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No. 97452-7

IN THE SUPREME OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of DON WESLEY WINTON

SUPPLEMENTAL BRIEF OF DON WESLEY WINTON

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I. INTRODUCTION

Mr. Winton is a probationer subject to the authority of the Department of Corrections, the Indeterminate Sentence Review Board (hereinafter “the Board”), and the conditions set forth in his Judgment and Sentence for the remainder of his life. Mr. Winton brought a personal restraint petition before Division Two of the Court of Appeals to rectify unlawful conditions of his release, to-wit: geographic restrictions banishing him from the City of Seattle, Clark County, Clallam County, Skamania County, and more than half of the State of Oregon; and an order requiring Mr. Winton to submit to random urinalysis testing for drugs and/or alcohol. The Board eliminated many of the unconstitutional conditions placed on Mr. Winton as oral argument approached in the Court of Appeals. Mr. Winton prevailed in his Personal Restraint Petition as to the remaining conditions.

The Board moves this court to reverse the appellate court’s decision striking the condition that bars Mr. Winton from entering Clark County without prior approval of his community corrections officer (hereinafter “CCO”).

II. STATEMENT OF THE ISSUE

Should this Court uphold the decision of the Court of Appeals because the Court of Appeals correctly applied the standard set forth in State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005); State v. Sims, 152

Wn. App. 526, 216 P.3d 470 (2009) (overruled in part on other grounds by 171 Wn.2d 436, 256 P.3d 285 (2010)); and In re Pers. Restraint of Martinez, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018) in holding that the geographic restriction prohibiting Mr. Winton from entering Clark County violated Mr. Winton's constitutional right to travel?

III. STATEMENT OF THE CASE

On July 5, 2007, in Clark County Superior Court Cause No. 06-01-02237-8, Mr. Winton pleaded guilty to two counts of child molestation in the first degree involving victim G.L.D. (Mr. Winton's niece) and one count of child molestation in the third degree involving victim A.L.D. (Mr. Winton's stepdaughter). ISRB Mtn. Disc. Rev., Appendix C. He was sentenced on October 23, 2007 to an indeterminate sentence with a minimum term of 98 months and a maximum term of life imprisonment on Count I, a determinate sentence of 98 months on Count II, and a determinate sentence of 44 months on count III. Id. A lifetime no-contact order was entered with respect to victim G.L.D. Answer to Mtn. Disc. Rev., Appendix A. A five-year no-contact order was entered with respect to victim A.L.D. (referred to erroneously in the order as "A.L.W."), which expired on 10/23/2012. Id. at Appendix B.

On September 29, 2014, by order of the Indeterminate Sentence Review Board, Mr. Winton was released from total confinement and placed on restrictions and supervision of the Indeterminate Sentence Review Board.

ISRB Mtn. Disc. Rev., Appendix E. Mr. Winton is currently under the supervision of the Indeterminate Sentence Review Board and the Department of Corrections with respect to Count I relating to his niece, G.L.D., for the remainder of his life.¹ ISRB Mtn. Disc. Rev., Appendix C. Mr. Winton is no longer subject to supervision of the Department of Corrections, and has never been subject to the authority of the Indeterminate Sentence Review Board, for his conviction of child molestation in the third degree involving his stepdaughter, A.L.D., as that offense is a class C felony with a maximum term of 60 months. There is also no longer a no-contact order in effect with Mr. Winton's daughter, A.L.D., as the no-contact order was in effect for the maximum term of 60 months.

Prior to his release in 2014, the Board noted that Mr. Winton was a low risk for future offending.² While in custody, Mr. Winton had no infractions. Since his release, Mr. Winton has obeyed all of the conditions of supervision including no-contact provisions with respect to the two victims and other family members. In re Pers. Restraint of Winton, 9 Wn. App. 2d 1050 (2019).

¹ Count I was a determinate sentence due to the date of offense, but the term of incarceration was identical to the minimum term imposed on Count II.

² Mr. Winton was not released at his first release hearing as the Board did not have a treatment completion report. At the time of his first review, the Board indicated in its Decisions and Reasons that it would defer its final release decision until reviewing his treatment summary, but it was "unaware of any evidence which would likely overcome a presumption of release." ISRB Mtn. Disc. Rev., Appendix B.

Mr. Winton owns a home in Oregon, and he travels regularly from his primary residence in Des Moines, Washington to Oregon with permanent approval of the Board.³ ISRB Mtn. Disc. Rev., Appendix M. Mr. Winton's biological daughter lives in Oregon, and he visits with her periodically in Oregon. The restriction prohibiting Mr. Winton from entering Clark County barred him from using Interstate-5 to travel from Des Moines to Oregon.

IV. STANDARD OF REVIEW

A petitioner may challenge a decision from which he had “no previous alternative for obtaining state judicial review if he is under restraint and the restraint is unlawful.” RAP 16.4(a),(c); In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994). A condition prohibiting an offender from entering a county limits the offenders freedom and therefore constitutes a restraint. In re Pers. Restraint of Martinez, 2 Wn. App. 2d 904, 413 P. 3d 1043 (2018). A restraint is unlawful if it is unconstitutional. RAP 16.4(c)(2),(6).

After accepting review of a Court of Appeals decision granting or denying a personal restraint petition, the Supreme Court reviews pure questions of law de novo. In re Pers. Restraint of Coats, 173 Wn.2d 123, 267 P.3d 324 (2011).

³ To leave the State, Mr. Winton is still required to obtain a travel pass from his Community Corrections Officer (CCO).

V. ARGUMENT

A. The Court of Appeals Did Not Err in Subjecting the Board's Condition Implicating Mr. Winton's Fundamental Constitutional Right to Travel to Strict Scrutiny.

The Court of Appeals correctly subjected the geographic restriction placed on Mr. Winton by the Board to strict scrutiny.

Community custody conditions are reviewed for abuse of discretion, however, the imposition of an unconstitutional condition is always an abuse of discretion. State v. Padilla, 190 Wn.2d 672, 416 P.3d 712 (2018).

A condition of probation challenged on the grounds that it infringes upon a fundamental constitutional right is subject to strict scrutiny review. In re Pers. Restraint of Rainey, 168 Wash.2d 367, 374, 229 P.3d 686 (2010), citing State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (review of a no-contact order entered following a domestic violence conviction is subject to strict scrutiny where the defendant's fundamental constitutional right to marry is implicated). See also State v. Olsen, 189 Wn.2d 118, 124, 399 P.3d 1141 (2017) (a condition of probation implicating a probationer's right to privacy is subject to strict scrutiny). Such conditions are afforded a more careful review by the appellate courts and should be "'sensitively imposed' so that they are 'reasonably necessary to accomplish the *essential* needs of the State and public order.'" Id. (emphasis supplied).

In Washington, courts have consistently applied strict scrutiny in reviewing conditions of community custody which implicate an offender's right to travel. State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005); State v. Sims, 152 Wn. App. 526, 216 P.3d 470 (2009), overruled on other grounds by State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011); State v. Alphonse, 147 Wn. App. 891, 197 P.3d 1211 (2008), review denied, 166 Wn.2d 1011, 210 P.3d 1018 (2009); In re Personal Restraint of Martinez, 2 Wn. App. 2d 904, 413 P. 3d 1043 (2018). The Indeterminate Sentence Review Board implicitly asks that this court overrule years of established precedent by holding that a lesser standard of review should apply.

The Board argues that a lower standard is warranted because an offender's constitutional rights are diluted or diminished by reason of a criminal conviction. "This [argument] is off target because it fails to recognize that the state [already] has far more latitude in determining what would qualify as legitimate objectives when dealing with a convicted criminal than it would if it sought to apply a restrictive condition in another setting." Andrew Horwitz, Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 Wash. & Lee L. Rev. 75, 158 (2000). The State has compelling interests in protecting community safety and rehabilitating offenders, and it may therefore appropriately impose geographic restrictions on offenders to serve those interests, so long as the

conditions imposed are also narrowly tailored to serve those compelling interests. Schimelpfenig, 128 Wn. App. At 228 (holding that even a county-wide banishment order could be imposed if narrowly tailored under the circumstances of a particular case). Therefore, there is no need to reduce the standard of review or establish a new framework which erodes the constitutional rights of convicted persons in order to serve the legitimate interests of the government in furthering community safety and rehabilitating offenders.

In the case at bar, the Court of Appeals recognized that a probationer's constitutional right to travel *may* be restricted pursuant to statute, but such restrictions must be narrowly tailored to serve a compelling governmental interest (e.g. rehabilitation of the offender, community safety, or victim safety). In re Pers. Restraint of Winton, 9 Wn. App. 2d 1050 (2019).

The Board has not cited, in its Response to Mr. Winton's Personal Restraint Petition or its Motion for Discretionary Review, a single case that directly supports its argument that a lower standard of review should apply to geographic restrictions imposed on parolees. Instead, the Board relies largely on dicta and holdings in cases where the constitutional validity of geographic restrictions placed on offenders was not at issue before the court. For example, the Board relies on Jones v. Helms, 452 U.S. 412, 101 S. Ct.

2434, 69 L.Ed.2d 118 (1981). In Jones, the constitutional validity of geographic restrictions placed upon probationers was not before the court. Rather, the Jones Court considered a provision in Georgia law that enhanced the penalty for the misdemeanor offense of child abandonment if the offender left the jurisdiction of the State of Georgia before he could be prosecuted. Id. The court noted that the enhanced punishment for leaving the jurisdiction was clearly related to the procedure for ascertaining guilt or innocence and that there was a rational basis for the legislature to exercise the police powers of the State to make abandonment within the State followed by departure from the state a more serious offense than mere abandonment of a child within the State. Id. at 422-23.

The Board also relies on State v. McBride, 74 Wn. App. 460, 873 P.2d 589 (1994), a case in which a convicted drug trafficker challenged a condition of sentence which prohibited him from entering a “protected against drug trafficking” area. The court found that the order was not unconstitutionally overbroad because it was limited in its application to known drug traffickers and covered a small defined area within Spokane where drug trafficking was known to occur and where the particular defendant had previously engaged in drug trafficking. Id. at 464-65. Nonetheless, the Court of Appeals reversed in part for the trial court to “revisit its order as to its breadth and consider possible exceptions as

provided in RCW 10.66.050.” Id. at 466-67. The court did not adopt a lower standard of review in McBride, and its reversal for the purpose of more narrowly tailoring the geographic restriction imposed suggests that the court in fact applied strict scrutiny in reviewing the restriction. Id.

Other cases relied upon by the Board such as Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L. Ed. 2d 484 (1972) (holding that due process requires a hearing before revocation of probation); Berrigan v. Sigler, 499 F.2d 514 (D.C. Cir. 1974) (holding that the parole board struck the appropriate balance between its duties of supervision and the right of parolees to travel); Bagley v. Harvey, 718 F.2d 921 (9th Cir. 1983) (holding that a federal parolee is not entitled to choose the state he is released to) simply recognize that the State may appropriately impose restrictions on offenders that could not be imposed absent a conviction but do not purport to establish the standard of review applicable to geographic restrictions such as the restriction imposed on Mr. Winton. The recognition that probationers may appropriately be subjected to restrictions that implicate constitutional rights is not inconsistent with the holding of the Court of Appeals in Mr. Winton’s case, nor is it inconsistent with the body of Washington cases applying strict scrutiny in reviewing geographic conditions imposed on offenders. The offender’s status as a probationer and the fact of a criminal conviction give rise to certain compelling interests that would not otherwise

exist, and the government may impose restrictions to serve those interests, so long as the restrictions are narrowly tailored. The fact of a criminal conviction does not eliminate the constitutional rights of the offender, and the State must not encroach upon those rights any more than is necessary to serve its legitimate interests in assuring community safety and rehabilitation.

B. The Court of Appeals Did Not Err When it Held that the Geographic Restriction Placed on Mr. Winton is Unconstitutionally Overbroad.

When reviewing a condition of community custody, the court does not presume that the challenged condition is constitutional. The presumption of constitutionality that is afforded to legislative enactments does not apply to individual conditions of community custody which are determined on a case-by-case basis. State v. Valencia, 169 Wash.2d 782, 239 P.3d 1059 (2010), overturning State v. Riles, 135 Wn.2d 326, 348, 957 P.2d 655 (1998); State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The court in Schimelpfenig, after a review of caselaw from across the country, adopted a nonexclusive list of factors for courts to consider in determining whether a geographic restriction imposed on an offender is constitutionally permissible:

- (1) whether the restriction is related to protecting the safety of the victim or witness of the underlying offense;
- (2) whether the restriction is punitive and unrelated to rehabilitation;
- (3) whether the restriction is

unduly severe and restrictive because the defendant resides or is employed in the area from which he is banished; (4) whether the defendant may petition the court to temporarily lift the restriction if necessary; and (5) whether less restrictive means are available to satisfy the State's compelling interest.

Schimelpfenig, 128 Wn. App. at 339-41.

The court's decision should "turn on a careful analysis of the facts, circumstances, and total atmosphere of the case." Id.

The Court of Appeals applied the Schimelpfenig factors to the present case and found that the ISRB has a compelling interest in preventing contact between Mr. Winton and the victims and victims' families residing in Clark County, but also found that the geographic restriction was not narrowly tailored to serve that purpose. This court should uphold the decision of the Court of Appeals.

1. The Geographic Restriction is Not Related to Protecting Victim or Witness Safety.

The Board's geographic restriction is not related to protecting the safety of the victim or witnesses of Mr. Winton's offenses. The court in Schimelpfenig, *supra*, recognized a distinction between a geographic restriction imposed to protect the safety of a victim or witness where a defendant poses a continuing threat, and a geographic restriction imposed to protect a victim or family member from being reminded of the defendant. In

that case, the court held that imposition of a no-contact order was sufficient to protect the murder victim's family from the psychological impact of interacting with the defendant. In contrast, the Schimelpfenig court reviewed a number of cases in which a broad geographic restriction was appropriately entered: People v. Brockelman, 933 P.2d 1315 (Colo.1997), (Colorado Supreme Court upheld a two-year banishment order in two neighboring cities where victim lived and worked where defendant brutally assaulted the victim and violated both criminal and civil restraining orders); State v. Nienhardt, 196 Wis.2d 161, 537 N.W.2d 123 (Wis.Ct.App.1995) (Wisconsin Court of Appeals upheld banishment order where defendant convicted of repeated harassment and stalking of victim who lived in the city); and Predick v. O'Connor, 260 Wis.2d 323, 325, 660 N.W.2d 1 (Wis.Ct.App.2003) (Wisconsin Court of Appeals upheld banishment from a county where defendant stalked and harassed an entire family for several years, assaulted some of the family members, and had repeatedly violated no-contact orders). In those cases reviewed by the Schimelpfenig court where a broad geographic restriction was held to be appropriately imposed upon an offender, the offender's underlying offenses coupled with a failure to comply with no-contact orders gave rise to legitimate continuing victim safety concerns.

Mr. Winton has not challenged the imposition of no-contact conditions imposed by the Board which prevent him from having contact with the victims

and numerous other family members. He has complied with the no-contact conditions imposed by the Board and the no-contact orders issued by the trial court, and he has not made any attempt to communicate with the victims in the fourteen years since his arrest. Prior to sentencing and during his period of incarceration, he engaged in sex offender treatment. When he was evaluated, following completion of treatment and prior to his release, he was determined to be at low risk to recidivate, and he has maintained a record free of violations while on community custody over the past six years. There is no evidence that he poses an ongoing risk to the safety of victims or witnesses.

2. Less Restrictive Means Are Available to Serve the Board's Interest in Preventing Contact Between Mr. Winton and Victims and Witnesses of His Offenses.

While recognizing that the Board has a legitimate and compelling interest in preventing Mr. Winton from having contact with victims or witnesses, the Court of Appeals correctly determined that the geographic restriction the Board imposed is not narrowly tailored to serve that purpose.

Washington courts have long recognized that broad geographic restrictions should not be imposed where no-contact orders will suffice to serve the government's community safety, rehabilitation, or other legitimate interests. For example, in State v. Alphonse, 147 Wn. App. 891, 197 P.3d 1211 (2008), the defendant was charged with telephone harassment after repeatedly contacting a police officer who had investigated him for harassment of a

former girlfriend. The defendant threatened to kill the officer and other officers within the department, perform sexual acts on his wife, and to assault his wife and daughters. Upon his conviction, the trial court ordered that the defendant have no contact with the victim or his family and that he not appear within the city limits of Everett unless required to for legal or judicial reasons. Division One held that although there was a legitimate interest in protecting the safety of the victim and other police officers included in the defendant's harassing calls and the order was not unduly burdensome because the defendant neither lived nor worked in the City of Everett, the city-wide geographic restriction was unconstitutional because a no-contact order would be sufficient to serve the government's compelling interest. The court noted "cases in which such banishment orders have been upheld involved either brutal assaults of the victim, repeated harassment, or repeated violations of no-contact orders, and banishment was the only effective means of protecting the victim." Id. at 910.

In the case at bar, the Court of Appeals recognized that the geographic restriction at issue in the case at bar is significantly more restrictive than geographic restrictions which were held to be unconstitutional in other cases. For example, in State v. Sims, 152 Wn. App. 526, 216 P.3d 470 (2011), Division Two held that an order that restricted the defendant's entry into the county and city where his child sex abuse victim and her family lived, which

was imposed to protect their mental wellbeing, was overly broad despite the fact that it allowed him to travel through the county on the way to another locale. In State v. Schimelpfenig, Division Two held that an order prohibiting the defendant from residing in the county where his murder victim's surviving family members lived was unconstitutionally overbroad despite the fact that the defendant was allowed to travel within the county for work or recreational purposes. In both cases, the court determined that no-contact orders could be imposed, so a broad geographic restriction was not the least restrictive means available to serve the legitimate state interest in protecting the mental wellbeing of victims and witnesses.

The Board asserted in its Motion for Discretionary Review that the purpose of the county-geographic restriction imposed on Mr. Winton is “ensuring compliance with no contact conditions and notifying victims and their families that the offender will be in the area, thereby limiting the potential for contact and trauma to the victims and families.” ISRB Mtn. Disc. Rev. at 3. No-contact orders and conditions are sufficient to serve the Board's interest in prohibiting Mr. Winton from contacting the victims and witnesses of his offenses, particularly in light of Mr. Winton's history of compliance with the court's orders and the Board's conditions over a period of fourteen years and his low risk of recidivism.

Further, the Board conceded at oral argument before the Court of Appeals that the order prohibiting Mr. Winton from entering Clark County even to travel through the county is overly broad. Prohibiting Mr. Winton from traveling through Clark County has the practical effect of preventing his travel along Interstate 5 or 205 between his primary residence in Oregon and his second home in Oregon. Mr. Winton also has a biological daughter who lives in Oregon who he visits there periodically.

The only factual support the Board was able to provide in support of its argument that a county-wide ban is necessary to ensure compliance with the separately imposed no-contact requirements is that this prohibition prevented inadvertent contact between Mr. Winton and a family member of a victim on one occasion. However, Mr. Winton does not travel to Clark County except to pass through the county along Interstate 5 or 205. The Board's assertion that Mr. Winton would have had contact with a victim's family member while traveling through the county but for the Board's geographic restriction is highly speculative.

The Board also reasons that a travel restriction is necessary so that it can inform victims and family members that Mr. Winton will be in the area. However, a travel restriction is not necessary to serve this purpose. An order simply requiring Mr. Winton to provide the Board advance notice of travel

plans would serve this purpose without infringing upon Mr. Winton's constitutional rights.

3. Mr. Winton Cannot Seek Judicial Review of the Geographic Restriction to Have it Temporarily or Permanently Removed.

In addition to the fact that the order is not narrowly tailored, the Court of Appeals held that the internal review process afforded to Mr. Winton by the Board to challenge geographic restrictions did not adequately protect his constitutional rights. The court cited the fact that, despite Mr. Winton's numerous objections, the Board did not strike any of the other obviously unconstitutional restrictions, including a ban on entering the City of Seattle and half the State of Oregon, until shortly before it responded to Mr. Winton's personal restraint petition. In re Pers. Restraint of Winton, 9 Wn. App. 2d 1050 (2019); ISRB Mtn. Disc. Rev., Appendix F, H; Answer to Mtn. Disc. Rev., Appendix E-G.

Moreover, a similar failure of the Board's internal review process to remedy constitutional violations was noted in In re Pers. Restraint of Martinez, 2 Wn. App. 2d 904, 413 P.3d 1043 (2018). In that case, the petitioner was prohibited from entering Thurston County without prior written approval of his Community Corrections Officer and the Indeterminate Sentence Review Board. Additionally, just as in Mr. Winton's case, the basis cited by the State for the condition in In re Pers. Restraint of Martinez was a report of the victim

liason indicating that the petitioner could not be released to Thurston County due to “victim issues.” 2 Wn. App. 2d at 915. The Martinez court questioned this vague assertion, as the Board failed to provide any evidence that the victim was residing in Thurston County in response to the Petitioner’s assertion that she had moved to Texas. Id.

VI. CONCLUSION

This court should affirm the decision of the Court of Appeals, which correctly determined, based upon settled case law, that the geographic restriction barring Mr. Winton from entering Clark County was unconstitutional.

The Board concedes that Mr. Winton has a fundamental constitutional right to travel. Further, the Board conceded at oral argument before the Court of Appeals that its order prohibiting entry into Clark County was overbroad. In re Pers. Restraint of Winton, 2019 WL 2811126 (Wash. Ct. App. July 2, 2019).

The standard set forth by Division Two of the Court of Appeals in Schimelpfenig, 128 Wn. App. 224 was applied by Division One in Alphonse, 147 Wn. App. 891 and has not been otherwise contradicted by any division of the Court of Appeals. This court has twice declined to overrule the standard set forth in Schimelpfenig: by denying review of the Court of Appeals in State v. Alphonse, 166 Wn.2d 1011, 210 P.3d 1018 (2009), and by

affirming the application of the standard and overruling the Court of Appeals on other grounds in State v. Sims, 171 Wn.2d 436, 256 P.3d 285 (2011).

The Court of Appeals properly applied the Schimelpfenig factors to the geographic restriction in Mr. Winton's case and held that the county-wide geographic restriction imposed by the Board was not narrowly tailored. This court should therefore affirm the decision of the Court of Appeals.

SUBMITTED this 2nd day of April, 2020.



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