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NO. 65223-1-I

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

REC'D

AUG 25 2010

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RAMIZ COLAKOVIC,

Appellant.

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

The Honorable Richard McDermott, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	7
THE SENTENCING COURT'S ORDER PREVENTING RAMIZ FROM HAVING ANY CONTACT WITH HIS CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT .....	7
D. <u>CONCLUSION</u> .....	11

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

**State v. Ancira**  
107 Wn. App. 650, 27 P. 3d 1246 (2001) ..... 8, 9, 10

**State v. Bahl**  
164 Wn.2d 739, 193 P.3d 678 (2008) ..... 7

**State v. Ford**  
137 Wn.2d 472, 973 P.2d 452 (1999) ..... 7

**State v. Jones**  
118 Wn. App. 199, 76 P.3d 258 (2003) ..... 7

**State v. Letourneau**  
100 Wn. App. 424, 997 P.2d 436 (2000) ..... 8

**State v. Moen**  
129 Wn.2d 535, 919 P.2d 69 (1996) ..... 7

**State v. Paine**  
69 Wn. App. 873, 850 P. 2d 1369 (1993) ..... 8

**FEDERAL CASES**

**Santosky v. Kramer**  
455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ..... 8

A. ASSIGNMENT OF ERROR

The trial court's order prohibiting appellant from having any contact with his children unconstitutionally infringes on his fundamental right to parent.

Issue Pertaining to Assignment of Error

Appellant Ramiz Colakovic is appealing from the sentencing court's order prohibiting him from contacting his 12-year-old son and 10-year-old daughter, entered as part of Colakovic's judgment and sentence following his plea to assaulting the children's mother. There was no allegation Colakovic assaulted either of his children.

Did the sentencing court violate appellant's fundamental right to parent by imposing a no-contact order preventing him from having any contact with his children for ten years, where the order was unnecessary to protect them from harm?

B. STATEMENT OF THE CASE

On March 17, 2009, the King County Prosecutor charged Ramiz Colakovic with second degree assault while armed with a deadly weapon, felony violation of a no contact order and first degree theft, allegedly committed against his wife, Esma Colakovic,

on March 14, 2009. CP 1-7. At the time, Ramiz and Esma<sup>1</sup> had been married for 12 years and lived with their two children, Adnan (born 7/12/97) and Aldijana (born 3/20/00). CP 4, Supp. CP \_\_\_ (sub. no. 8, Order Prohibiting Contact, 3/24/09).

According to the Certification for Determination of Probable Cause, Ramiz was served on March 13, 2009, with a temporary order, valid until March 27, 2009, prohibiting him from contacting Esma or coming near her residence. CP 4. The certification further alleged that on the following morning, Ramiz approached Esma as she walked to her car and hit her on the head with a baseball bat. CP 4-5. A neighbor reportedly heard Esma screaming, came to her assistance and called 911. Ramiz had already left. CP 5.

Esma told police Ramiz had taken her cell phone, keys and purse during the attack. Esma was taken to the hospital for treatment of what appeared to be two impact points to the head and injuries to her left hand. CP 5. Ramiz was later taken into custody without incident. CP 5.

Ramiz and Esma are both Bosnian refugees. CP 7; RP (4/9/10) 7, 12. As the case proceeded, there was at one point a

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<sup>1</sup> Because the individuals share the same last name, first names are used to avoid confusion.

question about Ramiz's competency. CP 15-16. Although Ramiz was determined competent, he was diagnosed with Post Traumatic Stress Disorder (PTSD), a result of his wartime experiences. RP (4/9/10) 10-12, 18.

The state filed an amended information, alleging the same charges but adding as aggravating factors that: the offenses were committed within the sight or sound of Ramiz's minor children; and there was evidence of an ongoing pattern of psychological or physical abuse of Esma by Ramiz over a prolonged period of time. CP 8-14. An amended certification was also filed. It reported that during an interview with the detective, Esma alleged that her children had witnessed the assault on March 14. CP 14. She claimed that Aldijana heard her mother screaming and woke up Adnan saying, "get up, get up, dad is trying to kill mom." CP 14. Both reportedly looked outside and saw Ramiz assaulting Esma. CP 14. The children called their aunt who told them to call 911. CP 14.

Ramiz pled guilty to the second amended information on March 18, 2010.<sup>2</sup> CP 21-48. The charges and aggravators

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<sup>2</sup> In his statement of defendant, Ramiz indicated count 2 (FVNCO) was based on an act separate and distinct from the second degree assault charged in count 1. CP 30.

remained the same, although the state corrected some language pertaining to the aggravators. RP (3/18/10) 5, 21-25. As part of the plea agreement, the parties stipulated to DVDs of interviews of Ramiz's children. CP 42.

Sentencing occurred on April 9, 2010. The state agreed an exceptional sentence was not warranted. CP 42. The parties made a joint recommendation for a high-end sentence of 29 months, which included the deadly weapon enhancement. RP (4/9/10) 3-5. The only dispute was whether the court should prohibit Ramiz from contact with his children. RP (3/18/10) 17-18; RP (4/9/10) 9.

In support of its request to impose no contact orders regarding the children, the state relied on the aforementioned DVDs, which the court indicated it had reviewed before handing them back to the prosecutor.<sup>3</sup> RP (4/9/10) 5. The court indicated it had reviewed them. RP (4/9/10) 6. The prosecutor also asserted:

The kids went through eight to ten weeks of in-home counseling, and the kids and their mother are still scared. Noises at nighttime will scare the children. And the kids have indicated to myself, to the child

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<sup>3</sup> Because the court's oral ruling addresses the content of the DVDs, the record is sufficiently developed to address the constitutional right to parent issue. Nonetheless, undersigned counsel is attempting to obtain copies of these DVDs to supplemental the record.

interviewer, and to their mother that they are scared of their father. Ms. Colakovic has indicated that if he receives some counseling and there are some signs of improvement, she does not wish to preclude him from having a relationship with his children, but for right now, they are all very fearful of the defendant.

RP (4/9/10) 7.

In support of its request not to impose such orders, the defense asserted:

Your Honor, the issue of the no contact order with the children is the only point on which we disagree with the state. Your Honor, we ask the Court to not impose a no contact order with the children or to incorporate into the no contact order a provision such that the family court can subsequently modify it. I know, Your Honor, that Mr. Colakovic and his wife, Esma, their relationship may be beyond repair, however, Mr. Colakovic remains very much desirous of being some part of his children's lives.

Your Honor, this is not the first time that Mr. Colakovic and his wife have been in the court system. And I believe they have worked successfully in the past with third party transfer of children and whatnot, and I hope they can do that again in the future.

RP (4/9/10) 9.

Sue Wood, a social worker associated with the defense reported that although Ramiz's PTSD may have impacted his parenting, it did not impact his love for his children. RP (4/9/10) 10. Wood anticipated that counseling would reduce Ramiz's stress and that his parenting abilities would improve dramatically. Id.

Ramiz's sister spoke on his behalf as well, reporting her observations of Ramiz as a good father who tended to the children and prepared meals in the home. RP (4/9/10) 12.

In its oral ruling, the court addressed the DVDs of the children's interviews:

There is no doubt in my mind that you love your children, but I don't think that you understand that you are subjecting them to the same kinds of post-traumatic stress syndrome problems that you yourself have. I watched the DVDs that contained interviews of both your children, and they are beautiful, wonderful children, and you should be proud of them. They are smart, and they love both their parents, but they do not wish to see you until you receive some kind of treatment for your violence. They are afraid of what you did to their mother, and that should never exist in your family or in any family.

RP (4/9/10) 18-19.

In addition to the agreed-upon confinement time, the court imposed 10-year no contact orders prohibiting Ramiz from contacting either of his children. CP 52; Supp. CP \_\_ (sub. no. 57, Order Prohibiting Contact, 4/9/10); RP (4/9/10) 19. The court indicated it would consider modifying the orders, however, upon proof of counseling and an indication from "some trained professionals" that it would be "appropriate" for Ramiz to see his children and "if someone tells [the court] seeing you and being in

contact with you would be good for your children[.]” RP (4/9/10) 19-20. Ramiz verbalized his desire to appeal from the no contact orders regarding his children. RP (4/9/10) 24.

C. ARGUMENT

THE SENTENCING COURT'S ORDER PREVENTING RAMIZ FROM HAVING ANY CONTACT WITH HIS CHILDREN VIOLATES HIS FUNDAMENTAL RIGHT TO PARENT.

The sentencing court's order preventing Ramiz from having any contact with his children for ten years violates Ramiz's fundamental liberty interest in the care and custody of his children. The order preventing all contact is excessively and unreasonably restrictive.

“[I]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996) (imposition of a criminal penalty that does not comply with sentencing statutes may be raised for the first time on appeal); State v. Jones, 118 Wn. App. 199, 204 n. 9, 207-08, 76 P.3d 258 (2003) (challenge to sentencing conditions raised for the first time

on appeal); State v. Paine, 69 Wn. App. 873, 884, 850 P. 2d 1369 (1993). Accordingly, even if Ramiz had not objected to the imposition of the no contact orders, their propriety is properly before this Court.

Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P. 3d 1246 (2001), citing Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Prevention of harm to children is a compelling state interest, and the state does have an obligation to intervene and protect a child when a parent's actions or decisions seriously conflict with the physical or mental health of the child. Ancira, 107 Wn. App. at 653-54. The fundamental right to parent can be restricted by a condition of a criminal sentence only if the condition is reasonably necessary to prevent harm to the children. Ancira, 107 Wn. App. at 654; State v. Letourneau, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

The facts of Ramiz's case are similar to those in Ancira. In that case, Ancira and his wife got into an argument in a car while their children were present. Ancira, 107 Wn. App. at 652. While his wife was not in the car, Ancira drove away with one of the

children. Ancira, 107 Wn. App. at 652. Ancira was gone with the child for several days and would not return the child until his wife agreed to talk with him. Ancira, 107 Wn. App. at 652. Ancira pleaded guilty to felony violation of a domestic violence no-contact order. Ancira, 107 Wn. App. at 652. As part of Ancira's sentence, the court ordered that he have no contact with his wife or his two children for five years, finding that the children were present when the violation occurred, and that it is harmful for children to witness domestic violence even if they "aren't direct victims of physical violence themselves." Ancira, 107 Wn. App. at 652-53.

On appeal, the Ancira court observed that the state did not explain why prohibiting Ancira from contacting his wife would not adequately protect the children from the harm of witnessing domestic violence between their parents. Ancira, 107 Wn. App. at 655. The Ancira court also explained that the state did not demonstrate that prohibiting Ancira from *all* contact with his children for a lengthy period was reasonably necessary to protect them from the harm of witnessing domestic violence. Ancira, 107 Wn. App. at 645-55. The Ancira court also found that the record did not support "the total prohibition of indirect contact with the children by telephone, mail, e-mail, etc." Ancira, 107 Wn. App. at 655.

Accordingly, the Ancira court found that "completely prohibiting him from all contact with his children is extreme and unreasonable given the fundamental rights involved." Ancira, 107 Wn. App. at 655.

The same is true in Ramiz's case. There was no allegation Ramiz physically abused the children. Rather, the concern was that the children were witnessing domestic violence committed against their mother, causing them to be "afraid of what [Ramiz] did to their mother." RP (4/9/10) 19. There was no showing by the state that preventing contact between Ramiz and Esma would not adequately protect the children from witnessing domestic violence. The state also failed to demonstrate that a total prohibition of contact, including indirect contact by e-mail, mail, or telephone was reasonable or necessary to protect the children from observing domestic violence. Whether the children may have expressed their desire not to see Ramiz until he received some kind of treatment, there was no indication that contact by mail or telephone would be harmful to them. Given the similarities between this case and Ancira, this Court should hold that the no-contact order preventing Ramiz from having any contact with his two children for ten years is

extreme and unreasonable, given the fundamental rights involved.

Ancira, 107 Wn. App. at 655.

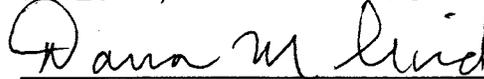
D. CONCLUSION

This Court should reverse the orders preventing Ramiz from having any contact with his children.

Dated this 25<sup>th</sup> day of April, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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Respondent,	)	
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	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 25<sup>TH</sup> DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAMIZ COLAKOVIC  
DOC NO. 339750  
MONROE CORRECTIONAL COMPLEX  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF AUGUST 2010.

x *Patrick Mayovsky*