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NO. 94892-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WENDY GRANATH,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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C. INTRODUCTION

In 1979, the Legislature gave the courts a powerful new tool to provide “maximum protection” to victims of domestic violence. The courts were authorized to issue post-conviction no-contact orders when a “defendant is found guilty of a crime and a *condition of 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 be provided to the victim.” (Emphasis added.) Laws of 1979, Ex. Sess. Ch. 105, Sec. 5, codified at RCW 10.99.050(1). The plain language of RCW 10.99.050 makes the post-conviction no-contact order part and parcel of the actual sentence imposed by the district court. It is a “condition of sentence.” A violation of such an order can be punished not only as a violation of the condition of the suspended or deferred sentence actually imposed, but also as a separate criminal offense. State v. Granath, No. 74677-4-I, Slip Op. 4, 11.

Currently, district courts can provide the maximum protection of a five year no-contact order as a condition of a suspended or deferred sentence and still impose significant punishment on the offender. In this case, the district court could have exercised its considerable sentencing discretion under RCW 3.66.068 and incarcerated Granath for nearly two years, suspended a portion of the jail time for five years and imposed a

five year no-contact order.

The Court of Appeals' decision below does not undermine or limit the district courts' authority to provide this maximum protection and punishment. Rather, the Court of Appeals' decision clarifies the law and instructs district courts on how to issue protection orders for the maximum term provided by law. The *Granath* decision is grounded in the plain language of the applicable statutes.

The State's argument is built on policy arguments. The Court of Appeals observed, "[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." Slip Op. at 11. The Court of Appeals rejected the State's assertion that its decision produces an absurd result.

It is not absurd to tie the length of a no-contact order to the sentence actually imposed. The district court stated in its oral ruling that in most cases, it is 'a good practice' to have the term of 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. It is a legal requirement, as the Court of Appeals' decision makes clear.

We conclude a no-contact order authorized by RCW 10.99.050(1) must reflect a no-contact condition of the sentence actually imposed. The no-contact order terminates when the no-contact condition of sentence terminates.

Slip Op. 13-14.

D. ISSUES PRESENTED

Did the post-conviction no-contact order issued pursuant to RCW 10.99.050(1) as a condition of the 24 month suspended sentence terminate when the defendant completed her sentence? Did the Legislature intend to criminalize a 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? When the no-contact condition of sentence expires, is there any express legislative authority for the continued validity of the no-contact order?

E. STATEMENT OF THE CASE

The facts of the case have been set forth in the briefs and the Court of Appeals decision below and need not be repeated here.

F. AUTHORITY AND ARGUMENT

G. The “maximum protection” the Legislature provided in RCW 10.99.050(1) is a post-conviction no-contact order issued as a condition of sentence that remains in effect until the sentence actually imposed is completed –up to five years. There is no express legislative authority for the continued validity of the no-contact order when the condition of sentence has expired.

The phrase “maximum protection” appears in the preamble to the 1979 act, codified at RCW 10.99.010.¹ The Legislature intended to have

¹ The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the *maximum protection from abuse which the law and those who enforce the law can provide*. The legislature finds that the existing criminal statutes are adequate to provide protection for

existing criminal statutes enforced “without regard” to the victim’s relationship with the accused. To meet this goal, the Legislature provided courts and law enforcement with some additional tools –such as no-contact orders. RCW 10.99.050(1) authorizes post-conviction no-contact orders “[w]hen a defendant is found guilty and a *condition of sentence* restricts the defendant’s ability to have contact with the victim, such *condition* shall be recorded and a written certified copy that order shall be provided to the victim.” This subsection has remained unchanged since its adoption in 1979.²

What has increased the “maximum protection” provided by post-conviction no-contact orders is the expanded sentencing jurisdiction

victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship. (Emphasis added.) Laws of 1979 Ex. Sess. Ch. 105, sec. 1, Domestic Violence – Official Response.

² The Legislature has provided protections to victims of domestic violence independent of any criminal prosecution. RCW 26.50.020 et seq. authorizes protection orders that 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.) 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/>.

granted to district courts by the Legislature in RCW 3.66.068. In 1979, district courts could suspend or defer sentences and impose conditions of sentence for only one year. Laws of 1969 Ch. 75 sec. 2. In 1983, the Legislature increased the district courts' probationary jurisdiction to two years. Laws of 1983 Ch. 156, sec. 2. In 1999, the Legislature authorized the district courts to suspend sentences on conditions imposed for up to five years for DUIs. Laws of 1999 Ch. 56, sec. 2.³ It was not until 2010 that the Legislature amended RCW 3.66.068 to increase the district courts' sentencing jurisdiction to five years for domestic violence offenses. Laws of 2010 Ch. 274 sec. 405.⁴

RCW 3.66.068 authorizes district courts to impose conditions of sentence, such as those recorded in post-conviction no-contact orders.

³It is important to note that the Legislature expressly exempted from that jurisdictional limit the enforcement of orders issued pursuant to RCW 46.20.720 –which require the defendant to have an ignition interlock installed in any vehicle he or she drives. That statute authorizes a 10 year IID restriction for some drivers convicted of DUI. *See* RCW 46.20.720(3)(c)(iii).

⁴ The Legislature has increased the protections to victims of domestic violence by criminalizing the violation of no-contact orders, punishing as a felony the third violation of such orders and where the violation is accompanied by an assault or drive by shooting, counting selected domestic violence misdemeanors as points at sentencing for domestic violence felony offenses, classifying an assault by strangulation as a felony, requiring the surrender and forfeiture of weapons when no-contact orders are issued in both criminal and family law matters and, most recently, punishing a misdemeanor assault as a felony when the offender has two selected prior convictions within 10 years. *See respectively* RCW 10.99.050(3); RCW 26.50.110(1), (4) and (5); RCW 9.94A.030(42); RCW 9A.36.021(1)(g) as amended by Laws of 2007 Ch. 79, secs. 1 & 2; RCW 9.41.800 and .810; RCW 9A.36.041(3), Laws of 2017 Ch. 275 sec. 1. This is not an exhaustive list.

(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 3.66.068.⁵ Courts of limited jurisdiction, sentencing, and no-contact orders issued as conditions of sentence are all creatures of statute. *See* Brief of Appellant’s Brief at 7-8. A court lacks inherent authority to suspend a sentence. State v. Rice, 180 Wn.App. 308, 312-13 (2014). Thus, when a court suspends a sentence, it must do so in the manner provided by the legislature. Id. Given the plain language of statutes authorizing the suspension or deferral of sentences, courts cannot impose conditions of the sentence unless the court suspends or defers some portion of the sentence. 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.”).⁶

⁵ The court’s jurisdiction tolls when the defendant fails to appear at a probation review hearing. RCW 3.66.068(3). The conditions of sentence—including the no-contact order—remain in effect during that extended period of time.

⁶ *Gailus* involved the similarly structured statute authorizing superior courts to impose conditions of a suspended sentence. RCW 9.95.210(1) (“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

RCW 3.66.068 authorizes the imposition of conditions of sentence only when “all or any part” of the sentence is suspended or deferred. Post-conviction no-contact orders issued pursuant to RCW 10.99.050(1) are such a condition of sentence. Based on the plain language of the statute, the Court of Appeals correctly held that a no-contact order is not independent of the sentence imposed.

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.

Slip Op. at 11.

The State argues the *Granath* decision requires courts to choose between punishing the offender and protection the victim. Brief of Respondent at 12-13. This is a false dichotomy. *See* Appellant’s Reply Brief at 9-10. Structuring sentences according to the broad authority provided in RCW 3.66.068 does not constitute sentencing “gymnastics” as the State claims. Judges in courts of limited jurisdiction daily confront the need to balance the goals of punishment, rehabilitation and community protection when imposing sentences. The need to suspend a portion of the maximum jail sentence to enforce conditions of sentence is not unique to

designate, not exceeding the maximum term of sentence or two years, whichever is longer.”)

domestic violence cases. Judges imposing DUI sentences face similar concerns. For repeat offenders, courts are required to impose significant mandatory minimum jail time followed by electronic home monitoring and then must still impose mandatory conditions of the unexecuted portion of the suspended sentence. *See* RCW 46.61.5055. The structure of suspended sentences as authorized by RCW 3.66.068 empowers the courts to meet these goals. *See e.g.*, State v. Wahleithner, 134 Wn.App. 931, 939-941 (2006) and Harris v. Charles, 171 Wn.2d 455, 465 (2011).

Here, the district court chose to suspend Granath’s sentence on condition of a no-contact restriction with the victim –among other things—for a period of 24 months. Granath completed the conditions of her sentence and the case was closed. The post-conviction no-contact order recording that condition of sentence cannot survive the completion of that 24 month suspended sentence.

B. The Court of Appeals decision in below does not conflict with its earlier decision in W.S. Armendariz and W.S. are based on the express language of the applicable sentencing statutes and do not control here.

According to the State, the Legislature intended to grant district courts the power to issue RCW 10.99.050 no-contact orders for the “maximum term” or “statutory maximum” regardless of the period of the suspended sentence actually imposed. Petition for Review at 1, 14-15;

Brief of Respondent at 5-6, 10, 13-14. As the Court of Appeals correctly noted, the State lifts these phrases from *Armendariz* and *W.S.*

The State's idea that a no-contact order may remain in effect for a "statutory maximum" of some kind is not expressed in RCW 10.99.050; it is derived from *Armendariz*. In that case, though, the maximum duration of the no-contact order was derived from the felony sentencing statutes, not from RCW 10.99.050.

....

The State attempts to find in *Armendariz* a general principle that a no-contact order imposed in conjunction with a criminal sentence may remain in effect for the statutory maximum term of the court's sentencing authority for the crime committed. But the State's argument depends on phrases—"statutory maximum" and "maximum allowable sentence"—that do not appear in RCW 10.99.050. Because the court was not called upon to interpret RCW 10.99.050, *Armendariz* does not provide authority to insert into RCW 10.99.050(1) a time limit equivalent to the statutory maximum term of a court's sentencing authority.

Slip Op. at 7, 9. These phrases also do not appear in the district court sentencing statute, RCW 3.66.068.⁷

For the same reason, the Court of Appeals rejected the State's reliance on *W.S.*

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

⁷ Compare RCW 9.95.210(1) where "maximum term of sentence" is expressly used to measure the superior court's probationary jurisdiction (when it exceeds two years).

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.

The State fails to rebut the Court of Appeals’ reading of W.S. The State stakes its claim on W.S.’s reliance on the general jurisdiction of the superior court “to hear a motion to modify or a willful violation of the DVNCO under RCW 26.50.110 can be filed in superior court.” State v. W.S., 176 Wn.App. 231, 241 (2013). The State argues that the “enforcement mechanism relied upon in W.S. was criminal prosecution under RCW 26.50.110—a mechanism equally available in Granath’s case—not any non-existent ability of the superior court to sanction a now-adult offender for violation of the juvenile court’s disposition.” Petition for Review at 15.

The State misreads the statutory citation used in W.S. That decision first references RCW 26.50.110(6) which authorizes the protected party of an order to initial contempt proceedings against the restrained party. The court then references RCW 10.99.040(4)(a) which provides for criminal penalties for violation of a pretrial no-contact order. In any event, the fact that a violation of a no-contact order can be enforced by a separate criminal prosecution does not speak to the court’s jurisdiction to issue the order in the first place. The first question is any prosecution for violation of a no-contact order is whether the

order is applicable (*e.g.*, the issuing court had jurisdiction) and may be enforced by criminal prosecution. City of Seattle v. May, 171 Wn.2d 847, 854 (2011).⁸ Here, the district court did not have authority to issue a five year no-contact order as a condition of a two year suspended sentence.

The State's arguments to the contrary are largely premised on the Legislative intent in the statute's preamble. This is a shaky foundation. A court may not rely on a statement of legislative intent in a preamble to override the unambiguous wording of the statute. State v. D.H., 102 Wn.App. 620, 627 (2000). As the Court of Appeals explained, the lack of a specific, temporal duration in RCW 10.99.050 is not ambiguous.

The State does not identify terms in RCW 10.99.050 that make it susceptible to more than one reasonable meaning. The absence of language stating a specific time limit such as five years does not necessarily create a durational ambiguity. In Anaya, this court construed the statute relating to no-contact orders issued or extended at arraignment. At the time, the statute did not expressly state how long such orders could remain in effect, yet this court did not find an ambiguity. In Armendariz, the statute in question did not expressly state the maximum duration of a no-contact order issued as a crime-related prohibition, yet the court did not find an ambiguity. And even if RCW 10.99.050 were ambiguous as to duration, it would not provide a route to the State's desired result. Because the statute criminalizes contact with the victim and establishes criminal penalties, the rule of lenity would apply. State v. Weatherwax, 188 Wash.2d 139, 155-56, 392 P.3d 1054 (2017).

Slip Op. at 12-13.

⁸ “The collateral bar rule precludes challenges to the validity—but not the applicability—of a court order in a proceeding for violation of such an order *except for challenges to the issuing court's jurisdiction to issue the type of order in question*. Void orders and inapplicable orders are inadmissible in such proceedings.” Id.,

Here, the relevant statutes are plain and unambiguous. A post-conviction no-contact order is a condition of sentence and cannot survive the completion of that sentence.

V. CONCLUSION

This Court should affirm the Court of Appeals' decision and reverse the district court's denial of Granath's motion to vacate the no contact order.

Respectfully submitted this 3rd day of November, 2017.

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