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Court of Appeals  
Division I  
State of Washington

NO. 73712-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT JACOBS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN D. GAIN

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

The defendant pled guilty to two counts of first-degree child molestation for molesting E.C., the seven-year-old daughter of his live-in girlfriend. The acts were part of a series of sexual assaults perpetrated upon E.C. by the defendant. At sentencing, the defendant professed his innocence and despite being an unrepentant, unevaluated and untreated sex offender, he asked the court to allow him to have unfettered contact with his biological minor children. Did the trial court appropriately restrict the defendant's ability to have contact with all minor children, including his biological minor children, until such time as a sexual deviancy evaluation could be conducted?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On April 6, 2015, the defendant pled guilty to two counts of first-degree child molestation. CP 13-105. On June 3, 2015, the defendant received a standard range minimum term sentence of 72 months. CP 110, 113.

**2. SUBSTANTIVE FACTS**

The victim of the defendant's molestations was E.C., the seven-year-old daughter of his live-in girlfriend. CP 1-6. On March

5, 2014, prior to the filing of charges, E.C. was interviewed by a child interview specialist. CP 46. E.C. began by telling the interviewer that the defendant was like a stepfather to her. CP 53. However, she then described how the defendant had been molesting and raping her for over a year. CP 49-105. E.C. said that the abuse had started long ago and that the most recent incident having occurred within the two weeks prior to her being interviewed. CP 56-57, 59. E.C. said that initially she did not know that what the defendant was doing to her was wrong. CP 64. She added that the defendant had warned her not to tell her mother. CP 56-57, 59.

E.C. went on to describe how the defendant would have her put lotion on his "private" and rub it until the "fishies" would come out. CP 62-63. She said that the first time it happened, the defendant showed her how to do it. CP 64. Since then, E.C. said that "sometimes I will get the fishies out and sometimes he would." CP 65. The defendant would tell E.C. how good it felt when she rubbed his "private" because she "rub[bed] it perfect for him." CP 73. When she could "hear a squish," that was "the fishies tryin' to come out." CP 67. When the defendant was done, he would tell

E.C. "that's all for today," "[a]nd the next day he would do it again, and the next day he would do it again." CP 68.

E.C. also described how the defendant would stick a "purple thing" in her "private" and turn it on. CP 76-84. E.C. said the purple thing had a black plug-in cord and that it shook and buzzed inside her. CP 76, 80-83. Despite telling the defendant that it hurt, he continued to put the purple thing inside her. CP 84. The "purple thing" was a vibrator that E.C.'s mother kept in her nightstand. CP 47, 80-81.

E.C. went on to disclose that the defendant would molest her when they took showers together. CP 86-88. She described his "private" "sticking out" and that she would be sitting between his legs in the shower, he would be sitting down and he "would move his private around" and "tried to touch my private" with his private. CP 87-88.

Finally, E.C. disclosed how the defendant would have her watch sex videos on his cell phone. CP 89-90. She said the videos showed men rubbing their privates, putting their privates in girls' mouths and making the "fishies go all over her mouth." CP 89-90.

At the end of the interview, E.C. said that she missed the defendant "a lot," that she did not want him to go to jail, and that her mother did not believe her but that she was telling the truth. CP 101, 104. She added that her mother had taken her to see the defendant and that she had warned her not to tell anyone. CP 100, 104.

Prior to the child interview but after E.C. had first disclosed the abuse to her mother, the defendant had texted E.C.'s mother pleading with her not to go to the police, proclaiming that "nothing like this will EVER happen again" and saying that he would undergo therapy. CP 43, 47.

On March 10, 2014, the defendant was charged with two counts of child molestation in the first degree. CP 1-6. At the time of his arraignment, the court imposed two no-contact orders. One, a Sexual Assault Protection Order (SAPO), prohibited the defendant from having any contact with E.C. CP 192-93. The other, an Order Prohibiting Contact (OPC), prohibited the defendant from having any contact with minor children. CP 191.

On April 10, 2014, the defendant moved to modify the OPC to allow contact with his biological minor children. CP 194. The Court denied the motion. CP 194.

On April 6, 2015, the State amended the charges against the defendant, adding two more counts of child molestation in the first degree and one count of rape of a child in the first degree. CP 11-12. In documents filed with the court in anticipation of trial, both the State and the defense indicated that the State would be seeking to introduce evidence that the defendant's phone contained pornography from websites including "daughter themed pornography, incest themed pornography [and] brother and sister themed pornography." CP 108, 212-15. The evidence showed that he also conducted a google search for "real mother and daughter sex." Id. In total, there were 174 pornographic websites listed on the defendant's phone. CP 48.

After being assigned out to trial, the defendant opted to plead guilty in a negotiated plea deal. CP 13-105; 1RP<sup>1</sup> 3-4. The defendant entered an Alford plea<sup>2</sup> of guilty to two counts of child

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP—April 6, 2015 (the plea hearing, and 2RP—June 3, 2015 (the sentencing hearing).

<sup>2</sup> Referring to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). In an Alford plea, "the accused technically does not acknowledge guilt but concedes there is sufficient evidence to support a conviction." In re Cross, 178 Wn.2d 519, 521-22, 309 P.3d 1186 (2013). In accepting an Alford plea, the judge must be satisfied that there is a factual basis for the plea. Id. In this case, a transcript of the child interview of E.C., some of the police reports from the case, and the certification for determination of probable cause and the prosecuting attorney case summary were provided to the court as part of the defendant's plea. CP 30-105.

molestation in the first degree. CP 26; 1RP 25. The State agreed to dismiss the other three counts. CP 33; 1RP 4.

The defendant was sentenced on June 3, 2015. At the sentencing hearing, in a letter to the court, E.C.'s mother informed the court that she has since learned that much of what the defendant had told her about his life had been a lie, like being a deputy sheriff in Georgia and a volunteer firefighter. 2RP 12. She said that the defendant's own family has since informed her that the defendant had done this before but "no one believed that little girl." 2RP 12. In a separate letter to the court, E.C. described how she has nightmares of the defendant getting out of jail and coming after her to "do this to me again." 2RP 13.

The sentencing court also had before it a pre-sentence report prepared by CCO Margaret Alquist of the Department of Corrections. CP 121-32. In the report, Alquist notes that in CPS records from 2011, the then-girlfriend of the defendant took her 12-year-old daughter to see a counselor because she was acting out. CP 129. The young girl disclosed that the defendant had sexually abused her, but she was very reluctant to talk about the abuse. CP 129. Additional CPS records requested by Alquist pertaining to this prior abuse were not received by the time of

sentencing. CP 129. Alquist also noted a history of domestic violence that the defendant blamed on his poor childhood. CP 130.

Alquist recommended that the defendant undergo a polygraph examination in regards to his sexual history and possible sexual contacts with his children and the non-blood-related children of his various girlfriends. CP 131.

As part of her report, Alquist interviewed the defendant. CP 123. The defendant told Alquist that he only pled guilty because statistics showed Washington juries tend to side with victims. Id. He then provided innocent explanations for the allegations. For example, he admitted that he took a shower with E.C. but claimed it was only because E.C. had lied to him when she said she had taken a shower the night before. He professed that he never touched E.C. sexually. Id.

The defendant also told Alquist that one time he and E.C.'s mother were having sex in the living room after which her mother went to work while he remained and began masturbating with some lotion while watching a pornographic video. He then noticed that E.C. was standing in the living room. According to the defendant, the only thing he did was to ask E.C. to throw him a towel. Id.

Overall, the defendant professed that he treated E.C. as if she were his own child. Id. While he may have touched her private areas, it was only for medical purposes. Id.

At sentencing, in exercising his right of allocution, the defendant told Judge Gain that he was not guilty of the crimes he was accused of. 2RP 19. Instead, the defendant claimed he simply made “mistakes” by putting himself “in the situation to be accused of stories like this, false accusations.” 2RP 19. Taking a shower with E.C. was a “split-second decision,” “a mistake” he made because he “just treated [E.C.] as mine.” 2RP 20. Masturbating in the living room where he “could easily be caught,” the defendant professed, was just “stupid.” 2RP 20.

Finally, the defendant asserted that his “beautiful children” were suffering by not being able to have contact with him and that “[a]ll my children love me unconditionally.” 2RP 20-22. He claimed that he could “fill this courtroom” with his nieces and nephews who would all say the same thing. 2RP 22. “The only thing I know,” the defendant told the court, “is helping.”

The court declined to impose the exceptional sentence below the standard range the defendant requested. 2RP 26. Instead, Judge Gain imposed an indeterminate standard range

minimum term sentence of 72 months. CP 110, 113. As a condition of sentence, the defendant was ordered to have no contact for life with E.C. and “[a]ny minors without supervision of a responsible adult who has knowledge of this conviction.” CP 113. As a condition of community custody, the court directed that the defendant “[h]ave no direct or indirect contact with minors.” CP 118.<sup>3</sup>

In imposing sentence and the no-contact restrictions, Judge Gain reiterated some of the concerns of CCO Alquist. He noted that an evaluation had not been done regarding the defendant’s sexual deviancy issues, there was no report of the defendant’s sexual history and whether there were other victims out there, and he had not undergone a polygraph examination. 2RP 28-29. These were items, Judge Gain noted, that would normally occur in this type of case and “something that will occur.” 2RP 29.

As part of the conditions of community custody, Judge Gain ordered the defendant to “obtain a sexual deviancy evaluation” (CP 117 -- Special Condition # 4) and “submit to and be available for polygraph examination as directed to monitor compliance with conditions of supervision” (CP 118 -- Special Condition # 13).

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<sup>3</sup> The court also entered a separate Sexual Assault Protection Order prohibiting the defendant from having any contact with E.C. CP 224-25.

**C. ARGUMENT**

**JUDGE GAIN DID NOT ABUSE HIS DISCRETION IN RESTRICTING THE DEFENDANT'S CONTACT WITH ALL MINOR CHILDREN UNTIL A SEXUAL DEVIANCY EVALUATION COULD BE COMPLETED**

The defendant challenges the sentencing condition restricting his contact with all minor children because it includes his biological children. This argument should be rejected. The trial court had ample reason to believe that until a sexual deviancy evaluation could be completed and the evidence showed otherwise, the defendant posed a risk to any minor child, including his biological children. Nothing in the record supports the drawing of an artificial demarcation whereby the defendant's biological children would be safe from molestation but other children, even children he "treated as his own," would not be safe.

The sentencing court possessed the power and authority to restrict the defendant's contact with minor children pursuant to RCW 9.94A.703(3)(b), (f) and RCW 9.94A.505(9). RCW 9.94A.703(3)(b) provides the sentencing court with the authority to impose a no-contact order with "a specified class of individuals." RCW 9.94A.505(9) and RCW 9.94A.703(3)(f) provides the sentencing court with the authority to impose "crime-related

prohibitions.” A “crime-related prohibition” means “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). A no-contact order is a crime-related prohibition. In re Rainey, 168 Wn.2d 367, 376, 229 P.3d 686 (2010).

The imposition of crime-related prohibitions is fact specific and based upon the sentencing judge’s in-person appraisal of the case and the offender. Id. at 374-75. Thus, this Court reviews the imposition of a no-contact order under an abuse of discretion standard. Id. An abuse of discretion is met where a defendant can show that no reasonable person would have taken the position adopted by the trial court or where the trial court has applied an incorrect legal standard. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982); Rainey, 168 Wn.2d at 375.

A parent does have a fundamental liberty interest in the care, custody, and control of their children.<sup>4</sup> State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). At the same time, it is

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<sup>4</sup> Here, there is no evidence that the defendant actually exercised care, custody or control of any of his biological children. In fact, it does not appear that any of the defendant’s biological children lived with him at the time of his arrest. See CP 124-25, 128.

The United States Supreme Court has stated that a state’s power to act to protect children as *parens patriae* is not nullified merely because the parent grounds his claim to control his children on a constitutional right. Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed 645 (1944).

“well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a *parens patriae* right and responsibility to intervene to protect the child.” In re Sumey, 94 Wn.2d 757, 762-63, 621 P.2d 108 (1980) (citing Parham v. J. R., 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); Wisconsin v. Yoder, 406 U.S. 205, 230, 233-34, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). As the Washington Supreme Court has stated:

Although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable legal deference ... they are not absolute and must yield to fundamental rights of the child or important interests of the State.

State v. Koome, 84 Wn.2d 901, 907, 530 P.2d 260 (1975).

In short, the prevention of harm to children is a compelling state interest. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008); Ancira, 107 Wn. App. at 654-55. Thus, 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 to

protect and prevent harm to children.<sup>5</sup> State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993); State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

A few substantially similar cases support the trial court's decision here. See Berg, supra; State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010); State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Berg was convicted at trial of child rape and child molestation for sexually assaulting the 14-year-old daughter of his live-in girlfriend. At trial, similar to the defendant here, Berg claimed that he had accidental physical contact with the victim, a child that he asserted he parented for four years and who felt more comfortable with him than any other adult. Berg, 147 Wn. App. at 930.

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<sup>5</sup> Riley provides a good example of a broad restriction on fundamental rights that was deemed permissible. Riley was convicted of computer trespass and was prohibited from communicating with all other persons via computer bulletin boards. Riley claimed this violated his fundamental right of association. The Supreme Court held that the sentencing court's restriction on internet access was indeed broad but it was a permissible and reasonable crime related means of discouraging Riley's communication with other hackers. Riley, at 37-38.

At sentencing, the trial court imposed a restriction on Berg's contact with any minor female. Berg requested that an exception be made for his biological child – his two-year-old daughter. The sentencing judge denied Berg's request, stating that,

[U]nless I get some report back from a treatment provider that he is safe to be with them. I mean, he was—the offense was against a person that was essentially his child, not his child, but, I mean, it was in living in that same arrangement. So to suggest that he could go back to what was virtually the same arrangement again with another young girl would only be putting him back in the same situation where he was convicted. I can't—I can't do that.

Id. at 941-42.

This Court upheld the imposition of the no-contact restriction. This Court recognized that despite the fact that the defendant's victim was not related to him, Berg acted as the victim's parent and thus, the order was reasonably necessary to protect others from similar harm -- even if the restriction included his own child. Id. at 943-44.

Corbett was convicted of four counts of rape for sexually assaulting the six-year-old daughter of his wife. Corbett had two biological sons who lived with their mother. The trial court imposed the sentencing condition that prohibited Corbett from having contact

with any minor, which included his two sons. Corbett challenged the sentencing condition, claiming that the State had failed to show he was a danger to his sons. Corbett, 158 Wn. App. at 597.

The appellate court upheld the sentencing condition and noted the clear similarities to Berg. The court noted Corbett lived with the victim as his stepdaughter. Like Berg and the defendant here, Corbett assumed a parenting role and then sexually assaulted the minor entrusted to his care. Id. at 599. The court upheld the imposition of the no-contact order, finding it “reasonably necessary to protect Corbett’s children because of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children.” Id.

Riles was a consolidated case of State v. Riles and State v. Gholston. Riles was convicted for anally raping a six-year-old boy. As a condition of sentence, Riles was prohibited from having contact with any minor children. Gholston was convicted of raping a 19-year-old girl. The trial court imposed the same condition of sentence as Riles, that Gholston have no contact with minor children. The Supreme Court upheld the no-contact provision for

Riles while ordering that the no-contact provision for Gholston be struck.

The "specified class of individuals" seems in context to require some relationship to the crime. It would be logical for a sex offender who victimizes a child to be prohibited from contact with that child, as well as from contact with other children. It is not reasonable, though, to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime.

Riles, 135 Wn.2d at 350.

Here, Judge Gain had before him a man who pled guilty to two counts of child molestation for acts that occurred over a lengthy period of time, but acts the defendant professed never occurred. Instead, the defendant provided innocent explanations for all of the victim's claims. This same man standing before the court had been accused in the past of sexually molesting another child who had lived in his household. Contrary to some other cases Judge Gain had seen, no sexual deviancy examination had been provided to the court. But just like the three cases cited above, Judge Gain had every reason to impose a no-contact provision with minor children restriction.

The defendant's argument relies heavily on what he calls an "absence of evidence" that he is a danger to his biological children. This argument fails.

First, there is nothing that was before the trial court supporting the existence of a demarcation between minors related to the defendant and minors who are not. Rather, just like the situations in Corbett and Berg, the defendant took on a parenting role -- a position of trust, wherein he then committed his sexual assaults.

Second, the demarcation suggested by the defendant -- blood-related minors versus non-blood-related minors, is completely artificial. An argument could just as easily be made that the demarcation should be based on the sex of the victim, the specific age of the victim, or even the color of the victim's hair. The point is, what the defendant considers an absence of evidence, is in fact evidence. The court had no sexual deviancy evaluation that would elucidate the risk of harm, the type of threat that the defendant posed or who he may prey upon. Thus, it was completely reasonable to prohibit a child sex offender from having contact with other minor children until such time as a sexual

deviancy evaluation could be conducted – an evaluation ordered by the court.<sup>6</sup>

Finally, the defendant relies on a number of cases that are inapposite. Ancira, *supra*; Rainey, *supra*; State v. Howard, 182 Wn. App. 91, 328 P.3d 969 (2014); State v. Sanford, 128 Wn. App. 280, 115 P.3d 368 (2005), all involve domestic violence cases wherein minor children were not the prime targets or victims of the defendants' criminal acts.

Ancira was a domestic violence no-contact order case involving Ancira's wife wherein the trial court entered an order preventing Ancira from contacting his children. The only identified potential harm to Ancira's children was the witnessing of domestic violence; a harm eliminated by the no-contact order with his wife.

Ancira, 107 Wn. App. at 655-56.

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<sup>6</sup> While Judge Gain seemed to leave the door open to the defendant returning directly to his court after an evaluation was conducted, other avenues are available to modifying the no-contact provision should it be deemed appropriate. In State v. Simpson, 136 Wn. App. 812, 150 P.3d 1167 (2007), an adult rape case, the defendant challenged the condition of sentence requiring him to obtain explicit consent from any sex partner as well as approval of his therapist and community corrections officer. On review, the court declined to rule directly on Simpson's claim that the restriction was overly broad and unduly burdensome. Rather, the court stated that it was speculative at this point, but that if upon release from custody, the post-release supervision turned out to be too intrusive, "Title 16 of the Rules of Appellate Procedure allows him to seek relief by way of a personal restraint petition." Id.

Sanford involved a domestic violence assault against the mother of his children. A no-contact order with the children was improperly imposed where there was no evidence the children witnessed the assault and no evidence Sanford had ever committed or threatened violence against his children. Sanford, 128 Wn. App. at 289.

Howard involved the defendant attempting to shoot his wife – with their children being present at the scene. The sentencing court imposed a lifetime no-contact order banning Howard from ever seeing his children. Other than recognizing that the children were impacted from having witnessed the shooting, the reviewing court could discern nothing in the record supporting a lifetime ban. Howard, 128 Wn. App. at 102.

Rainey involved a “bitter divorce” wherein Rainey took his three-year-old daughter and used the threat of leaving the country with her to harass his wife -- who was seeing another man. The sentencing court imposed a lifetime no-contact order banning Rainey from ever seeing his child. Because the trial court did not articulate any reason why a lifetime no-contact order was

necessary to protect Rainey's child, the order was struck. Rainey, 168 Wn.2d at 382.

State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000), another case the defendant relies, involved a teacher who engaged in a long-term 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 child rape, the court entered an order restricting Letourneau's contact with her own biological children. This Court reversed because there was no evidence that Letourneau was a pedophile who would molest her own children. Letourneau, at 427.

In short, the cases relied upon by the defendant are distinguishable, all based on factual situations that do not exist here. The defendant has not shown that Judge Gain acted anything other than appropriately when he entered orders protecting all minor children from the defendant, a convicted child molester.

**D. CONCLUSION**

For the reasons cited above, this Court should uphold the trial court's decision to impose a no-contact order barring the defendant from having contact with all minor children.

DATED this 28 day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, David Koch, containing a copy of the Brief of Respondent, in STATE V. JACOBS, Cause No. 73712-1-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.

  
\_\_\_\_\_  
Name  
Done in Seattle, Washington

09-28-16  
Date