FILED

APR 19, 2012

Court of Appeals
Division III
State of Washington

NO. 30123-1-III

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

STATE OF WASHINGTON,

Appellant,

v.

JESSE LUNA,

Respondent.

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

The Honorable Tari S. Eitzen, Judge

BRIEF OF RESPONDENT

ERIC J. NIELSEN
Attorney for Appellant

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

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A. ISSUE IN RESPONSE

Respondent was charged with a misdemeanor offense in the municipal court and that court issued a pretrial no-contact order. Respondent was later convicted and sentenced for that offense. On the form judgment and sentence order is a box entitled "NCO" marked with an X. The judgment and sentence order did not identify any persons respondent was restricted from contacting or any conditions on the restriction. Respondent was subsequently charged with violation of a post conviction no-contact order. It was alleged the municipal court judgment and sentence order imposed as a sentencing condition a post conviction no-contact order that respondent violated. Nowhere on the judgment and sentence was it stated that the pretrial no-contact order remained in effect as a sentencing condition and there was no separate no-contact order entered. Did the trial court properly conclude there was no valid admissible no-contact order to support the charge?

B. STATEMENT OF THE CASE

The Spokane County prosecutor charged respondent, Jesse Luna, by amended information with violation of a no contact order (Count II) issued in a municipal court cause no. N00009170. CP 8-9.[1] A pretrial no-

[1] Luna was also charged with possession of a stolen vehicle (Count I). CP 8-9. The two counts were severed. CP 45-46. He acquitted on that charge. RP 16 (July 25, 2011).

contact order was issued in that case on August 17, 2010. CP 36. Luna entered a guilty plea to the offense charged in that case and was sentenced. CP 10-13. On the judgment and sentence, which is a form order, the court simply marked a box entitled "NCO" with an X. Id. A separate post conviction no-contact order was never entered and nowhere in the judgment and sentence order was any person named who Luna was restricted from contacting.

Luna moved to dismiss on the grounds there was no valid post conviction no-contact order, which the State alleged was the basis for the violation of a no-contact order charged in the amended information. CP 14-21. Luna argued that on the date he was alleged to have violated the post conviction no-contact order the only municipal court no-contact order was the pre-trial order and it expired when entered his guilty plea. RP 3-6 (July 25, 2011).

The State conceded the municipal court's failure to enter a post conviction no-contact order contemporaneous with its judgment and sentence was a "grave error." RP 15 (July 25, 2011). The State argued, however, that because the judgment and sentence had an X marked in the box followed by the letters "NCO", and because Mr. Luna moved in the municipal court to recall the pretrial no-contact order on December 15, 2010, two months after the judgment and sentence order was entered,

under the holding in State v. Shultz, 146 Wn.2d 540, 48 P.3d 301 (2002), the pretrial no-contact order was a valid post conviction no-contact order as well. RP 6-12 (July 25, 2011).

The trail court rejected the State's argument and dismissed the charge finding there was no valid post conviction no-contact order to support the charge. In dismissing the charge, the court specifically concluded the Shultz decision was inapplicable, the purported post conviction no-contact order in the municipal court judgment and sentence did not comply with RCW 10.99.050 and Luna was not given adequate notice of a post conviction no-contact order. RP 13-16 (July 25, 2011); CP 60-61. The State appeals the order dismissing the charge. CP 41-44.

C. ARGUMENTS IN RESPONSE

1. THE COURT PROPERLY CONCLUDED THE SUPREME COURT DECISION IN SHULTZ IS INAPPLICABLE AND THERE WAS NOT A VALID POST CONVICTION NO-CONTACT ORDER TO SUPPORT THE CHARGE.

The State argues, as it did below, that Shultz controls and under its holding there was a valid post conviction no-contact order as part of the municipal court judgment and sentence order. It contends because there was a valid post conviction no-contact order the court erroneously

dismissed the violation of a no-contact order charge. Brief of Appellant (BOA) at 12-16. The State is wrong.

The trial court, as part of its gate-keeping function, must determine as a threshold matter whether a no-contact order alleged to be violated is applicable and will support the crime charged. State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005). An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. Miller, 156 Wn.2d at 31. Orders that are not applicable to the crime should not be admitted. If no order is admissible, the charge should be dismissed. Id. More recently, in City of Seattle v. May, 171 Wn.2d 847, 256 P.3d 1161 (2011), the Court clarified that in a proceeding for violation of a no-contact order, "the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct)." Id. at 854.

Under RCW 10.99.040 a court may issue a no-contact order when a person is charged but before arraigned. RCW 10.99.040(2)(a). The

court can also issue a no-contact order at arraignment or extend a previously issued no-contact order. RCW 10.99.040(3). When a person is convicted, if as part of the sentence the court "restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall provided to the victim." RCW 10.99.050(1).

The validity of a pretrial no-contact order extended at sentencing is a question of law. Shultz, 146 Wn.2d at 544. And, this Court can affirm a trial court's decision on any theory supported by the record and the law. State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997) (citing Tropiano v. City of Tacoma, 105 Wn.2d 873, 718 P.2d 801 (1986)).

The State argues the pretrial no-contact order issued by the municipal court was properly extended post conviction, citing Shultz. BOA at 12-15. In Shultz, the issue was whether at sentencing in a domestic violence case, "may the trial court extend as a sentencing condition a no-contact order entered pursuant to RCW 10.99.040(3) at arraignment, or does RCW 10.99.050(1) require the court to issue an entirely new no-contact order when the court decides to restrict the defendant's contact with the victim as a sentencing condition?" Shultz, 146 Wn.2d at 543. The Shultz majority, in a 5 to 4 decision, held the trial court may issue a new no-contact order under RCW 10.99.050, or extend

the existing order by "clearly indicating on the judgment and sentence that the order is to remain in effect." Id. at 548.

When Schultz was arraigned the court entered a no-contact order for a period of one year. The order was entitled, "No Contact Order," and it stated that it was entered "pursuant to RCW 10.99.040, RCW 10.99.050, EMC [Everett Municipal Code]10.22.010 and EMC 10.22.020." Schultz, 146 Wn.2d at 542. Shultz was later found guilty of assault. "On the 'Finding and Sentence,' the trial judge checked item 17, 'No Contact Order to remain in effect.'" Id. The Shultz Court held this was an effective extension of the pretrial order entered under RCW 10.99.040(3) because it satisfied the requirements for issuance of a post conviction non-contact order under RCW 10.99.050(1). Shultz, 146 Wn.2d at 548-49. The Court reasoned that "[b]y placing an X in the space alongside item 17, 'No Contact Order to remain in effect,' the trial judge recorded on the finding and sentence the elected sentencing condition; that condition remained fully recorded in the preexisting no-contact order, a certified copy of which had already been given to the victim." Id. at 548.

This case is readily distinguishable from Shultz. In Shultz the order cited both RCW 10.99.040 and RCW 10.99.050. The title of the order and its citation to RCW 10.99.050 were significant factors in the Shultz majority's analysis. "That order [the no-contact order entered at

Shultz's arraignment] is not designated a pretrial or preconviction no-contact order, but simply bears the title 'NO-CONTACT ORDER.' Moreover, the order provides that the defendant's contact with the victim was restricted pursuant not only to RCW 10.99.040 but also to 'RCW 10.99.050, EMC 10.22.010 and EMC 10.22.020.'" Shultz, 146 Wn.2d at 547 (emphasis added).

Here, unlike the order in Shultz, the municipal court no-contact order is clearly designated a pretrial order and does not cite RCW 10.99.050. Those factors that informed the Shultz Court's decision are not present.

Another significant factor in the Shultz Court's analysis was that in the judgment and sentence in that case, the court marked "No Contact Order to remain in effect." RCW 10.99.050(1) requires that "[w]hen a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." The Shultz court found that sentencing condition (the no-contact order) "remained fully recorded in the preexisting no-contact order" thereby complying with the requirement in RCW 10.99.050 that a post conviction no-contact order be recorded. Shultz, 146 Wn.2d at 548.

Here, by contrast, in the municipal court judgment and sentence, the court marked with an X the box with the letters "NCO." Nowhere in the judgment and sentence order does it indicate the pretrial no-contact order is "to remain in effect." Nowhere in the judgment and sentence order does it even mention the person or persons the defendant is restricted from contacting or the conditions of any such restriction. The judgment and sentence order does not meet the statutory recording requirements for a post conviction no-contact order. And, as explained in the argument heading below, it does not provide the constitutionally required notice or "fair warning."

The trial court found the no-contact order was invalid, did not comply with RCW 10.99.050 and therefore could not support the charge. As shown above, the court properly rejected the State's argument that under the holding in Shultz, the purported no-contact order was a valid extension of the pre trial no-contact order. This Court too should reject that argument and affirm the court's order dismissing the charge. The purported post conviction no-contact order in the municipal court's judgment and sentence order did not operate to extend the pretrial no-contact order, did not comply with RCW 10.99.050 and was facially invalid.

2. BECAUSE THE COURT PROPERLY CONCLUDED THE PURPORTED POST CONVICTION NO-CONTACT CONDITION IN THE MUNICIPAL COURT'S JUDGMENT AND SENTENCE ORDER FAILED TO PROVIDE LUNA WITH CONSTITUTIONALLY REQUIRED NOTICE IT IS FACIALLY INVALID AND INAPPLICABLE.

The court also properly concluded Luna did not receive proper notice or fair warning of the relevant prohibited conduct. Both our state and federal constitutions provide that a person may not be deprived of property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Due process requires that criminal prohibitions provide adequate notice of what conduct is prohibited and standards to prevent arbitrary enforcement. State v. Halstien, 122 Wn.2d 109, 117, 857 P.2d 270 (1993). No-contact orders that cannot be constitutionally applied to the charged conduct if the orders fail to give the restrained party fair warning of the relevant prohibited conduct. City of Seattle v. May, 171 Wn.2d at 854.

There is no indication in the municipal court judgment and sentence order what the letters "NCO" mean. A person would have to assume it meant "no-contact order."[2] But, even if it were reasonable to assume "NCO" means "no-contact order" there is yet another box on the form judgment and sentence next to the "NCO" box that states, "Have no contact with _____ DOB_____." CP 10-13. That box, however,

[2] That was the assumption made by the court below as well as the parties.

is not checked and the blanks are not filed in. The judgment and sentence form clearly contemplates that if a post conviction no-contact order is part of the sentence, the person the defendant is restricted from contacting must be named or that there be a separate order.

That was not a problem in Shultz because the judgment and sentence there referenced the previous no-contact order ("No Contact Order to remain in effect") so Shultz was on notice he was restricted from contacting the person named in the pervious order and under the terms and conditions of the previous order. There is no such notice here. Because the judgment and sentence here does not indicate any previous no-contact is to "remain in effect" and does name the person Luna is restricted from contacting and the conditions of any such restriction, as contemplated by the judgment and sentence order itself, it does not provide even minimal notice or "fair warning."

The State contends Luna must have had proper notice the court issued a valid no-contact order as part of his judgment and sentence in the municipal court case because he moved to recall the pretrial order on December 15, 2010, after he was sentenced. BOA at 16-18. The State was granted leave to supplement the record with the sentencing hearing and the December 15, 2010 hearing and its brief devotes pages reciting

verbatim the transcripts of those hearings to support its contention. BOA at 2-10.

What that shows is that Luna believed there was a valid no-contact order still in existence. It does not show the purported post conviction no-contact order in the judgment and sentence order was facially valid or complied with the "recorded" requirement in RCW 10.99.050. Absent proper notice in the judgment and sentence that the pretrial no-contact remained in effect, as in Shultz, as a matter of law, the judgment and sentence order is invalid and does not comply with the statute. For this separate reason, the Court correctly ruled the judgment and sentence referencing the no-contact order could not support the charge. See, City of Seattle v. May, 171 Wn.2d at 854 (if the order fails to give the defendant notice that the charged conduct was prohibited, the order should be excluded as inapplicable).

D. CONCLUSION

For any of the above reasons, this Court should affirm the trial court's decision dismissing the violation of a no-contact order charge.

DATED this 9 day of April, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051
Attorneys for Respondent

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Jesse Luna

No. 30123-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 19th day of April, 2012, I caused a true and correct copy of the **Brief of Respondent** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Signed in Seattle, Washington this 19th day of April, 2012.

x Patrick Mayovsky

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

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	COA NO. 30123-1-III
vs.	)	
	)	
JESSE LUNA,	)	
	)	
Respondent.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JESSE LUNA
2215 N. ATALANTIC
SPOKANE, WA 99205

SIGNED IN SEATTLE WASHINGTON, THIS 19TH OF APRIL 2012.

x Patrick Mayovsky