

63566-2

63566-2

NO. 63566-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL E. TURNER,

Appellant.

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

The Honorable John M. Meyer, Judge

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BRIEF OF APPELLANT

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ANDREW P. ZINNER  
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2009 DEC -3 11:11 AM '09  
COURT OF APPEALS  
DIVISION ONE  
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding the no-contact order the appellant allegedly violated satisfied mandatory statutory requirements and was therefore applicable to the appellant.<sup>1</sup>

2. The trial court exceeded its sentencing authority by imposing a sentence that could potentially exceed the statutory maximum.

Issues Pertaining to Assignments of Error

1. To prove a violation of a no-contact order, the state must establish the existence of an applicable order beyond a reasonable doubt. In the appellant's case, was the order insufficient to sustain the conviction because the mandatory legend required by RCW 10.99.040(4)(b) appeared on the back of the order after the judge's signature?

2. The trial court imposed a statutory maximum 60-month prison term. In addition, the court ordered the appellant to serve 9 months to 18 months community custody. Because this combination of imprisonment and community custody could potentially exceed the statutory maximum, must the sentence be remanded for clarification?

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<sup>1</sup> Turner has raised the same issue and presented the same argument in State v. Turner, COA No. 63147-1-I.

B. STATEMENT OF THE CASE

The state charged Michael E. Turner with felony violation of a domestic violence no-contact order and second degree malicious mischief. CP 1-2. Turner moved to exclude the no-contact order, contending the order did not properly include the following "legend" as required by RCW 10.99.040(4)(b):

"Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

CP 5-8; 1RP 14-25.<sup>2</sup>

The document containing the no-contact order in Turner's case was two-sided. Ex. 1 (attached as appendix). The front side included information such as the identity of the protected parties, the prohibited conduct, the date and the judge's signature. Language including the essence of the legend appeared on the back side of the order. Ex. 1.

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<sup>2</sup> The three-volume report of proceedings is cited as follows: 1RP – 2/9/2009; 2RP – 2/10/2009; 3RP – 2/26/2009.

Turner maintained only language found above the judge's signature on the front of the document was part of the order. Because the legend appeared only on the back of the document and the order did not refer to or otherwise incorporate it, the order was invalid. CP 6-8; 1RP 14-18. The trial court rejected the argument, finding the order included everything on both sides of the document, including the required legend. 2RP 3-5.

The case proceeded to jury trial, and the jury ultimately found Turner guilty of violating the no-contact order and not guilty of malicious mischief. CP 27-28. The trial judge imposed a statutory maximum sentence of 60 months, then added a 9-month to 18-month community custody term. CP 30-38.

C. ARGUMENT

1. THE TRIAL COURT ERRED AS A MATTER OF LAW BY CONCLUDING THE NO-CONTACT ORDER SATISFIED STATUTORY REQUIREMENTS.

The no-contact order the state charged Turner with violating appeared on a two-sided document with the issuing judge's signature at the bottom on the front side. The back side of the document contained language including the "legend" required by RCW 10.99.040(4)(b). Because the front, signed side of the document bore neither any part of the

mandatory legend nor language incorporating the legend, the order was not applicable and Turner's conviction should be dismissed with prejudice.

A charge of violation of a no-contact order must be based on an "applicable" order. State v. Miller, 156 Wn.2d 23, 31-32, 123 P.3d 827 (2005). A no-contact order is applicable only if it contains the mandatory legend set forth in RCW 10.99.040. RCW 10.99.045(5); Miller, 156 Wn.2d at 31, State v. Marking, 100 Wn. App. 506, 511, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), overruled on other grounds by Miller, 156 Wn.2d at 31. The question of an order's applicability is one of law to be decided as a threshold matter by the trial court. Miller, 156 Wn.2d at 31.

General Rule 14 generally forbids putting information on the back side of a court document. According to the rule, the writing or printing contained in "[a]ll pleadings, motions, and other papers filed with the court . . . shall appear on only one side of the page." GR 14(a). This "one side only" rule applies "to all proceedings in all courts" in Washington unless otherwise specified by court rule. GR 14(c). GR 14 applies specifically to criminal courts of limited jurisdiction. CrRLJ 1.5.

Orders are "papers filed with the court." See CR 54(a)(2); Seattle-First Nat. Bank v. Marshall, 16 Wn. App. 503, 508, 557 P.2d 352 (1976

("Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order."), review denied, 89 Wn.2d 1007 (1977). The prohibition on double-sided documents therefore applies to orders, rendering the order inapplicable in Turner's case.

Application of GR 14 should apply with even greater force to domestic violence no-contact orders given that violation of the terms of such an order can result in a felony conviction. A felony conviction is obviously a more onerous consequence than is a waiver of the right to sue for money or other civil damages. Yet in contracts cases, exculpatory agreements are enforceable only if they are conspicuous and do not violate public policy. Chauvlier v. Booth Creek Ski Holdings, Inc., 109 Wn. App. 334, 339, 35 P.3d 383 (2001). For example, a disclaimer that appeared in middle of a golf cart rental agreement was not sufficiently conspicuous to excuse the city from liability from injuries caused when the cart crashed. Baker v. City of Seattle, 79 Wn.2d 198, 202, 484 P.2d 405 (1971). In contrast, this Court found sufficiently conspicuous a release that was placed apart from other language in a ski resort agreement, used capital letters for important words, and contained explicit waiver language just above the signature line. Chauvlier, 109 Wn. App. at 342. In Nelson v.

Southland Corp.,<sup>3</sup> an employer's disclaimer that appeared at the beginning of the statement of corporate policies and procedures, and similar disclaimers that appeared in a variety of documents, at least two of which were signed by the employee directly below the disclaimer, were found to be effective as a matter of law. Nelson, 78 Wn. App. at 28-32 & n.2.

The order Turner allegedly violated did not conspicuously display the legend. Instead, the legend appeared on the back side of the document, under the signature lines for Turner and the issuing judge.\*\* There is nothing on the front side alerting the reasonable reader to turn the document over and look at the reverse side.

Turner acknowledges that in certain circumstances, substantial compliance with statutory requirements for legal documents has been sufficient to validate a document. An example is Kim v. Lee,<sup>4</sup> a case that addressed compliance with laws governing the entry of civil judgments. Kim involved an interpretation of RCW 4.64.030(2)(a), which mandates that a succinct information summary appear “[o]n the first page of each judgment[.]”

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<sup>3</sup> 78 Wn. App. 25, 894 P.2d 1385 (1995).

<sup>4</sup> 102 Wn. App. 586, 590, 9 P.3d 245 (2000), reversed on other grounds, 145 Wn.2d 79, 31 P.3d 665, 43 P.3d 1222 (2001).

The summary in Kim began on the first page but spilled over to the second because of the length of the caption. Kim, 102 Wn. App. at 590-91. This Court rejected a challenge to the summary's continuation on the second page of the judgment. Kim, 102 Wn. App. at 591. Applying the doctrine of substantial compliance with a statutory requirement, this Court found the judgment was effective in substantial part because the judgment summary began on the first page of the judgment. Kim, 102 Wn. App. at 591-92.

Although the pertinent statute in Turner's case, RCW 10.99.040, does not required the legend appear on the first page of the order, GR 14 does prohibit two-sided court documents. Unlike in Lee, where at least part of the summary appeared on the required front page, the municipal court did not substantially comply with GR 14 or comply with the rule at all. Instead, the court disregarded the rule by placing the legend and other important information regarding the no-contact order wholly on the reverse side of the order itself. The doctrine of substantial compliance therefore does not excuse the court's violation of the rule here.

Turner also acknowledges that in other circumstances, courts have been willing to permit the incorporation into a legal document information contained in other documents or elsewhere in the same document by

specific reference to the information. See State ex rel. Bloom v. Superior Court, 171 Wash. 536, 539, 18 P.2d 510 (1933) (trial court properly incorporated auditor's report into proposed findings of fact and conclusions of law).

Incorporating information by reference to attached appendices is a common characteristic of judgments and sentences in Washington criminal cases. In Turner's case, for example, the judgment and sentence form document gave the court the option of incorporating by reference additional current offenses "attached in Appendix 2.1" and additional prior convictions "attached in Appendix 2.2." CP 30-31. These references by incorporation appear in the main text of the "Findings" section of the form document. They also appear above Turner's signature.

But the municipal court judge did not incorporate the mandatory legend or any other information from the reverse side of the no-contact order into the order itself. In fact, the front side of the order makes no reference to the information contained on the back side. The order is thus invalid.

To summarize, GR 14 applies to the no-contact order, the legend is not conspicuous because it appears after the judge's signature and on the reverse side of the order, and the "order" portion of the document makes

no reference to the reverse side. For all of these reasons, the no-contact order is inapplicable to the charged offense. Without an applicable order, the state lacked sufficient evidence to sustain the charge. This Court should reverse the judgment and remand for dismissal with prejudice. State v. Nam, 136 Wn. App. 698, 707, 150 P.3d 617 (2007).

2. THE TRIAL COURT IMPROPERLY IMPOSED A SENTENCE THAT COULD POTENTIALLY EXCEED THE STATUTORY MAXIMUM 60 MONTHS.

The trial court imposed a statutory maximum 60-month prison term. In addition, the court ordered Turner to serve 9 months to 18 months community custody. Because this combination of imprisonment and community custody could potentially exceed the statutory maximum, the sentence must be remanded for clarification to ensure Turner does not serve a total of prison and community custody time in excess of 60 months.

"[I]llegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452, 454 (1999). This rule applies to a challenge to the sentencing court's authority to impose a sentence. State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000), review denied, 142 Wn.2d 1026 (2001). A sentencing court

derives its authority strictly from the Legislature. State v. Gronnert, 122 Wn. App. 214, 226, 93 P.3d 200 (2004).

The Legislature has classified Turner's crime as a Class C felony. RCW 26.50.110(5). A Class C felony is punishable by a maximum of five years imprisonment. RCW 9A.20.021(1)(c). Turner acknowledged his standard range, based on his criminal history, was 60 months. 2RP 2. He therefore does not challenge the trial court's imposition of a 60-month prison term. Rather, under In re Personal Restraint of Brooks<sup>5</sup> Turner asserts the combination of prison and community custody time is illegal because it exceeds the statutory maximum for his crime.

When a court sentences a defendant to a term of confinement and community custody under terms that could exceed the statutory maximum for the crime, the sentence must be remanded and the trial court must "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." Brooks, 166 Wn.2d at 675.<sup>6</sup>

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<sup>5</sup> 166 Wn.2d 664, 211 P.3d 1023 (2009).

<sup>6</sup> The Brooks Court approved of an amendment that said, "The total of the term of incarceration and the term of community custody for each counts I, II, and III shall not exceed the statutory maximum of 120 months." Brooks, 166 Wn.2d at 667.

Because Turner's sentence could now result in a term exceeding the 60-month statutory maximum, this Court should remand for an amendment that makes clear the combination of imprisonment and community custody shall not exceed 60 months.

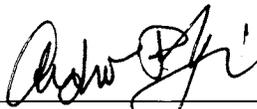
D. CONCLUSION

The state failed to prove each element of the charge beyond a reasonable doubt because the no-contact order is statutorily insufficient and therefore inapplicable. This Court should reverse Turner's conviction and remand for dismissal with prejudice. In the alternative, this Court should remand, directing the trial court to amend the sentence to "explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum."

DATED this 3 day of December, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER  
WSBA No. 18631  
Office ID No. 91051

Attorneys for Appellant

## APPENDIX

IN THE DISTRICT COURT  
SKAGIT COUNTY, WASHINGTON

STATE OF WASHINGTON, )  
CITY OF Mount Vernon )

Plaintiff, )

vs. )

Turner, Michael Edward )  
Defendant DOB: 7-29-77 )

No. CASE # MC 20901

ORDER PROHIBITING CONTACT  
PURSUANT TO:

- RCW 10.99.040/.045 (Pretrial DVPA)
  - RCW 10.99.050 (Post-Conv. DVPA)
  - RCW 9A.46.040 (Pretrial Harassment)
  - RCW 9A.46.080 (Post-Conv. Harassment)
- CLERK'S ACTION REQUIRED

The court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense or crime of harassment, and further finds that this Order Prohibiting Contact is necessary to prevent possible recurrence of violence and/or harassment. The person(s) protected by this order is/are

(1) Michelle L. Frydenlund 12-75  
Victim #1 (DOB)

(2) Ryan G. Frydenlund 6-5-75  
Victim #2 (DOB)

who reside(s) at:

(1) 804 N 15th Mount Vernon

(2) Same as Vic 1

IT IS ORDERED THAT:

Defendant is PROHIBITED from:

Directly or indirectly causing or attempting to cause physical harm, bodily injury, assault, sexual assault, molesting, harassing, threatening, stalking, intimidating, keeping under surveillance, or otherwise interfering with the protected person(s).

Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing or service of process of court documents by a 3<sup>rd</sup> party or contact by defendant's lawyers with the protected person(s).

Entering or knowingly coming within or knowingly remaining within or upon (distance in feet) of the protected person(s)'s  residence  school  workplace  other: \_\_\_\_\_

- Defendant may pick up clothing and undisputed personal items with law enforcement officers present.
- The parties affected by this order have children in common and the court hereby orders that (1) Any exchange of said child(ren) for the purposes court-ordered or mutually agreed upon child visitation of shall be arranged through a third party; (2) The defendant shall not be present at the same time as the protected person(s) during said exchange; and (3) These conditions regarding child visitation shall apply to the conduct of the defendant only insofar as they are consistent with other court orders.
- The court makes findings pursuant to RCW 9.41.500, and orders that the defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to the Mount Vernon  County Sheriff's Office  Police Department. The defendant is also prohibited from obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.

Other: \_\_\_\_\_

It is further ordered that the clerk of the court shall forward a copy of this order on or before the next judicial day to the Mount Vernon  County Sheriff's Office  Police Department, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

THIS ORDER SHALL REMAIN IN EFFECT FROM THIS DATE UNLESS MODIFIED, OR RESCINDED. (Pre trial status to 2099) OR (if checked) FOR  ONE YEAR  TWO YEARS or  until \_\_\_\_\_ UNLESS MODIFIED, RESCINDED, OR UPON ACQUITTAL OR DISMISSAL.

Done in open court in the presence of the defendant this 15 day of May, 2008.

[Signature]  
JUDGE/COMMISSIONER

[Signature]  
Deputy Prosecuting Attorney

Attorney for Defendant  
WSBA # \_\_\_\_\_

[Signature]  
Defendant

Mount Vernon

SKAGIT COUNTY DISTRICT AND MUNICIPAL COURTS  
 DISTRICT  ANA  BUR  MOUNTAIN VIEW  SW  
ACTION MEMO/COURT ORDER/HEARING NOTICE

DVPA  
OB MP156

DEFENDANT Turner, Michael III CASE # MC21548/MC20901 CHARGE DVLS3  
DOB: \_\_\_\_\_ DEFENDANT'S ADDRESS  Same as  Citation  Notice/Order/Warrant of 01 of 2  
 New:  \_\_\_\_\_ Resisting

THE ABOVE NAMED DEFENDANT WAS:

- Arraigned and advised of constitutional rights.
- Released on promise to appear  if bail or bond of \$ \_\_\_\_\_ is posted.  Cash only
- Referred to:  court clerk;  assigned counsel;  public defender;  prosecutor;  private attorney.
- Returned to jail  until bail posted  to serve sentence of \_\_\_\_\_ days.
- Granted a continuance on Defendant's Motion.
- I agree to waive my right to a speedy trial for 90 days beyond the court date listed below \_\_\_\_\_
- Allowed to post and forfeit bail  on performance of certain conditions. Def. Initial

THIS CASE IS:

- Continued to 6-27-08 at 3:00 P.M. for:
  - determination of indigence  arraignment;  further arraignment;  trial setting
  - Defendant to post bail of \$ \_\_\_\_\_ and pay warrant fees  and show proof of:  restitution;  alcohol school;  driver's license;  vehicle license;  all Skagit infractions paid;  \_\_\_\_\_;
  - jury trial;  non-jury trial;  guilty plea;  sentencing;  rule on motion;  petition for deferred prosecution;
  - pre-trial conference;  probation violation/ deferred revocation hearing.
  - dismissal without prejudice and further order if no information filed.

DEFENDANT IS ORDERED: Released on promise to appear, if and only so long as all conditions marked below are met, and if any required bail/bond is posted.

DEFENDANT IS ORDERED TO:

- IMMEDIATELY notify court clerk IN WRITING of any change in address from that above stated.
- Contact Office of Assigned Counsel within 2 hours at  205 W Kincaid #305, Mount Vernon, WA. 336-9418  
 or contact the municipal court clerk to apply for a public defender by \_\_\_\_\_
- Contact:  prosecutor (336-9460) or  private attorney  today  by \_\_\_\_\_
- Appear at time scheduled above.  Complete action above or appear at time scheduled.
- Take this form to court clerk  immediately  by \_\_\_\_\_
- Contact Defense attorney weekly;  Stay in  Skagit Co.  Washington State.
- Have no intentional contact with Michelle + Ryan Frydenlund
- Stay away from \_\_\_\_\_
- Do not possess or consume any alcohol or controlled substances.  Do not possess any firearms or weapons.
- Do not drive without valid license and insurance.
- Read thoroughly and strictly comply with the terms of the Domestic Violence No Contact Order filed in this case.
- Do not violate any existing protection/no contact/restraining orders from this or any court of competent jurisdiction.
- \_\_\_\_\_
- Comply with any release conditions unless specifically modified by written Court order.

Dated: 5-15, 2008 [Signature]  
JUDGE/COMMISSIONER/CLERK

NOTICE TO DEFENDANT:  
1. IF YOU FAIL TO COMPLETE THE ABOVE ACTION BY THE TIME ABOVE INDICATED, AND/OR FAIL TO APPEAR AT THE TIME SCHEDULED. A WARRANT FOR YOUR ARREST WILL BE ISSUED WITHOUT FURTHER NOTICE TO YOU, AND YOU MAY BE CHARGED WITH AN ADDITIONAL CRIMINAL OFFENSE OF "BAIL JUMPING", AND IF THE CHARGE AGAINST YOU IS A TRAFFIC OFFENSE, YOUR DRIVER'S LICENSE WILL BE SUSPENDED.

DEFENDANT'S STATEMENT:  
I AGREE TO COMPLY WITH THE ABOVE ORDER, WHICH I HAVE READ, OR AGREE TO READ. I UNDERSTAND THAT EACH TERM OF THIS ORDER MARKED WITH AN "X" APPLIES TO ME.

X [Signature]  
(DEFENDANT'S SIGNATURE)

CHUPP  
VIC  
Sub

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

STATE OF WASHINGTON )

Respondent, )

v. )

MICHAEL TURNER, )

Appellant. )

COA NO. 63566-2-1

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
COURTHOUSE ANNEX  
605 S. THIRD  
MOUNT VERNON, WA 98273
  
- [X] MICHAEL TURNER  
DOC NO. 756346  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

2009 DEC 3 PM 4:21  
STATE OF WASHINGTON  
FILED

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF DECEMBER 2009.

x Patrick Mayovsky