IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES CODY FARRIS, Appellant.	No. 39331-0-II UNPUBLISHED OPINION

Armstrong, J. — James Farris appeals his standard range sentence, arguing that the trial court failed to actually consider his request for an exceptional sentence downward. He also challenges a no-contact order the trial court entered at sentencing. Because the record supports Farris's arguments, we vacate the standard range sentence and the no-contact order and remand for resentencing.

FACTS

In 1996, a court ordered Farris to have no contact with his daughter. Twelve years later, she contacted him, and they e-mailed for one year. Based on these contacts, the State charged Farris with violating the order. During the trial, the superior court again ordered Farris to have no contact with his daughter. Later in the trial, the parties learned the 1996 order had expired years earlier.[1] The State then dismissed the charge, but not before Farris had again contacted his daughter. The State charged him with violating the latest no-contact order.

1 The parties agree that the no-contact order likely expired about a year after it was issued, though neither party pinpoints this date.

The State offered to recommend a specific exceptional sentence below the standard range if Farris pleaded guilty. Farris accepted the offer and agreed to ask for the same sentence. At sentencing, however, Farris's attorney asked the court to sentence Farris to time served, considerably less than what the parties agreed upon. The State countered by recommending a standard range sentence, which the trial court imposed, explaining: "It sounds like a shame [to issue a standard range sentence] but I don't think I have any—any authority to enter an exceptional sentence other than the standard range." Report of Proceedings (RP) at 16. The court also imposed a new five-year no-contact order forbidding Farris from contacting his daughter.

ANALYSIS

I. Abuse of Discretion at Sentencing

Farris claims the trial court abused its discretion in sentencing him within the standard range. He argues the court erroneously assumed that it lacked the authority to give an exceptional sentence below the statutory guideline.

The Sentencing Reform Act (SRA) gives a sentencing court discretion to impose an exceptional sentence below the standard range when "it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Any "substantial and compelling" reason may constitute a mitigating circumstance. RCW 9.94A.535. Although no defendant is entitled to an exceptional sentence below the standard range, he is entitled to have the trial court "actually" consider such a request. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). A trial court abuses its discretion in considering the request if it refuses

categorically to impose an exceptional sentence below the standard range. *Grayson*, 154 Wn.2d at 342.

To show that the trial court refused to exercise its discretion, Farris points to the court's comment that, "[i]t sounds like a shame but I don't think I have any . . . authority to enter an exceptional sentence other than the standard range." RP at 16. The State, on the other hand, finds the trial court's exercise of discretion in the following: "I don't know any legal basis for an exceptional other than the [failed] agreement."[2] RP at 13.

Both comments clearly reflect the trial court's belief that it lacked the authority to consider Farris's request for an exceptional sentence because of the failed plea agreement. But the failed agreement did not divest the court of its power and obligation to consider an exceptional downward sentence. At most, Farris's failure to recommend the agreed-upon sentence relieved the State of its obligation to recommend an exceptional downward sentence, a remedy which it took advantage of. Nothing in the agreement purports to bind the court to a standard range sentence should one of the parties fail to perform as agreed. Sentencing judges are not bound by the prosecutor's sentencing recommendation. *State v. Nelson*, 108 Wn.2d 491, 499, 740 P.2d 835 (1987).

The record shows the trial court failed to "actually" consider Farris's request for an exceptional sentence. *Grayson*, 154 Wn.2d at 342. We vacate the sentence and remand for the trial court to consider granting Farris an exceptional sentence in light of the troubling circumstances surrounding his prosecution.[3]

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[2] The State does not contest Farris's right to appeal the standard range sentence.

[3] Farris presents a plausible argument for "substantial and compelling" reasons to mitigate his sentence. Had the State properly investigated the lapsed initial order, he would not have been

II. Constitutionality of the No-contact order

Farris argues that the current no-contact order also violates his fundamental right to parent. The SRA authorizes a trial court to impose "crime-related prohibitions" as a condition of a sentence. RCW 9.94A.505(8); *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). We generally review sentencing conditions for abuse of discretion. *Rainey*, 168 Wn.2d at 374. But if the issue touches a constitutional right (such as the right to the care, custody, and companionship of one's children), we will affirm only if the condition is reasonably necessary to accomplish the essential needs of the State and public order. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Before the trial court could constitutionally prohibit Farris from contacting his daughter, the State had to prove this was reasonably necessary to protect her. *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001) (holding that the State failed to show no contact with the defendant's nonvictim children was reasonably necessary to prevent them from witnessing domestic violence); *State v. Letourneau*, 100 Wn. App. 424, 441, 997 P.2d 436 (2000) (State failed to provide sufficient evidence to demonstrate the need for a no-contact order with defendant's biological children).

The record does not speak to the reason behind the 1996 no-contact order. The State did not establish a compelling interest rationalizing the new order other than reporting that his daughter and her mother preferred one. Nor did the trial court did not explain why it imposed the no-contact order. Without some factual explanation justifying the need for no contact, the State did not prove the need for a new order. Thirteen years have passed since the original order and

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before the court for entry of the additional no-contact order.

the family's circumstances have likely changed in ways that may be critical to deciding whether the new order is necessary. Accordingly, we vacate the latest no-contact order.

We vacate the standard range sentence and the latest no-contact order and remand for further proceedings.[4]

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Worswick, A.C.J.

Taylor, J.P.T.

[4] Farris argues that he was denied effective representation when trial counsel failed to instruct the court that it had the authority to issue an exceptional sentence below the standard range, despite the invalid stipulation between the parties. Because we are remanding for resentencing on the first issue, we need not address this issue.