[Cite as *State v. Emery*, 2015-Ohio-1487.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-09-062
	:	O P I N I O N
- vs -		4/20/2015
	:	
MARY EMERY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2014CRB02471

D. Vincent Faris, Clermont County Prosecuting Attorney, Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Mary Emery, appeals from her sentence in the Clermont County Municipal Court for domestic violence. For the reasons discussed below, we affirm.

{¶ 2} On May 29, 2014, appellant was arrested and charged by complaint with domestic violence in violation of R.C. 2919.25(A), a misdemeanor of the first degree. The charge arose out of allegations that on May 28, 2014, appellant struck her 17-year-old

daughter, H.E., in the face several times and threatened to kill her.

{¶ 3} A motion for a temporary protection order was filed the same day as the complaint. However, the following day, H.E. sought to withdraw the motion for a temporary protection order, stating that she had "no fear" that appellant would cause her harm. Appellant was released on bond, with the condition that she have no uninvited contact with her daughter. H.E. went to live with her grandparents and Children's Protective Services (CPS) instituted a security plan for H.E.

{¶ 4} On August 6, 2014, appellant entered a no contest plea to the amended charge of domestic violence in violation of R.C. 2919.25(C), a misdemeanor of the fourth degree. In entering this plea, appellant specifically stipulated that the following facts were sufficient for a guilty finding:

> On 5-28-14 [appellant] struck her daughter [H.E.] in the face several times and threatened to kill her. On a separate date there is an audio recording where the [appellant] can be heard striking [H.E.] and telling her she is going to "beat the shit out of her and fucking kill her."

{¶ 5} The trial court accepted appellant's no contest plea and sentenced her to 30 days in jail, with 28 days suspended and credit for two days served. The court placed appellant on community control for a period of two years and imposed the following relevant conditions: (1) appellant shall not violate any laws of the United States, including federal, state, county, and city, (2) appellant shall complete counseling as directed by Life Point Solutions, and (3) appellant shall have no uninvited contact with H.E. other than such contact expressly authorized by CPS or the juvenile court.

{¶ 6} At the time of sentencing, appellant claimed that the security plan instituted by CPS had been discontinued, and she objected to the condition that she have no uninvited contact with H.E. on the basis that the condition interfered with her parental rights. In response, the trial court advised appellant as follows:

> THE COURT: And you are to have no uninvited contact with [H.E.] other than such contact which is expressly authorized by Children's Protective Services or juvenile court. It is not my desire in any way, shape or form [sic.], I don't have jurisdiction to interfere with your parental rights with [H.E.]. But juvenile . . . you told me there's a protection plan in place. Okay? I don't know the details of that. If Children's Protective Services indicates that you can have contact with [H.E.] then that's . . . I'm authorizing that. If juvenile court says you can have contact with [H.E.], I'm authorizing that. Those are the entities that have jurisdiction from a parental right type of standpoint. But I think they need to be making that decision rather than me. Now again it's no uninvited contact. If you're talking with [H.E.] on the phone, she's agreeable with that, she agrees to meet with you then nobody has to approve that contact if she says it's okay. But if there are issues with you communicating or having contact with [H.E.], juvenile court and Children's Protective Services is the entity [sic] that can authorize you to have uninvited contact with her.
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> * * *
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> [I]f you feel that you are being deprived of the opportunity to see your daughter and you believe that your parental rights are being infringed upon, then I'm encouraging you and advising you to talk to juvenile court to see what you need to do to exercise that. I'm in a difficult situation. She's the victim of a criminal offense here, an offense of violence. I'm going to err on the side of caution in terms of protecting her. But I'm indicating I'm cognizant of the fact that this is a parental type situation. And again, I don't know what the status, the specific status of Children's Protective Services is. And it may be something that they can clarify very simply for you. But my order is it's no uninvited contact unless it's approved by Children's Protective Services or juvenile court.

{¶ 7} Appellant timely appealed from the imposition of her sentence, raising three assignments of error in which she challenges the no-uninvited-contact condition.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT VIOLATED [APPELLANT'S] CONSTITUTIONAL RIGHTS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶ 10} In her first assignment of error, appellant argues the trial court's condition that she have no uninvited contact with her daughter resulted in a de facto termination of her

parental rights in violation of the Due Process Clause. Appellant contends that the no-uninvited-contact condition of her community control interferes with her fundamental right to the care, custody, and management of her child and that the condition is not narrowly tailored to promote a compelling governmental interest. The state argues that the community-control condition, authorized pursuant to R.C. 2929.27(C), is constitutional as applied in this case.

{¶ 11} R.C. 2929.25 governs misdemeanor community-control sanctions and provides that "in sentencing an offender for a misdemeanor, other than a minor misdemeanor, the sentencing court may * * * [d]irectly impose a sentence that consists of one or more community control sanctions authorized by section 2929.26, 2929.27, or 2929.28 of the Revised Code." R.C. 2929.25 (A)(1). In ordering appellant to have no uninvited contact with her daughter, the trial court relied on R.C. 2929.27(C), which provides that a court "may impose any * * * sanction that is intended to discourage the offender or other persons from committing a similar offense if the sanction is reasonably related to the overriding purposes and principles of misdemeanor sentencing." Appellant challenges the constitutionality of the no-uninvited-contact condition imposed pursuant to R.C. 2929.27(C).

{¶ 12} "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000). The United States Supreme Court has "long recognized that the Amendment's Due Process Clause * * * 'guarantees more than fair process.'" *Id.*, quoting *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). "The Clause also includes a substantive component that 'provides heightened protection against government inference with certain fundamental rights and liberty interests.'" *Id.*, quoting *Glucksberg* at 720.

{¶ 13} Where a party argues that a statute or regulation impinges upon a fundamental constitutional right, courts must apply a strict-scrutiny standard of review. *Harrold v. Collier*,

107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 39. Under the strict-scrutiny standard, a statute or regulation that infringes on a fundamental right is unconstitutional unless the statute or regulation is narrowly tailored to promote a compelling governmental interest. *Id.*, citing *Chavez v. Martinez*, 538 U.S. 760, 775, 123 S.Ct. 1994 (2003).

{¶ 14} "[I]t cannot * * * be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66; *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388 (1982). As such, a strict-scrutiny standard of review applies. *Harrold* at ¶ 39. The issue before us, then, is whether the trial court's implementation of the no-uninvited-contact condition of appellant's community control, as authorized by R.C. 2929.27(C), was narrowly tailored to promote a compelling government interest.

{¶ 15} The state's interest in protecting the safety and welfare of children has long been recognized as a compelling governmental interest. *See Santosky* at 766; *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438 (1944); *In re McCrary*, 75 Ohio App.3d 601, 608 (12th Dist.1991). Parents' constitutionally protected interest in their family integrity "is counterbalanced by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is necessary as against the parents themselves." *Kottmyer v. Maas*, 436 F.3d 684, 690 (6th Cir.2006). In this case, we find that the application of the no-uninvited-contact condition, in conjunction with the trial court's directive that contact may be authorized by CPS or the juvenile court, was narrowly tailored to promote the compelling governmental interest of protecting the safety and welfare of H.E., a child-victim of domestic violence.

{¶ 16} Appellant contends that the no-uninvited-contact condition is not narrowly tailored because it "turn[s] the parental relationship on its head" by preventing "all contact between [appellant] and her daughter unless [H.E.] approves it first." This does not

accurately reflect the imposed community-control sanction. Appellant is not prevented from having "all contact" with her daughter and her parental rights are not permanently terminated by the temporary community-control condition. Rather, the imposed community-control sanction seeks to allow visitation and contact between appellant and H.E. in a manner that accommodates both appellant's fundamental right to the care, custody, and management of her daughter, and the state's need to protect the safety and welfare of H.E., a child-victim of domestic violence. The imposed sanction is narrowly tailored as it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *State v. Burnett*, 93 Ohio St.3d 419, 429 (2001), citing *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495 (1988). The sanction protects H.E. from further violence delivered at the hands of appellant as it restricts appellant's contact with H.E. to those situations where H.E. feels safe enough to invite contact or where CPS or the juvenile court authorize contact.

{¶ 17} Appellant asserts that CPS no longer has an open case regarding appellant and H.E., and that neither CPS nor the juvenile court have jurisdiction over the matter. From the record, it is apparent that CPS became involved in the matter once the allegations of appellant striking her daughter came to light. The trial court recognized that CPS had instituted a security plan for H.E. Although appellant claimed that the security plan had been terminated by the time of sentencing, the trial court indicated that it was unaware of the "specific status" of CPS's security plan. The court believed that CPS was still actively involved in appellant's case and instructed appellant to contact CPS if she felt that she was being deprived of the opportunity to have contact with her daughter. As the record is devoid of evidence demonstrating that the security plan had been terminated or that CPS's involvement had concluded, we find no error in the court's imposition of the no-uninvited-contact condition. Furthermore, as a juvenile court has jurisdiction over certain specified matters relating to children, including custody, visitation, and other parenting issues, we find

no merit to appellant's contention that the juvenile court lacks the ability or jurisdiction to order contact between appellant and H.E. *See* R.C. 2151.23.

{¶ 18} Accordingly, we find that the no-uninvited-contact condition was specifically adapted to the exigencies of this situation and narrowly tailored to serve the state's interest in protecting the welfare and safety of H.E. while observing appellant's fundamental right to the care, custody, and control of her child. The imposition of the no-uninvited-contact provision was, therefore, constitutional as applied in this case.

{¶ 19} Appellant's first assignment of error is overruled.

{¶ 20} Assignment of Error No. 2:

{¶ 21} THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING, AS A CONDITION OF COMMUNITY CONTROL, THAT [APPELLANT] HAVE NO UNINVITED CONTACT WITH HER DAUGHTER.

{¶ 22} In her second assignment of error, appellant argues the trial court abused its discretion in imposing the no-uninvited-contact condition of her community control. Appellant argues that the condition has no rehabilitating component and is not related to her criminal conduct.

{¶ 23} R.C. 2929.25, the misdemeanor community-control sanctions statute, states, in pertinent part, that in the "interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior the court may impose additional requirements on the offender" and the "offender's compliance with the additional requirements also shall be a condition of the community control sanction imposed on the offender." R.C. 2929.25(C)(2).

{¶ 24} The Ohio Supreme Court has set forth a test to determine whether a community-control condition is proper. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888. Under the *Talty* test, courts must consider whether the condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was

convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." *Id.* at ¶ 12. The imposed condition cannot be overly broad so as to unnecessarily impinge upon the offender's liberty. *Id.* at ¶ 13. Appellate courts review the trial court's imposition of community-control conditions under an abuse of discretion standard. *Id.* at ¶ 10; *State v. Hart*, 12th Dist. Brown No. CA2011-03-008, 2012-Ohio-1896, ¶ 68. "An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable." *State v. Keever*, 12th Dist. Warren No. CA2012-01-005, 2012-Ohio-4643, ¶ 11.

{¶ 25} Applying *Talty* to the facts of the present case, we find that the trial court did not abuse its discretion by imposing the no-uninvited-contact condition. The no-uninvited-contact condition is reasonably related to appellant's rehabilitation and bears some relation to the crime, as it restricts appellant's access to her daughter, the victim, for two years while appellant undergoes counseling at Life Point Solutions and learns how to better interact and discipline her daughter. Moreover, the condition is reasonably related to appellant's future criminality, as it helps to maintain some degree of control over appellant's interactions with her daughter and helps protect H.E. from future physical abuse at the hands of her mother. Contrary to appellant's arguments, the no-uninvited-contact condition is not overly broad as it is a temporary order that does not terminate appellant's parental rights or prohibit her from having "all" interaction with her daughter. Rather, the no-uninvited-contact condition serves the statutory ends of community control by rehabilitating appellant, ensuring her good behavior, and providing justice and protection to H.E. while simultaneously allowing appellant to have contact with H.E. whenever H.E. invites contact or when CPS or the juvenile court authorizes contact.

{¶ 26} Community-control conditions that restrict parental rights, including those that prohibit contact where the defendant's children were the victims of the crime for which the

defendant has been convicted, have consistently been upheld when the conditions pass the *Talty* test. *See, e.g., State v. McClure*, 159 Ohio App.3d 710, 2005-Ohio-777 (1st Dist.); *State v. Sommerfeld*, 8th Dist. Cuyahoga No. 84154, 2004-Ohio-6101. In *McClure*, the defendant was the legal guardian of one child-victim and the adoptive mother of another child-victim. 2005-Ohio-777, ¶ 1. McClure decided to kill herself and the two children. *Id.* She placed the two children in her van in her friend's garage, put on a movie, and let the van run. *Id.* After about 45 minutes, one of the children began to cry, which caused McClure to "snap out of it." *Id.* McClure removed the children from the van and called for help. *Id.* She was later convicted of two counts of felonious assault and sentenced to five years of community control. *Id.* One of the conditions of her community control was that she was to have "no contact" with the children. *Id.* at ¶ 2. McClure appealed her sentence, arguing that the condition that she have no contact with the children was "equivalent to a termination of her parental rights without due process." *Id.* at ¶ 3.

{¶ 27} Applying the test set forth in *Talty*, the First District Court of Appeals rejected McClure's argument. The First District found that the no-contact condition of McClure's community control was related to the crimes for which she was convicted and protected the children from future harm. *Id.* at ¶ 12. In upholding the no-contact condition, the First District specifically noted that the "community-control condition is a temporary order that does not permanently terminate [McClure's] parental rights or cause any change in the legal custody of either child." *Id.*

{¶ 28} Similarly, in *Sommerfeld,* the Eighth District Court of Appeals upheld a community-control condition which prohibited a father from being a custodial parent for five years. 2004-Ohio-6101 at ¶ 40-45. Over the course of a weekend, Sommerfeld had paddled his three-year-old daughter a number of times when he felt she was misbehaving, often times with a piece of wooden floorboard. *Id.* at ¶ 4-12. The paddling left the three-year-old with

bruised and swollen buttocks. *Id.* at ¶ 14. As a result of the paddlings, Sommerfeld was convicted of child endangering and felonious assault and sentenced to five years of community control. *Id.* at ¶ 15-17. One of the conditions of his community control was that he was "prohibited from being a custodial parent of any minor child during the five year period." *Id.* at ¶ 17. Sommerfeld appealed his sentence, arguing that the trial court exceeded its authority when it prohibited him from being a custodial parent while on community control. *Id.* at ¶ 40.

{¶ 29} The Eighth District upheld Sommerfeld's sentence, finding that "[p]recluding [Sommerfeld] for a time from taking on the responsibility of child custodial care is both related and germane to the crime of child endangering." *Id.* at ¶ 44. The court further noted that the purpose behind the prohibition was to "ensure [Sommerfeld] had the time to 'rehabilitate' his parental behavior over the period of community control." *Id.* Applying the test set forth in *Talty*, the Eighth District concluded that the trial court acted within its discretion in choosing to limit Sommerfeld's "custodial authority over any potential victims of his physically injurious parental style." *Id.* at ¶ 45.

{¶ 30} Like the conditions set forth in *McClure* and *Sommerfeld*, the no-uninvited-contact condition of appellant's community control is related to the crime for which she was convicted and serves the purpose of protecting H.E. from future domestic violence incidents while appellant is being rehabilitated. We therefore conclude that the trial court did not abuse its discretion in imposing the no-uninvited-contact condition of appellant's community control.

{¶ 31} Appellant's second assignment of error is overruled.

{¶ 32} Assignment of Error No. 3:

{¶ 33} THE TRIAL COURT DID NOT HAVE JURISDICTION TO RENDER AN ORDER OF THIS NATURE AS IT WAS TANTAMOUNT TO A CUSTODY DETERMINATION WHICH

A MUNICIPAL COURT DOES NOT HAVE THE POWER TO MAKE.

{¶ 34} In her third assignment of error, appellant argues that the municipal court lacked jurisdiction to impose the no-uninvited-contact condition of her community control. Appellant contends that the condition was "tantamount to a custody determination," over which the juvenile court has exclusive jurisdiction.

{¶ 35} We find no merit to appellant's argument. As we recognized above, "[c]ourts have upheld conditions that restrict parental rights, including those that allow no contact, when the defendant's children were the victims of the crime for which the defendant was convicted." *McClure*, 2005-Ohio-777 at ¶ 13, citing *Sommerfeld*, 2004-Ohio-6101 at ¶ 40-45. While R.C. 2151.23 gives a juvenile court the jurisdiction to restrict or terminate parental rights, R.C. 1901.20 provides municipal courts with jurisdiction over criminal misdemeanor offenses committed within its territory. *See* R.C. 1901.20; *State v. Cowan*, 101 Ohio St.3d 372, 2004-Ohio-1583. Pursuant to the power statutorily granted to the municipal court by R.C. 1901.20, the trial court acted within its authority by imposing the no-uninvited-contact condition as part of appellant's community-control sanction. In sentencing offenders, the municipal court has the authority to issue community-control sanctions as long as such sanctions are permitted under R.C. 2929.26, R.C. 2929.27, or R.C. 2929.28 and are constitutional. *See* R.C. 2929.25(A)(1). As discussed in the resolution of appellant's first and second assignments of error, imposition of the no-uninvited-contact condition pursuant to R.C. 2929.27(C) is neither unconstitutional nor an abuse of the trial court's discretion under the standard set forth in *Talty*, 2004-Ohio-4888.

{¶ 36} Accordingly, we conclude that the trial court acted within its jurisdiction in imposing the condition that appellant have no uninvited contact with her daughter, except as authorized by CPS or the juvenile court, as a result of her domestic violence conviction.

{¶ 37} Appellant's third assignment of error is overruled.

{¶ 38} Judgment affirmed.

M. POWELL, P.J., and S. POWELL, J., concur.