

No. 94892-8

NO. 74677-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

WENDY GRANATH,

Petitioner.

APPELLANT'S BRIEF

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A. **ASSIGNMENT OF ERROR**

The King County Superior Court erred in affirming the decision of the King County District Court denying Granath's motion to vacate the post-conviction no-contact order issued as a condition of sentence when the 24 month suspended sentence terminated.

B. **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Did the post-conviction no-contact order issued pursuant to RCW 10.99.050 by the district court as a condition of a 24 month suspended sentence survive the expiration of the suspended sentence?

What statute sets the duration of a post-conviction no-contact order issued by a district court as a condition of sentence pursuant to RCW 10.99.050?

C. **STATEMENT OF THE CASE**

A jury convicted Wendy Granath of cyberstalking and violation of a no-contact order both with domestic violence designations. She was sentenced on November 8, 2012. The court imposed a 24 month suspended sentence. CP 35-36. One of the conditions of the suspended sentence was a post-conviction no-contact order. CP 39-40. The order issued did not list a specific expiration date. Rather, paragraph 4 reads, "This no contact order expires on: _____. Five years from today if no date is entered." CP 39.

Granath appealed. Pending the appeal, the court stayed only the jail term. Granath's appeal was unsuccessful. After remand, the court held a number of review hearings. On October 9, 2014, the sentencing judge decided to close the case upon defendant's payment of her legal financial obligations. Those were paid on December 8, 2014. The court's jurisdiction otherwise expired on November 12, 2014. CP 2.

On March 4, 2015, Granath moved to vacate the no contact order. CP 2. Following oral argument on March 12, 2015, the court found that the no-contact order was not a condition of sentence that expired with the court's retained jurisdiction, but rather, that it was a stand-alone order. CP 13-14. While the court noted that because its jurisdiction had expired, it ". . . could not enforce [the no contact order] as a violation of condition of sentence," the court nevertheless found that the order was "an action that could survive on its own because the order was lawfully ordered . . . pursuant to a conviction." Id. at 14.

Granath appealed. The King County Superior court affirmed the district court's decision, relying on cases involving felony offenses decided under the Sentencing Reform Act, *State v. Armendariz*, 160 *Wn.2d* 106 (2007), and the Juvenile Justice Act, *State v. W.S.*, 176 *Wn.App.* 231 (2013). The superior court explained.

Thus, in both Armendariz and W.S., the reviewing court determined that the trial court may impose the domestic violence no-contact order for the statutory maximum of the crime, regardless of the court's statutory jurisdiction over the offender.

The Court concludes that in this case the permissible length of the domestic violence no-contact order issued by the district court is the maximum term of sentence that the district court could impose or suspend. The maximum term of sentence for gross misdemeanor domestic violence crime is a sentence suspended for five years, meaning the district court had authority to impose a domestic violence no-contact order for five years.

CP 46.

D. AUTHORITY & ARGUMENT

1. Courts of limited jurisdiction, sentencing and no-contact orders are creatures of statute.

Washington's courts of limited jurisdiction are creatures of statute.

Smith v. Whatcom County District Court, 147 Wn.2d 98, 104, 52 P.3d 485 (2002), citing Const. art. IV, secs. 1, 12. "The legislature has sole authority to prescribe their jurisdiction and powers." *Id.* For any court, sentencing is also a creature of statute. No court may impose a sentence in excess of its express statutory authority. In re Goodwin, 146 Wn.2d 861, 876-77 (2002). A post-conviction domestic violence no-contact order authorized by RCW 10.99.050 is a condition of sentence.

When a defendant is found guilty of a crime and *a condition of the sentence* restricts the defendant's ability to have contact with the victim, *such condition shall be recorded and a written certified copy of that order* shall be provided to the victim.

RCW 10.99.050(1) (Emphasis added.) *See also* State v. Anaya, 95 Wn.App. 751, 754 (1999) (“The post-trial no-contact order authorized by the statute is entered after a determination of guilt and when a court determines that contact with the victim should be restricted *as a sentencing condition.*”). The no contact order is the “recording” of the sentencing condition. *See* State v. Schultz, 146 Wn.2d 540, 544 (2002) (“When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant’s ability to have contact with the victim,’ RCW 10.99.050(1) requires the ‘record[ing]’ of ‘such condition.’”).

Consequently, the court’s authority to set the term of no-contact orders must be grounded in the applicable statutes. The validity of the no contact order is reviewed *de novo*. Schultz, 146 Wn.2d at 544.

2. The district court had no authority to extend a post-conviction no contact order--a condition of the sentence-- beyond the jurisdiction retained by the sentencing court or the maximum penalty, 364 days in jail.

No statute or appellate decision authorizes a domestic violence post-conviction no contact order --issued pursuant to RCW 10.99.050 as a condition of sentence— to extend beyond the court’s jurisdiction authorized by RCW 3.66.068 or the maximum term of confinement. RCW 10.99.050 does not set the duration of post-conviction no- contact orders.

It is important to note, that the legislature expressly addressed the duration of pre-trial no-contact orders in RCW 10.99.040.¹ The legislature has also specifically addressed the duration of protection orders in other situations. *See State v. Navarro*, 188 Wn.App. 550 (2015) (Sexual Assault Protection Orders issued in conjunction with a criminal sentence expire 2 years after the term of imprisonment). But the legislature did not include separate provisions for the duration of post-conviction no-contact orders in RCW 10.99.050. Rather, the legislature expressly stated that post-conviction no-contact orders are a condition of sentence and, thus, are governed by the relevant sentencing statute.

The law governing the duration of a post-conviction no-contact order is that governing the district court's sentencing authority. This is consistent with the express statutory language and the case law that the post-conviction no-contact order issued pursuant to RCW 10.99.050 is a condition of sentence.

¹ RCW 10.99.040 reads in relevant part, emphasis added:

(2) (c) The no-contact order shall also be issued in writing as soon as possible, *and shall state that it may be extended as provided in subsection (3) of this section.* . . .

(3) *At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended.* So long as the court finds probable cause, the court may issue or extend a no-contact order even if the defendant fails to appear at arraignment. *The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed.*

(5) *If a no-contact order has been issued prior to charging, that order shall expire at arraignment or within seventy-two hours if charges are not filed.*

The maximum sentence for misdemeanor cyberstalking and violation of a no contact order is 364 days in jail. RCW 9.61.260(2); RCW 26.50.110(1); RCW 9.92.020; RCW 3.66.060(1). A district court “has continuing jurisdiction and authority to suspend the execution of all or any part of its sentence upon stated terms. . . for a period not to exceed [f]ive years after imposition of sentence for a defendant sentenced for a domestic violence offense.” RWC 3.66.068(1)(a).

Here, however, the district court did not retain the maximum 60 months of jurisdiction authorized. At sentencing, the district court suspended Granath’s sentence for 24 months. The district court imposed a number of conditions of the suspended sentence, including a post-conviction no-contact order. CP 35. The district court’s jurisdiction terminated on November 12, 2014 and the district court affirmatively closed the case. District courts have jurisdiction over a sentence “[a]ny time before entering an order terminating probation.” RCW 3.66.069.²

²RCW 3.66.069 reads in whole as follows, with emphasis added:

Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension. Upon the revocation of the deferral or suspension, the court may impose the sentence previously suspended or any unexecuted portion thereof. ***In no case shall the court impose a sentence greater than the original sentence***, with credit given for time served and money paid on fine and costs.

Any time before entering an order terminating probation, the court may revoke or modify its order suspending the imposition or execution of the sentence. Whenever the ends of justice will be served and when warranted by the reformation of the probationer, the court may terminate the period of probation and discharge the person so held.

Thus, all conditions of sentence –including the no contact order—were terminated when the case was closed. The no-contact order in this case should have been vacated as well.

A post-conviction no-contact order does not have a life of its own. It survives only as part of the criminal prosecution. *State v. Anaya* involved a pretrial no-contact order issued pursuant to RCW 10.99.040 order and held that the order did not survive dismissal of case. *State v. Anaya*, 95 Wn.App. 751, 754 (1999). The legislature agreed with the court’s analysis and amended RCW 10.99.040(3) to add the qualification that “[t]he no-contact order shall terminate if the defendant is *acquitted* or the charges are *dismissed*.” Laws of 2000, ch. 119, § 18 (emphasis added). Pursuant to RCW 10.99.050, a pre-trial no-contact order can be extended and continue in effect after a finding of guilt. *Schultz*, 146 Wn.2d at 545 (sentencing court is not required to issue a new physical order at sentencing, but may continue the pretrial order by affirmatively indicating stating in the judgment and sentence). The law is clear that no contact orders issued pursuant to RCW 10.99 continue only as part of the criminal case.

While a violation of the order may be prosecuted as a crime pursuant to RCW 26.50.110(1), it is still a condition of the sentence. It is only effective during the term of the suspended sentence and the district

court's jurisdiction. There is nothing in RCW 10.99.050 that authorizes a no contact order as a condition of the sentence to exceed the length of the suspended sentence.

3. The adult and juvenile felony sentencing laws tie the duration of RCW 10.99.050 no-contact orders to the maximum term of incarceration.

In affirming the district court's decision, the superior court relied on two cases holding the duration of no-contact orders issued as conditions is the statutory maximum term of incarceration, *State v. Armendariz*, 160 Wash.2d 106, 119 (2007) and *State v. W.S.*, 176 Wash. App. 231 (2013). If these cases did apply here, then the maximum duration of the no-contact order would be only 364 days –the statutory maximum for a gross misdemeanor. Nonetheless, these cases do not apply because the structure and statutes governing adult and juvenile conditions of sentence do not apply to misdemeanor sentences.

In *Armendariz*, the court addressed the duration of a no-contact order issued as a “crime related prohibition,” part of a felony sentence for Assault Third Degree against a police officer. *Armendariz*, 160 Wn.2d at 202-03. The court looked to the provisions in the SRA governing crime related prohibitions, which specifically and independently grant authority for such conditions of sentence. *Id.* at 204-05. The court found that the current statute retained the authority expressly stated in the predecessor

statute --that conditions of sentence may be imposed “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.”³ Id.

Armendariz does not apply here. It is grounded in the express language of the SRA. Felony sentences imposed by superior courts have a fundamentally different structure than misdemeanor sentences imposed by courts of limited jurisdiction. The SRA governs only sentencing for felonies; it does not apply to misdemeanor sentencing. RCW 9.94A.010.

The superior court’s reliance on the juvenile offender case, *State v. W.S.*, 176 Wash. App. 231 (2013), is also misplaced. In *W.S.*, the court held that the juvenile court may impose a post-conviction no-contact order for the statutory maximum term of *incarceration* (10 years for a felony Assault Second Degree), regardless of the expiration of the court’s statutory juvenile jurisdiction at the offender’s 18th birthday. W.S., 176 Wash. App. at 242–43. The court relied upon the “intent of the Legislature to protect victims of domestic violence and the jurisdiction of

³ Former RCW 9.94A.120(20) (2000) provided that courts may “impose and enforce” no-contact orders issued as a condition of sentence “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.”

the superior court to enforce a DVNCO.” Id. at 240.⁴ Nonetheless, the court also recognized that, as a condition of sentence, the duration of the no-contact must be authorized by statute. So the court relied upon *Armendariz* to hold as follows.

[T]he juvenile court’s authority to impose a DVNCO under RCW10.99.050 for the statutory maximum of the crime is independent and unrelated to the court’s statutory jurisdiction over the offender.

Id. at 243.

W.S. held the “statutory maximum” was the maximum period of incarceration available –10 years. State v. W.S., 176 Wn.App. 231, 242-43 (2013), *quoting* State v. Armendariz, 160 Wn.2d 106, 119 (2007).

[T]rial court authority to impose *crime-related prohibitions*, including no-contact orders, under RCW 9.94A.505(8), *is independent of authority to impose conditions of community custody*. This being so, it would be illogical to limit the effectiveness of orders imposed under RCW 9.94A.505(8) to a defendant's community custody term. In contrast, a time limit concomitant with the statutory maximum for the defendant's crime is logical, as well as supported by the plain language of the SRA, its legislative history, and its interpretation by the [Sentencing Guidelines Commission].

Emphasis added.

⁴ Id. at 241-42, *citing* Laws of 2007, ch. 173, sec. 1, RCW 10.99.040(4)(a), RCW 26.50.110(6). The 2007 amendment did not address the duration of RCW 10.99 no-contact orders, but the scope of the crime of violating no contact orders in response to recent judicial decisions. The Legislature also stated, “This act is not intended to . . . effectuate any substantive change to any criminal provision in the Revised Code of Washington.”

W.S. is consistent with case law explaining the juvenile court's sentencing authority. Juvenile sentences are not limited by the length of the juvenile court's statutory jurisdiction. State v. Bourgeois, 72 Wn.App. 650, 658, 866 P.2d 43 (1994) (RCW 13.40.300 limits confinement of the juvenile to his 21st birthday, but does not limit the court's authority to enter a disposition that extends beyond that point). Also, juvenile sentences may be imposed up to the statutory maximum for the offense. State v. Miller, 54 Wn.App. 763, 764-66, 776 P.2d 149 (1989) (RCW 13.40.160 limits the courts sentencing authority to the statutory maximum sentence that an adult could receive for the same offense).

In contrast, the district court's authority to impose crime related prohibitions –i.e., conditions of sentence-- is dependent upon the actual suspension or deferral of the sentence. *See* RCW 3.66.068. For example, if the court does not suspend any of the maximum sentence (364 days in jail), the court cannot impose any conditions of sentence. State v. Gailus, 136 Wn.App. 191, 201 (2006) (trial court erred by setting conditions of sentence when the defendant was sentenced to the maximum one-year penalty on a gross misdemeanor). The period for which conditions of sentence may be imposed is not determined by the statutory maximum – 364 days—but by the period of time the sentence is suspended or deferred. The period for which conditions of sentence are in force is for the actual

period of the sentence is suspended or deferred –i.e., the jurisdiction retained by the court at sentencing.

The holding in *W.S.* is also based on the superior court’s general jurisdiction. The superior court has broader authority than the juvenile court, a division of the superior court, to modify or enforce a no-contact order issued pursuant to RCW 10.99.050. W.S., 176 Wn.App. at 241-42. In contrast, district courts are courts of limited jurisdiction and have no power to act without express statutory authorization. Smith v. Whatcom County District Court, 147 Wn.2d 98, 104, 52 P.3d 485 (2002). In *Smith*, the court distinguished the district court’s authority to enforce conditions of sentence for the probationary period in RCW 3.66.068 and the statutory authority to enforce fines as a civil judgment by contempt for 10 years.

We hold that the district court had subject matter jurisdiction to enforce Smith's fines by jailing her for nonpayment. We further hold that the state is limited to 10 years in which to collect Smith's fines. This decision does not vitiate the two-year limit on probation, nor will it lessen the use of probation in district court. A district court may not ask a defendant to carry out terms of probation for 10 years. That part of the superior court's order prohibiting collection of fines after two years is vacated.

Smith, 147 Wn.2d at 111, *citing* RCW secs. 10.01.180; 7.21.030 and 6.17.020. Here, there is no statute authorizing a specific *duration* for a

post-conviction no-contact order independent of the district court's sentencing authority.⁵

Here, the statutory maximum period to enforce conditions of sentence is the term originally retained by the sentencing judge –24 months. The sentencing court could have chosen to retain 60 months of jurisdiction so that the no-contact order would remain in effect for that period of time. The judge did not do so.

Nonetheless, if applied to this case, both *Armendariz* and *W.S.* compel only a holding that the post-conviction no-contact order can only be imposed for the statutory maximum term of incarceration, 364 days. Also, the holding in *W.S.* is antithetical to the lower court's decision here. *W.S.* held the post-conviction no-contact order is “independent and *unrelated to the court's statutory jurisdiction* over the offender.” *W.S.*, 176 Wn.App. at 243. But here the State and the courts relied on the district court's *statutory jurisdiction* in the hope of finding the longest

⁵RCW 26.50.110(6) authorizes enforcement of no-contact orders by contempt, similar to the statutes authorizing enforcement of the fines discussed in *Smith*. The statute provides an enforcement mechanism when criminal prosecution is not available or timely pursued. See *State v. Miller*, 156 Wn.2d 23, 31 (2005) (“An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order.”) See also RCW 9A.04.080(1)(i) (statute of limitations for gross misdemeanors is 2 years). It should be noted that RCW 26.50.110(6) applies to all types of domestic violence protection orders, not just orders issued in criminal cases. Consequently, that section does not provide a time limit for such enforcement. Rather, the enforcement duration is determined by the issuing court's statutory authority. This is consistent with the legislative decision that no-contact orders issued pursuant to RCW 10.99.050 are conditions of sentence and subject to the issuing court's sentencing authority.

duration possible. They relied upon the district court's maximum *allowable statutory jurisdiction*, 60 months, even though that period was not fully retained by the sentencing court. This position is not supported by either *W.S.* or the district court sentencing statutes.

The district court *may* suspended a misdemeanor domestic violence sentence for *up to 5* years to enforce conditions of sentence. RCW 3.66.068(1)(a).⁶ But the court's jurisdiction continues only for the length of time originally imposed in the judgment and sentence and terminates upon an order closing the case. RCW 3.66.069. The district court sentencing statute does not permit any condition of sentence to survive the termination of its statutory jurisdiction, unless otherwise authorized by law.⁷

As with all other conditions of sentence imposed pursuant to RCW 3.66.068, the post-conviction no-contact order issued in this case is a condition of sentence that cannot survive the expiration of the sentence. *See also State v. Rodriguez*, 183 Wn.App. 947, 959 (2014) (RCW 10.99.050 no-contact order issued by superior court as a condition of a misdemeanor sentence cannot exceed "the maximum term of sentence or

⁶It is important to note that the Legislature expressly excepted from the court's jurisdictional restrictions orders issued pursuant to RCW 46.20.720 regarding ignition interlock devices in DUI cases. RCW 3.66.068(4), but not RCW 10.99.050 orders.

⁷For example, the district court statute expressly provides for the enforcement of restitution for 10 years. RCW 3.66.120.

two years, whichever is longer,” as provided in RCW 9.95.210(1)(a)).

While the district court was correct in its observation that a RCW10.99.050 no-contact order may itself give rise to “a separate criminal action,” CP 22, the order is still a condition of sentence. There is nothing in RCW 10.99.050 or RCW 3.66.068 that permits a post-conviction no-contact order to exceed the length of the suspended sentence and the court’s retained probationary jurisdiction.

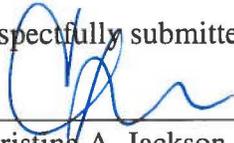
4. Granath is indigent and does not have the ability to pay the costs associated with this appeal.

Pursuant to this court’s decision in *State v. Sinclair*, 192 Wn.App. 381 (2016), Granath asks this court to exercise its discretion to waive any costs requested by the State in the event this appeal is not successful. The superior court entered an order of indigency pursuant to RAP 15.2 finding that Granath did not have the ability to contribute to the cost of this appeal. This court duly waived the filing fee. Granath is represented by the public defender appointed to handle her appeal in the King County Superior Court. Granath’s indigency is presumed to continue throughout the appeal. RAP 15.2(f).

E. **CONCLUSION**

The post-conviction no contact order issued as a condition of a suspended sentence cannot survive the expiration of that sentence. The courts below erred in holding that the no contact order was valid for five years –three years beyond the termination of the suspended sentence.

Respectfully submitted this 11th day of July, 2016.



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APPENDIX 1

RCW 10.99.050

(1) When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim.

(2)(a) Willful violation of a court order issued under this section is punishable under RCW 26.50.110.

(b) The written order shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

(3) Whenever an order prohibiting contact is issued pursuant to this section, the clerk of the court shall forward a copy of the order on or before the next judicial day to the appropriate law enforcement agency specified in the order. Upon receipt of the copy of the order the law enforcement agency shall enter the order for one year or until the expiration date specified on the order into any computer-based criminal intelligence information system available in this state used by law enforcement agencies to list outstanding warrants. Entry into the computer-based criminal intelligence information system constitutes notice to all law enforcement agencies of the existence of the order. The order is fully enforceable in any jurisdiction in the state.

(4) If an order prohibiting contact issued pursuant to this section is modified or terminated, the clerk of the court shall notify the law enforcement agency specified in the order on or before the next judicial day. Upon receipt of notice that an order has been terminated, the law enforcement agency shall remove the order from any computer-based criminal intelligence system.

APPENDIX 2

RCW 3.66.068

- (1) A court has continuing jurisdiction and authority to suspend the execution of all or any part of its sentence upon stated terms, including installment payment of fines for a period not to exceed:
 - (a) Five years after imposition of sentence for a defendant sentenced for a domestic violence offense or under RCW 46.61.5055; and
 - (b) Two years after imposition of sentence for all other offenses.
- (2)(a) Except as provided in (b) of this subsection, a court has continuing jurisdiction and authority to defer the execution of all or any part of its sentence upon stated terms, including installment payment of fines for a period not to exceed:
 - (i) Five years after imposition of sentence for a defendant sentenced for a domestic violence offense; and
 - (ii) Two years after imposition of sentence for all other offenses.
- (b) A court shall not defer sentence for an offense sentenced under RCW 46.61.5055.
- (3) A defendant who has been sentenced, or whose sentence has been deferred, and who then fails to appear for any hearing to address the defendant's compliance with the terms of probation when ordered to do so by the court, shall have the term of probation tolled until such time as the defendant makes his or her presence known to the court on the record.
- (4) However, the court's jurisdiction period in this section does not apply to the enforcement of orders issued under RCW 46.20.720.
- (5) For the purposes of this section, "domestic violence offense" means a crime listed in RCW 10.99.020 that is not a felony offense.