

NO. 61996-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JORGE A. CRESPO-ORTIZ,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. After being convicted of raping his 12-year-old niece, with his own expert claiming he was an untreated sex offender with a moderate risk of reoffending, and that his sexual deviancy and treatment were exacerbated by his substance abuse issues, did the trial court appropriately put restrictions on the defendant's ability to contact all minors, including his daughter, and appropriately order that the defendant undergo substance abuse treatment?

2. Did the sentencing court properly impose the \$100 DNA collection fee?

B. STATEMENT OF THE CASE

The issues raised on appeal pertain only to conditions imposed as part of the defendant's sentence for one count of second degree rape of child. Thus, the statement of the case is limited only to those few facts relevant to the issues raised.

A jury convicted the defendant of second-degree rape of a child for raping his niece, MDD. CP 7-8, 98. MDD was 12 years old at the time of the rape, a crime that occurred on April 1, 2007. CP 2, 7-8, 74-91. The defendant is MDD's 20-year-old uncle. CP 2.

The defendant was sentenced on July 11, 2008. CP 110-19. At sentencing, defense counsel asked for a SSOSA (a Special Sex Offender Sentencing Alternative per RCW 9.94A.670), arguing that the defendant was an untreated sex offender who needed treatment. 11RP¹ 6-7. The court, after reviewing the defense presentence report and attached sexual deviancy evaluation, denied the request. 11RP 2, 5, 18. Instead, the court imposed a standard range minimum term indeterminate sentence of 90 months. 11RP 18; CP 110-19.

The court stated that the defendant's sexual deviancy evaluator noted that the defendant "does not accept accountability for his sexual behavior," and that he poses a "moderate risk" of reoffending if treatment is provided in the community. 11RP 5, 13-14. The evaluator noted that the defendant "may have a narcissistic personality disorder complicated by a substance abuse disorder. And it would be a challenge for a treatment provider." 11RP 13, 17. The evaluator noted that the substance abuse problem was untreated and that the moderate risk assessment was

¹ The verbatim report of proceedings is cited as follows: 1RP--2/15/08, 2RP--3/17/08, 3RP--3/18/08 (morning), 4RP--3/18/08 (afternoon), 5RP--3/25/08 (this volume will not be cited--it is misdated and is a duplicate of 4RP), 6RP--3/27/08, 7RP--5/13/08, 8RP--5/19/08 (9:00 a.m.), 9RP --5/19/08, 10RP--5/20/08, and 11RP--7/11/08.

premised on the defendant remaining "substance free." 11RP 13-14, 17. The court noted that close supervision would be required of the defendant "to make sure there wasn't a repetition of this sexual misbehavior with this particular victim or any other."

11RP 14.

After reviewing this evidence, the court ordered that the defendant have a substance abuse evaluation and sexual deviancy evaluation and follow all treatment recommendations. 11RP 19-20; CP 118. The court also ordered that the defendant have no contact with MDD for life, and that he not have any unsupervised contact with other minors without a responsible adult being present who had knowledge of his rape conviction, or until such time as a community corrections officer deemed the restriction should be lifted. 11RP 19, 21-22; CP 115, 118. While the defendant was in custody, the Court ruled that he could have telephone and mail contact with his wife and daughter in Mexico. 11RP 5, 12, 21; CP 115.

Additional facts are included in the sections they apply.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RESTRICTING THE DEFENDANT'S CONTACT WITH HIS DAUGHTER AND ORDERING THAT HE UNDERGO A SUBSTANCE ABUSE EVALUATION.

The defendant challenges the conditions of his sentence that (1) restrict his contact with his daughter, and (2) that require he undergo a substance abuse evaluation and follow all treatment recommendations. He argues that the conditions are not sufficiently crime related. In making this argument, the defendant ignores the sexual deviancy evaluation he submitted to the court in asking for a SSOSA. The court considered the evidence before it and imposed these appropriate crime related conditions of sentence.

a. The Order Restricting Contact.

The order placing restrictions on the defendant's ability to contact his daughter was imposed pursuant to RCW 9.94A.505(8) and RCW 9.94A.700(5)(b) and (e). RCW 9.94A.505(8) and RCW 9.94A.700(5)(e) provide the court with the authority to impose "crime-related prohibitions." RCW 9.94A.700(5)(b) provides the court with the authority to require that a defendant "not have direct

or indirect contact with the victim of the crime or a specified class of individuals."

This Court reviews the imposition of crime-related prohibitions for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). Determining whether a relationship exists between the crime and an order limiting contact is generally left to the discretion of the sentencing judge. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). Careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). But crime-related prohibitions that limit fundamental rights are permissible, provided they are imposed sensitively and the restrictions are reasonably necessary to accomplish the essential needs of the State and public order.² Riley, 121 Wn.2d at 38. Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

² The defendant in Riley, for example, was convicted of computer trespass and was prohibited from communicating with other persons through computer bulletin boards. Riley claimed this violated his fundamental right of association. The Supreme Court held that the sentencing court's broad restriction was a permissible reasonable crime related means of discouraging Riley's communication with other hackers. Riley, at 37-38.

The defendant argues that the order restricting his contact with his daughter is unlawful because there is no evidence he had a generalized sexual interest in pre-teen children and the order is not narrowly tailored. Def. br. at 6-7. This claim is belied by the record. The defendant's own attorney, in asking for a SSOSA, argued that the defendant was a sex offender who needed sexual deviancy treatment. The defense expert said that the defendant was a moderate risk of reoffending, a risk that was not limited to his current victim. This evidence certainly gave the court reason to prohibit the defendant from having unsupervised contact with minor children. See e.g., State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998) (defendant convicted of raping a six-year-old was appropriately prohibited from contacting all children); Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (prevention of harm to children is a compelling state interest). In addition, under RCW 9.94A.700(5)(b), a sentencing court may prohibit a defendant from having contact with "the victim of the crime or a specified class of individuals," the relevant distinguishing feature here being minors.

Still, the defendant relies on State v. Letourneau,³ to argue that his own daughter should not have been included in the order restricting contact with minors. Letourneau is distinguishable. Letourneau had a continuing consensual sexual/romantic relationship with one of her students. In fact, she bore two of his children. Letourneau, 100 Wn. App. at 430. After Letourneau pled guilty to two counts of second-degree rape of a child, the court entered an order restricting Letourneau's contact with her own biological children. This Court reversed because the trial court's prohibition did not meet the reasonably necessary standard; there was no evidence in the record that Letourneau was a pedophile who would molest her own children. Letourneau, at 427. Such is not the case here.

Unlike Letourneau, the defendant raped a close family member, his niece. Unlike Letourneau, there was evidence the defendant suffers from a sexual deviancy problem that makes him a moderate risk of reoffending. And unlike Letourneau, there is evidence the defendant suffers from substance abuse issues that increase his risk of reoffending and decrease his chances at

³ State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000).

successfully treating his sexual deviancy. With this evidence, there was sufficient evidence for the trial court to believe it was reasonably necessary for the protection of all minors, including the defendant's child, to place restrictions on his contact with his child. See e.g., Berg, supra (court permissibly prohibited the defendant from having contact with his own biological daughter after he was convicted of raping the daughter of his girlfriend).

While reasonable minds might differ, that is not the standard the defendant must meet to overrule the trial court's action here. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). To prevail on appeal, the defendant must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). The limited restrictions here directly related to the circumstances of the crime and were reasonably necessary to further the State's compelling interest in protecting children. See City of Sumner v. Walsh, 148 Wn.2d 490, 506, 61 P.3d 1111 (2003) (the State has a compelling interest in protecting children from becoming victims of

crime). The defendant has failed to show the sentencing court abused its discretion.⁴

b. Substance Abuse Treatment.

The defendant contends that the trial court erred in requiring him to submit to a substance abuse evaluation as a condition of community custody. The State disagrees.

This Court reviews sentencing conditions for an abuse of discretion. Riley, 121 Wn.2d at 37. A sentencing court may order a defendant to participate in treatment if it is directly related to the circumstances of the crime committed. See RCW 9.94A.607(1); RCW 9.94A.700(5)(c); State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). The existence of a relationship between the crime and the condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing

⁴ It should also be noted that the Court in Letourneau relied in part on the fact that there was a pending dissolution action and that family court was the more appropriate forum to deal with the issue of the scope of contact Letourneau could have with her children. Letourneau, at 443. Here, there is no evidence there is any pending family law action or any evidence that the defendant's wife and child even know about his actions in raping his niece. Further, the defendant is going to be deported and his wife and child live in Mexico; it is unlikely a family law court has any jurisdiction to deal with this issue. Finally, as the trial court noted, with the defendant being deported, it is unlikely he will receive appropriate sexual deviancy treatment once he is out of custody. 11RP 7.

judge." State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (citations omitted). No causal link need be established between the condition imposed and the crime committed, if the condition directly relates to the circumstances of the crime.

Llamas-Villa, 67 Wn. App. at 456.

The defendant asserts his case is no different than that of State v. Jones, wherein the Court of Appeals, Division II, held that a sentencing court may not impose a requirement that a defendant undergo an alcohol/drug evaluation when the evidence indicates that it was drugs that contributed to the defendant's criminal conduct, not alcohol. See State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003). The defendant's situation is markedly different.

Here, the defense expert opined that the defendant had a substance abuse problem that contributed to his sexual deviancy, and that if not treated, would limit the efficacy of sexual deviancy treatment. 11RP 13-14, 17. This is from the very report the defendant submitted in seeking treatment. The trial court acted within its discretion in finding the condition reasonably related to the offender's risk of reoffending, the safety of the community, and that substance abuse contributed to the offense charged.

2. THE SENTENCING COURT APPROPRIATELY IMPOSED THE DNA COLLECTION FEE.

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced the defendant believing the fee was mandatory, or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's argument rests on his belief that the DNA collection fee is not mandatory; it is mandatory.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant was sentenced on July 11, 2008. CP 110-19.

The defendant asserts that because he committed his crime in April of 2007, a former version of RCW 43.43.7541 is applicable

to his case. Under this former version, the trial court had the discretion to waive the DNA collection fee.⁵ The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4). The defendant claims that pursuant to the savings clause, RCW 10.01.040, this former version of RCW 43.43.7541 applied to his case.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever

⁵ In imposing the fee here, the court stated, "I will order the mandatory financial consequences, i.e., the Victim Penalty Assessment and the DNA collection fee." 11RP 20.

any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-613, 5 P.3d 741 (2000). In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute." Id. Rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v.

Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979));
see also, State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that newly enacted drug laws controlled both pending and future criminal cases. The particular amendment to the drug statute stated that "the provisions of this chapter shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future. Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The Court held that this new statute applied to pending cases, finding that the language of the statute fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684. Here, even assuming the savings statute applies,⁶ the statutory

⁶ RCW 10.01.040 applies to criminal penal statutes. State v. Toney, 103 Wn. App. 862, 864-865, 14 P.3d 826 (2000). The statute applies only to substantive changes in the law. State v. McNeal, 142 Wn. App. 777, 793-794, 175 P.3d 1139 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 472, 150 P.3d 1130 (2007)). The amount of the DNA collection fee has remained the same since 2002. The amendment to the statute pertains only to the possibility of waiving the fee. This is not a criminal penal amendment affecting a substantive right.

language clearly shows the legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the former version of RCW 43.43.7541, the legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the legislature removed any reference to when the crime was committed. This in itself indicates that the legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the legislature thought such a provision necessary it would have included it with the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the sentencing reform act. The term

"every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).⁷

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample was required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The legislature stated, in pertinent part, that [t]his section applies to. . . [a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to

⁷ See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

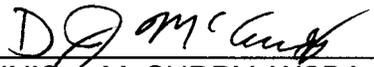
crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

D. CONCLUSION

For the reasons cited above, this Court should affirm the conditions of sentence imposed by the trial court.

DATED this 15 day of June, 2009.

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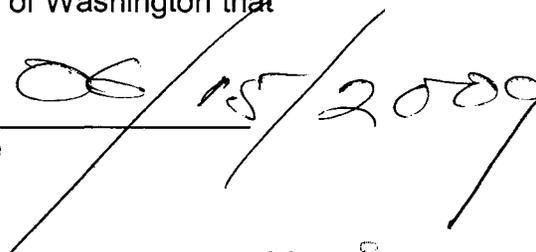
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CRESPO-ORTIZ, Cause No. 61996-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



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