 74677-4

No. 94892-8

NO. 74677-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

WENDY GRANATH,

Petitioner.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. AUTHORITIES AND ARGUMENTS IN REPLY 4

1. 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. 4

2. As a "condition of sentence," a no-contact order issued pursuant to RCW 10.99.050 is subject to the law governing misdemeanor sentences. 7

3. The sentencing scheme for misdemeanors is distinct from those governing felons and juveniles. 11

TABLE OF AUTHORITIES

WASHINGTON CASES

Harris v. Charles, 171 Wn.2d 455 (2011) 11-12

State v. Anaya, 95 Wn.App. 751 (1999) 4, 6, 11

State v. Armendariz, 160 Wn.2d 106 (2007) 4

State v. Gailus, 136 Wn.App. 191 (2006) 7

State v. O'Brien, 115 Wn.App. 599 (2003) 6

State v. Porter, 188 Wn.App. 735 (2015) 7

State v. Rodriguez, 183 Wn.App. 947 (2014) 4, 6, 8

State v. Schultz, 146 Wn.2d 540 (2002) 4, 6

State v. Wahleithner, 134 Wn.App. 931 (2006) 9

State v. Wilkerson, 107 Wn.App. 748 (2001) 8

STATUTES, COURT RULES AND OTHER AUTHORITIES

RCW 3.66.068 ....7, 9, 10

RCW 3.66.069 .....7, 8

RCW 9.92.080 10

RCW 10.99.050 ..... 4, 5, 6, 7, 9, 11

RCW 26.50.020 10

RCW 26.50.110 10

RCW 26.50.120 10

AUTHORITIES AND ARGUMENTS IN REPLY

1. **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).

Despite the unambiguous mandate cited above, the State advances a novel argument which ignores the plain language of RCW 10.99.050(1).

> A plain reading of RCW 10.99.050 shows that it grants authority to issue DVNCOs to protect a domestic violence victim, regardless of whatever sentence is imposed, or suspended, in punishing the defendant.

Brief of Respondent at 6. The State claims that the issuance of a post-conviction no-contact order has only two prerequisites: a conviction and sentence. Id. at 5-6. The State is wrong. The third prerequisite is "a

condition of sentence that restricts contact with the victim." RCW 10.99.050(1). Unless the court imposes such a condition of sentence, a no-contact order cannot be issued pursuant to RCW 10.99.050(1).

The State elaborates on its argument later in the brief.

> [Granath] claims that a RCW 10.99.050 DVNCO is a "condition[] of [a] suspended sentence" . . . and she claims any DVNCO under RCW 10.99.050 is dependent upon the actual suspension or deferral of the sentence." There is no such dependence. Instead a RCW 10.99.050 DVNCO stands alone, issued under the authority unrelated the suspension of any sentence.

Brief of Respondent at 20 (citations to Appellant's brief omitted). *See also* Id. 21-26.

RCW 10.99.050 clearly states that the written no-contact order is issued as a "condition of sentence" --part of the actual sentence imposed. 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] This court has no authority to do so.

> When the words in a statute are clear, we are required to apply the statute as it is written. We may not read into statutes wording that is not there even if we believe that the Legislature may have inadvertently omitted it. Likewise, we must give effect to all words in a statute.

[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."

State v. Anaya, 95 Wn.App. 751, 756 (1999) (footnotes omitted).

The State tries to cobble together support for its position from the use of the term "issue" as used in RCW 10.99.040 and .050 and RCW 10.31.100. The use of the term "issue" does not support the State's claim. Clearly, RCW 10.99.050 authorizes superior courts and courts of limited jurisdiction to issue post-conviction no-contact orders. But the order is issued "as a condition of sentence." The order is dependent upon the sentence authorized and imposed as courts have repeatedly recognized. *See* State v.Schultz, 146 Wn.2d 540, 547 (2002) ("[W]here the trial court determines at sentencing that a defendant's contact with the victim is to be restricted, RCW 10.99.050(1) may be satisfied either by entry of a new no-contact order or by the court's affirmative indication on the judgment and sentence that the previously entered no-contact order is to remain in effect.") [2]; State v. Rodriguez, 183 Wn.App. 947, 958-59 (2014) (duration of post-conviction no-contact order issued as a condition of sentence could not exceed the lawful maximum term to suspend the

[2] *Schultz* describes how RCW 10.99 ties the issuance of no-contact orders to the procedural stages of the criminal prosecution. "[T]he scheme gives a trial court the authority to enter a no-contact order ***at every possible juncture in the prosecution***. Under RCW 10.99.040(2) and (3), an order may be issued upon the defendant's release prior to arraignment, it may be extended or initially entered at arraignment, or (where the defendant is released after arraignment) it may be issued after arraignment and prior to trial. Further, under RCW 10.99.050(1), even if the court has entered no prior order under RCW 10.99.040(2) or (3), ***it must do so at sentencing if the defendant's contact with the victim is to be restricted as a sentencing condition***." Id. at 544 (emphasis added.)

sentence); State v. O'Brien, 115 Wn.App. 599, 602 (2003) (no-contact order may be made a condition of a sentence for person who has been convicted of a crime, citing RCW 10.99.050(1)); State v. Porter, 188 Wn.App. 735, 738 (2015) (SRA was amended to permit felons who complete all other conditions of sentence to obtain final discharge and petition for a separate no-contact order that will continue for the length of statutory maximum sentence).

2. As a "condition of sentence," a no-contact order issued pursuant to RCW 10.99.050 is subject to the law governing misdemeanor sentences.

District courts are authorized to impose conditions of sentence 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.").[3] However, if the court imposes a suspended or deferred sentence, the court can impose additional conditions necessary to address the offender's conduct while still under supervision. State v. Wilkerson, 107 Wn.App. 748, 756 (2001) (RCW 3.66.068 and related court rules permit court to impose a new probation condition, not in the original sentence, even when defendant had not violated original conditions of sentence). Also, "[a]ny time before entering an order terminating probation, the court may revoke or modify its order suspending the imposition or execution of the sentence." RCW 3.66.069.

This clear statutory mandate provides district court judges the flexibility and discretion when sentencing offenders on domestic violence charges to impose conditions of sentence –such as a restriction on contact with the victim—as part of a suspended or deferred sentence for up to 60 months. This is similar to the misdemeanor sentencing scheme applied in *Rodriguez*. There the statute authorized conditions of sentence for the maximum sentence imposed or two years whichever is longer. The court vacated a 60 month no-contact order because that term exceeded the period authorized by statute. State v. Rodriguez, 183 Wn.App. 947, 958-

[3] *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*.

59 (2014).

The State argues that requiring the no-contact order to be treated as a condition of sentence 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.

When imposing a sentence authorized by RCW 3.66.068 and RCW 10.99.050(1), the district court judge can devise a sentence to address both punishment and protection. The judge can impose an appropriate initial term of incarceration –which not only punishes but also incapacitates the offender and protects the victim—and an appropriate term of supervision of the conditions of sentence during which the unexecuted portion of the sentence is available to enforce the conditions. A judge can chose to suspend only a few days or weeks of the maximum jail time in order to impose the maximum period of supervision and still impose nearly the maximum punishment allowed by law. The sentencing judge can also choose to retain a shorter period of probationary jurisdiction and, thus, curtail the duration of the post-conviction no-contact order as will best facilitate the offender's rehabilitation. *See e.g.,*

State v.Wahleithner, 134 Wn.App. 931, 939-941, 143 P.3d 321 (2006).[4]

For example, in this case, Ms. Granath was convicted of two offenses. The sentencing court could have imposed a significant punishment and still protect the victim. The judge could have run the sentences consecutively, imposed the maximum sentence of 364 days on one count, suspended all or some of that time on the second count for the full 60 months authorized, and issued a no-contact order for 60 months. RCW 3.66.068; RCW 9.92.080(2), (3). If the court had not restricted contact with the victim in the initial sentence, the court could have added that condition at a later and then issued a no-contact order for the remainder of the court's jurisdiction.

The State's arguments are primarily premised on the Legislature's stated policy to provide domestic violence victims with the greatest protection that the law provides. The law provides significant protection for domestic violence victims by authorizing no-contact orders in criminal prosecutions.[5] But the courts must comply with the laws as written. The

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[4] *Wahleithner* illustrates a district court's authority to tailor a sentence to address community safety, punishment and accountability. There defendant's consecutive sentences for three drunken driving offenses were suspended in part, upon certain conditions. The suspensions were revoked because defendant failed to meet the conditions of sentence. Suspension was an act of legislative and judicial grace intended to encourage obviously needed treatment.

[5] The law also provides protection orders that victims of domestic violence may obtain independent of a criminal prosecution. RCW 26.50.020 et seq. These orders provide broader protections than those issued as part of an offender's sentence. *See* RCW 26.50.060 (may protect the victim's minor children, other family members, pets, etc.)

State urges an interpretation of RCW 10.99.050 that would require this court to amend the clear and unambiguous language. In addition, the State's arguments ignore the controlling sentencing laws.

The State's arguments elevate policy over precedent and statute. This court rejected a similar argument in *State v. Anaya.*

> In addition to its statutory construction arguments, the State also argues that the chapter's clearly stated policy of protecting victims of domestic violence indicates that no-contact orders survive dismissal of the criminal charge. We fully agree that the Legislature has stated in very clear terms that domestic violence is victims. Our court has previously recognized that strong statement of legislative policy. But that strongly stated policy does not justify our reading into this criminal statute provisions that are not there. Creating statutory law is a purely legislative function.

Anaya, 95 Wn.App. at 769 (footnotes omitted).

3. The sentencing scheme for misdemeanors is distinct from those governing felons and juveniles.

The State urges this court to rely upon cases applying sentencing laws unique to felony and juvenile sentencing --*Armendariz* and *W.S.*. However, it is well-settled that misdemeanor sentencing has a different legal framework and goals. The Washington Supreme Court explained these differences in *Harris v. Charles.*

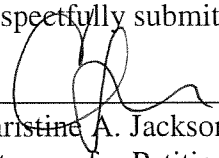
These orders are enforceable not only by criminal prosecution, RCW 26.50.110, but also by contempt. *See* RCW 26.50.110(3), (6); RCW 26.50.120 (indigent protected party may ask prosecuting attorney to initiate contempt proceeding). It is not uncommon for persons protected by a post-conviction no-contact order to seek additional protection under RCW 26.50. The King County Prosecuting Attorney's Office operates a program to assist victims of domestic violence obtain such orders. *See* http://protectionorder.org/.

> [T]he distinct treatment of misdemeanants and felons for purposes of sentencing credit rationally relates to maintaining the traditional discretion that courts have when sentencing a misdemeanor offender. *See [State v.]Wahleithner*, 134 Wash.App. [931] at 939, 941, 143 P.3d 321 [(2006)]. Misdemeanor sentencing courts have the discretion to issue suspended sentences or to impose sentences and conditions with "carrot-and-stick incentive[s]" to promote rehabilitation, a goal of non-felony sentencing. Id. at 941, 143 P.3d 321; *see also State v. Williams*, 97 Wash.App. 257, 263–63, 983 P.2d 687 (1999). In contrast, the SRA has limited felony sentencing courts' discretion. *See Wahleithner*, 134 Wash.App. at 939, 941, 143 P.3d 321. Though a sentence imposed pursuant to the SRA might present a felony defendant with the opportunity to improve himself, rehabilitation is not a justification for sentencing under the SRA. *State v. Barnes*, 117 Wash.2d 701, 711, 818 P.2d 1088 (1991); see also RCW 9.94A.010 (purposes of the SRA). The different treatment of felons and misdemeanants when granting sentencing credit serves the legitimate government interest in maintaining the purpose and discretion of misdemeanor sentencing.

Harris v. Charles, 171 Wn.2d 455, 465 (2011) (misdemeanants not entitled to credit for time served on pretrial EHM as the structure and goals of misdemeanor sentencing provide a rational basis for disparate treatment).

The imposition of a post-conviction no-contact order as a condition of a suspended or deferred sentence comports with the plain language of RCW 10.99.050, the law governing district court sentencing RCW 3.66.068, and supports the goals of misdemeanor sentencing.

Respectfully submitted this 20th day of October, 2016.



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