

No. 291545

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JAMES V. ADAMS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

THE HONORABLE NEIL Q. RIELLY

OPENING BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

As part of a criminal sentence, Mr. Adams was prohibited from contact with minors, subject to modification by court order. He petitioned the criminal court to modify his sentence to allow him to file a petition in family court for contact with his minor daughter. The criminal court granted the motion. However, the criminal court judge insisted that Mr. Adams must have the child's mother personally served, despite his being indigent, incarcerated, and without means to determine her residence. The court further ordered that no other judge or commissioner could determine whether alternative service was appropriate.

Mr. Adams appeals the court's order, contending to the extent that a judge "retains jurisdiction" over a case, he does not and cannot deprive other members of the court of their statutory jurisdiction over the same matter. Further, the criminal court assumed the statutory jurisdiction of the family court; erected a procedural barrier, unduly infringing upon Mr. Adams' due process right of access to the courts; and overstepped its sentencing authority by imposing a non-crime related prohibition. Mr. Adams requests this court to vacate the condition that he must have Ms.

Rowe personally served, and remand the case to the family court for determination of the manner of service and further proceedings.

I. Assignments Of Error

A. The criminal court erred when it modified the sentence to allow Mr. Adams to pursue an action in family court, but then usurped the authority of that court by requiring Mr. Adams to effect personal service on the other party in a civil action.

B. The criminal court erred when it stated it would retain individual responsibility to determine whether proper service had been effected in a civil matter, divesting the entire remaining superior court of jurisdiction in the matter.

C. The court violated Mr. Adams' due process right of meaningful access to the court when it imposed a criminal court order, restricting action in the family court.

D. The criminal court abused its discretion by imposing a non-crime related prohibition, that is, requiring Mr. Adams to effect personal service on another party in order to bring an action in family court.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the criminal sentencing court usurp the authority of the Family Court when it required Mr. Adams to effect personal service on the other party in a civil action?
2. Did the criminal sentencing court err by ordering that he was the only judge who could determine whether proper service had been effected in this matter, most particularly because he has retired from the bench since imposition of the order?
3. Did the criminal sentencing court violate Mr. Adams' due process right by restricting his access to the civil court?
4. Did the criminal sentencing court abuse its discretion when it imposed a non-crime related prohibition?

II. Statement Of Facts

Appellant James Adams was found guilty of homicide by abuse of his infant son, and sentenced on March 18, 2005, under Spokane County Superior Court Cause No. 04-1-01724-7. (CP 1). As a part of his sentence, unless modified by court order, Mr. Adams was precluded from contact with minors when released into

community custody.¹ (CP 8-9). The court further ordered that, unless modified by court order, he was not allowed contact with the child's mother, Jenny Rowe, for life. (CP 23).

On February 2, 2006, the court granted a motion by Mr. Adams requesting contact and visits with a minor relative while he remained incarcerated. (CP 13-14). On January 13, 2010, Mr. Adams submitted a petition and affidavit to the trial court, seeking a modification of his sentence to allow him to pursue, through family court, contact with his minor daughter, Laura Adams. (CP 15-23).

The court heard the motion to modify the sentence on January 28, 2010. (1/28/2010, RP 3). At that time the prosecutor informed the court he had attempted to provide notice to Ms. Rowe about the hearing by mailing a letter to her last known address and making a telephone call to the last known phone number. He could not confirm whether Ms. Rowe actually received notice of the hearing. (1/28/2010, RP 12).

In a ruling by way of opinion letter, dated January 19, 2010, and filed February 2, 2010, the court acknowledged Mr. Adams' request for a court order allowing him to bring an action in family

¹ The trial court's prohibition regarding contact with minors was a condition of community custody, not his sentence. (CP 9). However, the parties have proceeded as if it was a condition of his sentence.

court to establish contact with his daughter. (CP 25). The court noted Mr. Adams did not know the current location of Ms. Rowe, or his daughter, and he would likely attempt alternative, rather than personal service. (CP 26). The court granted the following relief: The no-contact order was modified to allow Mr. Adams to pursue a request in family court for contact with his minor daughter; he was allowed to contact Ms. Rowe only to effectuate service; and the criminal court required personal service on Ms. Rowe regarding the action in the family court. The court requested an order detailing the relief it had granted. (CP 26).

A second hearing on the matter was held May 6, 2010. (5/6/2010, RP 2-11). At that time, Mr. Adams requested the criminal court to modify the order prepared by the State. He asked the criminal court to allow the family court to determine the type of service necessary to notify Ms. Rowe of the action in family court. (5/6/2010, RP 4-5). The court orally ruled as follows:

“Mr. Adams may file a motion in family court to establish contact with Laura Lynn Adams. This court requires personal service in the motion on Ms. Rhodes [sic]....I am not agreeing that substitute service is appropriate at this point in time. What you’re going to do Mr. Adams, establish by good faith. And you are going to have to establish, to my satisfaction, that you just do not have any other options. So you have to work really hard to try to locate her and try to get personal service on it. I am not

going to turn this over to another commissioner or judge to make a determination on that. And if I'm not satisfied with the efforts you've made to try to get personal service, then I am going to continue to require that."

(5/6/2010, RP 7-8).

The court's written order stated: "Mr. Adams may file a motion in Family Court to establish contact with Laura Lynn Adams. This Court requires personal service of the motion on Ms. Rowe. Substitute service would clearly prejudice Ms. Rowe's rights." (CP 29). The court noted on the written order Mr. Adams' objection to its requirement of personal service. (CP 30). Mr. Adams appeals.

III. Argument

A. The Criminal Sentencing Court Erred When It Required Mr. Adams To Effect Personal Service On The Other Party To The Civil Action Because It Usurped The Authority Of Family Court.

The superior court has general jurisdiction to decide any justiciable controversy, so long as jurisdiction is not vested in another court. Const. art. 4 § 6 (Amendment 28) and RCW 2.08.010. The legislature has enacted statutes to "distribute and assign" certain cases to specific divisions of the superior court. Thus, although family court jurisdiction is derivative and not original, family courts have jurisdiction and full power over any Title 26 RCW

proceeding, including proceedings related to visitation. RCW 26.12.010.

Here, at the original sentencing, the criminal court restricted Mr. Adams' fundamental right to parent his daughter by imposing the crime-related prohibition of no contact with minors. (CP 9). A criminal sentencing court may impose such a limitation if the condition is reasonably necessary to prevent harm to a child. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). Generally, however, the criminal sentencing court is *not* the proper forum to address such concerns other than on a temporary basis. *Id.* at 655.

Rather,

“The Legislature has provided more appropriate forums than the criminal sentencing process to address the best interests of dependent children with respect to most visitation issues- It is the business of the family and juvenile courts to address the best interests of minor children with respect to most other kinds of harm that could arise during visitation with a parent who has been convicted of a crime.... To that end, the family and juvenile courts have authority to appoint guardians ad litem to investigate the best interests of minor children and those courts have broad discretion to tailor orders that address the needs of children in ways that sentencing courts in criminal proceedings cannot.” *State v. Letourneau*, 100 Wn. App. 424, 443, 997 P.2d 436 (2000).

In this case, the criminal sentencing court modified the sentence to allow Mr. Adams to file a petition in family court to request contact with his daughter, but then added the condition of personal service on Ms. Rowe. The condition was beyond the court's criminal sentencing authority.

RCW 4.28.020 provides:

"From the time of the commencement of the action by service of summons, *or by filing of a complaint*, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings." (Emphasis added).

Mr. Adams contends that once the no-contact prohibition was modified, he should have been allowed to file his petition with the family court, as the appropriate forum with the jurisdiction and full power to conduct any and all proceedings related to the petition for contact, including the determination of the appropriate service of process. RCW 26.12.190. The sentencing court usurped the authority of the family court and its order must be vacated.

B. The Criminal Court Judge's Intention To Retain Individual Responsibility To Determine Whether Proper Service Had Been Effected In A Civil Matter Did Not Deprive The Family Court Of Statutory Jurisdiction Over The Matter.

A particular judge cannot assign himself exclusive jurisdiction over a case because a county's superior court judges each have identical authority. See *State v. Caughlan*, 40, Wn.2d 729, 732, 246 P.2d 485 (1952). There is simply no case authority for the proposition that a single judge may divest the entire remaining superior court of jurisdiction to hear a family law case.

Most significantly, here, the criminal court judge, Judge Neil Q. Rielly has retired from the bench. Although a retired judge may be appointed pro tempore under article 4 §7 (amendment 80) of the Washington Constitution, this case is not so complex that transfer to the family court would be disruptive or consume a substantial amount of limited judicial resources. *Zachman v. Whirlpool Financial Corp.*, 123 Wn.2d 667, 869 P.2d 1078 (1994).

To the extent that Judge Rielly may have intended to retain individual responsibility to decide the issue of manner of service in this case, this cannot be construed to mean that no other judge may now make a determination regarding service of process.

C. Mr. Adams' Due Process Right Of Meaningful Access To The Court Was Violated By The Imposition Of The Criminal Court Order.

There is no question but that prisoners have a constitutional right of access to the courts, including civil proceedings. *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *State v. Dorsey*, 81 Wn. App. 414, 421, 914 P.2d 773 (1996). Indeed, courts must be careful not to erect procedural barriers that might unduly infringe upon an inmate's right of access to the courts. *See Whitney v. Buckner*, 107 Wn.2d 861, 866, 734 P.2d 485 (1987).

Mr. Adams pointed out to the sentencing court that because he was incarcerated, indigent, and had no knowledge of where Ms. Rowe and his daughter were living, he could likely not effect personal service. He told the court, "I'm more than willing to have a sheriff objectively serve her if the state would be willing to forward my petition to your office." (5/6/2010 RP 8). The court responded: "There's no provision for that, Mr. Adams. I know you are really at a disadvantage being in prison at this point, but I have people I have seen do it all the time, and it is just harder for you but you have to arrange for your own service....There's a statute that provides substitute service, but I made it clear in there that under these facts and circumstances I am just not allowing it." (5/6/2010 RP 8-9).

Aside from the argument the criminal court overstepped its authority in imposing the personal service requirement, the court also did not consider the substantial body of case law that admonishes courts not to erect procedural barriers for indigent petitioners.

In *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971), the Court tackled the issue of indigent women who sought to dissolve their marriages but could not afford the filing fees or costs of personal service by a state-paid sheriff. *Id.* at 381. The Court noted that the appellants there were obligated to resort to the judicial process, as dissolution was entirely a state-created matter. They were, however, precluded from the pursuing legal action because of the financial burden. *Id.* at 382-383. The Court drew the conclusion that “A State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship [marriage] without affording all citizens the means it has prescribed for doing so.” *Id.* at 383. The Court reasoned “reliable alternatives exist to service of process by a state-paid Sheriff if the State is unwilling to assume the cost of official service.” *Id.* at 382. Simply put, the State was not allowed to prescribe an exclusive method for

adjusting a fundamental human relationship and then deny without due process access to the means it has established. *Whitney*, 107 Wn.2d at 866.

In *Whitney*, the Washington Supreme Court recognized that access to the courts in a dissolution action is a fundamental right, not lost to prisoners merely because they are incarcerated. *Whitney*, 107 Wn.2d at 866. The court went on to hold that a prisoner's due process right of access to the courts "includes the right to bring actions for dissolution of marriage *and for related matters*." *Id.* (Emphasis added). Petitioning the family court for visitation with one's child, particularly where there has not been a termination of parental rights, should qualify as a "related matter".

The sole issue before the court in *Ashley v. Superior Court In and For Pierce County*, 83 Wn.2d 630, 521 P.2d 711 (1974), was the waiver or payment of the costs of service of process by indigents in a civil dissolution action. *Id.* at 634. Although the case was decided before the adoption of CR4(d)(4), (service of process by mail), the court went so far as to find that a superior court has the inherent power to waive its own rules; and in the case of an indigent who cannot afford service by a sheriff, it must fashion a

different method of service which involves only minor cost to the petitioner. *Ashley*, 83 Wn.2d 637.

The cases, read together, indicate a concern on the part of the United States Supreme Court and the Washington Supreme Court, that petitioners not be locked out of the courts because they cannot meet the requirements of the procedural processes. Here, despite Mr. Adams' obvious incarceration, indigency, and inability to locate Ms. Rowe, the criminal court nevertheless stated:

"I am not agreeing that substitute service is appropriate at this point in time. What you're going to do Mr. Adams, establish by good faith. And you are going to have to establish, to my satisfaction, that you just do not have any other options. So you have to work really hard to try to locate her and try to get personal service on it." (5/6/2010 RP 7).

The criminal court conceded that personal service of process could be accomplished by a non-professional party; however, there simply is no way Mr. Adams can move forward with his petition under the condition prescribed by the judge. The criminal court effectively barred him procedurally from pursuing his action in family court. Again, Mr. Adams seeks to begin his petition in family

court and allow that court to determine the proper method of service under the circumstances and consistent with due process for all parties.

D. The Sentencing Court Erred By Imposing A Non-Crime Related Prohibition, Requiring Mr. Adams To Effect Personal Service On Another Party In Order To Bring An Action In Family Court.

A trial court only possesses the power to impose sentences provided by law. *In re Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). As part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions authorized by the Sentencing Reform Act. RCW 9.94A.505(8).

A “crime-related prohibition” means an order of a court prohibiting conduct that *directly relates to the circumstances of the crime for which the offender has been convicted*, and shall not be construed to mean orders directing an offender to participate in rehabilitative programs or to otherwise perform affirmative conduct. RCW 9.94A.030(12). (Emphasis added). A “circumstance” is “[a]n accompanying accessory or fact.” *State v. Williams*, 157 Wn. App. 689, 692, 239 P.3d 600 (2010). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Here, the criminal court lifted its no-contact order, having determined it was within the province of the family court to address what, if any, contact would be in the child's best interest. However, it erred when it did not consider that requiring personal service on a party for a civil matter did not bear a direct relationship to the crime for which Mr. Adams was convicted.

A reviewing court may reverse the decision if it is manifestly unreasonable, exercised on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

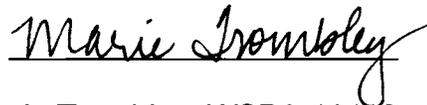
While it is clear that the court's understandable concern was for the protection of Ms. Rowe's rights as a parent, the facts do not meet the requirements of the correct standard for imposition of a crime-related prohibition. The manner of service and whether the threshold requirements for service are met is a matter for the family court not for the sentencing court. The court abused its discretion by imposing the requirement of personal service on Ms. Rowe.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Adams respectfully requests this court to vacate the condition that he must have Ms. Rowe personally served and remand the case to the family court for determination of service and further proceedings.

Dated: March 7, 2011.

Respectfully submitted,

A handwritten signature in cursive script that reads "Marie Trombley". The signature is written in black ink and is positioned above the typed name and contact information.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant James V. Adams, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on March 7, 2011, to James V. Adams, DOC # 881608, Coyote Ridge Correction Center, PO Box 769 Connell, WA, 99326; and Mark Erik Lindsey, 1100 W. Mallon Ave, Spokane, WA 99260.

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