

NO. 78452-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL ARMENDARIZ,

Petitioner.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Under the current version of the Sentencing Reform Act (SRA), may a sentencing court impose a five-year no-contact order as a condition of sentence on a class C felony?

B. FACTS

Ismael Armendariz and Diana Nonas-Truong had a romantic relationship that soured. Eventually, Armendariz was ordered by a court to have no contact with Ms. Nonas-Truong.

On January 3, 2004, police responded to a 911 call, apparently from Nonas-Truong's neighbor, reporting a broken window and possible domestic violence at Nonas-Truong's residence. 1RP 32-33. Armendariz had been at the residence earlier in the evening. 2RP 104-05, 108-09. Nonas-Truong did not know her bedroom window was broken because she had been in the shower. 2RP 95.

Seattle Police Officer Chittenden responded to the call and, while other officers looked for Armendariz, Chittenden locked the front door and interviewed Nonas-Truong. 2RP 140-43.

Meanwhile, Armendariz returned to Nonas-Truong's apartment and yelled, kicked and pounded on doors and windows in an apparent

attempt to enter. 2RP 144. Armendariz shouted that he knew the police were there, and he didn't care if he went to jail. 2RP 144. When Officer Chittenden started to open the front door, Armendariz kicked the door, causing it to hit the officer in the head. A protracted struggle ensued. When Chittenden called for "fast backup," Armendariz said "Yeah, you better call for help bitch." 2RP 154. When Chittenden felt Armendariz grab his holster, the officer called for "help," the most urgent request for assistance. 2RP 145-51.

Armendariz was eventually arrested through the collective efforts of several officers, all of whom testified in court. 2RP 155-57 (Chittenden); 1RP 36-36 (Deputy Innoyue); 2RP 114-20 (SPD Officer Polhemus); 2RP 124-30 (SPD Officer Milstead). The melee was also witnessed by Nonas-Truong, and she, too, testified in court. 2RP 100-04. Armendariz testified, and said that the officer grabbed him unexpectedly as he knocked at the front door, and that he did not resist the officer or commit an intentional assault. 1RP 39-46 (direct), 46-83 (cross). Armendariz was convicted of felony assault in the third degree for his attack on the officer, and a misdemeanor for violation of the no-contact order. CP 30 - 31.

At sentencing, Ms. Nonas-Truong told the court that she had been traumatized, and that she was struggling to put her life back together. 1RP 86. As part of the felony sentence, the trial court ordered Armendariz to have no contact for five years with Nonas-Truong. CP 34. The trial court also entered a separate order imposing a no-contact order as a special condition of community custody. CP 37. Armendariz did not object to either order.

On appeal, Armendariz argued that the court did not have authority under RCW 9.94A.720 to order no contact with Nonas-Truong as a condition of community placement because Nonas-Truong was not the victim of the assault. Br. of App. at 20 -21. The Court of Appeals rejected this argument, noting that the tumultuous relationship between Armendariz and Nonas-Truong is what led to the assault, that Armendariz committed the crime while resisting arrest for violation of a court order prohibiting contact with Nonas-Truong, and that the present no-contact order was justified as a "crime-related prohibition." State v. Armendariz, No. 55074-8-I, slip op. at 8. (Court of Appeals Division I, Feb. 13, 2006 -- unpublished). The court noted that the parties had not addressed whether the five-year duration of the order was permissible as a condition of community custody. Id. at 8 n.19.

In his petition for review, Armendariz challenged the authority of the trial court to order no contact with Nonas-Truong as a condition of community custody, as well as the authority of the court to enter a five-year no contact order as a "crime-related prohibition." This Court granted review "only on the issue of the 5-year no-contact order."

C. ARGUMENT

Armendariz argues that, in a bill that was intended solely to reorganize the SRA, the legislature deliberately took away a sentencing court's authority to order a defendant to have no contact with victims or witnesses for up to the statutory maximum period.¹ This argument should be rejected. Sentencing courts have long had the authority to order no contact with victims and witnesses for the statutory maximum term, and the reorganization of the SRA did not divest courts of that authority.

¹ RCW 9A.20.021 establishes the statutory maximum penalty for all felonies so no penalties or conditions can exceed that period. See generally State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003). Assault in the third degree is a class C felony, subject to a statutory maximum sentence of five years. RCW 9A.36.031(1)(a).

1. THE PLAIN LANGUAGE OF THE SRA
AUTHORIZES SENTENCING COURTS TO
PROHIBIT CONTACT WITH VICTIMS AND
WITNESSES UP TO THE STATUTORY MAXIMUM
PERIOD.

Issues of statutory construction are reviewed de novo to ascertain and carry out the legislature's intent. State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006); State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Intent is determined by looking at the language of the statute. Van Woerden, 93 Wn. App. at 116. "Plain language does not require construction," State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994), and "[c]ourts should assume the Legislature means exactly what it says." State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). See also State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); State v. Groom, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) ("...it is imperative that we not rewrite statutes to express what we think the law should be...").

RCW 9.94A.505, entitled "Sentences," sets forth general propositions applicable to all sentences imposed under the SRA, and outlines how sentences should be imposed by cross-referencing other important sub-sections. Significantly, § .505

contains one provision that creates authority to order “crime-related prohibitions.” RCW 9.94A.505(8). Separate provisions in the same subsection establish authority to order conditions that will apply while the offender is on community custody.² RCW 9.94A.505.

The subsection provides as follows:

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in RCW 9.94A.510 or 9.94A.517;

(ii) RCW 9.94A.700 and 9.94A.705, relating to **community placement**;

(iii) RCW 9.94A.710 and 9.94A.715, relating to **community custody**;

(iv) RCW 9.94A.545, relating to **community custody** for offenders whose term of confinement is one year or less;

* * *

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.505 (bold added). The term “crime-related prohibitions” is defined as:

...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

² For ease of reference, “community custody” as used in this brief refers to community custody, community placement, and community supervision.

construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(13).

By the plain terms of these two provisions, the SRA authorizes a sentencing court to impose a condition that will "prohibit conduct that directly relates to the circumstances of the crime." A sentencing court that prohibits a defendant from contacting an important witness simply "prohibit[s] conduct that directly relates to the circumstances of the crime." Thus, the no-contact order issued in this case is authorized by the plain language of the SRA.

In order to prevail, Armendariz would have to show that the SRA excludes no-contact orders from the definition of "crime-related prohibitions." He cannot, because the statute does not provide such an exclusion.

Nor can Armendariz show that the statutory language limits "crime-related prohibitions" to the period of community custody. In fact, sub-section (8), relating to "crime-related prohibitions," is clearly distinct from conditions of community custody, as conditions

of community custody and placement are specifically referred to in subsections (2)(a)(ii) – (iv). And, the statute governing community placement refers back to the court's more general authority to enforce "crime-related prohibitions." RCW 9.94A.700(5)(e). There would be no reason for this cross-reference unless the two subsections established independent sources of authority. Thus, in order not to render it superfluous, subsection (8) relating to "crime-related prohibitions" must be interpreted as granting the sentencing court some authority distinct from the court's authority to establish community custody conditions.

This distinction between community custody conditions and "crime-related prohibitions" existed under previous versions of the SRA. See former RCW 9.94A.120(11) – (15) (relating to community custody and placement), and (16) (crime-related prohibitions). Indeed, Armendariz concedes that under the pre-2001 SRA, sentencing judges had the authority to order no contact for five years. Pet. for Review at 9 ("The SRA formerly authorized the superior court to order the offender to have no contact with a witness for a period up to the maximum term.").

Armendariz's concession is appropriate, as Washington courts have repeatedly held that no-contact orders up to the

statutory maximum period were permissible under the statute, as to both victims and witnesses. For example, in State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001), the Court of Appeals noted that, under RCW 9.94A.120(20), the trial court is authorized to impose a no-contact order as a condition of sentence that relates directly to the circumstances of the crime for which the offender has been convicted. The Court also noted that "Ancira's children, as witnesses, were directly connected to the circumstances of the crime." State v. Ancira, 107 Wn. App. at 656. See also State v. Brown, 108 Wn. App. 960, 963, 33 P.3d 433 (2001) ("We hold that RCW 9.94A.120(20) allows the court to impose a no-contact order "as part of [an offender's] sentence" if it is related to the circumstances of the crime."); State v. Miniken, 100 Wn. App. 925, 928, 999 P.2d 1289, review denied, 142 Wn.2d 1009 (2000) ("...a court has the authority to prohibit an offender from having contact with individuals for a period longer than the sentence imposed but not beyond the maximum allowable sentence.").

Recent cases also confirm the sentencing court's broad authority to impose "crime-related prohibitions." See State v. Acrey, ___ Wn. App. ___, 146 P.3d 1215 (2006) (affirming sentencing court's order prohibiting defendant -- convicted of

stealing thousands of dollars from an elderly man while posing as his caretaker -- from working as a caretaker for elderly or disabled people); State v. Warren, 134 Wn .App. 44, 70, 138 P.3d 1081 (2006) (affirming lifetime order prohibiting contact between child sex offender and the victim's mother).

Thus, under the plain language of the SRA -- now and before 2001 -- a sentencing court may order no contact between victims and witnesses up to the statutory maximum for the offense.

2. THE 2001 REORGANIZATION OF THE SRA DID NOT MAKE ANY SUBSTANTIVE CHANGE TO THE ACT.

Armendariz argues that when the legislature reorganized the SRA in 2001, it removed language from former RCW 9.94A.120(20), thereby divesting courts of the authority to impose no-contact orders that are independent of community custody. See Laws of 2000, ch. 28; Laws of 2001, ch. 10.³ This argument conflicts with the plain language of the statute, with the structure of

³ Former RCW 9.94A.120(20) provided: "As part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, *prohibiting the offender from having any contact with other specified individual or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.*" (italics indicates language that does not appear in RCW 9.94A.505(8)). Part of the italicized language is now in RCW 9.94A.700(b).

the statute, and with the legislature's express intent that the 2001 reorganization should make no substantive change to the SRA. The argument should be rejected.

The act in question, Laws of 2000, ch. 28, was described as "AN ACT Relating to reorganization of, and technical, clarifying, nonsubstantive amendments to, community supervision and sentencing provisions...". In passing this technical bill, the legislature stated:

The sentencing reform act has been amended many times since its enactment in 1981. While each amendment promoted a valid public purpose, some sections of the act have become unduly lengthy **and repetitive**. The legislature finds that it is appropriate to adopt clarifying amendments to make the act easier to use and understand.

The legislature does not intend chapter 28, Laws of 2000 to make, and no provision of chapter 28, Laws of 2000 shall be construed as making, a substantive change in the sentencing reform act.

The legislature does intend to clarify that persistent offenders are not eligible for extraordinary medical placement.

RCW 9.94A.015. Finding--Intent--2000 c 28 (emphasis added).

In short, what the legislature intended to do was to reorganize and recodify the SRA, without amending it. This Court has already implicitly recognized that fact when, in State v. Law,

154 Wn.2d 85, 110 P.3d 717 (2005), this Court observed that "[f]ormer RCW 9.94A.120(2) and former RCW 9.94A.390 were combined as current RCW 9.94A.535 in the recodification of the SRA in 2000. Laws of 2000, ch. 28, § 8"). Also, this Court has previously recognized that a statute can be recodified without making a substantive amendment.

To "recodify" means "to codify again[.]" and "recodification" means "the action of recodifying or state of being recodified." Webster's Third New International Dictionary 1896 (Unabridged 1993). "Codification" is "[t]he process of collecting and arranging systematically, usually by subject, the laws of a state or country, or the rules and regulations covering a particular area or subject of law or practice[.]" Black's Law Dictionary 258 (6 ed.1990). Recodification of a statute involves rearrangement of the statute or placing it in a different part of the code. (A statute can be amended at the same time as recodification, but amending the statute is not, itself, recodification. See, e.g., City of Seattle v. Public Employee Relations Comm'n, 116 Wn.2d 923, 927 n. 1, 809 P.2d 1377 (1991) (noting the Administrative Procedure Act had recently been both amended and recodified.)).

State v. Aho, 89 Wn. App. 842, 743 n.2, 954 P.2d 911 (1998).

So, if no substantive change was intended by this bill, then removal of language should be interpreted only as an effort by the legislature to eliminate redundancy. As noted above, the legislature expressly stated that "some sections of the act have

become unduly lengthy and repetitive." RCW 9.94A.015. Indeed, the language that is missing from the current version of RCW 9.94A.050(8) *would be* redundant because RCW 9.94A.505(8), read together with RCW 9.94A.030(13), clearly authorizes sentencing courts to preclude contact with individuals or classes of individuals. By removing the "prohibiting contact" language from former RCW 9.94A.120(20), repetition is avoided. By contrast, the "prohibiting contact" language is arguably necessary in RCW 9.94A.700(b) because that provision does not incorporate "crime-related prohibitions."

In spite of the clear statement of intent, Armendariz asks this Court to read a *substantive* change into a recodification that was expressly intended to be *non-substantive*. Worse, his interpretation would suggest that by using *broader* language to describe the court's authority to impose crime-related prohibitions in the current SRA, the legislature intended to *narrow* the sentencing court's authority. That cannot be. The legislature resorted to broader language because, under the new version, more specific language was not needed. Because Armendariz's proposed interpretation would effectively repeal a long-standing provision of the SRA, and would divest a sentencing court of authority to order no contact with

victims and witnesses for the statutory maximum term, that interpretation is substantive, so it is precluded by the legislature's statement of intent. His interpretation may be rejected on this basis alone.

Moreover, Armendariz's interpretation of the SRA is also contrary to the view of the Sentencing Guidelines Commission. An agency charged with interpretation and implementation of statutory directives is presumed to understand the statutory scheme. While not controlling, the agency's construction of the statute is given great weight. Public Utility Dist. No. 1 of Pend Oreille County v. State Dept. of Ecology, 146 Wn.2d 778, 790, 51 P.3d 744 (2002) (Dept. of Ecology). City of Yakima v. International Ass'n of Fire Fighters, 117 Wn.2d 655, 671-72, 818 P.2d 1076 (1991) (Public Employment Relations Commission); Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448, 536 P.2d 157 (1975) (Shoreline Hearings Board).

The Sentencing Guidelines Commission (SGC) is the administrative agency created by the legislature to assist it in implementing, monitoring, and improving the SRA. RCW 9.94A.850 - .865. This Court has "repeatedly looked to the explanations of the Sentencing Guidelines Commission when

interpreting the SRA." Matter of Charles, 135 Wn.2d 239, 251, 955 P.2d 798 (1998) (citing State v. Ha'mim, 132 Wn.2d 834, 844, 940 P.2d 633 (1997), and In re Long, 117 Wn.2d 292, 301, 815 P.2d 257 (1991)).

As to no-contact orders, the SGC has consistently interpreted the SRA as granting judges the authority to prohibit contact with witnesses and victims, regardless of the period of community custody. See e.g. Washington Sentencing Guidelines Comm'n, Implementation Manual I-43 (1999) (interpreting former RCW 9.94A.120(20)).⁴ This interpretation of the court's authority to order no contact with witnesses was unchanged in each of the five Implementation Manuals issued since the legislature reorganized the SRA in 2001. See Washington Sentencing Guidelines Comm'n, Implementation Manual I-40 (2001); I-40 (2002); I-39 (2003); I-40 (2004); I-40 (2005); I-42 (2006).⁵ Thus, it is clear that the SGC

⁴ The 1999 manual says: "**CONTACT WITH INDIVIDUALS** A court may prohibit an offender from having contact with specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the community supervision or community placement term. The order prohibiting contact must relate directly to the circumstances of the crime of conviction (RCW 9.94A.120(20))."

⁵ Each manual from 2001 to 2006 says: "**CONTACT WITH INDIVIDUALS** A court may prohibit an offender from contacting with (sic) specified individuals or a specific class of individuals **for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the community supervision or community placement term.** The order prohibiting contact

believes that sentencing courts may prohibit contact, and that the authority to do so is independent of the authority to impose community custody conditions, and thus also independent of the community custody time limits. The SGC's interpretation should be considered persuasive evidence as the correct interpretation of RCW 9.94A.505(8).

Moreover, there is no sound policy reason for the legislature to divest judges of the authority to order no contact with victims and witnesses for the statutory maximum period. It is well-known that victims and witnesses are increasingly reluctant to become involved in criminal prosecutions for fear of harassment and retaliation.⁶ The concern may be particularly acute where, as here, the witness and the defendant know each other, and where there has been previous domestic violence. In these circumstances, a court's ability to order that a defendant have no contact with a victim or witness for as long as possible can ameliorate the victim's or witness' fear that

must relate directly to the circumstances of the crime of conviction (RCW 9.94A.505(8))." (emphasis added).

⁶ See e.g. <http://www.ncjrs.gov/pdffiles/witintim.pdf> (Victim and Witness Intimidation: New Developments and Emerging Responses by Kerry Murphy Healey, National Institute of Justice).

participation in the trial process will subject her to retaliation.⁷ The legislature would not silently remove such an important provision from the SRA in a bill that was avowedly administrative rather than substantive. Armendariz's interpretation, which would effect such a change, is fatally flawed.

D. CONCLUSION

The plain language of RCW 9.94A.505(8) permits a court to impose a five-year no contact order upon sentencing of a class C felony. No time limit is imposed by the statute, no court has imposed a limit, and the agency charged with advising the legislature on sentencing matters has concluded that courts have the authority to impose the five-year order.

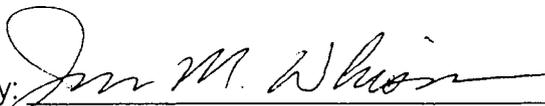
⁷ No contact orders up to the statutory maximum period are routine in felony cases. Acceptance of Armendariz's argument will needlessly jeopardize thousands of no contact orders entered by sentencing courts since 2001.

Thus, Armendariz's argument should be rejected, and imposition of the five-year no- contact order should be affirmed.

DATED this 5th day of January, 2007.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Elaine Winters, of Washington Appellate Project, at the following address: 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, the attorney of record for the appellant, containing a copy of the Supplemental Brief of Respondent in STATE V. ISMAEL ARMENDARIZ, Cause No. 78452-3 in the Supreme Court of the State of Washington.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

Date

1-5-07