

See

NO. 39331-0-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES CODY FARRIS,

Appellant.

BRIEF OF RESPONDENT

**SEAN BRITTAIN
W.S.B.A #36804
Deputy Prosecutor
for Respondent**

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PM 1/28/10

Table of Contents

	Page
I. ISSUES	1
II. SHORT ANSWERS	1
III. FACTS	1
IV. ARGUMENTS	1
1. THE APPELLANT’S SENTENCE SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT FIND A SUBSTANTIAL AND COMPELLING REASON TO IMPOSE AN EXCEPTIONAL SENTENCE.....	1
2. THE APPELLANT’S SENTENCE WITHIN THE STANDARD RANGE SHOULD BE AFFIRMED BECAUSE HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	6
3. THE COURT HAD A VALID AND JUSTIFIABLE REASON TO ISSUE A NO CONTACT ORDER PROHIBITING THE APPELLANT FROM HAVING CONTACT WITH HIS DAUGHTER; THEREFORE HIS RIGHT TO PARENT WAS NOT VIOLATED.....	9
V. CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
Cases	
<i>In re Breedlove</i> , 138 Wn.2d 298 (1999)	4
<i>In re Dependency of C.B.</i> , 79 Wn. App. 686 (1995).....	10
<i>In re Pawling</i> , 101 Wn.2d 392 (1984)	10
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....	7
<i>State v. Ammons</i> , 105 Wn.2d 175, <i>cert. denied</i> , 479 U.S. 930 (1986).....	2
<i>State v. Brockob</i> , 159 Wash. 2d 311, 150 P.3d 59 (2006)	8
<i>State v. Ermels</i> , 156 Wn.2d 528 (2006)	5
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322 (1997)	2
<i>State v. Grayson</i> , 154 Wn.2d 333 (2005).....	2
<i>State v. Jury</i> , 19 Wash.App. 256, 576 P.2d 1302, 1306 (1978).....	7
<i>State v. Khanteechit</i> , 101 Wn. App. 137 (2000)	2
<i>State v. Letourneau</i> , 100 Wn. App. 424 (2000)	10
<i>State v. Lopez</i> , 107 Wash.App. 270, 27 P.3d 237 (2001), <i>aff'd</i> , 147 Wash.2d 515, 55 P.3d 609 (2002)	8
<i>State v. Myers</i> , 86 Wash.2d 419, 545 P.2d 538 (1976).....	7
<i>State v. Osman</i> , 157 Wn.2d 474(2006).....	2
<i>State v. Riles</i> , 135 Wn.2d 326 (1998)	10
<i>State v. Riley</i> , 121 Wn.2d 22 (1993)	9

<i>State v. Sardinia</i> , 42 Wash.App. 533, 713 P.2d 122, <i>review denied</i> , 105 Wash.2d 1013 (1986)	7
<i>State v. Visitacion</i> , 55 Wash.App. 166, 776 P.2d 986, 990 (1989).....	7
<i>State v. Warren</i> , 165 Wn.2d 17, 32 (2008)	9
<i>Strickland</i> , 466 U.S. at 689, 104 S.Ct. 2052	8
Statutes	
RCW 9.94A.030(13).....	9
RCW 9.94A.535.....	3
RCW 9.94A.585(1).....	2
Other Authorities	
U.S. Const. Amend. VI, Wash. Const. art. 1, § 22	7

I. ISSUES

- 1. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT SENTENCED THE APPELLANT TO THE STANDARD RANGE?**
- 2. DID THE APPELLANT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL?**
- 3. DID THE TRIAL COURT VIOLATE THE APPELLANT'S RIGHT TO PARENT WHEN IT IMPOSED A NO CONTACT ORDER AS A CONDITION OF HIS SENTENCE?**

II. SHORT ANSWERS

- 1. NO. THE TRIAL COURT DID NOT FIND A SUBSTANTIAL AND COMPELLING REASON TO IMPOSE AN EXCEPTIONAL SENTENCE; THEREFORE, IT DID NOT ABUSE ITS DISCRETION WHEN SENTENCING THE APPELLANT TO THE STANDARD RANGE.**
- 2. NO. THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL**
- 3. NO. THE NO CONTACT ORDER WAS REASONABLY NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST; THEREFORE, THE APPELLANT'S RIGHT TO PARENT WAS NOT VIOLATED.**

III. FACTS

The State agrees with the Statement of the Case given in the Brief of Appellant.

IV. ARGUMENTS

- 1. THE APPELLANT'S SENTENCE SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT FIND A**

SUBSTANTIAL AND COMPELLING REASON TO IMPOSE AN EXCEPTIONAL SENTENCE.

As a general rule, “a defendant cannot appeal a sentence within the standard range.” RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481 (2006). However, “an appellant...is not precluded from challenging on appeal the procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 713, *cert. denied*, 479 U.S. 930 (1986). “[R]eview is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 330 (1997); *Osman*, 157 Wn.2d at 482 (following *State v. Khanteechit*, 101 Wn. App. 137, 139 (2000)).

“While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342 (2005) (following *Garcia-Martinez*, 88 Wn. App. at 330). “[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” *Id.*

In *Garcia-Martinez*, the appellant was convicted of delivering cocaine. At sentencing, the appellant requested an exceptional sentence below the standard range, arguing that the lower sentence would save taxpayers' money, that his involvement with the drug transaction was minimal, and that the amount of cocaine used in the transaction was unusually small. *Id.* at 325. In rejecting the appellant's arguments, the trial court noted that an exceptional sentence below the standard range would not be supported by the facts of the case. *Id.* The Court of Appeals upheld the trial court's refusal to impose an exceptional sentence downward. "Without an adequate factual or legal basis to permit it to step outside the standard range, the court decided it could not impose a sentence other than one within the standard range. This is an appropriate exercise of sentencing discretion." *Id.* at 331.

Under the SRA, a court may impose a sentence outside of the standard range if it finds substantial and compelling reasons to do so. RCW 9.94A.535. Before an exceptional sentence downward can be implemented, the court must find a mitigating circumstance, which must be established by a preponderance of the evidence. RCW 9.94A.535(1). Alternatively, a substantial and compelling reason can be justified when both parties have stipulated to an exceptional sentence and the court finds

the stipulation is consistent with the interests of justice. RCW 9.94A.535(2)(a); See *In re Breedlove*, 138 Wn.2d 298 (1999).

Here, the trial court did not abuse its discretion in sentencing the Appellant to the standard range. Simply put, the trial court did not find a substantial and compelling reason to give the Appellant an exceptional sentence below the standard range. There was no stipulation as to the exceptional sentence and the court did not find a mitigating factor. Because neither of these elements was present, the trial court was justified in sentencing the Appellant to the standard range.

As stated above, a stipulation between the parties is a justification to support an exceptional sentence. In the present matter, no formal stipulation was ever agreed upon. At the sentencing hearing, the State made it very clear that its recommendation would be based upon whether the Appellant agreed to the State's plea offer. The State explained to the court that its basis for offering the exceptional sentence was the invalid 1996 order weighed against the Appellant's criminal history. RP 10-11. Although the State was willing to agree that the invalid order was legal justification for the stipulation, that agreement was contingent upon the Appellant agreeing to the terms of the 51 month plea offer. When the Appellant chose to make his own recommendation, any form of an

agreement became null and void. Therefore, no stipulation as to the exceptional sentence was ever put in front of the court.

The Appellant argues that this case is similar to the *Ermels* case. The main factor that distinguishes the present matter from *Ermels* is that the stipulation here required the Appellant to agree to the State's recommendation. In *Ermels*, the plain language of the appellant's plea agreement indicated that he was not agreeing to the State's recommendation. *State v. Ermels*, 156 Wn.2d 528, 533 (2006). Clearly, the State understood that and it was part of the stipulation. Here, as made clear by the State, the stipulation directly involved the Appellant agreeing to the State's recommendation. Once again, once the Appellant sought to make his own recommendation, the stipulation became void. Therefore, the State never agreed to a legal basis for the exceptional sentence and no stipulation was put forth.

A second basis for an exceptional sentence below the standard range is when the court finds a mitigating factor has been established by a preponderance of the evidence. As with the *Garcia-Martinez* case, the Appellant made a request for an exceptional sentence and put forth his argument as to why the facts of the present case were a mitigating factor. The court listened to the Appellant's argument and determined that there was no legal basis for granting an exceptional sentence. The court stated,

“I don’t know any legal basis for an exceptional other than the agreement.” RP 13. Despite the Appellant’s assertions, this does not indicate that the court erroneously believed that only through a stipulation could the court issue an exceptional sentence; rather, what this indicates is that absent an agreement, there were no mitigating factors that supported an exceptional sentence.

The trial court allowed the Appellant to make his request for an exceptional sentence below the standard range. The trial court allowed the Appellant to put forth his reasons as to why an exceptional sentence should be given. The trial court determined that no stipulation was present. The trial court did not find any other legal basis for giving an exceptional sentence, thereby finding that no mitigating factors established a substantial and compelling reason. Because of these factors, “[w]ithout an adequate factual or legal basis to permit it to step outside the standard range, the court decided it could not impose a sentence other than one within the standard range. This is an appropriate exercise of sentencing discretion.” *Garcia-Martinez*, 88 Wn. App. at 331.

2. THE APPELLANT’S SENTENCE WITHIN THE STANDARD RANGE SHOULD BE AFFIRMED BECAUSE HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wash.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. Const. Amend. VI, Wash. Const. art. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wash.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wash.2d 419, 424, 545 P.2d 538 (1976). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263, 576 P.2d at 1307.

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for

the counsel's errors, the result of the proceeding would have been different." *Id.* citing *State v. Sardinia*, 42 Wash.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986). "A defendant must meet both prongs to satisfy the test." *State v. Brockob*, 159 Wash. 2d 311, 344-45, 150 P.3d 59 (2006).

Deference will be given to counsel's performance in order to "eliminate the distorting effects of hindsight" and the reviewing appellate court must indulge in a strong presumption that counsel's performance is within the broad range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *State v. Lopez*, 107 Wash.App. 270, 275, 27 P.3d 237 (2001), *aff'd*, 147 Wash.2d 515, 55 P.3d 609 (2002).

Here, the Appellant was not denied effective assistance of counsel. The Appellant argues that his counsel should have informed the court that it had discretion to impose an exceptional sentence based on a failed defense. This argument is without merit. The State recognizes that it is a legal defense to a charge of violating a no contact order that the underlying order was invalid at the time of the contact. The State also recognizes that in the present matter, the underlying order of the *original* charge, the 1996 order, was invalid. What the Appellant fails to recognize is that he was convicted of violating a pre-trial no contact order that was effective prior to the original charge being dismissed.

Simply put, it is not a defense to a charge of violating a no contact order that the current order was valid at the time of the contact, but the Appellant merely “jumped the gun.” The Appellant’s counsel never notified the court of a failed defense because the Appellant committed a new crime while the original charge was being dealt with. Therefore, there was no failed defense argument to put in front of the court. The Appellant cannot argue that his counsel was ineffective because he did not put forth an argument that did not exist. Finally, the Appellant was not prejudiced by his counsel’s tactics; rather, he was prejudiced by his *own actions*.

3. THE COURT HAD A VALID AND JUSTIFIABLE REASON TO ISSUE A NO CONTACT ORDER PROHIBITING THE APPELLANT FROM HAVING CONTACT WITH HIS DAUGHTER; THEREFORE HIS RIGHT TO PARENT WAS NOT VIOLATED.

Under the SRA, trial courts may impose crime-related prohibitions. *State v. Warren*, 165 Wn.2d 17, 32 (2008). These prohibitions are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(13). The standard of review is abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37 (1993). If the conditions are reasonable related to the crime, they are usually upheld. *Id.* at 36-37.

When sentencing conditions interfere with fundamental rights, they must be reasonably necessary to accomplish the State's essential needs. *State v. Riles*, 135 Wn.2d 326, 347 (1998). The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children. *State v. Letourneau*, 100 Wn. App. 424, 439 (2000). "When the rights of parents and the welfare of their children conflict, the welfare of the minor children is paramount." *In re Dependency of C.B.*, 79 Wn. App. 686, 690 (1995) (following *In re Pawling*, 101 Wn.2d 392, 399 (1984)).

Here, the trial court properly issued no contact orders prohibiting the Appellant from contacting his daughter. The Appellant cannot contest the fact that he was convicted of violating a no contact order, a crime in which his daughter Sage was the victim. When contacted by the police, Sage told them that she felt endangered by the Appellant's actions. This fact has never been contested. At sentencing, the State informed the court that Sage's mother wanted a continuing no contact order for her minor child. This was not objected to. Based on the fact that the Appellant was convicted of a domestic violence crime against his daughter, that his daughter told police that she was afraid of the Appellant, and because her mother wanted a continuing order to be put into place, the court's issuance

of the new no contact order was both directly related to the circumstance of the crime and reasonably necessary to prevent further harm to Sage.

The Appellant bases his argument on prior case law in which no contact orders were put in place to protect children that were not the victims of the crimes. This reliance is misguided. This is not a case involving a separate person from the victim being protected by the no contact order. This is a case in which the court issued a no contact order protecting *the* victim of the crime. The Appellant also argues that had Sage's mother really wanted the no contact order in effect, she would have renewed the expired 1996 order. What the Appellant fails to realize here is that at the time the Appellant was charged with the original violation, no one was aware that the 1996 order was invalid.

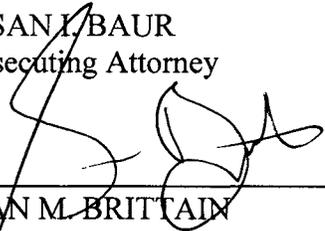
Simply put, this is not a matter for the family court to address. The Appellant committed an act of domestic violence against his daughter. She informed the investigating officers that she felt endangered by the Appellant's actions. The court's issuance of the no contact order arises from the exact circumstances of the crime. The no contact order is reasonably necessary to maintain the welfare and safety of the Appellant's daughter.

V. CONCLUSION

As stated above, the Appellant's appeal should be denied because there was no substantial and compelling reason for an exceptional sentence to be given, he was not denied effective assistance of counsel, and the no contact order with his daughter arises from the circumstances of the crime.

Respectfully submitted this 21 day of January, 2010

SUSAN I. BAUR
Prosecuting Attorney

By 
SEAN M. BRITTAIN
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Deputy Prosecuting Attorney
Representing Respondent

**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO.39331-0-II
)	Cowlitz County No.
Respondent,)	08-1-01475-1
)	
vs.)	CERTIFICATE OF
)	MAILING
JAMES CODY FARRIS,)	
)	
Appellant.)	
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I, Michelle Sasser, certify and declare:

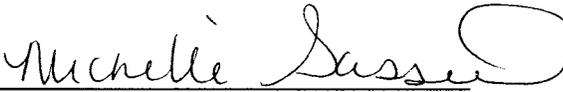
That on the 28th day of January, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Dana M. Lind
Attorney at law
1908 East Madison
Seattle, WA 98122

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

Dated this 28th day of January, 2010.


Michelle Sasser
Michelle Sasser