

NO. 39577-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JAMES MONTE STOGSDILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 04-1-03718-4

BRIEF OF RESPONDENT

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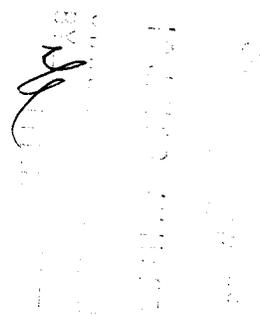


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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied defendant's motion to modify or vacate the sentence condition that requires defendant to have no contact with minor children where this condition is an appropriate crime-related prohibition that is reasonably necessary to prevent harm to the children.

B. STATEMENT OF THE CASE.

This is an appeal from the denial of a motion by Appellant James Monte Stogsdill, hereinafter, the "defendant", to modify or vacate a sentence condition that requires him not to have contact with minor children.

On March 2, 2006, the defendant pled guilty to an Amended Information which charged one count of rape of a child in the second degree. CP 29-40. In paragraph 11 of his Statement of Defendant on Plea of Guilty, the defendant wrote that, "[i]n Pierce County, Washington between 09/02/01 and 03/30/03, I engaged in sexual intercourse with A.T., who was between 12 and 14, more than 36 mo. younger than I and not my wife." *Id.* at 35. He also wrote that "H.W. was between 14 and 16 and not my wife", and that he "was more than 36 mo older and had sexual intercourse with her." *Id.*

On March 21, 2006, prior to sentencing, the defendant filed a Psychosexual Evaluation and Treatment Plan prepared by Certified Sex Offender Treatment Provider Michael Comte, a letter prepared by Case Manager Rodney Ehli of Lakeside-Milam Recovery Centers, and a letter regarding a polygraph examination conducted by Rick Minnich. CP 41-6.

According to the Psychosexual Evaluation and Treatment Plan prepared by Mr. Comte, the defendant “was accused of sexually assaulting his live-in partner’s daughter, AT on a number of occasions between the child’s ages of twelve and fourteen.” CP 42. A.T. “described fellatio, cunnilingus and [the defendant] touching her vaginal area and breasts on a number of occasions during that two-year period.” *Id.* Mr. Comte noted that the defendant’s “admissions are consistent with the victim’s report.” *Id.* at 43. A.T. said that the defendant “ejaculated in her mouth on at least one occasion.” *Id.* at 49. Defendant “said it is possible that he did, but he could not recall that occurrence.” *Id.*

H.W., a “girl unrelated to [the defendant]”, *Id.*, reported that defendant assaulted her on a number of occasions a few years before and “specifically described him touching her breasts and vaginal area and implied digital penetration of her vagina as often as three-to-four times a week over a period of time.” *Id.* at 43. “She said that on one occasion he threatened to kill her if she disclosed.” *Id.* Mr. Comte noted that the

defendant “admits to sexually assaulting [H.W.] on a number of occasions, but denied ever threatening her.” *Id.*

According to the letter prepared by Mr. Minnich, the defendant submitted to a polygraph examination, the purpose of which was to “verify his sexual history.” *Id.* at 58. During that examination, the defendant reported that he “sexually assaulted” his then four-year-old biological daughter, T., “on four occasions over a one-year period.” *Id.* at 59.

The defendant’s matter came before the trial court for sentencing on March 2, 2006, CP 64-76, and the court sentenced the defendant to the high-end of the standard range, 136 months to life in total confinement. RP 3/31/06 38; CP 64-76.

The trial court imposed, as part of the defendant’s sentence, a condition which required that “Defendant shall have no contact with: minor children.” CP 71. At the time sentence was imposed, Defendant had three minor biological children: T. and K., both daughters, and B., a son who was 15 years of age. CP 59.

The defendant appealed his conviction and sentence, but did not choose to raise any issue with respect to the no-contact condition. CP 83-94. The Court of Appeals affirmed. *Id.*

On September 5, 2007, over a year after his sentencing, the defendant filed two motions to modify or correct sentence and judgment.

See CP 1-7. In one, he moved the trial court to allow him to withdraw his guilty plea and in the other, he moved to modify the no-contact condition to allow him to contact his minor biological children. CP 1-3; CP 4-7. At the time this motion was brought, his minor son was approximately 17 years of age, daughter T. was about 12 and daughter K. was about 11. *See* CP 41-63. The defendant did not file or present a new evaluation or any new information indicating that the circumstances underlying his original psychosexual evaluation had changed. *See* CP 1-97; RP 03/31/2006 1-40; RP 07/24/2009 1-15.

On October 16, 2007, the court denied both motions “based on the written material submitted.” CP 8-9; CP 10-11. The defendant appealed and the Court of Appeals remanded for a show cause hearing. CP 95-101.

That hearing was conducted on July 24, 2009. Again, the defendant did not present any new information indicating that the circumstances underlying his original psychosexual evaluation had changed, *see* CP 1-97; RP 03/31/2006 1-40; RP 07/24/2009 1-15, and again, the court denied his motions. CP 19-20; RP 07/24/2009 1-14. In so doing, it noted “that the defendant admitted to sexual contact with his own biological child during his sexual deviancy evaluation” and found that the defendant’s children were properly included in the no-contact condition. CP 19.

On July 28, 2009, the defendant filed a timely notice of appeal seeking review of the trial court's denial of his motion to modify the no-contact condition so as to allow contact with his minor children. CP 21-22.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO MODIFY OR VACATE THE SENTENCE CONDITION THAT REQUIRES HIM TO HAVE NO CONTACT WITH MINOR CHILDREN BECAUSE THIS CONDITION IS AN APPROPRIATE CRIME-RELATED PROHIBITION THAT IS REASONABLY NECESSARY TO PREVENT HARM TO THE CHILDREN.

“As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions.” RCW 9.94A.505(8). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(13).

The Washington State Supreme Court has concluded that RCW 9.94A.505(8) and RCW 9.94A.030(13) together confer “the more specific authority to ‘prohibit[] the offender from having any contact with other specified individuals or a specific class of individuals’” for a period of

time up to the maximum allowable sentence. *State v. Armendariz*, 160 Wn.2d 106, 114, 156 P.3d 201 (2007)(quoting former RCW 9.94A.120(20)). The imposition of such crime-related prohibitions is generally reviewed for abuse of discretion and “[a]buse of discretion occurs when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008)(quoting *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)).

Although, “[p]arents have a fundamental liberty interest in the care, custody, and control of their children,” *State v. Foster*, 128 Wn. App. 932, 938, 117 P.2d 1175 (2005), a parent’s constitutional right does “not afford an absolute protection against State interference with the family relationship,” *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980). Indeed, “[c]ourts have recognized prevention of harm to children to be a compelling state interest”, *Letourneau*, 100 Wn. App. at 445, and that “the State has a *parens patriae* right and responsibility to intervene to protect the child.” *Sumey*, 94 Wn.2d at 762; *Ancira*, 107 Wn. App. at 654. Therefore, “[t]he 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. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001)(citing *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000)). “No causal link need be established between the

condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime.” *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

In the present case, defendant pleaded guilty to rape of a child in the second degree, RCW 9A.44.076, for engaging in sexual intercourse with both A.T., when she was 12 years of age, and H.W., when she was 14 years of age. CP 29-40. The sentencing court, in its subsequent judgment and sentence, ordered that defendant “shall have no contact with: minor children”. CP 71. This condition is clearly directly related to the circumstances of defendant’s crime, which entailed having sexual intercourse with minor children.

While the condition does interfere with the defendant’s right to the care, custody, and control of his own minor children, at present, his daughters, T. and K., it is reasonably necessary to prevent harm to these children. Defendant admitted before his plea was even entered, to “sexually assaulting his [then] four-year-old biological daughter on four occasions over a one-year period”. CP 43. He admitted to “fondling” his daughter’s “unclothed vaginal area” and to twice “performing cunnilingus” on her. *Id.* In other words, he admitted to conduct more egregious than that underlying his conviction, *see* RCW 9A.44.073 (defining rape of a child in the first degree); *compare* RCW 9A.44.076, conduct for which he was ordered not to have any contact with A.T. and

H.W. Therefore, if his own children are to be protected from defendant just as A.T. and H.W. are, defendant must be prevented from having any contact with them, just as he is prohibited from having any contact with A.T. and H.W.

Michael Comte, the Certified Sex Offender Treatment Provider, who performed a psychosexual evaluation on defendant, also concluded that a no-contact provision was a necessary condition to prevent harm by defendant to minor children. *Id.* at 51. Specifically, Mr. Comte noted that the defendant “is now admitting in his thirty-third year sexually assaulting his four-year-old daughter on four occasions over a one-year period by fondling her unclothed vaginal area and performing cunnilingus twice.” *Id.* at 43. Defendant also admits in his thirty-third year sexual contact with six females between the ages of thirteen and seventeen, which involved mutual sexual fondling, mutual oral sex and penile-vaginal intercourse in his vehicle.” *Id.* Mr. Comte’s “diagnostic impressions” of the defendant include “Alcoholism, Methamphetamine addiction and his Antisocial Personality Disorder.” *Id.* at 50. Mr. Comte found that the defendant “is a hebephile and a sexual addict” with “the possibility of pedophilic leanings.” *Id.* He noted that the defendant “is obviously a sexual addict and when disinhibited, he would be at extreme risk for further sexual assault.” *Id.*

The defendant never filed or presented a new evaluation or any other information or documentation indicating that the circumstances underlying his original psychosexual evaluation with Mr. Comte had changed. *See* CP 1-97; RP 03/31/2006 1-40; RP 07/24/2009 1-15.

As a result, the only information before the trial court was that the defendant “is a hebephile and a sexual addict” with “the possibility of pedophilic leanings,” CP 50, who has already repeatedly raped one of his minor children. *See, e.g.* CP 49. Therefore, a condition requiring him to have no contact with these children is reasonably necessary to prevent harm to these children. Because the 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, this condition does not unconstitutionally infringe upon the defendant’s right to the care, custody, and control of his children. Therefore, the defendant’s argument that the no-contact condition violates his constitutional right to parent fails.

Because that condition is an appropriate crime-related condition that is reasonably necessary to prevent harm to minor children, including the defendant’s minor children, the trial court’s order denying Defendant’s motion to modify or vacate that condition was proper and should be affirmed.

Although the defendant relies heavily on the *Letourneau*, *Ancira*, and *Berg* cases for the proposition that the trial court unnecessarily

infringed on his parental rights, each of these cases is distinguishable, all indicate that the no-contact condition at issue is reasonably necessary to protect defendant's children, and therefore, all indicate that the trial court's denial of the defendant's motion to modify or vacate that condition was proper.

Letourneau pled guilty to two counts of rape of a child in the second degree, *Letourneau* 100 Wn. App. at 426, after engaging in sexual intercourse with a student who "was not a family member and did not live in the home." *Berg*, 147 Wn. App. at 943. She was granted a special sex offender sentencing alternative, which was revoked three months later after she was found in the company of her original victim. *Letourneau* 100 Wn. App. at 426. Letourneau was then sentenced to 89 months of total confinement, and, as a condition of that sentence, "directed that in-person contact with minor children, including [her] own biological minor children, be supervised by a responsible adult having knowledge of the convictions who is approved by the Department of Corrections or by the court". *Id.* On review, the Court of Appeals struck the provision that "require[d] Letourneau's in-person contact with her own minor children, be supervised because there is insufficient evidence in the record that such a restriction is reasonably necessary to prevent Letourneau from sexually molesting her children." *Id.* at 427. The court noted that "[t]he record contains no evidence of past molestation of any of these children", that

there was no evidence to indicate that Letourneau sexually abused “any other children”, and that “[t]here was no evidence that Ms. Letourneau experiences pedophilia or any other paraphilia.” *Id.* at 439. “On this record,” the *Letourneau* Court concluded that the State failed to demonstrate that the no-contact condition was “reasonably necessary to protect [Letourneau’s] children from the harm of sexual molestation by their mother.” *Id.* Instead, the Court held that “[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.” *Id.* at 442.

Unlike *Letourneau*, in which the record contained (1) “no evidence of past molestation of any of [the defendant’s] children,” (2) no evidence of sexual abuse of any other children, and (3) no evidence that the defendant “experiences pedophilia or any other paraphilia,” *Id.* at 439, there is evidence of all three in the present case. The present case contains evidence that Defendant repeatedly raped his own biological child. *See e.g.*, CP 43, 59. The present case contains evidence and a conviction of raping more than one child, *see* CP 43, 58-59, CP 64-76 and CP 29-40, and the present case includes a finding by a certified sex offender treatment provider that Defendant “is a hebephile and a sexual addict” with “the possibility of pedophilic leanings”, who, when “disinhibited . . . would be at extreme risk for further sexual assault.” CP 50. Thus, under

Letourneau, there was more than a sufficient affirmative showing in the present case that the no-contact condition was reasonably necessary to protect the defendant's children from the harm of sexual molestation. Therefore, under *Letourneau*, the no-contact condition in this case was proper and the court's decision denying its modification or vacation should be affirmed.

Ancira, also relied upon by Appellant, is simply inapposite to the present case. Ancira was convicted of "violat[ing] a no-contact order requiring him to stay away from his wife". *Ancira*, 107 Wn. App. at 651. "[T]he trial court entered a new no-contact order as a condition of sentencing, which included Ancira's two minor children as well as his wife", *Id.* at 652, to prevent the children from the harm of witnessing domestic violence. *Id.* at 653. The Court in *Ancira* noted that "[t]he State has not explained why prohibiting Ancira from contacting his wife would not protect the children from witnessing domestic violence". *Id.* at 655. It therefore, struck the portion of the sentencing order prohibiting Ancira from all contact with his children.

Ancira is therefore, completely distinguishable from the present case. In *Ancira* the sentencing court sought to restrain the defendant from contacting minor children, even though the crime of which he was convicted was committed against an adult. In the present case, the sentencing court restrained Defendant from contacting children who are in

the same age group as the victims of the crime of which he was convicted. In *Ancira*, there was no evidence that restricting contact with the defendant's biological children was necessary to protect those children from harm. In the present case, there is more than ample evidence that such a restriction is necessary to protect Defendant's children from harm. There is evidence that the defendant raped his own biological child on multiple occasions, evidence and a conviction of raping more than one child, and a finding by a certified sex offender treatment provider, that Appellant "is a hebephile and a sexual addict" with "the possibility of pedophilic leanings", who, when "disinhibited . . . would be at extreme risk for further sexual assault." CP 50.

The Court in *Berg* dealt with a case in which the defendant was convicted of third degree child rape and third degree child molestation where the victim was the daughter of Berg's girlfriend. *Berg*, 147 Wn. App. at 926-7. The Court there upheld a no-contact condition that restrained Berg from unsupervised contact with his minor daughter because the trial "court reasonably feared that it would be putting [Berg's daughter] in the same situation that [the victim] was in when Berg sexually abused her." *Id.* at 943. Therefore, the Court concluded that the no-contact condition was "reasonably necessary to protect [Berg's daughter]." *Id.* at 942.

However, the defendant in the present case argues that “the order here includes all contact, not just unsupervised contact, with [Defendant’s] biological children” and therefore “exceeds the scope of the orders in *Letourneau* and *Berg*”. He is correct. The order in the present case is greater in scope than that approved in *Berg*, but so is the danger to the defendant’s children. Unlike in *Berg*, the danger to the defendant’s minor children is not simply potential or conjectural, it has already been in part realized. Unlike in *Berg*, *Letourneau*, *Ancira*, or any other case cited by the defendant, the defendant in this case admitted to already victimizing his child in very much the same manner he victimized the other two children in his underlying conviction. Defendant admitted to “sexually assaulting his [then] four-year-old biological daughter on four occasions over a one-year period”. CP 43. He admitted to “fondling” his daughter’s “unclothed vaginal area” and to twice “performing cunnilingus” on her. *Id.* In other words, he admitted to conduct more egregious than that underlying his conviction for which he was ordered not to have *any* contact with A.T. and H.W., and he did so in the context of a polygraph examination which found that “NO DECEPTION WAS INDICATED”. CP 58-63.

This puts the defendant and his children in a much different position than *Berg* and his child. Instead of a potential danger, the court in the present case had the duty to prevent the repetition of actual abuse by

the defendant of one of his own children. The court also had cause for heightened concern for the safety of Defendant's remaining minor children. Because the defendant has a demonstrated sexual interest in minor children and because he is apparently not deterred by parental relationships with such children, it was eminently reasonable to conclude that his other minor children were in greater danger of sexual victimization than was the child in *Berg*. Therefore, *Berg* is distinguishable from the present case, and the no-contact condition at issue here is reasonably necessary to prevent harm to the defendant's children. It is, therefore, constitutional. Consequently, the trial court properly denied defendant's motion to vacate or modify that condition and its decision should be affirmed.

Had the circumstances making the defendant a danger to his children changed, he could conceivably have filed or presented a new evaluation indicating that such was the case. He did not. *See* CP 1-97; RP 03/31/2006 1-40; RP 07/24/2009 1-15. There would seem to be nothing to prevent him from again seeking modification of the condition if circumstances do change.

Finally, Defendant argues that "[t]his order is even more severe than in *Berg* because it is a lifetime order," *Appellant's Brief*, p. 10, but this argument ignores *Armendariz*, which held that sentencing courts have the statutory authority under RCW 9.94A.505(8) and .030(13) to prohibit

offenders from having any contact with other specified individuals or a specific class of individuals for a period of time up to the maximum allowable sentence. *Armendariz*, 160 Wn.2d at 114. The maximum allowable sentence for the crime of which Defendant was convicted is life. See RCW 9A.44.076(2) and RCW 9A.20.021(1)(a). Therefore, the length of the no-contact condition at issue here was proper and, to the extent it was addressed below, the court properly denied Defendant's motion to modify or vacate that condition on this ground.

While the no-contact condition does interfere with the defendant's right to the care, custody, and control of his minor children, as argued above, it is an appropriate crime-related condition that is reasonably necessary to prevent harm to those children. Therefore, the trial court properly denied the defendant's motion to modify or vacate this condition and should be affirmed.

D. CONCLUSION.

Given the argument above, the trial court properly found that the sentence condition that requires the defendant to have no contact with minor children was an appropriate crime-related condition that is reasonably necessary to prevent harm to minor children, including the

defendant's own minor children. Therefore, the trial court properly denied the defendant's motion to modify or vacate that condition, and its decision should be affirmed.

DATED: January 27, 2010.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-23-10 
Date Signature