IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34308

STATE OF IDAHO,	)	**2008 Opinion No. 102**
	)	
Plaintiff-Respondent,	)	**Filed: 12/23/08**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
BRIAN C. COBLER,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael R. McLaughlin, District Judge.

Judgment of conviction and unified sentence of ten years, with two years determinate, for sexual abuse of a child sixteen or seventeen years of age affirmed in part, reversed in part and case remanded; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant. Sarah E. Tompkins argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

GUTIERREZ, Chief Judge

Brian C. Cobler appeals from his judgment of conviction and sentence entered upon his guilty plea to sexual battery of a child, sixteen or seventeen years of age. He challenges his sentence, the denial of his Idaho Criminal Rule 35 motion for reduction of sentence and the order denying his motion to modify a no contact order (NCO) that prohibited contact with any minors, including his own children. Because we conclude that the terms of the NCO violate Cobler's fundamental rights as a parent, we reverse in part and remand for further proceedings.

I.
BACKGROUND

In early October 2006, Brian C. Cobler and his wife, Angela T. Reed, were arrested on two charges each of sexual battery of a minor child, sixteen or seventeen years of age, Idaho

Code § 18-1508A. Cobler and Reed were involved in a sexual relationship with J.M., who was seventeen years old at the time and vulnerable both mentally and emotionally. The relationship lasted approximately three months and involved the use of illegal drugs. At Cobler's arraignment on the charges, the district court entered an NCO forbidding Cobler from having contact with the victim in the case or *any other minor child*. Specifically, the NCO, without exception, prohibits Cobler from having any contact with the victim and all minors, including in person or through another person, or in writing or e-mail, by telephone, paper or facsimile. It also prohibits any attempt to contact, harass, follow, communicate with or knowingly remain within 100 feet of a minor child.

Cobler entered a guilty plea to one count of the indictment in exchange for dismissal of the second count. The state also agreed to recommend a ten-year sentence with two years determinate, with Cobler to be required to follow all recommendations from a Sexual Abuse Now Ended (SANE) evaluation. The district court imposed sentence consistent with the plea agreement. Cobler subsequently filed a *pro se* motion for reduction of his sentence pursuant to Rule 35, and a motion to modify the NCO to allow him some contact with his own children. Cobler and Reed have two children together, both under the age of six, and Cobler has a daughter from a previous marriage, who was fifteen years old at the time of his arrest. The district court denied Cobler's Rule 35 motion, noting that Cobler indicated he would be submitting paperwork in support of his motion but did not do so. The court also denied Cobler's motion to modify the NCO, although without explanation. Cobler filed an amended Rule 35 motion, including documentation, which the district court again denied. This appeal followed.

II.
DISCUSSION

Cobler raises several issues on appeal related to the NCO entered against him. He also asserts that his sentence is excessive and that the district court abused its discretion by denying his Rule 35 motion.

A. Validity of the NCO

Cobler contends that I.C. § 18-920, authorizing the issuance of an NCO, is overbroad and vague on its face and as applied, that the NCO violates his fundamental rights as a parent, that the NCO is invalid because it lacks an expiration date, and that the NCO is invalid because it protects a class of persons rather than an individual. Of these challenges, only one was presented

to the district court in Cobler's *pro se* motion to modify the NCO--that the NCO violates his fundamental rights as a parent.

1. Cobler's fundamental right to parent his children

Cobler argues that the prohibition against his having contact with all minors interferes with his fundamental right to parent his children. The imposition and modification of an NCO is discretionary with the district court. I.C. § 18-920(1).[1] When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

The NCO was entered on October 17, 2006, the same day Cobler was arraigned on the charges against him. At arraignment, the state requested that the NCO include all minor children. This expansive restriction according to the state's request, was only to last until "the threat can be assessed." As requested by the state, the district court issued the NCO with a proviso that it would terminate upon dismissal of the case. Of course, the case has not been and will not be dismissed, as Cobler has been convicted.

A parent's fundamental right to parent his/her children is well established in Idaho. *See State v. Doe*, 144 Idaho 534, 536, 164 P.3d 814, 816 (2007); *Leavitt v. Leavitt*, 142 Idaho 664, 670, 132 P.3d 421, 427 (2006). The interest of "parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This interest "does not evaporate simply because they have not been model parents . . . . Even when blood relationships

---

[1] Idaho Code § 18-920(1) provides that:

> When a person is charged with or convicted of an offense under section 18-901, 18-903, 18-905, 18-907, 18-909, 18-911, 18-913, 18-915, 18-918, 18-919,18-6710, 18-6711, 18-7905,18-7906 or 39-6312, Idaho Code, or any other offense for which a court finds that a no contact order is appropriate, an order forbidding contact with another person may be issued. A no contact order may be imposed by the court or by Idaho criminal rule.

Idaho Criminal Rule 46.2 implements I.C. § 18-920 and instructs the courts on the information that must be included in each NCO.

are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[2] Whether an NCO can lawfully interfere with the fundamental right to parent one's children is a matter of first impression in Idaho, although we find substantial guidance from our sister state, Washington.

Washington Revised Code § 9.94A.505(8) (2008) authorizes the trial courts to order persons convicted of a felony sex offense to comply with "any crime-related prohibitions" during the period of community custody following release from total confinement. The aim of these prohibitions is "to further the purposes of public protection and to offer the offender an opportunity for self-improvement." *State v. Letourneau*, 997 P.2d 436, 441 (Wash. Ct. App. 2000) (analyzing Wash. Rev. Code § 9.94A.120(9)(c)(v), the previous codification of the current section). When a crime-related prohibition helps prevent the offender from further criminal conduct, it is a constitutional prohibition, even if it limits a fundamental right of the offender. *Id.* at 444. However, such a limitation must be "reasonably necessary to accomplish the essential needs of the state." *Id.*

In that case, upon sentencing, Letourneau was prohibited from having contact with the victim or any minors for the maximum term of life, unless the contact was supervised by a responsible adult having knowledge of the convictions. This prohibition was later modified to allow Letourneau to have mail and telephone contact with her children, subject to the Department of Correction's policies and procedures. However, Letourneau's children were not of a similar age or circumstance as the victim in her crime, and several evaluators agreed that she was not a pedophile or a risk to her own children. *Id.* at 446. Therefore the prohibition restricting Letourneau's contact with her own children was considered not directly crime-related, and not necessary to protect Letourneau's children from the harm of sexual molestation. *Id.* The court stated:

---

[2] The state asserts that the Idaho State Department of Health and Welfare has already terminated Cobler's parental rights to the two children he shares with Reed. Cobler acknowledged in his *pro se* motion to modify the NCO that termination proceedings had been initiated. However, there is no confirmation of termination in the record, and this Court will not speculate as to matters outside the record. We note, however, that if Cobler's parental rights were terminated, the challenged NCO may have been a contributing cause of that termination as it forced Cobler to "abandon" all contact with his children, and abandonment is one authorized basis for the termination of parental rights. *See* I.C. § 16-2005(1).

On this record, we conclude that the State failed to demonstrate that prohibiting Letourneau from unsupervised in-person contact with her biological children during the term of community custody is reasonably necessary to protect those children from the harm of sexual molestation by their mother. The SSOSA [Special Sexual Offender Sentencing Alternative] evaluators were unanimous in their conclusions that Letourneau is not a pedophile. Even the evaluator who pointed out that many people who molest children unrelated to them later offend against their own children did not opine that Letourneau is a pedophile, and noted specifically that "all sexual offenders are not alike." We can readily agree with that evaluator that children of sex offenders are entitled to the same protection from being molested by the offender as all other children in society. The legislature has specifically authorized courts to require offenders who are convicted of a felony sex offense against a minor victim after June 6, 1996, as Letourneau was, to comply with terms and conditions of community placement imposed by the Department of Corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim. *See* RCW 9.94A.120(9)(b)(vi). But this does not mean that either the court or the Department has the authority to place restrictions upon an offender's contact with his or her own biological children who are not of similar age or circumstances as a previous victim, where the restriction is neither a crime-related prohibition within the meaning of that statutory term nor otherwise necessary to protect the offender's biological children from the harm of sexual molestation. The general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights. There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention. Nothing in this record rises to that level. We strike the provision from Letourneau's judgment and sentence that restricts unsupervised in-person contact with her biological children following her release from total confinement.

This is not to say that in-person visitation between Letourneau and her minor children should not be supervised for other reasons unrelated to the danger of sexual molestation--the record supports the proposition that suitable guardians ad litem should be appointed to investigate the children's best interests with respect to the nature and degree of their ongoing relationship with their mother. The record also supports the proposition that professional intervention may very well be necessary to help the children cope with their mother's crimes and attendant notoriety. The record further supports the proposition that Letourneau herself has little if any insight into the needs of her children or as to the damage she has done to them, first by committing her crimes and then by aggressively exposing herself and her children to media notoriety. But these concerns are better addressed outside the confines of the criminal sentencing process, and this is particularly so in light of the revocation of the SSOSA and the termination of Letourneau's sexual deviancy treatment under the auspices of the SSOSA.

Id.

We consider the standard adopted in Washington persuasive in determining the proper course to follow in Idaho when reviewing the terms of an NCO. Thus, a term in an NCO limiting a fundamental right must be reasonably necessary to accomplish the essential needs of the state. It is without a doubt an essential need of the state to prevent sexual abuse of minor children, whether at the hands of the children's parents or by strangers. However, forbidding all contact with Cobler's children is not reasonably necessary to prevent sexual harm to them in this instance, nor is it reasonably related to rehabilitation. Cobler's psychosexual evaluation indicated that he had a moderate probability to reoffend and that his risk is localized to individuals similar to J.M., older adolescents who are vulnerable to exploitation due to troubled lives. Cobler is described as an opportunist with a disturbing pattern of involvement with older teenage girls. There is nothing in the record describing Cobler as a pedophile.

Two of Cobler's children, one boy and one girl, were under the age of six at the time of his arrest. Cobler has another daughter who was fifteen at the time of his arrest, who lives with her mother in Missouri. There was no indication in the psychosexual evaluation that Cobler would prey upon any of his children, nor that communication with their father would be harmful to them. Without such a determination, denying Cobler all parental rights oversteps the authority of the state. On the information in the record before us, the all-encompassing prohibition against Cobler having contact with any minors has not been shown to be sufficiently related to his crime, nor reasonably necessary to prevent future criminality or to rehabilitate him. Therefore the district court abused its discretion by denying Cobler's motion to modify the NCO to allow some form of contact with his children. On remand, the district court is directed to conduct an evidentiary hearing in order to reconsider the terms of the NCO consistent with the principles expressed herein.

2. Issues raised for the first time on appeal

Cobler asserts that the other four challenges to the NCO should be deemed raised in his motion based on lenient pleading rules, or because they were actually decided by the district court, and therefore are properly before this Court on appeal. We disagree. When determining whether an issue was raised below, this Court looks to the nature of the petitioner's request and the substance of the facts therein, and not just the title used to file the petition with the court. *Hauschulz v. State*, 143 Idaho 462, 466-67, 147 P.3d 94, 98-99 (Ct. App. 2006); *State v. Hyde*, 122 Idaho 604, 605, 836 P.2d 550, 551 (Ct. App. 1992). Cobler properly titled his petition as a

motion to modify the NCO. It is the substance of the facts alleged, however, that do not support his additional challenges to the NCO raised on appeal. Cobler's motion to the district court sought modification of the NCO so that Cobler would be allowed to have contact with his minor children. He did not raise constitutional claims against the validity of I.C. § 18-920 as being vague and overly broad, either generally or as applied. Cobler did not challenge the absence of any termination date for the NCO or the fact that the NCO prohibited contact with all minors as a class instead of naming specific individuals, nor that the NCO was unreasonable in its prohibition of being within 100 feet of any minor, even in the presence of other adults. These claims were not even hinted at by the facts alleged in Cobler's *pro se* motion. Lenient pleading rules do not change the limited nature of Cobler's motion to modify the NCO.

Cobler also argues that the district court addressed these four issues when it ruled on his second Rule 35 motion. When an issue is argued to or decided by the trial court, it can be formally raised on appeal. *State v. DuValt*, 131 Idaho 550, 553, 961 P.2d 641, 644 (1998); *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356-57, 787 P.2d 1159, 1164-65 (1990). In its second memorandum decision on Cobler's Rule 35 motion, the district court observed that an NCO was issued prohibiting contact with all minor children, and that the order was to remain in effect until dismissal of the case. The court did not address the validity of the NCO or any of its terms. Acknowledging the existence of the NCO and its terms is not the same as ruling on the validity of the terms of the NCO.

Although the longstanding rule in Idaho is that appellate courts will not consider issues, including constitutional issues, that are presented for the first time on appeal, *State v. Fry*, 128 Idaho 50, 54-55, 910 P.2d 164, 168-69, (Ct. App. 1994), this Court will consider such issues if they constitute fundamental error, *State v. Hollon*, 136 Idaho 499, 503, 36 P.3d 1287, 1291 (Ct. App. 2001). Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights. *State v. Yakovac*, 145 Idaho 437, 442, 180 P.3d 476, 481 (2008); *State v. Christiansen*, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007); *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989). Although some of Cobler's challenges to the validity of the NCO could be considered fundamental errors, we lack an adequate record on appeal with which to address them. They are best left for further consideration by the district court after an evidentiary hearing on remand.

B. Cobler's Sentence is Not Excessive

Cobler asserts that his sentence is excessive in view of the neglect he suffered as a child and his true feelings of remorse. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary "to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to a given case." *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Cobler's crime, sexual battery of a minor child, sixteen or seventeen years of age, I.C. § 18-1508A, is punishable by a life sentence. I.C. § 18-1508A(4). Cobler was sentenced to a unified period of imprisonment of ten years, with two years determinate. This clearly falls within the statutory maximum. Therefore, we must determine whether the sentence is unreasonable upon the facts of the case. Where reasonable minds could differ as to whether a sentence is excessive, this Court will not disturb the decision of the sentencing court. *State v. Stover*, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005); *State v. Cross*, 132 Idaho 667, 671, 978 P.2d 227, 231 (1999).

Cobler and Reed were involved in a sexual relationship with J.M. for more than three months. They used drugs with J.M. and encouraged her to discontinue taking her mental health medications. This relationship persisted despite their knowledge that J.M. was seventeen years old, and despite her parents' repeated requests to cease involvement with her. J.M. suffered emotional, psychological and physical injuries as a result of her relationship with Cobler and Reed. Although Cobler participated in both a presentence report and a psychosexual evaluation,

he was evasive about the full extent of his relationship with J.M., downplayed the amount of sexual interaction he had with her, and minimized the drug use that took place. He does not view himself as a sexual offender and does not view J.M. as a victim. In fact, he believed his sexual relationship with J.M. was good for her. Cobler supports his position that the sentence is excessive with the fact that he suffered from abuse and neglect as a child. He also points to the fact that he has no prior history of sexual offenses. Cobler claims he was high on drugs the first time he engaged in sexual conduct with J.M. and did not know that she was under eighteen until some months later. Nonetheless, Cobler continued his sexual relationship with J.M. after learning that she was still a minor, and while he claims to feel remorse, he does not identify what conduct he is remorseful for.

The district court was extremely concerned that Cobler was merely acquiescing to treatment, and not actively committed to successful completion. The presentence report indicates that Cobler has the potential for rehabilitation, but his likelihood of success in an outpatient scenario is not encouraging. Cobler is described as having trouble controlling his impulses. We agree with the district court that a sentence of confinement is necessary to protect societal interests, and to aid in rehabilitation and deterrence. We conclude the sentence imposed on Cobler was not excessive.

C. Denial of Cobler's Rule 35 Motion

Cobler also appeals from the district court's denial of his Rule 35 motion for reduction of sentence. An order denying a motion for reduction of a sentence under Rule 35 is reviewed for an abuse of discretion. If the sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reduction. *State v. Hernandez*, 121 Idaho 114, 117, 822 P.2d 1011, 1014 (Ct. App. 1991).

Cobler's initial Rule 35 motion was submitted *pro se*. In that motion he disputed the facts of the crime, placing the responsibility for the relationship on J.M., and claiming that her parents lied to authorities in order to harm Cobler because they couldn't control J.M. He maintained his assertions that the relationship was good for J.M., and that he never used drugs with her; he claimed he was looking out for her best interests. He also declared that his morals slipped when he was involved in this relationship, but that he is a loving and supporting father. Cobler claimed remorse, but was vague as to the reasons for his remorse. Cobler provided

documentation to the district court as to the programs he was involved with at the prison, though those documents are not part of the record on appeal. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991). Based on the record on appeal, we conclude the district court did not abuse its discretion by denying Cobler's Rule 35 motion.

III.

CONCLUSION

Cobler's sentence was not excessive when imposed, and the district court did not abuse its discretion by denying his Rule 35 motion for reduction of the sentence. However, the prohibition in the NCO against Cobbler having contact with all minors interferes with Cobler's fundamental parental right to care for his children and has not been shown to be reasonably necessary to protect his children from harm. Therefore, the district court abused its discretion by denying Cobler's motion to modify the NCO and we reverse that ruling. Cobler's other assertions of error regarding the NCO were not raised to the district court, were not argued to or decided by the district court, and therefore are not considered on appeal. This case is remanded to the district court for an evidentiary hearing on Cobler's motion to modify the NCO. We note that the district court should consider appointing counsel to assist Cobler with the proceedings on remand if Cobler requests counsel. *See Lassiter v. Dept. of Soc. Serv. Of Durham Cty.*, 452 U.S. 18 (1981) (constitutional right to due process may require appointed counsel for indigent parent in proceeding to terminate parental rights).

In all other respects, Cobler's judgment of conviction and sentence are affirmed.

Judge LANSING and Judge PERRY **CONCUR**.