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DECISION
NUMBER 09-01-0142
STATE OF WASHINGTON
BY *cm*
REPLY

No. 41583-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY BRANDON KNUDTSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-04367-3
The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion at sentencing by ordering that Appellant have no contact whatsoever with any minor child during his term of community custody.
2. The trial court violated Appellant's constitutional right to parent his child by ordering that he have no contact whatsoever with any minor child during his term of community custody.

II. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion, and violate Appellant's fundamental constitutional right to parent his children, by ordering as a condition of his sentence that he have no contact whatsoever with any minor child during his term of community custody, where his biological child was not the victim, where there is no showing by the State that he poses a danger to his own biological children or future biological children or male children? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The State charged Jeffrey Brandon Knudtson with one count of first degree rape of a child (RCW 0A.44.073). (CP 1) Knudtson subsequently entered a guilty plea to a reduced charge of first

degree child molestation (RCW 9A.44.083). (CP 49, 50, 51-62) Knudtson entered an Alford/Newton¹ plea, whereby he did not admit to committing the crime, but agreed that the trial court could review the police reports and the probable cause declaration to find a factual basis to support a conviction. (CP 59: 10/19/10 RP 5-10)

According to the probable cause declaration filed in the Superior Court, Knudtson, who was born in 1969, had sexual intercourse in 1999 with his then step-daughter, V.D., who was born in 1993. (CP 2) V.D. disclosed the incident in April of 2009. (CP 2)

The trial court accepted the plea, and entered a finding of guilt. (10/19/10 RP 10-11) Knudtson subsequently moved to withdraw his plea, based on the following: (1) Knudtson recently learned that another man in V.D.'s life had behaved in a sexually inappropriate manner around V.D., and that V.D.'s recent behavior indicated that she may not be credible; (2) that when Knudtson was granted a request for a new attorney, he should have been assigned an attorney who was not also employed by the Department of Assigned Counsel; (3) a police report from New York

¹ See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).

State pertaining to this matter was falsified; and (4) his trial counsel did not adequately represent his interests. (CP 109-11)

The trial court rejected Knudtson's assertions and denied the motion to withdraw the plea. (12/10/10 RP 10-11; CP 112, 136-39) The trial court sentenced Knudtson within his standard range to 63 months of confinement followed by 36 months of community custody. (12/10/10 RP 21; CP 94) This appeal timely follows. (CP 115)

IV. ARGUMENT & AUTHORITIES

Under RCW 9.94A.505(8), a sentencing court has the authority to impose crime-related prohibitions, including no-contact orders. State v. Armendariz, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). 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." RCW 9.94A.030(13). A court may impose probationary conditions that tend to prevent the future commission of a crime. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999). A trial court also has discretion to order that, during a term of community custody, an offender "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals[.]" RCW

9.94A.703(3)(b).²

On the other hand, “[p]arents have a fundamental liberty interest in the care, custody, and control of their children.” State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001) (citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). This means that a parent has a constitutionally protected, fundamental right to raise children without State interference. State v. Letourneau, 100 Wn. App. 424, 438, 997 P.2d 436 (2000) (citing In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998))

A criminal sentencing court may only impose limitations on this right when it is reasonably necessary to protect children from harm and there is an appropriate nexus between the offense committed and the sentencing condition. State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); Ancira, 107 Wn. App. at 653-54; Letourneau, 100 Wn. App. at 437-42. Furthermore, there “must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of

² Crime-related prohibitions are reviewed for an abuse of discretion. Armendariz, 160 Wn.2d at 110. Discretion is abused when “the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

his or her own biological children to justify such State intervention.”

Letourneau, 100 Wn. App. at 442.

In this case, Appendix H of the Judgment and Sentence imposes the following conditions of community custody upon Knudtson:

16. Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason.
...
19. Avoid places where children congregate. (Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks.)
...
24. No contact with any minors without prior approval of the DCO/CCO and Sexual Deviancy Treatment Provider.

(CP 105-06, emphasis in original) Knudtson’s counsel informed the court that Knudtson had minor biological children and that there were no allegations that Knudtson had abused or molested his biological children, and asked the court to modify the no-contact order so that he could have contact with his children. (12/10/10 RP 14-15, 19-20, 23) The court’s subsequent refusal to modify or tailor the no-contact provision is invalid because there was no affirmative showing that Knudtson poses a danger to his biological children, and because there is no finding that the restriction on Knudtson’s parental rights is necessary to protect his biological children.

In Letourneau, the defendant was convicted of two counts of

second degree rape of a child who was unrelated to her. 100 Wn. App. at 426-27. As part of her judgment and sentence, Letourneau was ordered to have no in-person contact with her biological children unless supervised. 100 Wn. App. at 426-27. The appellate court reversed the no-contact order because there was no evidence that Letourneau was a pedophile or that she otherwise posed a danger to her own children. The court concluded that the no-contact order was not reasonably necessary to prevent harm to Letourneau's children. 100 Wn. App. at 441.

In Ancira, the defendant was convicted of violating a domestic violence no-contact order against his wife. The trial court issued a five-year no-contact order that included his children, and prohibited all contact. 107 Wn. App. at 652-53. The trial court reasoned that the no-contact order was necessary to prevent further harm to the children who had witnessed the abuse of their mother.

On appeal, the court considered whether the no-contact order was necessary to protect the children from the harm of witnessing domestic violence. Ancira, 107 Wn. App. at 652-53. The appellate court noted that this particular condition, prohibiting all contact, was a "severe condition" and an "extreme degree of

interference with fundamental parental rights.” 107 Wn. App. at 654. Ultimately, the court held that while “some limitations on Ancira’s contact with his children, such as supervised visitation, might be appropriate, even as a part of a sentence,” ultimately the no-contact order was far too broad and the facts of the case “do not form a sufficient basis for this extreme degree of interference with fundamental parental rights.” 107 Wn. App. at 655-56.

In Berg, the defendant was convicted of rape of a child and third degree child molestation. As here, the victim in Berg was an unrelated female child living in the defendant’s home. The appellate court affirmed a sentencing condition imposed on Berg that prohibited unsupervised contact with “female minors,” including Berg’s biological children. 147 Wn. App. at 930, 944.

The court concluded that this restriction was “sufficiently tailored to the crime,” which involved a victim who was then living in Mr. Berg’s home, although not his child. Berg, 147 Wn. App. at 944. The Court noted that:

Even though [the order] restricts all forms of contact, not just physical contact, it addresses the potential for the same kind of abuse at issue here, which Berg was able to achieve by exploiting a child’s trust in him as a parental figure. Prohibiting Berg from having any unsupervised contact with A.B. prevents him from again fostering this kind of trust and putting her at the same risk of harm.

147 Wn. App. at 944. The appellate court noted with approval that the trial court “limited the order to Berg’s unsupervised contact with female children, noting that the prosecutor expressed no concern with Berg’s contact with boys.” 147 Wn. App. at 942.

Unlike Berg, the trial court in this case did not sufficiently tailor the restriction to limit the impact on Knudtson’s parental rights, while still meeting the State’s interest in protecting his children. The trial court here imposed a complete no-contact order for all minor children. (CP 106-07) The court’s order denies Knudtson even supervised contact with his own children. (CP 106)

The court’s order prohibits all contact, not just unsupervised contact, with Knudtson’s biological children, which exceeds the scope of the orders in Letourneau and Berg and resembles the order overturned in Ancira. Furthermore, like Letourneau, there is no finding in this case that Knudtson is a pedophile or that he otherwise poses a danger to his own children or to boys in general.

The trial court’s overly restrictive order does not adequately balance Knudtson’s fundamental parental rights with the State’s interest in protecting vulnerable children. The trial court abused its discretion by failing to tailor the order narrowly, which resulted in an unnecessary infringement on Knudtson’s parental rights.

V. CONCLUSION

The State failed to make an affirmative showing that Knudtson poses a danger to his biological children. The trial court failed to consider whether a total restriction on contact with minors during his term of community custody is necessary to protect Knudtson's biological children. This case should be remanded to the trial court for modification of the judgment and sentence so that the trial court's order prohibiting all contact with minors, including Knudtson's biological children, can be revised.

DATED: April 22, 2011

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CERTIFICATE OF MAILING

I certify that on 04/22/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Jeffrey B. Knudtson, DOC#344522, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

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