NO. 42222-1-II

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

STATE OF WASHINGTON, Respondent,

v.

JOHN JAMES BABNER, Appellant.

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

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

REBECCA WOLD BOUCHEY
Attorney for Appellant

NIELSEN BROMAN AND KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 2

D. ARGUMENT 11

1. THE TRIAL COURT ERRED BY REVOKING MR. BABNER'S SSOSA BASED ON VIOLATION OF AN UNCONSTITUTIONAL SENTENCING CONDITION PROHIBITING ALL CONTACT BETWEEN MR. BABNER AND HIS BIOLOGICAL INFANT SON. 11

2. THE SENTENCING JUDGE VIOLATED DUE PROCESS, THE APPEARANCE OF FAIRNESS DOCTRINE, AND CANON 3(D)(1) WHEN SHE SHOWED BIAS TOWARD MR. BABNER BY TELLING HIM IN OPEN COURT THAT HAVING A CHILD CALLED HIS "JUDGMENT" INTO QUESTION; TELLING HIM HE SHOULD HAVE HAD A VASECTOMY; AND TELLING HIM THAT HE WAS TOO POOR TO BECOME A FATHER. 19

E. CONCLUSION 25

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) 19, 20

Shapiro v. Thompson, 394 U.S. 618, 630-31, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) 13

Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) 13

WASHINGTON CASES

In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005) 13

In re Sumey, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) 13

State v. Ancira, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001) 14, 16, 17

State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) . 12, 14

State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 16, 17

State v. Bilal, 77 Wn.App. 720, 722, 893 P.2d 674, *rev. denied*, 127 Wn.2d 1013 (1995) 20

State v. Carlson, 66 Wn.App. 909, 917, 833 P.2d 463 (1992) 21

State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999) 19

State v. Dominguez, 81 Wn.App. 325, 330, 914 P.2d 141 (1996) . 21

State v. Ingle, 64 Wn.2d 491, 499, 393 P.2d 422 (1964) 22

State v. Ladenburg, 67 Wn.App. 749, 840 P.2d 228 (1992) 20

State v. Leon, 133 Wn.App. 810, 812, 138 P.3d 159 (2006) 20

State v. Letourneau, 100 Wn.App. 424, 432, 997 P.2d 436 (2000) 14, 15

State v. Llamas-Villa, 67 Wn.App. 448, 456, 836 P.2d 239 (1992) 14

State v. Madry, 8 Wn.App. 61, 68-70, 504 P.2d 1156 (1972) .. 20, 21

State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002) 20

State v. Post, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992) 20

State v. Ramirez, 140 Wn.App. 278, 290, 165 P.3d 61 (2007) 14

TABLE OF AUTHORITIES (Cont.)

WASHINGTON CASES (CONT.)

State v. Schimelpfenig, 128 Wn. App. 224, 226, 115 P.3d 338 (2005) 12

Washington Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 663 P.2d 457 (1983) 20, 24

CONSTITUTIONAL PROVISIONS

Wash. Const. art. I, sec. 22 19

U.S. Const. amends. VI, XIV 19

RULES, STATUTES AND OTHER AUTHORITIES

CJC 3(D)(1) 19, 22, 24

RCW 4.12.050 21

RCW 9.94A.505(8) 12

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by imposing a sentencing condition that prohibited all contact between Mr. Babner and his biological children.

2. The sentencing court violated Mr. Babner's fundamental constitutional right to parent without interference when it failed to narrowly tailor a sentencing provision prohibiting all contact with minors to permit at least supervised contact with his infant son.

3. The sentencing court abused its discretion when it revoked Mr. Babner's SSOSA sentence based on violation of a constitutionally void sentencing provision.

4. The sentencing judge violated Due Process, the appearance of fairness doctrine, and Canon 3(D)(1) when she showed bias toward Mr. Babner by telling him in open court that having a child called his "judgment" into question; telling him he should have had a vasectomy; and telling him that he was too poor to become a father.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by revoking Mr. Babner's SSOSA based on violation of an unconstitutional sentencing condition prohibiting all contact between Mr. Babner and his biological infant son.

2. The sentencing judge violated Due Process, the appearance of fairness doctrine, and Canon 3(D)(1) when she showed bias toward Mr. Babner by telling him in open court that having a child called his "judgment" into question; telling him he should have had a vasectomy; and telling him that he was too poor to become a father.

C. STATEMENT OF THE CASE

On January 23, 2009, John J. Babner pled guilty and was sentenced on two charges of child molestation in the first degree. CP 3. Mr. Babner received a suspended sentence under the SSOSA program. CP 7. One of the conditions of the suspended sentence was that he would have "No contact with any minors without prior approval of the DOC/CCO and Sexual Deviancy

Treatment Provider." Supp. CP, Appendix H, p. 3. At that time, Mr. Babner did not have any minor children.

On August 14, 2009, at the first review hearing on the SSOSA, all the parties agreed that Mr. Babner was complying with treatment and with the conditions of the suspended sentence. RP 4-5. Mr. Babner had been living with his girlfriend, who was pregnant by another man. RP 6. Because his girlfriend had since had her baby, Mr. Babner had already moved out of her home to avoid violating the no contact with minors provision of his suspended sentence. RP 6.

At that hearing, Mr. Babner asked the court to give permission for him to live with his girlfriend and her infant child. RP 6. Both the CCO and the treatment provider agreed at that time that they had no objection to Mr. Babner living with his girlfriend and her baby and "has a low risk for reoffending against the community." RP 7. The treatment provider, Dr. Gollogly, stated in his report to DOC that Mr. Babner was at "low risk of reoffending against the baby" and recommended that Mr. Babner be permitted to live with his girlfriend and the baby with only the limitation that the girlfriend supervise contact and Mr. Babner not personally care for the baby. Supp. CP, Report from Treatment, 8/14/09. The

court refused to permit Mr. Babner's return to his home or permit supervised contact with the child. RP 7-8.

In his report of December 7, 2009, Dr. Gollogly stated that Mr. Babner "continues to do well in treatment and should be a low risk for reoffense." Supp. CP, Report from Treatment, 1/8/10. The CCO's report stated that Mr. Babner was complying with treatment and DOC. Supp. CP, Report from DOC, 1/8/10.

Mr. Babner's first negative DOC report occurs when he is assigned a new CCO, Hilary Williams, in July of 2010. Mr. Williams is assigned to Mr. Babner's case on June 22[1] and on June 23, Mr. Williams states in his report, that "DOC has concerns" about Mr. Babner's "past employment," including two jobs that had been approved by prior CCOs. Supp. CP, Report from DOC, 7/23/10. The report also noted that Mr. Babner had informed his CCO that his girlfriend was pregnant with his child. Supp. CP, Report from DOC, 7/23/10. In sum, the CCO stated that he is concerned that "while it appears that Mr. Babner is complying with treatment, the DOC is left wondering if Mr. Babner is internalizing treatment." Supp. CP, Report from DOC, 7/23/10.

---

[1] See RP 53.

Polygraph tests administered on June 16, 2010, and February 18, 2010, confirmed that Mr. Babner had not had contact with minors. Supp. CP, Report from DOC, 7/23/10.

At the review hearing held on July 23, 2010, CCO Williams tells the court that he believes Mr. Babner is "manipulative" because his girlfriend is pregnant, he is "left to wonder, you know: Is this an attempt to, again manipulate the Court to say, I'm going to have minor contact because I have a child." RP 14. Mr. Williams states that his not in favor of Mr. Babner having any contact with his child. RP 14. Judge Katherine Stolz tells Mr. Babner that she also has "concerns." RP 17. Judge Stolz tells Mr. Babner:

> I don't really waste much time in revoking these things. The fact that you're having a kid, you know, you could get a vasectomy. You don't—you're not in a position to support a child. You're not in a position to be around minor children because of your conviction, you know. Those are choices that you made that put you afoul of the law. There are consequences; and, you know, she's just had one kid last year; and apparently, now, she's having another kid which doesn't sound like she's using too—and her mother has custody of two other kids, so it doesn't sound like she's got any real forethought for her future; so I think you need to seriously consider other measures besides some chancy birth control because you're not going to be able to have any contact with that kid. Do you understand?

RP 17-18.

In his report of October 22, 2010, CCO Williams states that Mr. Babner's girlfriend is due to have their baby any day. Supp. CP, Report from DOC 10/22/10. Mr. Williams states that he told Mr. Babner it would be a violation of the no contact with minors provision in his sentence to have photos of his child, to discuss his child with his girlfriend, or to even permit anyone else to talk about his child to him. Supp. CP, Report from DOC 10/22/10. Mr. Williams also states that Mr. Babner has complied with treatment and has taken monthly urinalysis and polygraph tests that have shown no drug use or deception. Supp. CP, Report from DOC 10/22/10.

The treatment report shows that Mr. Babner is doing well in treatment and is doing his best to overcome difficult economic circumstances. Supp. CP, Report from Treatment, 10/25/10. Dr. Gollogly again states that Mr. Babner is at "low risk for reoffense." Supp. CP, Report from Treatment, 10/25/10.

At the October 22 hearing, Mr. Babner tells the court that his girlfriend did have his baby, a son, and that he is complying with the court's order to have no contact with his child. RP 10/22/10 3. Judge Stolz again tells Mr. Babner if he does have any contact with

his infant son, she will revoke his sentence. RP 10/22/10 3. She goes on to say:

> All right, it looks like he's in compliance. . . . I do have concerns about choices he is making. I mean, you have got a job now making $8 and something cents an hour, 8.55. Probably not a living wage for yourself, and now you have a child. So you really need to start using some common sense in the decisions you make. Certainly not in any position to be entering into any kind of relationship where there are minor children involved.

RP 10/22/10 4. The judge states that: "conditions will remain in full force and effect. You are not to have any contact with minor children; that includes your child." RP 10/22/10 4.

On November 8, 2010, the State files a Petition for Hearing, requesting that Mr. Babner's sentence be revoked because Mr. Babner had contact with a minor on November 6. CP 40-43. An Amended Petition added allegations that Mr. Babner had also violated the terms of his sentence because he (1) had access to the internet, (2) had not changed the registered address for his vehicle, and (3) was terminated from treatment on November 15. CP 123-24.

In the subsequent hearing, Investigator Thomas Grabski testifies that he saw Mr. Babner's girlfriend leave her apartment with her two children, a toddler and an infant, get into a car

registered to Mr. Babner, and then drive to pick him up. RP 26-28. Mr. Babner got in the passenger seat. RP 29. The car was pulled over and Mr. Babner was arrested. RP 29.

CCO Williams testified that he believed Mr. Babner had violated the internet prohibition because he had a Facebook account that showed some activity (two friend requests). RP 38, 41. He testified that he could not actually confirm that Mr. Babner had used the account or whether there was any substantive activity. RP 41-43. Mr. Williams said that Mr. Babner told him his girlfriend maintained the account for him and that he had not been on the internet himself. RP 39-40.

Mr. Williams said that Mr. Babner was terminated from treatment after he called Dr. Gollogly to tell him Mr. Babner had been arrested and that he believed Mr. Babner had a Facebook account. RP 44-45. The CCO admitted that prior to his arrest, Mr. Babner had complied with treatment, passed all polygraphs, passed all drug tests, was employed and had stable housing. RP 55.

Dr. Gollogly testified tat Mr. Babner had been in treatment with his agency since February 2009 and had been doing an "excellent job in treatment," and "had, really, been working to turn

his life around." RP 59, 68. Dr. Gollogly said that he terminated Mr. Babner from treatment on November 15, 2010, because CCO Williams told him Mr. Babner had been in contact with his girlfriend, the toddler, and his infant son. RP 60. CCO Williams also told Dr. Gollogly that Mr. Babner had been using a Facebook account for nine months. RP 61. Based on Mr. Williams' assertions to him, Dr. Gollogly determined that Mr. Babner had not been honest in treatment and terminated him. RP 61.

Mr. Babner stipulated that he had been in a car with his girlfriend and her two children, including his infant son. RP 21. He testified that he had arranged to meet with his girlfriend to get his car back from her and had not expected her to bring the children. RP 75, 84. He acknowledged that it was a "poor choice" to get in the car with her. RP 84. He said that his girlfriend had the password to his Facebook account, which she had changed so there would be no question he was not using it. RP 77-78. The account was established prior to his convictions in this case. RP 78. Mr. Babner had arranged with another treatment provider, Jeanglee Tracer, to take over his treatment if he was permitted release. RP 81-82.

Judge Stolz decided to revoke Mr. Babner's suspended sentence. RP 102. In her oral decision, she stated the basis for her revocation:

> Well, you know, when I grant a SSOSA, I make it very plain to the individual that they are to have strict compliance. Now, I have—there have been judgments made by Mr. Babner throughout the pendency of this SSOSA that have given this court some question, serious concerns about his judgment, one of which was entering into the relationship with [his girlfriend] at a point in time when he is looking at serious jail time, moving in with her. Initially, she was described as a roommate. Obviously, that wasn't true. She's pregnant by someone else in what has been described, at least in some of the initial reports, as a rape which means you have a very vulnerable victim; and his victim, in this case, was a vulnerable minor with some developmental disabilities which he took advantage of. Even when the Court granted him the SSOSA, he had no job. He's got treatment obligations, you know. He apparently, takes no measures regarding contraception; and this woman winds up—two kids under the age of, what, 15 months, you know. He can't provide for himself and he's got someone pregnant, and she's bringing a kid into the world. I mean, the Court has indicated to him, I have serious concerns about that. It does not show judgment, Mr. Babner; and then to find out that you have had minor contact within 11 days of the Court warning you that you are not to have contact, or you go to jail, you disregarded that; and I don't think it was a one-time, somehow accidental contact. I think [your girlfriend] and you—you've been having contact with her and the children on a regular basis under the table and you just got nailed that day.
>
> The internet access: No, you know, no Internet access. It doesn't mean you go through some

> elaborate charade that someone else is handling your account. I mean, no Internet in your name; so at this time, the Court is going to revoke the SSOSA, and I'm going to sentence Mr. Babner to jail.

RP 101-2. The suspended sentenced was revoked by order May 12, 2011. CP 131-32. This appeal timely follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY REVOKING MR. BABNER'S SSOSA BASED ON VIOLATION OF AN UNCONSTITUTIONAL SENTENCING CONDITION PROHIBITING ALL CONTACT BETWEEN MR. BABNER AND HIS BIOLOGICAL INFANT SON.

A condition of the suspended sentence in this case was that Mr. Babner may have: "No contact with any minors without prior approval of the DOC/CCO and Sexual Deviancy Treatment Provider." Supp. CP, Appendix H, p. 3. At the time this condition was put in place, Mr. Babner did not have minor children. However, despite being informed when Mr. Babner became a child, the court repeatedly declined the opportunity to modify the provision to permit him supervised visitation with his infant son.

The petition to revoke sentence was filed when Mr. Babner was found to have had supervised contact with his son. CP 40-43. The superior court did not enter written findings in this case, but it appears from the court's oral ruling that Mr. Babner's sentence was

revoked primarily due to violating the prohibition against contact with minors.[2] RP 101-2. The provision prohibits all contact, even supervised, between Mr. Babner and his infant son. This sentencing condition is unconstitutional because is a violation of Mr. Babner's fundamental constitutional right to parent and was not narrowly tailored to the State's interests. As an unconstitutional violation of his fundamental right, this condition is void. Therefore, revoking Mr. Babner's SSOSA on this basis was an abuse of discretion and must be reversed.

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). However, when that sentencing condition affects a fundamental constitutional right, it will be reviewed with strict scrutiny and must be narrowly tailored to a compelling state interest to pass constitutional muster. *See State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005) (*citing Shapiro v. Thompson*, 394 U.S. 618, 630-31, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969))

---

[2] Although the court also cursorily refers to Babner's Facebook account, this relatively minor violation does not appear to be the reason for the revocation. RP 102. The court does state that being terminated from treatment is a violation of the SSOSA, but does not refer to this as a reason for termination. RP 97, 101-2.

(restriction of the fundamental constitutional right to travel is subjected to strict scrutiny and must be narrowly-tailored), *See also In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 57, 109 P.3d 405 (2005); *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

"Parents 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 fundamental liberty interest may be limited, however, if the State can show that the restriction is necessary to the State's compelling interest in preventing harm to children, and an obligation to intervene to protect children from actions that would jeopardize their physical or mental health. *In re Sumey,* 94 Wn.2d 757, 762, 621 P.2d 108 (1980).

Thus, in order for a no-contact order limiting contact with a defendant's child to be constitutional, the order must be found reasonably necessary to protect children from harm and there is the appropriate nexus between the offense committed and the sentencing condition. *Ancira,* 107 Wn.App. at 653-54. In addition, the crime-related prohibition must relate to the crime, but the

prohibition "need not be causally related to the crime." *State v. Letourneau*, 100 Wn.App. 424, 432, 997 P.2d 436 (2000) (*citing State v. Llamas-Villa,* 67 Wn.App. 448, 456, 836 P.2d 239 (1992)). And the prohibition must be reasonably necessary to "help prevent the criminal from further criminal conduct for the duration of his or her sentence." *Letourneau,* 100 Wn.App. at 438.

Crime-related prohibitions are reviewed for an abuse of discretion. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). 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). Likewise, revocation of a SSOSA is reviewed for abuse of discretion. *State v. Ramirez*, 140 Wn.App. 278, 290, 165 P.3d 61 (2007).

There is no evidence in the record that prohibiting all contact between Mr. Babner and his infant son, even supervised contact, was necessary to protect the child. The *Letourneau* court struck a crime-related prohibition that did not allow Ms. Letourneau to have unsupervised contact her biological children, although that provision did permit supervised contact. 100 Wn.App. at 442. Ms. Letourneau had been convicted of two counts of second degree

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

As in *Letourneau*, Mr. Babner's treatment provider did not provide any evidence that contact with his infant son would be a risk. In fact, Dr. Gollogly's report recommended that Mr. Babner be allowed to live with his girlfriend after she had her baby (the one not related to Mr. Babner) and be permitted contact with that child if supervised by the girlfriend. Supp. CP, Report from Treatment 8/14/09. Dr. Gollogly never states that Mr. Babner presents any risk of offending against his son or his girlfriend's other baby. Yet, the judge refused to consider any modification of the sentencing condition to permit at least supervised contact.

Furthermore, the restriction imposed on Mr. Babner, prohibiting even supervised contact with his child, was not

narrowly-tailored and therefore unconstitutional. In *Ancira,* Mr. Ancira was convicted of violating a domestic violence no-contact order against his wife. The court issued a no-contact order that included his children. *Ancira,* 107 Wn.App. at 652-53. The court reasoned that the no-contact order was necessary to prevent further harm to the children who had witnessed the abuse of their mother. The appellate court considered whether the no-contact order was necessary to protect the children from the harm of witnessing domestic violence. *Id.* The court reversed the no-contact order, concluding that the no-contact order protecting the wife was sufficient to protect the children from witnessing domestic violence. *Id.* at 665.

In *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), Mr. Berg was convicted of rape of a child and third degree child molestation. In *Berg*, as here, the victim was an unrelated female child living in his home. The appellate court affirmed a sentence condition imposed on Mr. Berg prohibiting **unsupervised** contact with "female minors," without excluding Mr. 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. 147 Wn. App. at 944. The Court notes 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.

Berg, at 944. The Court notes 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." *Id.*, at 942.

Like *Ancira*, the prohibition against Mr. Babner is too broad because it prohibits even supervised contact with his infant son, essentially for life. There is no evidence in the record that such a sweeping prohibition is necessary to protect the child or that supervised contact poses a risk. Like *Berg*, Mr. Babner's crime does not give any indication that he poses any risk to infant boys.[3] Therefore, the State's interest in protecting the children could have been served by a narrowly tailored restriction on unsupervised

---

[3] Mr. Babner's convictions in this case were for contact with the 5-year-old daughter of a friend. Supp. CP, Declaration for Probable Cause.

contact with the babies, as Dr. Gollogly had initially suggested to the court. Supp. CP, Report from Treatment 8/14/09. A provision requiring that contact be supervised would have been more than sufficient to serve the State's interests, while not violating Mr. Babner's constitutional rights. If this restriction had been narrowly tailored, Mr. Babner's conduct here—merely sitting in a car where the two babies were behind him strapped into carseats while the mother was also present and driving—would not have been a violation.

The court's decision in this case makes it clear that her primary reason for revoking Mr. Babner's sentence is that he had contact with a minor. There is no indication that the court would have revoked Mr. Babner's SSOSA without that violation. But, as argued above, that provision is void because it was a violation of a fundamental constitutional right. Therefore, revoking Mr. Babner's SSOSA based on a violation of a void condition is an abuse of discretion.

It is clear that the court was angry with Mr. Babner for having a child with his girlfriend when he did not have a good paying job and these convictions. RP 101-2; RP 17-18; RP 10/22/10 4. What is not clear is whether the court would have revoked the sentence if

violation of this void condition were removed from consideration. The only other violation listed by the court in the oral ruling—"internet use"—was a very minor violation, at worst and was only cursorily mentioned by the judge as opposed to the page and a half devoted to the contact and Mr. Babner's "poor judgment" in getting his girlfriend pregnant. *See* RP 101-2. Therefore, the remedy here is to remand to the superior court for a new hearing.

2. THE SENTENCING JUDGE VIOLATED DUE PROCESS, THE APPEARANCE OF FAIRNESS DOCTRINE, AND CANON 3(D)(1) WHEN SHE SHOWED BIAS TOWARD MR. BABNER BY TELLING HIM IN OPEN COURT THAT HAVING A CHILD CALLED HIS "JUDGMENT" INTO QUESTION; TELLING HIM HE SHOULD HAVE HAD A VASECTOMY; AND TELLING HIM THAT HE WAS TOO POOR TO BECOME A FATHER.

One of the due process rights accorded a defendant in a SSOSA revocation hearing is the right to "a neutral and detached hearing body." *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, sec. 22; U.S. Const. amends. VI, XIV. Due Process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) require a judge to disqualify herself if she is biased against a party or her impartiality may reasonably be questioned. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *State v.*

Madry, 8 Wn.App. 61, 68-70, 504 P.2d 1156 (1972). Impartial means the absence of bias, either actual or apparent. *State v. Moreno,* 147 Wn.2d 500, 507, 58 P.3d 265 (2002). The appearance of fairness doctrine is "directed at the evil of a biased or potentially interested judge or quasi-judicial decisionmaker." *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Evidence of actual or potential bias is required before application of the appearance of fairness doctrine. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, *rev. denied*, 127 Wn.2d 1013 (1995)).

"Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ladenburg*, 67 Wn.App. 749, 840 P.2d 228 (1992) (*citing Washington Medical Disciplinary Board v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983)). The test for determining whether a judge should disqualify where the judge's impartiality might reasonably be questioned is an objective one. *State v. Leon,* 133 Wn.App. 810, 812, 138 P.3d 159 (2006). A court must determine "whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing]." *State v. Dominguez*, 81 Wn.App. 325, 330,

914 P.2d 141 (1996). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry,* 8 Wn.App. 61, 70, 504 P.2d 1156 (1972).

The appearance of fairness doctrine normally requires that the aggrieved party must request recusal once there is reason to believe the judge is biased. *State v. Carlson*, 66 Wn.App. 909, 917, 833 P.2d 463 (1992). This is based on the court's belief that the attorney of the aggrieved party would be in the best position to evaluate whether there has been actual bias. *Carlson*, 66 Wn. App. at 917. However, in this case, Judge Stolz' first objectionable statements were made during the review hearings, when Mr. Babner was not represented by counsel and had no way of knowing about the recusal procedure. By the time he was assigned counsel for the revocation hearing, the bias at that hearing was not revealed in Judge Stolz's statements until the end of the hearing when she again expresses her anger at Mr. Babner for having a child when he is poor and a convicted offender. Moreover, it is not clear that an affidavit of prejudice could have been filed after Mr. Babner had already been sentenced by Judge Stolz. *See* RCW 4.12.050. Therefore, the fact that Mr. Babner did not move for

recusal below should not preclude him from raising the appearance of fairness doctrine here.

In any case, CJC 3(C)(1) provides that "judges must disqualify themselves in a proceeding in which their impartiality might reasonably be questioned," including where: "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

Colloquies between the court and counsel can become the basis for a fair trial challenge. *See State v. Ingle,* 64 Wn.2d 491, 499, 393 P.2d 422 (1964). At the July 23 review hearing when Judge Stolz is first told that Mr. Babner's girlfriend will have his child, the Judge responds by telling him he should have had a vasectomy and is not "in a position to support a child," that these "are choices that [he] made that put [him] afoul of the law, and "I think you need to seriously consider other measures besides some chancy birth control because you're not going to be able to have any contact with that kid." RP 17-18. Then, the judge sets the next review hearing for three months out rather than six because of her "concerns. RP 17-18. Then, at the October 22 review hearing, after noting that Mr. Babner is in compliance with his sentence and

treatment, the Judge again tells him she has "concerns about the choices he is making," namely that he is having a child and has a job that pays only eight dollars an hour. RP 10/22/10 4. Again, the court sets the next review hearing only three months out instead of the usual six. RP 10/22/10 4. Finally, at the revocation hearing, the judge's oral ruling again uses language about her "serious concerns about [his] judgment," namely that he is having a child:

> Well, you know, when I grant a SSOSA, I make it very plain to the individual that they are to have strict compliance. Now, I have—*there have been judgments made by Mr. Babner throughout the pendency of this SSOSA that have given this court some question, serious concerns about his judgment, one of which was entering into the relationship with [his girlfriend] at a point in time when he is looking at serious jail time, moving in with her.* Initially, she was described as a roommate. Obviously, that wasn't true. She's pregnant by someone else in what has been described, at least in some of the initial reports, as a rape which means you have a very vulnerable victim; and his victim, in this case, was a vulnerable minor with some developmental disabilities which he took advantage of. Even when the Court granted him the SSOSA, he had no job. He's got treatment obligations, you know. *He apparently, takes no measures regarding contraception; and this woman winds up—two kids under the age of, what, 15 months, you know. He can't provide for himself and he's got someone pregnant, and she's bringing a kid into the world. I mean, the Court has indicated to him, I have serious concerns about that. It does not show judgment, Mr. Babner*; and then to find out that you have had minor contact within 11 days of the Court warning you that you are not to have contact, or you

> go to jail, you disregarded that; and I don't think it was a one-time, somehow accidental contact. I think [your girlfriend] and you—you've been having contact with her and the children on a regular basis under the table and you just got nailed that day.

RP 101-2.

Objectively, Judge Stoltz's statements to Mr. Babner that he had no business having a child when his job only paid $8 per hour, should have gotten a vasectomy, and that because of his convictions, he should not have a child, show that she is biased against him. Although her comments do not initially lead to revocation, upon learning that Mr. Babner will become a father, Judge Stolz immediately advises him that she regards him with suspicion (questioning his "judgment") and puts him under tight supervision (shortening time between review hearings). Judge Stolz's comments present a situation where a "reasonably prudent and disinterested observer" could conclude that this was not "a fair, impartial, and neutral" hearing. Therefore, under the due process clause, appearance of fairness doctrine, and CJC 3(C)(1), she should have recused herself from sitting in judgment on Mr. Babner. A proceeding held in violation of the appearance of fairness doctrine is invalid. *See Washington Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). The

revocation should therefore be reversed and the case remanded for a new hearing before another judge.

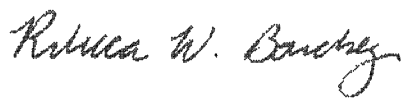
E. CONCLUSION

The sentencing provision prohibiting all contact with minors was void because it was not narrowly tailored to avoid violating Mr. Babner's fundamental constitutional right to parent. Mr. Babner's SSOSA suspended sentence was revoked due to his violation of this unconstitutionally void provision. Therefore, the revocation must be reversed and the case remanded for a new hearing. Furthermore, the fairness of these proceedings was called into question by the sentencing judge's repeated comments to Mr. Babner indicating that his compliance with the terms of his sentence had been called into question by what she characterized as his poor judgment—specifically that he had not had a vasectomy, was having a child when, in the judge's opinion, he should not because he was too poor and a convicted felon. The violation of the appearance of fairness doctrine also requires reversal of the revocation order and that the new hearing be held in front of another judge.

DATED: November 2, 2011

Respectfully submitted,

NIELSEN, BROMAN & KOCH



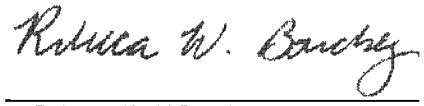
Rebecca Wold Bouchey
WSBA No. 26081
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on November 2, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
via attorney portal

Appellant:
John James Babner
DOC #324963
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584



Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant

BOUCHEY LAW FIRM

November 02, 2011 - 3:26 PM

Transmittal Letter

Document Uploaded: 422221-Appellant's Brief.pdf

Case Name: State v. John James Babner

Court of Appeals Case Number: 42222-1

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Rebecca W Bouchey - Email: **BoucheyR@nwattorney.net**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us