

NO. 66760-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HOLTON MILLER,

Appellant.

2011 SEP 27 PM 4:42
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 5

THE COURT IMPERMISSIBLY ENTERED A NO- CONTACT
ORDER AS A SENTENCING CONDITION ABSENT
EVIDENCE THAT THE PROTECTED PARTY WANTED THE
ORDER AND WITHOUT ENSURING THE CRIME VICTIM
HAD THE OPPORTUNITY TO BE HEARD 5

1. A court’s order barring contact with another person must
withstand strict scrutiny 5

2. The court imposed a long term no-contact order without
obtaining the protected party’s opinion, and without weighing
the State’s interest against the constitutional rights abridged .. 9

F. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010)....5, 6, 7, 10, 11

State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010)9

State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998).....6

State v. Warren, 165 Wn.2d 17, 34, 105 P.3d 940 (2008).....5, 7

Court of Appeals Decisions

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

United States Supreme Court Decisions

Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)6

Washington Constitution

Const. art. I, § 35.....6, 9

Statutes

RCW 9.94A.5056

RCW 9.94A.7007

A. SUMMARY OF ARGUMENT.

Holton Miller asked the prosecution and court to consider whether the complaining witness wanted a blanket no-contact order before imposing such an order as a condition of his sentence. Without obtaining the complainant's opinion, the State sought a complete ban on contact between the complainant and Miller. When Miller asked the sentencing judge to consider striking the no-contact order if the complainant asked him to do so, the judge summarily refused and stated it would not consider a lesser prohibition on contact under any circumstances. The State's failure to seek or present the complainant's viewpoint at the sentencing hearing and the court's refusal to consider the factual circumstances of the case and the need for a no-contact order before imposing a complete ban on contact violated the victim's rights amendment and denied Miller his right to freedom of association and due process of law.

B. ASSIGNMENTS OF ERROR.

1. The court's refusal to consider a less restrictive no-contact order violated Miller's rights to freedom of association absent evidence of a compelling state interest reasonably tailored to the public's needs.

2. The court's failure to consider the necessity of the restrictions before imposing the no-contact order constituted an abuse of discretion.

3. The failure to apprise the court of the complainant's sentencing concerns or make efforts to do so violated the victim's rights amendment to the Washington Constitution.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

A no-contact order is a restriction on a person's freedom of association which the State must demonstrate is reasonably necessary to prevent harm based on the circumstances of the case. Here, the State never sought the complainant's opinion about the need for a blanket no-contact order, even when notified that her interests did not align with the prosecution's, and the court refused to consider any lesser restrictions on contact. Did the court's failure to require that the State prove a compelling need for the no-contact order and its refusal to consider less restrictive alternatives deny Miller his right to due process of law and freedom of association, as well as violate the victim's rights amendment of the constitution?

D. STATEMENT OF THE CASE.

When the prosecution told Holton Miller that it would seek a no-contact order with Corinna Barker as a condition of his sentence, Miller asked whether the prosecution knew if Barker wanted a no-contact order. 7/2/10RP 8. The prosecutor responded that she did not “have [Barker’s] opinion at this time. This is just the State’s recommendation, and not Ms. Barker’s recommendation.” Id. The court assured Miller that Barker would be able to speak at the sentencing hearing. 7/2/10RP 9-10.

Miller’s case was set for a sentencing hearing on August 27, 2010, before a different judge than the judge who presided when Miller pled guilty. 8/27/10RP 2. On August 27th, the assigned prosecutor did not appear and the sentencing judge questioned the basis for the agreed recommendation that Miller receive a sentence below the standard range. Id. at 2-3. The judge rescheduled the sentencing hearing and requested written briefing on the sentencing recommendation. 8/27/10RP 5.

The prosecution did not explain whether it ever contacted Barker to inform her of the hearings. 8/27/10RP 2-3; 9/9/10RP 3. The prosecution did not explain whether it ever obtained her opinion of the need for a no-contact order. 7/2/10RP 8. The

prosecution did not offer any evidence about whether Barker wanted the no-contact order.

Defense counsel explained that Barker had never sought a no-contact order. 9/9/10RP 9. Although the offense to which Miller pled guilty was felony violation of a no-contact order, the underlying incident involved a single, brief telephone call from jail, and the State dismissed the charges for which Miller was originally arrested. CP 34-35. In the one-minute long phone call, Miller asked Barker to obtain something from his apartment that he needed. 9/9/10RP 5; CP 35. He did not speak threateningly or abusively. CP 35. Due to the minor nature of the telephone call at the root of the charged offense, the prosecution asked the court to impose a sentence less than the standard range. 8/27/10RP 3; CP 35. Additionally, Miller was experiencing substantial untreated mental health issues at the time he made that telephone call. 9/9/10RP 4-5. The court imposed a sentence less than the standard range based on the parties' stipulation and Miller's mental health issues at the time of the offense. CP 40-41.

Miller asked the sentencing judge to consider striking the no-contact order if Barker asked him to do so. 9/9/10RP18. The judge refused to consider any less severe sanction than the

complete five-year no-contact order and chastised Miller for raising the notion that it would not impose the full no-contact order. 9/9/10RP 18-19. The judge did not consider less restrictive alternatives than a complete no-contact order lasting the statutory maximum, and imposed a five year ban on any contact with Barker. Id.; CP 45. Miller appeals.

E. ARGUMENT.

THE COURT IMPERMISSIBLY ENTERED A NO-CONTACT ORDER AS A SENTENCING CONDITION ABSENT EVIDENCE THAT THE PROTECTED PARTY WANTED THE ORDER AND WITHOUT ENSURING THE CRIME VICTIM HAD THE OPPORTUNITY TO BE HEARD

1. A court's order barring contact with another person must withstand strict scrutiny. A court's sentencing authority is not absolute. In re Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). Sentencing restrictions that interfere with a constitutional right are subject to strict scrutiny, and may be imposed only to the extent they are reasonably necessary to accomplish the State's essential needs. Id. Conditions that interfere with fundamental rights must be "sensitively imposed" and "narrowly drawn" to serve the State's compelling interest. Rainey, 168 Wn.2d at 373; State v. Warren, 165 Wn.2d 17, 32, 34, 105 P.3d 940 (2008). The victim's

constitutional rights further restrict the court's sentencing authority. Const. art. I, § 35; see State v. Gentry, 125 Wn.2d 570, 629, 888 P.2d 1105 (1995) (explaining victim's rights amendment mandates that "victims of crime [have] the right to participate in the judicial process" by being heard at sentencing).

A person convicted of a crime retains the right to freedom of association as well as the fundamental rights to marry and parent. See Rainey, 168 Wn.2d at 377; see also Dawson v. Delaware, 503 U.S. 159, 163, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) ("The First Amendment protects an individual's right to join groups and associate with others holding similar beliefs."). Orders barring a person from having contact with another person must not violate the freedom of association absent compelling circumstances and narrowly tailored restrictions. See State v. Riles, 135 Wn.2d 326, 249-50, 957 P.2d 655 (1998) (holding that sentencing condition prohibiting convicted sex offender from contact with minors unjustifiably violated freedom of association of rights where the victim was 19-year old).

A sentencing court's authority to impose a no-contact order stems from its power to order "crime-related prohibitions" under RCW 9.94A.505(8) (providing that court "may" impose crime-

related conditions at sentencing); see also RCW 9.94A.703(3)(b) (“discretionary conditions” of community custody include no contact with victim of the crime). But this authority is limited by the overarching constitutional right to freedom of association that may not be denied absent a compelling interest and by the least restrictive means possible. Warren, 165 Wn.2d at 32.

“More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” Warren, 165 Wn.2d at 32. Sentencing conditions burdening a fundamental right “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” Rainey, 168 Wn.2d at 373 (quoting Warren, 165 Wn.2d at 32).

Warren involved a husband’s claim that a no-contact order barring contact with his wife violated the fundamental right to marriage. The court held that strict scrutiny is required before prohibiting contact that is constitutionally protected. 165 Wn.2d at 33. Similarly, a court may issue protection orders prohibiting contact between a parent and child, but these restrictions have been upheld only if of limited duration and when reasonably necessary after considering less restrictive alternatives. Rainey,

168 Wn.2d at 377-78. The record must factually support long-term blanket restrictions on contact between individuals. Id.

Less stringent limitations on contact may satisfy the State's interest in protecting the party. State v. Ancira, 107 Wn.App. 650, 655, 27 P.3d 1246 (2001). In Ancira, the trial court imposed a no-contact order prohibiting Ancira from all contact with his wife and children as a condition of Ancira's sentence for felony violation of a domestic no-contact order. Id. at 652-53. This Court recognized the State's interest in preventing the children from witnessing domestic violence but held that the State had "failed to demonstrate that this severe condition was reasonably necessary" to prevent that harm. Id. at 654. Instead, indirect contact, such as mail, or supervised contact without the mother's presence, might successfully satisfy the State's interest in protecting the children. Id.

The fact-specific nature of the inquiry required before a court restricts contact dovetails with the court's obligation to respect the victim's rights and consider his or her opinion. Under the victim's rights provision of the constitution, the victim has the right to be informed of the sentencing proceeding, to attend it, and to

make a statement before the court pronounces sentence. Const. art. I, § 35. The victim has “a constitutional right to be present at . . . sentencing.” State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

The purpose of the victim’s rights amendment is to guarantee victims dignity, respect, and an opportunity to be heard at sentencing. Const. art, I, § 35. A victim may wish to have some contact with a person who is incarcerated for a long period of time. Indirect contact such as letter writing may aid in addressing and rectifying the root relationship problems. Long-term, blanket no-contact orders may not be what the victim desires and may not be necessary for public order. See Ancira, 107 Wn.App. at 656.

2. The court imposed a long term no-contact order without obtaining the protected party’s opinion, and without weighing the State’s interest against the constitutional rights abridged. Here, the State did not obtain the victim Barker’s opinion about whether she wanted a no-contact order. 7/2/10RP 8. After it was put on notice that it should seek Barker’s opinion because her interest might not align with the State’s, the prosecution offered no evidence about what Barker wanted. Id. at 8-9. It did not present any evidence

that it consulted with her or that it informed her of her right to be present at the sentencing hearing.

The court imposed a complete, blanket, long-term no-contact order without considering the factual circumstances of the case. 9/9/10RP 17; CP 45. A no-contact order that lasts several years is more “draconian” than a short term order and the appropriateness of its duration must be expressly considered by the sentencing court. Rainey, 168 Wn.2d at 381.

The court did not consider less restrictive alternatives to a complete ban on all possible contact. 9/9/10RP 18-19. When Miller asked the court if it would be willing to consider “dropping” the no-contact order upon conditions such as counseling and upon Barker’s request, the court refused to consider any alternatives, and ruled, “I will not be dropping this no contact order.” 9/9/10RP 18-19. The court responded to Miller’s mere request that it consider striking the no-contact order if Barker asked by accusing Miller of failing to understand the problem and stating that this request might merit a more lengthy prison sentence for Miller. 9/9/10RP 19. The court imposed a complete ban on contact with Barker without requiring the State to prove that a blanket prohibition

for five years was reasonably necessary to serve the State's interest.

The sentencing proceeding disregarded Barker's rights to participate in the process where the condition imposed affected her own freedom of action. Additionally, the no-contact order was not "sensitively imposed" based on the compelling needs of the State and the restrictions necessary to serve the public. The simple request for consideration of a less stringent no contact order caused the court to threaten a harsher sentence than it had imposed. 9 /9/10RP 19. By failing to appreciate that it must impose restrictions that deny constitutional rights with sensitivity and upon weighing the specific facts of the case and after considering less restrictive alternatives, the court abused its discretion and denied Miller his right to due process of law. Rainey, 168 Wn.2d at 377-78.

F. CONCLUSION.

For the reasons stated above, Mr. Miller respectfully asks this Court remand his case for a new sentencing hearing so that the court may properly and fully consider the imposition of any no-contact order. Mr. Miller also asks that no costs be awarded in the event that he does not substantially prevail on appeal.

DATED this 27th day of September 2011.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 66760-2-I
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> HOLTON MILLER 634002 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

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DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF SEPTEMBER, 2011.

X _____ *gnt*

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