

NO. 94892-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WENDY GRANATH,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. **IDENTITY OF RESPONDENT**

Wendy Granath, Respondent here and Petitioner below, respectfully requests this Court to deny review of the decision of the Court of Appeals designated in section B of this Answer.

B. **COURT OF APPEALS DECISION**

Wendy Granath requests this Court to deny review of the published decision in the Court of Appeals in State v. Granath, No. 75677-4-I (July 31, 2017), a copy of which is attached as Appendix A to State's Petition for Review.

C. **ISSUE PRESENTED FOR REVIEW**

Did the post-conviction no-contact order issued pursuant to RCW 10.99.050 by the district court as a condition of a 24 month suspended sentence survive the completion of the suspended sentence? Must the no-contact order issued pursuant to RCW 10.99.040 be congruent with the no-contact condition of sentence of the sentence actually imposed and terminate when the condition of sentence terminates? Did the Legislature intend to criminalize violation of a post-conviction no-contact order entered as a condition of sentence if the violation is committed after the sentence has been served?

D. **STATEMENT OF THE CASE**

A jury convicted Wendy Granath of cyberstalking and violation of a no-contact order both with domestic violence designations. She was sentenced on November 8, 2012. The court imposed a 24 month suspended sentence. CP 35-36. One of the conditions of the suspended sentence was a post-conviction no-contact order. CP 39-40. The order issued did not list a specific expiration date. Rather, paragraph 4 reads, “This no contact order expires on: _____ . Five years from today if no date is entered.” CP 39.

The parties agree that the district court closed the case in December 2014 after Granath paid the legal financial obligations. At this point, the no-contact condition of her suspended sentence no longer remained in effect. Granath moved to vacate the no contact order. CP 2. The district court denied her motion. The district court ruled the no-contact order was not a condition of sentence that expired with the sentence, but rather, that it was a “stand-alone” order. CP 13-14. While the district court noted that it “. . . could not enforce [the no contact order] as a violation of condition of sentence,” the court nevertheless found that the order was could “survive on its own.” Id. at 14.

Granath appealed to the King County Superior court which affirmed the district court’s decision. The Court of Appeals granted

review and reversed. State v. Granath, No. 74677-4-I, Slip Op. at 1-3 (July 31, 2017). As the state notes, the court properly framed the question as “[w]hether the legislature intended to criminalize violation of a post-conviction no-contact order entered as a condition of sentence if the violation is committed after the sentence has been served?” Id. at 4. The court correctly answered the question, “no.”

To discern the legislature's intent, *we must look to the plain language of RCW 10.99.050*. Specifically, we must look at the command of the first subsection, which reads as follows: “When 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.” RCW 10.99.050(1).

This subsection states three prerequisites for a postconviction no-contact order issued under RCW 10.99.050. The defendant must be found guilty of a crime, there must be a sentence, and a condition of the sentence must restrict the defendant's ability to have contact with the victim. When those prerequisites are met, the no-contact condition of sentence must be “recorded” in a separate order that is provided to the victim.

This subsection does not say that a no-contact order issued under RCW 10.99.050 may remain in effect for the maximum term of the court's sentencing authority. Nothing like the phrase “statutory maximum” is found in the operative language of RCW 10.99.050. The only no-contact order the statute authorizes is one that records a no-contact condition of the sentence. It follows that when the no-contact condition of sentence expires, there is no express legislative authority for the continued validity of the no-contact order. A no-contact order is “stand-alone” only in the sense that a violation can be enforced as a criminal offense in any jurisdiction in the state.

(Emphasis added.) Id. at 11.

D. REASONS REVIEW SHOULD BE DENIED

The Court of Appeals decision in Granath does not conflict with its prior decision in State v. W.S., 176 Wn.App. 231(2013). Also, the Court of Appeals' published decision in Granath is properly and correctly grounded in the plain language of the relevant statutes and well-established principles of statutory construction. Thus, there is no substantial public interest that supports review by this court. The State argues the Granath decision "contravenes the legislature's explicit intent to provide victims of domestic violence with 'the maximum protection from abuse allowed by law.'" Petition For Review at 5. To the contrary, Granath clarifies and validates no-contact orders for the maximum duration allowed by the law. The court correctly discerned the maximum protection allowed by law is concurrent with the duration of the condition of sentence imposed.

It is the State's arguments that are not grounded in statute as the court of appeals noted.

The State fails to come to grips with the plain language of RCW 10.99.050(1). Instead, the State makes a policy argument. The State contends a five-year term is necessary to fulfill the legislatively expressed purpose of assuring the victim of domestic violence "the maximum protection from abuse which the law and those who enforce the law can provide." Laws of 1979, 1st Ex. Sess., ch. 105, § 1; RCW 10.99.010.

If the statute is construed as authorizing no-contact orders that assure maximum protection for victims, then there is no reason to stop at 5 years; a no-contact order of 50 years or longer would be permissible. As we said in Anaya, the "strongly stated policy" of protecting victims of

domestic violence “does not justify our reading into this criminal statute provisions that are not there. Creating statutory law is a purely legislative function.” Anaya, 95 Wash. App. at 760, 976 P.2d 1251.

(Emphasis added.) Granath, Slip Op. at 11.

1. THE GRANATH DECISION AUTHORIZES DVNCOs TO PROVIDE THE MAXIMUM PROTECTION THE LEGISLATURE INTENDED.

The State first argues that the holding in Granath “leads to absurd results that contravene the intent of the Legislature.” Petition For Review at 7. The State goes on to posit in colorful terms that sentencing courts can only issue five year no-contact orders “in every case” by “engaging in creative sentencing gymnastics” and “jump[] through . . . superficial hoops.” Petition For Review at 13. As noted by the Granath court, “[i]t is not absurd to tie the length of a no-contact order to the sentence actually imposed.” Slip Op. at 13. Also, the court correctly noted, “[t]he State fails to come to grips with the plain language of RCW 10.99.050(1). Instead, the State makes a policy argument.”

These arguments were rejected by the court below and are unmoored from the plain language of the statute. The State accuses the lower court of reading the plain language of RCW 10.99.050 in isolation. But it is the State that attempts to conjure from a single statement of legislative intent alone an interpretation of that statute which ignores the related statute governing district court sentencing.

RCW 10.99.05 is clear and unambiguous. A post-conviction no contact order is authorized as a condition of sentence and does not operate independent of the actual sentence imposed. RCW 10.99.050(1) states:

When 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.

(Emphasis added). Consistent with the plain language of the statute, courts have recognized that post-conviction no-contact orders are issued as a condition of the sentence imposed. State v. Anaya, 95 Wn.App. 751, 754 (1999); State v. Schultz, 146 Wn.2d 540, 544 (2002); State v. Rodriguez, 183 Wn.App. 947, 958-59 (2014); State v. Armendariz, 160 Wn.2d 106, 201-05 (2007).

The State's proposed construction would require this court to delete the majority of the subsection (1) starting from "a condition of sentence restricts . . ." to the end of the sentence and substitute the phrase "and sentenced the court may issue a no-contact order."¹ The State cites no authority for this novel statutory construction and none exists. In fact, the State's arguments are contrary to the district court's statutory sentencing authority as codified in RCW 3.66.068, .069.

District courts are authorized to impose conditions of sentence

¹ According to the State, RCW 10.99.050(1) would read as follows: When a defendant is found guilty of a crime and sentenced the court may issue a no-contact order."

subject to suspended or deferred sentences for up to 60 months for domestic violence offenses. RCW 3.66.068, .069.

(1) A court has continuing jurisdiction and authority to suspend the execution of all or any part of its sentence upon stated terms, including installment payment of fines for a period *not to exceed*: (a) Five years after imposition of sentence for a defendant sentenced for a domestic violence offense

(2)(a) . . . [A] court has continuing jurisdiction and authority to defer the execution of all or any part of its sentence upon stated terms, including installment payment of fines for a period *not to exceed*: (i) Five years after imposition of sentence for a defendant sentenced for a domestic violence offense

(Emphasis added.) RCW 3.66.068. It is well-settled that a court cannot impose conditions of the sentence unless the court suspends or defers some jail time. State v. Gailus, 136 Wn.App. 191, 201-02 (2006) (“The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender.”).²

The State argues that requiring the no-contact order to be treated as a condition of the actual sentence imposed forces the courts to choose between punishment of the offender and protection of the victim of domestic violence. This is a false dichotomy. The law provides district courts considerable flexibility to fashion a sentence that does both. “Even the trial court in Granath noted, “it is ‘a good practice’ to have the term of

² *Gailus* involved the similarly worded statute authorizing superior courts to impose probation as part of a misdemeanor suspended sentence. RCW 9.95.210(1) which reads: In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer. This is the same statute discussed in *State v. Rodriguez*, *supra*.

a no-contact order match the term of the defendant's probation; the court simply did not believe it was a legal requirement.” Slip Op. at 13. The Granath decision establishes only that the law requires this “good practice.”

The court below carefully reviewed the statutory language of the relevant statutes and the cases which have addressed the duration of no-contact orders issued pursuant to RCW 10.99. Slip Op. at 3-9. The State fails to find fault with the court’s analysis. Instead, the State offers a parade of horribles unsupported by any facts or law. The Granath decision is grounded on the plain language of the statute and should stand.

2. W.S. HAS NO APPLICATION TO THIS CASE AND GRANATH DOES NOT CONFLICT WITH THAT DECISION.

The State relies on *State v. W.S.*, 176 Wash. App. 231 (2013) to argue that post-conviction no-contact orders may be issued for the maximum term of incarceration. If *W.S.* did apply here, then the maximum duration of the no-contact order would be only 364 days –the statutory maximum for a gross misdemeanor. Nonetheless, *W.S.* does not apply because the statutes governing juvenile conditions of sentence do not apply to misdemeanor sentences imposed by district courts and *W.S.* relies upon *Armendariz* which, in turn, is grounded in the express

language of the Sentencing Reform Act. *See* Appellant’s Brief at 12-18.

See also Slip Op. at 7-10.

The State argues the Granath court improperly distinguished *W.S.* by asserting that case turned on the authority of the juvenile department of the superior court to modify or enforce a no-contact order after the offender turns 18. Petition for Review at 15. While the Granath court observed that point made in *W.S.*, Slip Op. at 9, the court also observed that *W.S.* found support in *State v. Armendariz*, 160 Wn.2d 106 (2007), that held a no-contact order as a crime related prohibition could be imposed for the “statutory maximum of the crime.” Slip Op. at 9-10. Nonetheless, the Granath court rejected the State’s reliance on *W.S.* because Granath’s legal theory was not addressed in *W.S.*

The State deduces from this statement that *W.S.* authoritatively interpreted RCW 10.99.050(1) as including the words “for the statutory maximum of the crime.” in view of the argument and theory presented in *W.S.*, the State’s reasoning is incorrect.

“An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory.” *State v. Reinhart*, 77 Wash. App. 454, 458-59, 891 P.2d 735, review denied, 127 Wash.2d 1014, 902 P.2d 164 (1995); *John Doe G v. Dep’t of Corr.*, 197 Wash. App. 609, 619, 391 P.3d 496, review granted in part, 188 Wash.2d 1008, 394 P.3d 1009 (2017). Granath’s legal theory is that the plain language of RCW 10.99.050(1) ties the permissible length of the no-contact order to the sentence actually imposed. That theory was not raised in *W.S.* The appellant’s only theory was that an order issued by a juvenile court must expire when the juvenile court’s limited statutory jurisdiction over the offender expires. We held that a juvenile court’s authority to issue a no-contact order under RCW 10.99.050 is “independent and unrelated to the court’s statutory jurisdiction over the offender.” *W.S.*, 176 Wash. App. at 243, 309 P.3d 589. This is because after a juvenile offender turns 18, the

superior court has the authority to enforce the no-contact order. W.S., 176 Wash. App. at 243, 309 P.3d 589. The reference in W.S. to “the statutory maximum of the crime” comes from the court's discussion of *Armendariz*, not from analysis of RCW 10.99.050. Therefore, the reference in W.S. to “statutory maximum” does not control or inform our analysis of the legal theory raised by *Granath*.

Slip Op. at 10. As the court of appeal noted, *W.S.* is not grounded in the plain language of RCW 10.99.050. The court’s decision in *Granath* is grounded in that language. The State offers no argument undermining this aspect of the decision below. Finally, the State offers no citation to authority for the claim that a superior court’s authority to modify or enforce a no-contact order after an offender turns 18 (as clearly stated in *W.S.* and *Granath*) is “non-existent.” Petition For Review at 15.

3. THE STATE MISREPRESENTS COUNSEL’S STATEMENT IN ORAL ARGUMENT.

During argument, undersigned counsel was asked if her argument undermined the principle that “a crime related prohibition can be imposed up to the maximum sentence” – a reference to the holding in *State v. Armendariz*. Counsel responded affirmatively and went on to explain that the State could chose to use the statutory maximum of 364 days as the limit for DVNCOs but that she did not believe that was consistent with the law or the State’s interest. Respondent made this point in Appellant’s Brief at 17. Respondent has consistently argued that courts of limited jurisdiction have flexibility in fashioning sentences –unlike their superior

court counterparts who are bound by the restrictions of the Sentencing Reform Act for felony sentences —that balance the goals of rehabilitation, protection and punishment. Appellant’s Reply Brief at 9-12.

The State posits a solution in search of a problem. District courts have always had authority to impose conditions of sentence and related no-contact orders for up to 60 months. Granath does not restrict that authority. The Granath decision merely clarifies that the duration of the post-conviction no-contact order issued pursuant to RCW 10.99.050 runs concurrent with the term the court actually suspends or defers the sentence because such an order is a “condition of sentence.” RCW 10.99.050.

E. **CONCLUSION**

The post-conviction no contact order issued as a condition of a suspended sentence cannot survive the expiration of that sentence. The Court of Appeals correctly states the law and does not merit review by this court.

Respectfully submitted this 15th day of September, 2017,

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