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NO. 66760-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
HOLTON M. MILLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

The imposition of a no contact order or other crime related prohibition is generally reviewed for abuse of discretion. At sentencing for a conviction of Domestic Violence Felony Violation of a Court Order, the court imposed a no contact order between Miller and the victim. In imposing the order, the court noted that Miller had a 25-year violent history of assault, harassment and violating no contact orders that affected both this victim and another.

The Washington State Constitution grants crime victims the right to attend and make a statement at sentencing if they notify the prosecuting attorney. The Washington State Constitution states that this provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding. The victim in this case did not notify the prosecuting attorney that she wished to attend sentencing. The victim did not attend the sentencing hearing or make a statement to the court regarding the no contact order. Did the court abuse its discretion by imposing the no contact order?

B. STATEMENT OF THE CASE

On January 4, 2010, the State charged the appellant Miller with Domestic Violence Felony Violation of a Court Order and Assault in the Second Degree - Domestic Violence for incidents that occurred between December 29, 2009 and December 30, 2009 involving victim Corinna Barker. CP 1-2.

On July 9, 2010, the State filed an Amended Information charging Miller with one count of Domestic Violence Felony Violation of a Court Order that occurred on January 14, 2010. CP 8. Miller entered a plea of guilt admitting that he had called Barker from jail and spoke with her in violation of the no contact order. CP 18.

The State recommended the court impose a no contact order with Barker. CP 13; 7/2/10 RP 8. The deputy prosecuting attorney advised the court that she did not know Barker's opinion regarding the no contact order at that time and that "[t]his is just the State's recommendation, and not Ms. Barker's recommendation." 7/2/10 RP 8. During the plea hearing, the court stated that Barker could "speak at sentencing if she wishes to do so." 7/2/10 RP 9.

Miller's standard sentencing range on the single count of Domestic Violence Felony Violation of a Court Order was 60

months based on his agreed offender score of 12. CP 24-30, 32. However, the State and Miller agreed to request an exceptional sentence of 30 months. CP 31, 33-35. At the sentencing hearing on August 27, 2010, the court declined to consider the request for an exceptional sentence until the parties had provided written briefing on the issue. 8/27/10 RP 4-7.

At the subsequent sentencing hearing on September 9, 2010, both parties provided briefing to the court and jointly recommended an exceptional sentence of 30 months. 9/9/10 RP 3. The court imposed a sentence of 36 months incarceration and other conditions of sentence, including no contact with Corinna Barker for five years. 9/9/10 RP 17.¹

In determining the sentence and the imposition of the no contact order, the court considered several factors. The court noted that Miller "is someone who has 24 domestic violence incidents reported since 2000, who has 11 with the current victim, 13 with a different victim." 9/9/10 RP 8. The court stated Miller "at the time had a pending case with an entirely different victim" and

¹ There is no record that Corinna Barker attended the sentencing hearing. In addition, there is no record indicating that Barker had ever notified the prosecuting attorney that she wished to attend the sentencing hearing or that she had an opinion on the imposition of the no contact order.

that he "has a 25-year violent history of assault, harassment, violating no contact orders, etcetera." 9/9/10 RP 8. The court also expressed concern that Miller contacted Barker from jail with "a phone call that appears to be urging the victim to break into the apartment for some reason that is not really clear to me..." 9/9/10 RP 8.

The sentencing court noted that, "It's also clear that he has apparently absolutely no regard for Court orders telling him not to contact someone." 9/9/10 RP 9. The court further stated:

This case is very troubling to me given the defendant's history, and I have no confidence whatever that he's able to abide by no contact orders and follow those and abstain from the kind of behavior that gets him before the Court.

9/9/10 RP 17. After the court imposed the sentence, Miller asked if the court would consider it if the victim "was willing to come forward and get this thing dropped and go into counseling and stuff." 9/9/10 RP 18. According to Miller, he had "only been involved with her since July 2009." 9/9/10 RP 15. The court reiterated to Miller that, "You need to stay away from her, sir" and that the court "will not be dropping this no contact order." 9/9/10 RP 18-19. The court again emphasized to defense counsel that:

I'm gravely concerned about your client stating that he understands the problem, needs to stay away from her and the first thing he says after I impose sentencing is that he wants to know if the no contact order can be lifted.

9/9/10 RP 19.

C. ARGUMENT

THE COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING THE NO CONTACT ORDER BECAUSE THE COURT HAD A COMPELLING INTEREST IN PREVENTING FUTURE HARM TO THE VICTIM AND HER PRESENCE WAS NOT REQUIRED AT THE HEARING.

1. The court did not abuse its discretion because the no-contact order directly related to the circumstances of the crime for which Miller was convicted, and the court had a compelling interest in preventing future harm to the victim due to Miller's violent criminal history and previous domestic violence incidents.

As part of any sentence, the court may impose and enforce crime related prohibitions and affirmative conditions as provided in this chapter. RCW 9.94A.505(8). A "crime related prohibition" is "an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10); State v. Armendariz, 160 Wn.2d 106, 111-12, 156 P.3d 201 (2007). A no contact order with a victim

is a crime-related prohibition. State v. Rainey, 168 Wn.2d 367, 376, 229 P.3d 686 (2010).

The imposition of a crime related prohibition is generally reviewed for abuse of discretion. Armendariz, 160 Wn.2d at 106. Where the decision or order of the court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Washington courts have held that a "more careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right," such as the fundamental right to marriage or the fundamental right to parent. State v. Warren, 165 Wn.2d 17, 32-33, 195 P.3d 940 (2008); Rainey, 168 Wn.2d at 374-75. Such conditions must be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." Id.

Nevertheless, because the imposition of crime related prohibitions is necessarily fact-specific and based upon the sentencing judge's in-person appraisal of the trial and the offender, the appropriate standard remains abuse of discretion. Id. at 375.

The State has a compelling interest in preventing future harm to the victims of a crime. Id. at 377.

Here, the court did not abuse its discretion because the imposition of the no contact order between Miller and Barker was not manifestly unreasonable or for untenable reasons. The court's imposition of the five-year no contact order directly related to the circumstances of the crime for which Miller was convicted (Miller had violated a no contact order by calling Barker from jail) and the court was concerned for Barker's safety due to Miller's violent criminal history and previous domestic violence incidents.

At the time of the incident, Miller had been dating Barker for less than six months. They were not married, and they had no children together. Therefore, unlike Rainey, Warren, and Ancira, the court's imposition of the no contact order with Barker did not interfere with a fundamental constitutional right to marriage or the right to parent.² However, even if we characterized Miller's desire to contact Barker as a fundamental constitutional right, the court's

² State v. Rainey, 168 Wn.2d 367 (2010) (sentencing condition that prevented defendant from having contact with his daughter and ex-wife); State v. Warren, 165 Wn.2d 17 (2008) (sentencing condition prohibiting defendant from having contact with his wife); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001) (sentencing condition that prevented defendant from contacting any of his children).

sentence was not an abuse of discretion because the no contact order was "sensitively imposed" and was "reasonably necessary to accomplish the essential needs of the State and public order."

Even though Miller did not plead guilty to a violent offense involving Barker, the court expressed its concern for her safety by noting that Miller "has a 25-year violent history of assault, harassment, violating no contact orders" that included both Barker and another victim. 9/9/10 RP 8. In addition, the court stated that this case was "very troubling to me given the defendant's criminal history" and that the court had "no confidence whatever that he's able to abide by no contact orders." 9/9/10 RP 9, 17.

The State has a compelling interest in preventing future harm to victims such as Barker. Accordingly, the no contact order was sensitively imposed because the court considered multiple factors, including the underlying facts of this case, the history between Miller and Barker, and the court's concern whether Miller would abide by the court order. Given Miller's extensive criminal history and his apparent willingness to violate court orders, the no contact order was reasonably necessary to protect Barker. The court did not abuse its discretion by imposing the no contact order.

2. The court did not abuse its discretion by imposing the no contact order because the victim's presence was not required and Miller is precluded from relying on the victim rights provision as a basis of error on appeal.

The importance of victim rights is recognized in the Washington State Constitution by granting basic fundamental rights to "ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect." Const. art. I, § 35. The provision provides, in part, "Upon notifying the prosecuting attorney, a victim of a crime charged as a felony...has the right to attend, and to make a statement at sentencing..." Id. (emphasis added). However, the provision also clearly acknowledges the limitation that:

This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

Id. (emphasis added). In his brief, Miller refers to Const. art. I, § 35, but does not address these specific areas of the victim rights provision that completely refute his argument on appeal.

The State acknowledges the importance of participation of victims in the criminal justice system. However, Const. art. I, § 35 did not require the court to ensure victim Corinna Barker's attendance or opportunity to be heard at sentencing. There is no evidence that Barker ever notified the prosecuting attorney that she wished to attend or make a statement at sentencing.

More importantly, Const. art. I, § 35 explicitly states that, "This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding." Id. Accordingly, by the clear language of Const. art. I, § 35, Miller is precluded from relying upon the provision as a basis of error on his appeal.³

D. CONCLUSION

The sentencing court imposed the no contact order based on the compelling interest to prevent future harm to Barker, a domestic violence victim. There is no evidence that Barker wished to attend the hearing. Furthermore, Miller is precluded from relying upon the

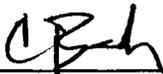
³ In addition, any constitutional right to attend sentencing would have been granted to Barker (and not Miller). As such, Miller would lack the standing to assert Barker's constitutional right on his behalf.

victim rights provision as a basis of error. The court did not abuse its discretion by imposing the no contact order.

DATED this 14th day of December, 2011.

Respectfully submitted,

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