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72223-9

NO. 72223-9-I

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

8

STATE OF WASHINGTON,

Respondent,

v.

JAMES DUNCAN,

Appellant.

FILED  
2022/12/13  
KING COUNTY

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The sentencing court erred when it entered a domestic violence no-contact order for five years beginning on the date of sentencing.

Issue Pertaining to Assignment of Error

Under chapter 10.99 of the Revised Code of Washington, the trial court is authorized to enter a domestic violence no-contact order for a period not to exceed the statutory maximum sentencing term for the crime at issue. Although a no-contact order was first issued against appellant at arraignment, the trial court did not start the maximum five-year period until sentencing. Was this error?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged James Duncan with (count 1) Felony Harassment – Domestic Violence and (count 2) Assault in the Fourth Degree – Domestic Violence in connection with an incident involving his girlfriend, Tammy Bennett, on March 9, 2014. CP 1-5, 7-8.

At Duncan's arraignment – on March 25, 2014 – the court entered a pre-trial domestic violence no-contact order, citing both RCW 10.99.040 and .050, which prevented Duncan from having any contact with Bennett and warned him that any violation was a

criminal offense under RCW chapter 26.50. Supp. CP \_\_\_\_ (sub no. 11, Domestic Violence No-Contact Order).

Trial occurred in late June and early July 2014. RP 2-291. Jurors convicted Duncan as charged and entered special verdicts indicating the crimes involved domestic violence. RP 289; CP 31-34.

At sentencing on July 11, 2014, the Honorable Carol Schapira imposed a prison-based Drug Offender Sentencing Alternative on count 1 and a concurrent 364-day sentence on count 2. RP 306-307; CP 69, 75. Judge Schapira also continued the prohibition on contact with Bennett by replacing the pre-trial no-contact order with a post-trial order. That order indicates that it expires July 11, 2019, which is five years from the date of its entry. And, like the original order, it cites RCW 10.99.040 and .050 and warns that any violation is a criminal offense under RCW chapter 26.50. Supp. CP \_\_\_\_ (sub no. 52, Domestic Violence No-Contact Order).

Duncan timely filed his Notice of Appeal. CP 82-91.

C. ARGUMENT

THE FIVE-YEAR NO-CONTACT PERIOD SHOULD RUN FROM THE DATE ON WHICH AN ORDER WAS FIRST ENTERED.<sup>1</sup>

This Court reviews the validity of a no-contact order de novo.

State v. Schultz, 146 Wn.2d 540, 544, 48 P.3d 301 (2002).

Under the rules of statutory construction each provision of a statute should be read together (*in para materia*) with other provisions in order to determine legislative intent underlying the entire statutory scheme. The purpose of interpreting statutory provisions together with related provisions is to achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes. Statutes relating to the same subject will be read as complimentary, instead of in conflict with each other.

State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (footnotes omitted), cert. denied, 531 U.S. 984, 121 S. Ct. 438, 148 L. Ed. 2d 444 (2000).

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<sup>1</sup> Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 146 wn.2d 540 452 (1999).

RCW 10.99.040 authorized the no-contact order entered at Duncan's arraignment. Under RCW 10.99.040(2)(a), the court may issue a no-contact order whenever a defendant, having been arrested or charged with a domestic violence offense, is released on bail prior to arraignment or trial. Furthermore, under RCW 10.99.040(3):

At the time of arraignment the court shall determine whether a no-contact order shall be issued or extended. So long as the court finds probable cause, the court may issue or extend a no-contact order . . . . The no-contact order shall terminate if the defendant is acquitted or the charges are dismissed. . . .

Any willful violation of such an order is a criminal offense under RCW chapter 26.50. RCW 10.99.040(4)(a).

RCW 10.99.050 authorized the no-contact order entered at Duncan's sentencing. RCW 10.99.050(1) provides, "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." As under RCW 10.99.040, any willful violation of such an order is a criminal offense under RCW chapter 26.50. RCW 10.99.050(2)(a).

The relationship between RCW 10.99.040 and RCW 10.99.050 has previously been examined. In State v. Schultz, as in Duncan's case, the trial court entered a no-contact order at arraignment under RCW 10.99.040(3). Following the defendant's conviction, at sentencing, the court did not enter a new order under RCW 10.99.050(1). Instead, it merely indicated on the judgment that the prior order would remain in effect. Schultz, 146 Wn.2d at 542, 548. The issue on appeal was "whether a no-contact order entered at arraignment survives a finding of guilt and may be extended as a sentencing condition." Id. at 545. Noting the legislative intent behind RCW chapter 10.99 to ensure the availability of protection "at every possible juncture of the prosecution," the Schultz court rejected the defendant's argument that the original order had expired upon conviction. Id. at 544-546. The Court also rejected the argument that RCW 10.99.050(1) required entry of an entirely new order to continue the prohibition on contact:

where 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.

Id. at 304-304.

More recently, in State v. Luna, 172 Wn. App. 881, 292 P.3d 795 (2012), review denied, 177 Wn.2d 1010, 302 P.3d 180 (2013), Division Three of this Court held that it is not even necessary at sentencing to expressly indicate on the judgment that the pre-trial no-contact order under RCW 10.99.040 is being continued under RCW 10.99.050. Rather, simply telling the defendant it will continue and then indicating the fact of a no-contact order on the judgment will suffice. Luna, 172 Wn. App. at 884-887.

Under Schultz and Luna, there is no dispute the court in Duncan's case had authority under RCW 10.73.040(3) to enter the no-contact order at arraignment and then continue the prohibition at sentencing and beyond under RCW 10.73.050(1) by either indicating it was doing so or replacing the original order with a new one. In Duncan's case, Judge Schapira chose the latter option – most likely because the standard form that was used provides boxes to check depending on whether the order is entered pre-trial or post conviction. See Supp. CP \_\_\_\_ (sub nos. 11 and 52, Domestic Violence No-Contact Orders).

Since the no-contact order was initially imposed on Duncan at his March 25, 2014 arraignment, and the prohibition continued at sentencing with the no-contact order issued on July 11, 2014, an

issue arises concerning on what date the prohibition ceases.

The duration of a no-contact order, imposed as a crime-related condition of sentence, is limited by the maximum sentence the defendant could face for his crime under the Sentencing Reform Act. State v. Armendariz, 160 Wn.2d 106, 118-119, 156 Wn.2d 201 (2007). While no statute expressly imposes such a limitation, in the absence of any contrary guidance, the Supreme Court concluded “it is reasonable to subject these conditions to the same time limit as applies to all other aspects of a defendant’s sentence.” Id. at 119. And this limitation has been held applicable to no-contact orders issued under RCW chapter 10.99. See State v. W.S., 176 Wn. App. 231, 242-243, 309 P.3d 589 (2013).

Felony Harassment is a class C felony with a maximum sentence of five years. See RCW 9A.46.020(2)(b); RCW 9A.20.021(1)(c). Thus, Duncan could be prevented from contacting Bennett for a maximum of five years.

While the no-contact order entered at sentencing expires after five years, the listed expiration date – July 11, 2019 – reveals that the clock did not start running until the date of sentencing, July 11, 2014. Because, however, this order is treated as a continuation of the prohibition contained in the order from arraignment, the five-year

clock should have started on March 25, 2014. Otherwise, the period of no contact would exceed the five-year maximum term. Because the current order exceeds the court's statutory authority, it must be modified.

D. CONCLUSION

This Court should order modification of the no-contact order so that it properly reflects an expiration date of March 25, 2019.

DATED this 26<sup>th</sup> day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

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Respondent,	)	
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	)	
JAMES DUNCAN,	)	
	)	
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 26<sup>TH</sup> DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIFE OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES DUNCAN  
DOC NO. 375919  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF JANUARY 2015.

x Patrick Mayovsky