IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN JAMES BABNER, Appellant.	No. 42222-1-II UNPUBLISHED OPINION

Worswick, C.J. — John James Babner appeals the revocation of his special sex offender sentencing alternative (SSOSA).[1] He claims that the trial court relied on an unconstitutional basis for revocation and violated the appearance of fairness doctrine. We disagree with both propositions and affirm.

FACTS

On January 23, 2009, Babner pleaded guilty to two counts of first degree child molestation for acts he committed with a five-year-old daughter of friends he was living with while awaiting housing at Fort Lewis. The superior court imposed an 89-month-to-life sentence, credited Babner for 10 months already served, and then released him to community custody on a SSOSA. Among his SSOSA conditions was the following:

25. No contact with any minors without prior approval of the DOC [Department

[1] RCW 9.94A.670.

> of Corrections]/CCO [Community Corrections Officer] and Sexual Deviancy Treatment Provider.

Clerk's Papers at 147.

On August 14, 2009, Babner appeared in court for a compliance hearing and asked the court to alter this SSOSA condition because his girl friend had just given birth; he had moved out of the home until he could get court approval. Because Babner was in complete compliance with all of his SSOSA conditions, both the CCO and treatment provider favored allowing Babner to move back into the home as long as his girl friend agreed to supervise any contacts he had with the child and these contacts were a subject during his periodic polygraph exams. Babner was not the biological father to this child but, inferentially, had the trial court granted his request to live with the child, he would have had some parenting role. The trial court denied the motion, ruling:

> Well, I'm hesitant, at this point, to allow him to reside with a minor child. I think he's only six months into this SSOSA. He's got a long way to go. I'm not going to lift the requirement that he have no contact with minors at this time. We'll review this matter in six months and see how he's doing.

Report of Proceedings (RP) at 7-8.

On July 23, 2010, Babner again appeared for a compliance hearing and informed the court that his girl friend was pregnant with his child. The trial court expressed concern over Babner's actions, set a new review hearing for three months, and regarding the new child stated:

> I don't really waste much time in revoking on these things. The fact that you're having a kid, you know, you could get a vasectomy. You don't—you're not in a position to support a child. You're not in a position to be around minor children because of your conviction, you know. Those are choices that you made that put you afoul of the law. There are consequences; and, you know, she's just had one kid last year; and apparently, now, she's having another kid which doesn't sound like she's using too—and her mother has custody of two other kids, so it doesn't

> sound like she's got any real forethought for her future; so I think you need to seriously consider other measures besides some chancy birth control because you're not going to be able to have any contact with that kid. Do you understand?

RP (July 23, 2010) at 17-18.

On October 22, 2010, Babner again appeared for a compliance hearing. The trial court found that he was in compliance and Babner averred that he would not have any contact with his new son. The trial court then reminded Babner that she would not hesitate to revoke his SSOSA if he was out of compliance:

> All right, it looks like he's in compliance. I agree with Doctor Gollogly, I do have concerns about choices he is making. I mean, you have got a job now making $8 and something cents an hour, 8.55. Probably not a living wage for yourself, and now you have a child. So you really need to start using some common sense in the decisions that you make. Certainly not in any position to be entering into any kind of relationship where there are minor children involved. The fact that you seem oblivious to that does give this court some concern.

RP (Oct. 22, 2010) at 4.

On November 6, 2010, CCOs Thomas Grabski and Hilary Williams, working with the City of Tacoma Police Department, observed Babner in his car that his girl friend was driving with two children in the back seat. The officers stopped the car and took Babner into custody for having contact with minors.

On May 12, 2011, the trial court held a revocation hearing based on four charges:

(1) improper contact with minors;
(2) using the internet;
(3) not obeying all laws by not failing to reregister his car at his Tacoma address; and
(4) being terminated from his sexual deviancy program.

CP at 123-25. Following a hearing, the court found that the State had shown violations 1, 2, and 4. The trial court then revoked Babner's suspended sentence.

> Well, you know, when I grant a SSOSA, I make it very plain to the individual that they are to have strict compliance. Now, I have—there have been judgments made by Mr. Babner throughout the pendency of this SSOSA that have given this Court some question, serious concerns about his judgment, one of which was entering into the relationship with Ms. Tremblay at a point in time when he is looking at serious jail time, moving in with her. Initially, she was described as a roommate. Obviously, that wasn't true. She's pregnant by someone else in what has been described, at least in some of the initial reports, as a rape which means you have a very vulnerable victim; and his victim, in this case, was a vulnerable minor with some developmental disabilities which he took advantage of. Even when the Court granted him the SSOSA, he has no job. He's got treatment obligations, you know. He, apparently, takes no measures regarding contraception; and this woman winds up—she's got two kids under the age of, what, 15 months, you know. He can't provide for himself on a stable basis; and he's got someone pregnant, and she's bringing a kid into the world. I mean, the Court has indicated to him, I have serious concerns about that. It does not show judgment, Mr. Babner; and then to find out that you have had minor contact within 11 days of the Court warning you that you are not to have contact, or you go to jail, you disregarded that; and I don't think it was a one-time, somehow accidental contact. I think Ms. Tremblay and you—you've been having contact with her and the children on a regular basis under the table and that you just got nailed that day.
>
> The Internet access: No, you know, no Internet access. It doesn't mean you go through some elaborate charade that someone else is handling your account. I mean, no Internet access means there shouldn't be anything on the Internet in your name; so at this time, the Court is going to revoke the SSOSA, and I'm going to sentence Mr. Babner to jail. I believe the original sentence was 79 months to life on both counts.

RP (May 12, 2011) at 101-02. Babner appeals.

DISCUSSION

I. No-Contact-With-Minors Condition

Babner challenges his SSOSA no-contact-with-minors condition, claiming that prohibiting contact with his biological child violates his constitutional right to parent and was not narrowly tailored to the State's interests. Thus, he argues, the trial court abused its discretion in revoking his SSOSA on this basis.[2]

RCW 9.94A.670(6)(a) authorizes the trial court to impose "crime-related prohibitions" as part of any SSOSA. "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct." RCW 9.94A.030(10). We review crime-related prohibitions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Abuse of discretion occurs when a decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

While parents have a fundamental right to raise their children without state interference, s*ee In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (a parent's right to rear his children without state interference is a constitutionally-protected fundamental liberty interest) *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), these

[2] We agree with Babner that the trial court's oral decision suggests that it would not have revoked his SSOSA based only on his two other violations. We do, though, consider both violations as supporting the trial court's underlying concern with Babner's poor decision making.

"[p]arental rights are not absolute, however, and may be subject to reasonable regulation." *City of Sumner v. Walsh*, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003). Sentencing courts can place limits on this fundamental right to parent when reasonably necessary to further the State's compelling interest in protecting children. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); *Ancira*, 107 Wn. App. at 654; *State v. Letourneau*, 100 Wn. App. 424, 437-42, 997 P.2d 436 (2000).

In *State v. Berg*, the sentencing court imposed a no-contact order covering all minor females, including Berg's two-year-old daughter, after a jury convicted Berg of sexually molesting a 14-year-old girl. 147 Wn. App. at 930, 941. Berg parented the victim but she was not his biological child. 147 Wn. App. at 942-43. Division One upheld the no-contact order as a reasonable crime-related prohibition, stating:

> A.A. lived in the home where Berg was acting as her parent when the abuse occurred. By allowing Berg to be alone with A.B., who also lived in the home as his child, the court reasonably feared that it would be putting A.B. in the same situation that A.A. was in when Berg sexually abused her. Thus, the trial court's order restricting contact was reasonably necessary to protect A.B.

Berg, 147 Wn. App. at 942-43.

Here, as in *Berg*, Babner befriended a vulnerable child and exploited both the child's and her parents' trust in order to satisfy his sexual deviancy. Further, had the trial court allowed Babner to live at home, he would have had unfettered access to both children, not just his biological child. In that Babner was in deviancy treatment for his pedophilia, it was reasonable for the trial court to prevent Babner from being with minor children, especially in his own home.

The cases Babner cites are inapposite. In *Letourneau*, the appellate court struck down a no-contact condition with the defendant's biological children because insufficient evidence existed to show that it was reasonably necessary to protect her children. *Letourneau*, 100 Wn. App. at 441-42. Letourneau did not abuse a family member or a child living in her home and evaluators did not find her to be a pedophile. *Letourneau*, 100 Wn. App. at 441-42. In *Ancira* and *State v. Sanford*, 128 Wn. App. 280, 115 P.3d 368 (2005), the courts struck down no-contact orders with the defendants' biological children when the defendants committed domestic violence against their wives and not their minor children. *Ancira*, 107 Wn. App. at 654-57; *Sanford*, 128 Wn. App. at 289. In contrast, Babner's crimes were against a vulnerable, trusting, five-year-old minor and the prohibition was clearly crime related.

Notwithstanding that Babner does not challenge the no-contact order as it applied to the nonbiological child, the restriction on his biological child was reasonable, not an abuse of discretion. Accordingly, we affirm Babner's sentencing condition prohibiting contact with all minor children, including his biological child, as a valid crime-related prohibition that does not unduly burden his fundamental parenting rights.

But Babner also argues that the no-contact condition is not narrowly tailored to serve the State's interest in protecting children. Specifically, Babner argues that the no-contact condition should not apply to his son because there was no evidence introduced that he was a threat to male children. He also argues that there was no evidence to support such broad restrictions. We disagree.

Babner did not make this constitutional claim below nor request a lesser restrictive condition after his son's birth based on his fundamental parenting right. As such, the trial court did not have an opportunity to address it.[3] In this unique situation where the SSOSA condition was imposed before either child was born, it was incumbent on Babner to assert his parenting right so the trial court could consider less restrictive alternatives. Furthermore, the trial court revoked Babner's SSOSA because he had contact with both children, not just for the child with whom he had a parenting right. As such, even if we were to find this restriction overly broad, we would still affirm the trial court's decision to revoke based on the nonbiological child.

Even so, the trial court had ample evidence to apply the no-contact condition to all minor children, especially during the duration of Babner's deviancy treatment. And while his treatment provider initially recommended allowing Babner to have contact, the trial court disagreed, invited Babner to revisit the issue after he had been in treatment longer, and, ultimately, based its decision to revoke the SSOSA on Babner's poor decision-making and disregard for the court's admonitions. The treatment provider's final assessment of Babner's conduct supports the trial court's decision to revoke. His provider explained:

> He is ignoring and not addressing his sex offender and mental health issues. He has been persistent in deception and demonstrates an unwillingness to comply with the treatment rules of this Agency [sic]. He is a risk to be at large in the community.

Plaintiff's Ex. 2. The trial court did not abuse its discretion in revoking Babner's SSOSA.

[3] In fact, Babner agreed to the condition continuing in effect: "The only thing I do know of, my newborn son is—he is born and it is a boy. Other than that, if you have any questions about that, my girlfriend is present. I have no contact and I will uphold that condition to have no contact with any minors, including my own son." RP (Oct. 22, 2010) at 3.

II. Appearance of Fairness

Babner next argues that the trial court's comments during the compliance hearings and at the revocation hearing show that she was not an impartial and neutral decision maker, that she should have recused herself from his case, and that this court should invalidate the revocation order and remand for a new hearing.

Due process, the appearance of fairness, and Canon 2 Rule 2.11(A) of the Code of Judicial Conduct require that a judge disqualify him or herself from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Gamble*, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010).

But an appearance of fairness claim is not "constitutional" in nature under RAP 2.5(a)(3) and, thus, may not be raised for the first time on appeal. *See State v. Morgensen*, 148 Wn. App. 81, 90–91, 197 P.3d 715 (2008); *see also City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based.").

Babner argues that because he was pro se at the compliance hearings, we should address

his claim even though he did not claim judicial bias or prejudice below. But he cites no legal authority for this proposition and we disagree that we should address this claim for the first time on appeal as it is incumbent on counsel or the defendant to assert bias or unfairness so that the trial court can address the party's concerns and recuse itself if necessary. *State v. Carlson*, 66 Wn. App. 909, 916-17, 833 P.2d 463 (1992). In any case, as we noted above, the record contains ample evidence to support the trial court's revocation order and, as such, Babner cannot demonstrate prejudice.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.