he defendant shall participate in the following crime-related treatment or counseling services: Domestic Violence Batterer's Treatment and successfully complete." CP 39. The Court of Appeals held in an unpublished opinion that the felony order was authorized.

Regardless of whether the felony order is appropriate, Armendariz will be required by law to meet the concurrent treatment condition under the misdemeanor sentence, a condition he does not challenge. His completion of the program pursuant to the misdemeanor sentence will undoubtedly satisfy his obligations under the felony sentence, so the felony order is superfluous. Thus, the treatment order is not an issue of any practical import to this particular case, nor has Armendariz shown that it is an issue of "substantial public interest."

3. WHETHER ADMISSION OF A SINGLE STATEMENT BY ARMENDARIZ WAS REVERSIBLE ERROR, IS NOT A QUESTION OF SUBSTANTIAL PUBLIC INTEREST.

This final issue is also not worthy of review. Armendariz said to a booking officer, "Come on, bitch. Take off these handcuffs and

we can go at it.” Armendariz, slip op. at 3. The statement was admitted over objection. However, a very similar statement was offered into evidence and is not challenged on appeal. In that statement, Officer Chittenden testified that when he was initially attacked by Armendariz and called for backup, Armendariz said, “Yeah, you better call for help bitch.” 2RP 154. This statement, when taken together with the five witnesses who testified to the fact that the defendant assaulted the officer, shows beyond question that the subsequent statement at the holding cell likely did not impact the jury’s verdict. The claim on appeal was a challenge to an evidentiary ruling, reviewed for an abuse of discretion. The Court of Appeals observed that the evidentiary ruling was possibly erroneous but that any error was harmless given the overwhelming evidence. The question is necessarily fact-bound and affects no other case or defendant, so there is no broad-based issue of substantial public interest and the claim does not meet the criteria of RAP 13.4(b).

D. CONCLUSION

For the foregoing reasons, Armendariz's petition should be denied.

DATED this 13th day of November, 2006.

Respectfully submitted,

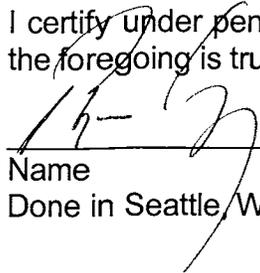
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Answer to Petition for Review, in STATE V. ARMENDARIZ, Cause No. 78452-3, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

11/13/06
Date 11/13/06