

DA 13-0309

IN THE SUPREME COURT OF THE STATE OF MONTANA

2014 MT 202N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL WESLEY SIMPSON,

Defendant and Appellant.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Richland, Cause No. DC 11-043
Honorable Katherine M. Bidegaray, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Wade Zolynski, Chief Appellate Defender; Nicholas C. Domitrovich,
Assistant Appellate Defender; Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General; Tammy A. Hinderman,
Assistant Attorney General; Helena, Montana

Mike Weber, Richland County Attorney; T.R. Halvorson, Deputy County
Attorney; Sidney, Montana

Submitted on Briefs: June 25, 2014
Decided: July 29, 2014

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Michael Simpson (Simpson) appeals from two conditions in the judgment and sentence entered by the Seventh Judicial District Court, Richland County, following his plea of guilty to one count of Attempted Sexual Abuse of Children, in violation of §§ 45-4-103 and 45-5-625, MCA.

¶3 On September 26, 2011, Simpson, then 26 years old, was charged by Information with one count of sexual abuse of children, a felony, and an alternate count of attempted sexual abuse of children, also a felony. The State alleged that he knowingly enticed the 14-year-old daughter of a former coworker to engage in sexual conduct in chat messages on Facebook, and attempted to arrange a meeting for them to engage in sexual intercourse. Simpson and the State entered into a binding plea agreement whereby Simpson agreed to plead guilty to the attempt charge, and the parties agreed to recommend a sentence of a ten-year commitment to the Department of Corrections with six years suspended, to be run concurrently with an existing felony sentence.

¶4 Following Simpson's plea of guilty, a psychosexual evaluation was conducted by Dr. Marla North, and a presentence investigation (PSI) was conducted by Adult Probation

and Parole. Dr. North concluded Simpson did not show an overt sexual deviance, but did have a “slight elevation [of sexual interest] in pre-juvenile males and females” that would “need to be ruled out or explored further in treatment.” Dr. North recommended that Simpson complete all phases of an outpatient treatment program and have “[n]o unsupervised time with minors under the age of 21. All supervisors must be pre-approved by his treatment team. No employment or activities where children are involved or congregate without prior permission from treatment and probation.” At the time Dr. North made this recommendation, she was aware that Simpson was married and had a 12-year-old step-son and a 3-year-old biological daughter (with whom he had limited contact), but she made no exception for family members. The PSI incorporated the recommendations from the psychosexual evaluation and set forth further conditions relating to Simpson’s contact with children. The District Court ordered substantially all the conditions recommended by the PSI.

¶5 On appeal, Simpson alleges that two of the conditions ordered by the court are illegal and unconstitutional. First, he challenges condition 27, which states:

The Defendant shall not have contact with any individual under the age of 18 unless accompanied by an appropriately trained, responsible adult who is aware of the Defendant’s sexual conviction and is approved by the probation and parole officer and sexual offender treatment provider.

Second, he challenges condition 43, which states:

The Defendant shall not date, live with, or otherwise be aligned with any person with children under the age of 18 without the express prior approval of the therapist and probation and parole officer. If this approval is granted, they shall both be involved with the Defendant’s treatment to the extent recommended by the treatment provider.

Simpson argues these two conditions unduly burden his right to privacy as well as his familial rights by possibly requiring him to get a divorce from his wife because the relationship was not preapproved by Probation & Parole and preventing him from parenting his biological daughter and step-son. He also claims that these conditions do not bear a sufficient nexus to the facts of the case or his personal characteristics, and “do nothing to contribute to [his] rehabilitation or the protection of the victim or society.”

¶6 When the legality and/or propriety of a probation condition is challenged, we first review the sentencing condition for legality. If the challenged condition is legal, we then review the reasonableness of the condition for an abuse of discretion. *State v. Ashby*, 2008 MT 83, ¶ 9, 342 Mont. 187, 179 P.3d 1164. A district court abuses its discretion in regards to sentencing conditions if a nexus does not exist between the condition and either the offense being sentenced or the background or characteristics of the offender. *State v. Stiles*, 2008 MT 390, ¶ 10, 347 Mont. 95, 197 P.3d 966.

¶7 We disagree with Simpson’s characterization that the challenged conditions prevent him from parenting his daughter and step-son and require him to divorce his wife, rendering them illegal and unconstitutional. Rather, the conditions require supervision of his contact with minors, with the permission of his therapist and probation officer, as recommended in the psychosexual evaluation based on his conviction for a sexual offense involving a child. Simpson’s characterization of the conditions was discussed at sentencing, and both the probation officer and the District Court expressed their understanding that Simpson’s marriage would not be a problem and, with the proper

supervision, he would not be prevented from having contact with his children. Though these conditions limit the full scope of Simpson’s right to familial relationships and right to privacy, probationers “are subject to conditional liberty properly dependent upon special restrictions.” *State v. Moody*, 2006 MT 305, ¶ 19, 334 Mont. 517, 148 P.3d 662.

¶8 Simpson next points to the statute allowing a court to impose “reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society,” § 46-18-201(4)(q), MCA, and argues that “nothing in the record indicates that these conditions are ‘necessary’ to rehabilitate [him] or protect society.” However, our review of a condition’s necessity is whether there is a correlation or connection to the offense or the offender. *Ashby*, ¶ 15.

¶9 Simpson points to our holding in *Ashby* that, for conditions related to characteristics of the offender, “the history or pattern of conduct to be restricted [must be] recent, and significant or chronic,” and a “passing, isolated, or stale instance of behavior or conduct will be insufficient to support a restrictive probation condition.” *Ashby*, ¶ 15. Simpson argues that there is no significant or chronic pattern of conduct showing him to be a danger to minors, and that the psychosexual evaluation did not conclude him to be specifically interested in juvenile victims, but rather his victim criteria would be “availability or new and different.” He therefore concludes that the challenged restrictions on his contact with minors constitute an unreasonable abuse of discretion by the court. However, the condition does not have to be related to both the unique background or characteristics of the offender *and* the underlying offense. Simpson was

convicted of attempted sexual abuse of children for initiating sexually explicit conversations with a 14-year-old and attempting to arrange a meeting for sexual intercourse with her. Thus, the conditions restricting his unsupervised contact with minors bears a nexus to the offense even if the restricted conduct is not based on a “recent, and significant or chronic” pattern of behavior by Simpson. Therefore, the conditions challenged here are not an abuse of the District Court’s discretion.

¶10 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our Internal Operating Rules, which provides for noncitable memorandum opinions. The issues in this case are ones of judicial discretion and there clearly was not an abuse of discretion.

¶11 Affirmed.

/S/ JIM RICE

We concur:

/S/ MICHAEL E WHEAT

/S/ PATRICIA COTTER

/S/ BETH BAKER

/S/ JAMES JEREMIAH SHEA