SUPREME COURT NO. 102564-5
COA NO. 84430-0-I

IN THE SUPREME COURT OF THE STATE
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARC VAN SLYKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George F. B. Appel, Judge

PETITION FOR REVIEW

DANA M. NELSON
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Marc Vanslyke asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published opinion in State v. Vanslyke, ___ Wn. App. __, 536 P.3d 1155 (2023); COA No. 38853-1-III, filed October 16, 2023. A copy of the slip opinion is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. When a no contact order is issued as a condition of sentence and also recorded as a post-conviction no-contact order at the original sentencing hearing and then the convictions are reversed on appeal, must the expiration date for a subsequently entered no-contact order take into account the time the offender was already subject to the order to avoid exceeding the statutory maximum term as statutorily required?

2. As this is a matter of statutory construction and an issue of first impression, does this case involve an issue of substantial public interest that should be decided by this Court? RAP 13.4(b)(4).

3. When a no contact order is entered at the original sentencing hearing and then the convictions are reversed on appeal, must the expiration date for a subsequently entered no contact order take into account the time the offender was already subject to the order to avoid violating due process and the right to equal protection?

4. Does this case involve significant questions of law under the state and federal constitutions that should be decided by this Court? RAP 13.4(b)(3).

5. Alternatively, should this Court remand for the trial court to strike the $500 victim penalty assessment (VPA) from Vanslyke's judgment and sentence?

D. STATEMENT OF THE CASE

On May 14, 2020, the Snohomish County prosecutor charged appellant Marc Vanslyke with domestic violence felony violation of a no contact order (FVNCO) for allegedly contacting Jolene Washington on May 8, 2020. CP 213-15; RCW 26.50.110(1).[1] The state also alleged Vanslyke prevented Washington from contacting the authorities on that date. Id.; RCW 9A.36.150.

On December 1, 2020, Vanslyke pled guilty to both offenses in exchange for the prosecutor's agreement not to charge him with possessing heroin or drug paraphernalia. CP 133-155. According to the state's charging document, police found what appeared to be

[1] The state alleged the charge was a felony because Vanslyke had two prior convictions for violating a no contact order. CP 213. The statute RCW 26.50.110 has since been repealed by Laws 2021, ch. 215, section 170, effective July 1, 2022.

heroin in Vanslyke's pocket during a search incident to arrest. CP 207.

At sentencing on May 11, 2021, the court sentenced Vanslyke to the statutory maximum of 60 months (also the standard range) on the felony. CP 187-205. For the gross misdemeanor, the court sentenced Vanslyke to 364 days suspended on condition Vanslyke complete 60 months of probation. CP 182; RCW 9.95.210(b) (allowing five-year suspension for "dv" offenses).

As a condition of the judgment and sentence for the FVNCO, the court indicated "A separate post-conviction domestic violence no contact order, . . . is filed contemporaneously with this judgment and sentence.'' CP 196. The post-conviction domestic violence no contact order entered on May 11, 2021, indicated it shall expire "5 years from today's date if no date is entered." CP 130-32. Because no date was entered, the order was set to expire May 11, 2026. Id.

On his initial appeal, Division One held Vanslyke was not informed of an essential element of the FVNCO and remanded to the trial court to allow Vanslyke to withdraw both pleas as they were part of a package deal. CP 152-54. The mandate entered on February 4, 2022. Id.

On March 7, 2022, Vanslyke withdrew his pleas and the case proceeded to trial on an amended information. CP 129; 149-51. On July 20, 2022, a jury convicted Vanslyke of violating the no contact order but acquitted him of interfering with a 911 call. CP 77-79.

Sentencing occurred on August 9, 2022. The court imposed the statutory maximum of 60 months of incarceration (also the standard range). CP 27. As part of the judgment and sentence, the court ordered Vanslyke shall have no contact with Jolene Washington until August 9, 2027. CP 31.

Contemporaneously with the judgment and sentence, the court entered a post-conviction domestic violence no contact order. CP 126-128. The expiration date is indicated as "5 years from today's date," i.e. August 9, 2027. Id.

On appeal, Vanslyke argued the no contact order expiration date was not authorized because it exceeded the statutory maximum of five years. In other words, as a result of his successful appeal and subsequent resentencing, Vanslyke will ultimately serve five years plus a little over ten months subject to the order (because of the five years from the date of resentencing plus the 10+ months he was already subject to it prior to withdrawing his pleas). Brief of Appellant (BOA) at 7-18. Vanslyke also argued that failing to take into account the time he already served subject to the order in setting the expiration date violated his right to due process and equal protection. BOA at 18-23.

In a published opinion, the court of appeals rejected Vanslyke's arguments. Appendix at 3. Regarding Vanslyke's statutory interpretation argument, the court held:

> The plain language of RCW 10.99.050 resolves the issue presented here. It unambiguously states, without qualification, that a NCO issued as a condition of a felony sentence "remains in effect for a fixed period of time determined by the court, which may not exceed the adult maximum sentence established in RCW 9A.20.021. RCW 10.99.050(2)(d). Vanslyke was convicted of a class C felony, which carries a maximum sentence of five years. RCW 9A.20.021(1)(c). Therefore, RCW 10.99.050 authorized the sentencing court to impose an NCO lasting up to five years for Vanslyke's offense. The trial court's NCO issued as a condition of Vanslyke's sentence did not exceed that statutory limit.

Appendix at 3-4.

Regarding Vanslyke's due process argument, the court held the no contact order does not constitute a "penalty" or "punishment" and therefore the increased

time for the no contact order is not problematic. Appendix at 5.

Regarding Vanslyke's equal protection argument, the court held:

> Upon remand, Vanslyke was treated the same as any other defendant who never appealed. He was recharged, tried by a jury, convicted, and resentenced. The duration of the trial court's new sentencing conditions and NCO are relevant to maintaining the court's objective that Vanslyke not contact the victim throughout his entire sentence of incarceration. Therefore, we decline to find an equal protection violation.

Appendix at 11.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. BECAUSE THIS CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST, THIS COURT SHOULD ACCEPT REVIEW.

This case presents an issue of statutory interpretation and one of first impression – whether the five-year-no-contact-order imposed on Vanslyke exceeds the statutory maximum because it doesn't take into

account the time he already served subject to the order before his conviction was reversed on appeal. This Court should accept review. RAP 13.4(b)(4).

The meaning of a statute is a question of law the court reviews de novo. State v. C.G., 150 Wn.2d 604, 608, 80 P.3d 594 (2003). The court's goal is to determine the legislature's intent and carry it out. Id. If a statute's meaning is plain, then the court must give effect to the plain meaning as expressing what the legislature intended. Id.

Resolution of the issue raised herein involves the statutory interpretation of RCW 9.94A.505(9) and RCW 10.99.050. Under RCW 9.94A.505(9), as part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions, including prohibition on contact. In State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007), this Court noted this provision was rooted in former RCW 9.94A.120 and the

no contact order provided thereunder was not to exceed the maximum allowable sentence for the crime. In other words, it was tied to the sentence.

Similarly, under RCW 10.99.050, when the judgment and sentence restricts contact, the court should enter a separate no contact order subjecting the offender to criminal liability for its violation but again, not to exceed the adult maximum sentence.

The statutory maximum for Vanslyke's offense is five years. Thus, the no contact order entered in his case by law cannot exceed five years. Appendix at 3-4. Now, neither RCW 9.94A.505 or 10.99.050 indicate how that five years is calculated but it is logical to read that as five years total. Thus, regardless of when it "begins to run," Vanslyke can be subject to it for five years total – the statutory maximum.

It doesn't make sense to read it as five years running from the date of any resentencing because that is

not how the statutory maximum is calculated for other conditions of sentence, or community custody. See e.g. RCW 9.94A.505(6). Why would the legislature have a different intent for no contact orders as opposed to any other condition of sentence? It does not make sense.

Under the rule of lenity, the Court must interpret an ambiguous statute in the defendant's favor unless it would lead to absurd consequences. State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). The rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant"; State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991) ("The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are").

Here, it is the Court of Appeals interpretation that leads to absurd consequences. For instance, consider the situation where a person is convicted of a class C felony and after serving the entire five-year maximum sentence with its attendant post-conviction no-contact order, and the person's conviction is reversed on appeal. The defendant is then retried and sentenced again to the five-year statutory maximum with the attendant no contact order. Despite having already served the entire statutory maximum sentence as part of the first sentence, under the appellate court's reading of the statute, the no contact order would remain in place for another five years. Even though there is no underlying sentence to serve.

But the result becomes even more absurd taken a step further. Suppose the conviction is reversed on appeal again and once again the defendant is retried, reconvicted and resentenced. Again, the state's interpretation would allow the no contact order to go on

for yet another five years. Despite the underlying sentence having been served and expired twice over.

That cannot be what the legislature intended. It is black letter law "Statutes should receive a sensible construction which will effect the legislative intent and avoid unjust or absurd consequences. In re Welfare of Hoffer, 34 Wn. App. 82, 84, 659 P.2d 1124 (1983).

Here the legislature intended to protect the victim from contact for up to the statutory maximum of the underlying conviction and sentence. That requires reading the period of no contact as a whole, not separately for each new resentencing. This Court should accept review. RAP 13.4(b)(4).

2. BECAUSE THIS CASE PRESENTS SIGNIFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, THIS COURT SHOULD ACCEPT REVIEW.

The appellate court erred in holding the imposition of the five-year no contact order – without taking into

account the time Vanslyke spent already subject to it – is not violative of his due process or equal protection rights. This Court should accept review. RAP 13.4(b)(3).

As a matter of due process, a defendant cannot be penalized for exercising the right to appeal. North Carolina v. Pearce , 395 U.S. 711, 723-24, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 104 L. Ed. 2d 865, 873, 109 S. Ct. 2201 (1989). If Vanslyke were subject to an increased no contact period following his successful appeal, he would be penalized for winning his appeal. Consistent with due process, the length of a no-contact order cannot be increased simply because Vanslyke got his convictions reversed on appeal and then was retried and resentenced.

Imposition of a more severe sentence following a successful appeal raises a rebuttable presumption of judicial vindictiveness. Pearce, 395 U.S. at 726; State v.

Franklin, 56 Wn. App. 915, 920, 786 P.2d 795 (1989), review denied, 114 Wn.2d 1004 (1990). By imposing a longer period of no contact following Vanslyke's successful appeal, the trial court presumptively acted out of vindictiveness towards Vanslyke at the resentencing hearing. A more severe sentence after a new trial can only be imposed consistent with due process where the reasons for doing so affirmatively appear in the record and are based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. Pearce, 395 U.S. at 726. There is nothing like that in the record here. Vanslyke's due process rights were therefore violated by entry of a no contact condition and order extending the expiration date.

The appellate court's reliance on *non* due-process case law to find no constitutional violation here was erroneous. See Appendix at 6.

An increased penalty in the due process context is any "action detrimental to the defendant." United States v. Goodwin, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982). Imposing another five-year no contact order without credit for the first is an action detrimental taken after a successful appeal. It subjects Vanslyke to a longer period of jeopardy for violating the order.

Vanslyke is subject to a longer total term of restriction and subject to being arrested, thrown in jail and ultimately convicted of a separate offense with its own term of confinement in the event he violates the no contact condition/order. RCW 10.99.050(2)(a). The actual effect – the detrimental impact – of the new sentence is to subject Vanslyke to a longer prohibition on contact that he would be subject to had he not appealed. Vanslyke is being penalized for appealing because he is exposed to criminal liability for a longer period of time. This is a due process violation because there are no new

facts to justify the increased sentence. The only thing that changed between the first sentence and the second sentence was the appeal that resulted in a trial rather than a plea.

Subjecting Vanslyke to a longer period of no contact following his successful appeal would also violate the constitutional right to equal protection. "Equal protection requires that similarly situated individuals receive similar treatment under the law." Harris v. Charles, 171 Wn.2d 455, 462, 256 P.3d 328 (2011); U.S. Const. amend. XIV; Wash. Const. art. I, § 12. "A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection." State v. Gaines, 121 Wn. App. 687, 705, 90 P.3d 1095 (2004). Under rational basis review, the application of a law violates equal protection principles where "the law is irrelevant to maintaining a state objective" or "creates an arbitrary classification." Harris, 171 Wn.2d at 463 (quoting

State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)).

Vanslyke is similarly situated to those who commit domestic violence crimes in all relevant respects. There cannot be one maximum expiration date for the no contact order for those who do not appeal or who lose their appeal and another maximum expiration date for those who win their appeal and are ultimately resentenced on remand. That disparity has no relation to any legitimate government objective and creates arbitrary classifications. For these reasons, this Court should accept review. RAP 13.4(b)(3).

3. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE $500 VPA FROM VANSLYKE'S JUDGMENT AND SENTENCE.

Finally, even if this Court does not grant review on the statutory interpretation argument, Vanslyke respectfully requests that this Court remand for the $500 VPA to be

stricken from his judgment and sentence. At sentencing, the trial court imposed only the $500 VPA and stated, "I'm going to waive every other thing that I can." RP 24 (8/9/22). Vanslyke was represented by court-appointed counsel at trial, and the trial court found him indigent for purposes of this appeal. CP 1-2.

At the time of Vanslyke's sentencing, RCW 7.68.035(1)(a) mandated a $500 penalty assessment "[w]hen any person is found guilty in any superior court of having committed a crime," except for some motor vehicle crimes. RCW 43.43.7541 similarly mandated a $100 DNA collection fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." Both fees were mandatory regardless of the defendant's indigency or inability to pay. State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016); State v. Mathers, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016).

In April of 2023, however, the legislature passed Engrossed Substitute House Bill 1169, amending RCW 7.68.035. The amendment provides, "The court shall not impose the penalty assessment under this section if the court finds that the defendant, at the time of sentencing, is indigent" as defined in RCW 10.101.010(3). Laws of 2023, ch. 449, § 1. The new law also eliminates the $100 DNA collection fee for all defendants. Laws of 2023, ch. 449, § 4. These amendments took effect on July 1, 2023. Laws of 2023, ch. 449, § 27.

Under this Court's decision in State v. Ramirez, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018), and the court of appeals' decision in State v. Wemhoff, 24 Wn. App. 2d 198, 201-02, 519 P.3d 297 (2022), costs of litigation are not final until the termination of all appeals. Amendments to cost statutes therefore apply prospectively to cases like Vanslyke's that are still pending on appeal. Wemhoff, 24 Wn. App. 2d at 201-02. Because the $500 VPA is not final

until the termination of Vanslyke's appeal, he is entitled to the benefit of the legislative amendments.

Vanslyke recognizes the late hour of this request, but notes that the bill was not signed into law until May 15, 2023, after Vanslyke filed his opening brief in the court of appeals. Laws of 2023, ch. 449. He is therefore raising this issue now. And, while the amendments allow for individuals to make a motion in the trial court, Vanslyke would have to do so without counsel. Since this Court will assess whether or not to accept review of Vanslyke's case, it would be efficient for this Court to also address the $500 VPA.

F. CONCLUSION

This case involves an issue of substantial public interest that should be resolved by this Court. RAP 13.4(b)(4). It also involves significant questions of law under the state and federal constitutions. RAP 13.4(b)(3).

If this Court declines to accept review, this Court should remand to the trial court to strike the $500 VPA.

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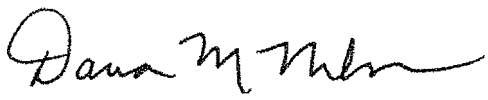
Dated this 15th day of November, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



DANA M. NELSON, WSBA 28239
Attorneys for Petitioner

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARC RICHARD VANSLYKE, Appellant.	No. 84430-0-I DIVISION ONE PUBLISHED OPINION

FELDMAN, J. — Marc Richard Vanslyke appeals the no-contact condition of his judgment and sentence and the no-contact order (NCO) issued in connection therewith. Vanslyke claims that the trial court was required to reduce the duration of the no-contact condition and NCO by the amount of time that he was subject to a prior no-contact condition and NCO for the same offense and that his trial attorney was ineffective by failing to properly argue this issue below. Finding no statutory or constitutional error, we affirm.

I

On January 18, 2018, the Lynwood Municipal Court issued an order prohibiting Vanslyke from contacting Jolene Washington until January 18, 2024. On May 8, 2020, police officers responding to a 911 hang-up call from Washington's apartment found her in the apartment and Vanslyke on the neighbor's balcony. The State charged Vanslyke with (1) felony violation of a court

order – domestic violence[1] and (2) gross misdemeanor interfering with domestic violence reporting.

Vanslyke pleaded guilty to both counts. On May 11, 2021, the trial court sentenced Vanslyke to 60 months of incarceration on the class C felony count and imposed 364 days of confinement on the gross misdemeanor count but suspended that sentence. As a condition of the sentence, the court ordered Vanslyke not to contact Washington. It also issued a separate post-conviction NCO that expired five years from the date of sentencing.

On January 31, 2022, this court held that Vanslyke's plea was constitutionally invalid because the charging language failed to apprise him of an essential element of a willful violation of a court order. *State v. Vanslyke*, No. 82651-4-I, slip op. at 1 (Wash. Ct. App. Jan. 31, 2022) (unpublished), http://www.courts.wa.gov/opinions/pdf/826514.pdf (citing *State v. Briggs*, 18 Wn. App. 2d 544, 550, 553, 492 P.3d 218 (2021)). This court remanded the matter to the trial court to allow Vanslyke to withdraw his guilty pleas, which he did. *Id.*

Following a jury trial, Vanslyke was found guilty of the felony count but not guilty of the gross misdemeanor count. At the resentencing hearing on August 9, 2022, the trial court again sentenced Vanslyke to 60 months of incarceration and, as a condition of the sentence, prohibited him from contacting Washington until August 9, 2027. The court also issued a separate post-conviction NCO that likewise expired "5 years from today's date." Vanslyke appeals.

[1] The statute under which Vanslyke was charged, RCW 26.50.110, has since been repealed. LAWS OF 2021, ch. 215, § 170 (eff. July 1, 2022).

II

A. *Statutory Interpretation*

Vanslyke argues that the duration of the no-contact sentencing condition and NCO imposed at his resentencing hearing exceed the maximum length permitted by RCW 10.99.050 because the trial court failed to credit him with the time he was subject to the no-contact sentencing condition and NCO imposed at his initial sentencing hearing. We disagree.

We review a trial court's sentence with deference and will only reverse a sentence based on a "clear abuse of discretion or misapplication of the law." *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440 (1990). Here, Vanslyke's sentencing arguments require us to interpret RCW 10.99.050. "The goal of statutory interpretation is to discern and implement the legislature's intent." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "If the legislature's intent is clear based on the plain language of the statute, 'then the court must give effect to that plain meaning as an expression of legislative intent.'" *State v. Granath*, 190 Wn.2d 548, 552, 415 P.3d 1179 (2018) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002)). Statutory interpretation is a legal issue, which we review de novo. *State v. Landsiedel*, 165 Wn. App. 886, 889, 269 P.3d 347 (2012).

The plain language of RCW 10.99.050 resolves the issue presented here. It unambiguously states, without qualification, that an NCO issued as a condition of a felony sentence "remains in effect for a fixed period of time determined by the court, which may not exceed the adult maximum sentence established in RCW 9A.20.021." RCW 10.99.050(2)(d). Vanslyke was convicted of a class C felony,

which carries a maximum sentence of five years. RCW 9A.20.021(1)(c). Therefore, RCW 10.99.050 authorized the sentencing court to impose an NCO lasting up to five years for Vanslyke's offense. The trial court's NCO issued as a condition of Vanslyke's sentence did not exceed that statutory limit.

Moreover, the legislature knows how to provide defendants with credit for court-imposed restrictions, and it did not do so here. For example, RCW 9.94A.505(6) provides, "The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced." Additionally, RCW 9.94A.680(3) states, "For offenders convicted of nonviolent and nonsex offenses, the court may credit time served by the offender before the sentencing in an available county supervised community option . . . ." Had the legislature intended to provide a statutory basis to credit defendants with time they were previously prohibited from contacting a person, it would have used similar language in RCW 10.99.050. It did not, and its use of different language is legally significant. *See Samish Indian Nation v. Dep't of Licensing*, 14 Wn. App. 2d 437, 442, 471 P.3d 261 (2020) ("When the legislature uses different language in the same statute, courts presume the legislature intended a different meaning.").

Despite the clear language of the statute, Vanslyke urges us to apply the rule of lenity to construe RCW 10.99.050 in his favor. But courts may apply the rule of lenity only where a statute is ambiguous such that "it is subject to two or more reasonable interpretations." *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). RCW 10.99.050 is subject to only one reasonable interpretation: the sentencing court could properly impose an NCO lasting up to five years from the

date of sentencing. Vanslyke offers no authority supporting any legislative intent to credit defendants with time they were previously subject to NCOs for the same offense. We therefore assume no such intent exists. *See State v. Loos*, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) ("When a party provides no citation to support an argument, this court will assume that counsel, after diligent search, has found none."). In sum, because the trial court did not prohibit Vanslyke from contacting the victim for longer than the maximum duration prescribed in RCW 10.99.050, it did not abuse its discretion in setting the duration of the sentencing condition or NCO.

B. *Due Process*

"[T]he 'imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy is a violation of due process of law.'" *State v. Brown*, 193 Wn.2d 280, 288, 440 P.3d 962 (2019) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)) (internal quotation marks omitted). Vanslyke argues that the trial court penalized him for exercising his right to appeal in violation of due process because, by not crediting him with the time he was subject to the initial sentencing condition and NCO during the pendency of his first appeal, the court effectively imposed a longer period of no-contact following his successful appeal. This argument fails because a no-contact restriction is not a "penalty"—nor is it "punitive"—for due process purposes. As a result, due process does not require that Vanslyke receive credit for the time that he was subject to the previous sentencing condition and NCO for the same offense.

Our constitutional analysis in *In re Personal Restraint of Arseneau*, 98 Wn. App. 368, 370-71, 989 P.2d 1197 (1999), is controlling here. In *Arseneau*, the Department of Corrections prohibited Arseneau from contacting a family member who was not the victim of the offense for which he was sentenced. The defendant argued the restriction violated the constitutional prohibitions on double jeopardy and ex post facto punishments. *Id.* at 379.[2] In determining whether the government's action was sufficiently "punitive" to warrant constitutional scrutiny, we first considered the relevant legislative purpose. *Id.* We then examined the effect of the governmental action as measured by the following seven factors:

> 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has been historically regarded as punishment; 3) whether it comes into play only on a finding of scienter; 4) whether it furthers retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether an alternative purpose to which it may rationally be connected is assignable for it; and 7) whether it appears to be excessive in relation to the alternative purpose assigned.

Id. at 379-80 (citing *State v. Ward*, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963))). We reasoned the prohibition was not "punitive" because, although it imposed an affirmative burden, "no-contact provisions have not traditionally been considered punishment. They are civil in nature and designed to

[2] Although *Arseneau* did not involve a due process challenge, we may look to cases discussing other constitutional rights for guidance in determining what constitutes a "penalty" in the due process context. *See State v. Felix*, 125 Wn. App. 575, 578-79, 105 P.3d 427 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)) (applying the definition of "punishment" for purposes of due process and the right to jury trial to "punishment" for purposes of ex post facto and double jeopardy); *see also In re Pers. Restraint of Forbis*, 150 Wn.2d 91, 100-01, 74 P.3d 1189 (2003) (citing *Hudson v. U.S.*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997)) (applying the definition of "punitive" for purposes of double jeopardy to "punitive" for purposes of ex post facto).

protect third parties." *Id.* at 380. We also noted that the no-contact prohibition did not depend on a finding of scienter, was intended to regulate conduct instead of punish, and was not exaggerated or excessive. *Id.*

In *State v. Felix*, we affirmed our reasoning in *Arseneau* in the context of whether a post-conviction NCO constitutes "punishment" for purposes of the constitutional right to a jury determination of necessary facts that increase a defendant's potential punishment. 125 Wn. App. 575, 578-79, 105 P.3d 427 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In declining to find a constitutional violation, we held that an NCO issued under RCW 10.99.050 is even less punitive than the no-contact prohibition in *Arseneau* because the former "applies only to the actual victim of the crime" and the statute "specifies only additional enforcement measures for no-contact orders that may already be issued as a sentencing condition." *Id.* at 579-80.[3]

Here too, Vanslyke's sentencing condition and NCO are not punitive for due process purposes. The legislative purpose of RCW 10.99.050 is to "protect[] victims of domestic violence" and to do so "for the adult statutory maximum." LAWS OF 2019, ch. 263, § 301 (eff. July 28, 2019). This legislative purpose shows that

[3] Washington courts have reached similar conclusions for other court-imposed restrictions short of confinement. Our Supreme Court has held that certain presentencing release conditions are not punitive such that denying defendants credit time subjects them to double jeopardy. *See State v. Medina*, 180 Wn.2d 282, 293-94, 324 P.3d 682 (2014) (supervised alternative community program); *Harris v. Charles*, 171 Wn.2d 455, 469-73, 256 P.3d 328 (2011) (electronic home monitoring of misdemeanants). The court has also declined to hold that probationers have a constitutional right to credit for nonjail time served on probation. *See In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 597-98, 647 P.2d 1026 (1982). Similarly, the court has reasoned that sanctioning an inmate for not attending mandatory stress and anger management classes was not sufficiently punitive to constitute an ex post facto violation. *See Forbis*, 150 Wn.2d 91 at 100-01. Our court has applied the same logic to a statutory weekly check-in requirement for sex offenders. *See State v. Boyd*, 1 Wn. App. 2d 501, 513, 408 P.3d 362 (2017). We have also held that imposing warrant costs and DNA collection fees is not punitive. *See State v. McCarter*, 173 Wn. App. 912, 918, 295 P.3d 1210 (2013); *State v. Brewster*, 152 Wn. App. 856, 859, 218 P.3d 249 (2009).

the purpose of restricting Vanslyke's conduct in this manner is not to punish him, but to protect Ms. Washington (the victim). The trial court's justification for imposing the NCO at the resentencing hearing was also non-punitive in nature:

> I do agree that the post-conviction no-contact order is appropriate. *It won't do you any harm* based on the things I understand from this case, from this trial, and from what you told me today. Not only is she better off without you, not only is the public better off without you two together, but also you're probably better off without her.

(Emphasis added.) The sentencing condition and NCO are not exaggerated or excessive; they are limited solely to inappropriate contact between Vanslyke and the victim and do not extend his term of confinement. Nor do these restrictions depend on a finding of scienter. For these reasons, the sentencing condition and NCO are not a penalty (or punitive) for due process purposes and, accordingly, the trial court did not violate Vanslyke's due process rights when it did not give Vanslyke credit for the time he was subject to the previous sentencing condition and NCO for the same offense.

To bolster his due process argument, Vanslyke argues that we should presume improper judicial vindictiveness under the United States Supreme Court's holding in *Pearce*, 395 U.S. 711. This argument fails because the Supreme Court has since restricted the *Pearce* presumption of judicial vindictiveness to only those cases in which "there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) (quoting *U.S. v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) (internal citation omitted); *see also Brown*, 193 Wn.2d at 288-90 (acknowledging the line of cases limiting the *Pearce* presumption of

vindictiveness). If no reasonable likelihood exists, the defendant must prove "actual vindictiveness." *Smith*, 490 U.S. at 799-800. Further, the presumption does not apply where a greater sentence is imposed after trial than was imposed after a guilty plea because "the judge may gather a fuller appreciation of the nature and extent of the crimes charged" at trial. *Id.* at 801.

Here, there is nothing in the record indicating a "reasonable likelihood" that the sentencing court acted with vindictiveness at the August 9, 2022, resentencing hearing. To the contrary, the court imposed the same sentence it originally imposed on the felony count: 60 months of incarceration with an accompanying five-year no-contact sentencing condition and concomitant NCO. Also, the new sentencing condition and NCO were imposed after a trial, where the judge may have "gather[ed] a fuller appreciation" of Vanslyke's relationship with the victim and the nature of the offense than when he previously accepted Vanslyke's guilty plea. *See Smith*, 490 U.S. at 801. Thus, even assuming the sentencing condition and NCO are a penalty, Vanslyke has not established, as he must, that the trial court acted with actual vindictiveness.

Vanslyke relies on *Goodwin*, 457 U.S. at 373, for the proposition that "[a]n increased penalty in the due process context is any 'action detrimental to the defendant.'" Vanslyke's reliance on *Goodwin* is misplaced. The United States Supreme Court there addressed prosecutorial vindictiveness, not whether a court-imposed restriction short of confinement is a "penalty." *See Goodwin*, 457 U.S. at 373. Contrary to Vanslyke's assertion, *Goodwin* stated that "in *certain* cases in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has found it necessary to 'presume' an improper vindictive

motive." *Id.* (emphasis added). The Court explained that this presumption applies "only in cases in which a reasonable likelihood of vindictiveness exists." *Id.*

Properly construed, *Goodwin* supports our conclusion that not every governmental action "detrimental to the defendant . . . after the exercise of a legal right" constitutes a penalty for due process purposes. Rather, the action must be punitive, and the presumption of a vindictive motive in punishing the defendant only exists where a "reasonable likelihood of vindictiveness exists." *Id.* Vanslyke's sentencing condition and NCO are not punitive, and the trial court did not act with vindictiveness. For all these reasons, we decline to find a due process violation.

C. *Equal Protection*

Vanslyke claims the trial court violated his equal protection rights by subjecting him to a harsher sentence than a defendant who does not successfully appeal their conviction. We disagree.

Equal protection requires that similarly situated individuals receive similar treatment under the law. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. 1, § 12. In determining whether a defendant's equal protection rights have been violated, courts employ rational basis review when, as here, a classification does not involve a fundamental right or suspect class. *Harris*, 171 Wn.2d at 462-63 (quoting *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004)). "Under rational basis review, a party challenging the application of a law as violating equal protection principles has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification." *Id.* (quoting *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004)) (internal quotation marks omitted). Rational basis review is a deferential standard of review. *Id.* Equal

protection does not impose an absolute bar to the imposition of a more severe sentence upon retrial because resentencing involves issuing a new sentence, rather than increasing an existing sentence, and the result "depend[s] upon a particular combination of infinite variables peculiar to each individual trial." *Pearce*, 395 U.S. at 722-23 (overruled on other grounds).

Applying these legal principles here, Vanslyke's equal protection argument fails because he does not show, as he must, that the trial court's imposition of a five-year no-contact sentencing condition and NCO was irrelevant to maintaining a state objective or created an arbitrary classification between him and defendants who do not successfully appeal their conviction. Upon remand, Vanslyke was treated the same as any other defendant who had never appealed. He was recharged, tried by a jury, convicted, and resentenced. The duration of the trial court's new sentencing condition and NCO are relevant to maintaining the court's objective that Vanslyke not contact the victim throughout his entire sentence of incarceration. Therefore, we decline to find an equal protection violation.

D. *Ineffective Assistance of Counsel*

Vanslyke argues that his trial counsel was ineffective because they failed to object to the expiration dates of the sentencing condition and NCO. We disagree.

"A successful ineffective assistance of counsel claim requires the defendant to show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance." *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Vanslyke's ineffective assistance argument fails because, even if his lawyer had objected to the expiration dates of the sentencing condition and NCO, his argument that "the expiration date of the order must take into account

time already served subject to the order following entry of the initial sentence" fails as a matter of statutory and constitutional analysis (as the discussion above shows). Thus, even if his lawyer's performance was deficient, Vanslyke has not established that he was prejudiced by the deficient performance. Accordingly, we decline to grant relief on this basis.[4]

III

We affirm Vanslyke's judgment and sentence and the corresponding NCO.

Feldman, J.

WE CONCUR:

Díaz, J.

Mann, J.

[4] Our unpublished decision in *State v. Briggs*, No. 83278-6-I (Wash. Ct. App. Nov. 14, 2022) (unpublished), http://www.courts.wa.gov/opinions/pdf/832786.pdf, is also persuasive here. There, we rejected Briggs' statutory, due process, equal protection, and ineffective assistance of counsel arguments on similar facts. Although *Briggs* is an unpublished opinion, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c). We adopt the reasoning in *Briggs* as set forth in the text above.

NIELSEN KOCH & GRANNIS P.L.L.C.

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