

63147-1

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NO. 63147-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL E. TURNER,

Appellant.

2009 DEC 21 PM 4:25  
CLERK OF COURT  
STATE OF WASHINGTON

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

The Honorable Michael E. Rickert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THIS COURT SHOULD ADDRESS THE MERITS OF TURNER'S CHALLENGE TO THE APPLICABILITY OF THE NO-CONTACT ORDER.

The appellant, Michael Turner, contends the state failed to sustain the charge of violation of a no-contact order because the order did not comply with RCW 10.99.040 and .045(5). Brief of Appellant (BOA) at 3-8. The state responds by citing State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005), for the proposition that validity of the order is not an element of the offense. Brief of Respondent (BOR) at 5-8.

Turner does not dispute the state's assertion. Indeed, Turner cited Miller for the proposition that only applicable no-contact orders support a conviction. Brief of Appellant (BOA) at 3 (citing Miller, 156 Wn.2d at 31-32). This proposition is made clear by the Court's following conclusion: "As Miller has not shown that this order was invalid, deficient, or otherwise inapplicable to the crime charged, his conviction is affirmed . . . ." Miller, 156 Wn.2d at 32.

In short Turner argues the order in his case is inapplicable because it is not statutorily sufficient. The state asserts Turner waived this issue because he did not assign error to the trial court's admission of the no-contact order. BOR at 7-8. But Turner plainly challenged the trial court's

decision that the order sufficiently included the "legend" required by RCW 10.99.040(4)(b). BOR 3-8.

RAP 10.3(g) provides that “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” Further, RAP 12.1(a) provides that generally “the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.” Finally, the Rules of Appellate Procedure are “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). See State v. Boss, 144 Wn. App. 878, 890, 184 P.3d 1264 (2008) (this Court excused failure of appellant to raise issue until oral argument because “the argument advanced at oral argument is closely related to the argument actually briefed and that the issue as now framed and advanced is of great importance.”), a’ffd. on other grounds, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4844372 (Dec 17, 2009).

In addition, there is no question Turner preserved the issue in the trial court. 2RP 4-6. The only reason he stipulated to admission of the no-contact order was that the trial court rejected his pretrial challenge to the order. 2RP 8. Turner's counsel said, “[G]iven the Court's ruling, we'll agree that the Court can consider that no-contact order, but we don't want

that to be construed as a waiver of our issue here." 2RP 8. The Court replied, "No waiver. Your issue is protected." 2RP 8.

The trial court also made clear the matter was for this Court, stating, "Rather than me doing that [granting Turner's motion] I'll let the Court of Appeals do it." 2RP 6. The court also said, "Maybe the Court of Appeals will feel that the judge's signature has to be at the bottom of all the material on the order." 2RP 7. Cf. State v. Gray 134 Wn. App. 547, 558, 138 P.3d 1123 (2006) (appellant waived challenge to admission of judgment and sentence for earlier violation of no-contact order by waiting until state rested to move to dismiss), review denied, 160 Wn.2d 1008 (2007).

Counsel for Turner respectfully requests this Court to address the merits of Turner's challenge to the no-contact order on the merits.

2. THE NO-CONTACT ORDER IS STATUTORILY INSUFFICIENT AND CANNOT SUSTAIN THE CHARGE.

Turner maintains the order did not comply with RCW 10.99.040(4)(b) because the mandatory "legend" appeared on the back of the two-page document containing the order and after the signature line. BOA at 3-8. The state asserts the order is sufficient. BOR at 8-12. Turner disagrees.

The state first suggests this Court should not review the applicability of the no-contact order, citing footnote 4 of Miller, which states:

We do not suggest that orders may be collaterally attacked after the alleged violations of the orders. Such challenges should go to the issuing court, not some other judge.

Miller, 156 Wn.2d at 31.

But at the same time, the Miller Court held, "An order is not applicable to the charged crime if it . . . is not statutorily sufficient, . . . or otherwise will not support a conviction of violating the order." Miller, 156 Wn.2d at 31; BOR at 8-9. If the trial court errs by finding the order statutorily sufficient, as the trial court did in Turner's case, the proper recourse is to challenge the court's error in this Court. And because this involves a question of law, this Court reviews de novo. State v. Gray, 134 Wn. App. 547, 558, 138 P.3d 1123 (2006). Miller, therefore, does not procedurally prohibit Turner's challenge in this Court.

On the merits, Turner asserts the legend should not be considered part of the order because GR 14 prohibits two-sided "pleadings, motions, and other papers filed with the court."<sup>1</sup> The state urges this Court to reject

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<sup>1</sup> GR 14 provides:

All pleadings, motions, and other papers filed with the court shall be legibly written or printed. The use of letter-size paper (8-1/2 by 11

Turner's reliance on GR 14 because he did not rely on it in the trial court, the rule was not intended to apply to court generated documents, and GR 14 provides no remedy for failure to comply. BOR at 11-12.

First, Turner did not waive his reliance on GR 14 by failing to cite it in the trial court. In his pretrial motion, Turner challenged the order specifically because the legend appeared on the back side of the two-sided document. Adopting the state's waiver suggestion would mean appellate counsel could not rely on case law or statutes unless they were first presented to the trial judge. Turner urges this Court to summarily reject the State's implicit waiver claim.

Second, Turner acknowledges the "author's comments" section to GR 14 states the "requirements were "not intended to apply to court generated documents." 2 Wash. Prac. GR 14; BOR at 12. Had the drafters wished to exempt court-generated documents, however, they could have articulated the exemption in the rule. In any event, Turner sets forth several reasons why the rule should apply to no-contact orders,

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inches) is mandatory. The writing or printing shall appear on only one side of the page. The top margin of the first page shall be a minimum of three inches, the bottom margin shall be a minimum of one inch and the side margins shall be a minimum of one inch. All subsequent pages shall have a minimum of one inch margins. Papers filed shall not include any colored pages, highlighting or other colored markings. This rule applies to attachments unless the nature of the attachment makes compliance impractical.

especially that the Legislature has clearly expressed a desire that the legend be made part of the order. BOA at 4-8. In addition, the legend is neither conspicuously displayed nor incorporated by reference such that an offender's attention would be drawn to the legend.

The legend serves an important purpose in the statutory scheme:

The consent warning serves an important function in deterring individuals from violating the order. Absent the warning, one might mistakenly believe that consent to contact by the person protected under the order invalidates the order's otherwise mandatory prohibition. Consequently, the mandatory language is consistent with the legislative intent to increase protection for victims of domestic violence and punish persons who violate such orders by eliminating the consent defense.

State v. Marking, 100 Wn. App. 506, 511-512, 997 P.2d 461, review denied, 141 Wn.2d 1026 (2000), overruled on other grounds, Miller, 156 Wn.2d 31. This important notice function is frustrated when the legend, which contains the consent warning, is on the reverse side of a two-sided document, after the signature line, with no incorporation by reference.

For these reasons, this Court should find that the trial court erred by applying the no-contact order to Turner's charge. Without the order, the state cannot sustain the charge. Turner's conviction, therefore, should be remanded for dismissal with prejudice.

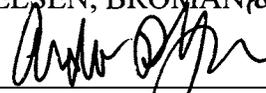
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Turner requests this Court to reverse his conviction for violation of a no-contact order and remand for dismissal with prejudice.

DATED this 21 day of December, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VERNON MARK CALHOUN, Cause No. 630369-I, in the Court of Appeals, Division I, for the State of Washington.

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

Verita Schwantes

Name

Done in Seattle, Washington

12/22/09

Date

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