IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES MONTE STOGSDILL, Appellant.	No. 39577-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — James Stogsdill appeals the trial court's denial of his CrR 7.8 motion in which he sought to modify his sentence and remove the requirement that he have no contact with minor children, including his own minor daughter who is now 14 years old. Stogsdill pleaded guilty to raping A.T., his live-in partner's daughter. In addition, the psychosexual evaluation and A.T.'s statements at sentencing indicated that Stogsdill's family and friends were unconcerned with his illegal sexual conduct and knowingly failed to protect A.T. The trial court properly limited Stogsdill's conduct with persons in his target victim class and did not abuse its discretion when it denied Stogsdill's CrR 7.8 motion to modify his sentence to allow him to have contact with his daughter, his granddaughter, and other minor children. Accordingly, we affirm.

Facts

Stogsdill is a convicted sex offender. Stogsdill entered into a plea bargain under which he pleaded guilty to an amended information charging him with one count of second degree child rape of his live-in partner's daughter, A.T., in violation of RCW 9A.44.076.[1] He petitioned the trial court for a special sex offender sentencing alternative (SSOSA), former RCW 9.94A.670 (2001). The psychosexual evaluation and treatment plan presented in support of Stogsdill's SSOSA request reads in relevant part as follows,

> [Stogsdill] was accused of sexually assaulting his live-in partner's daughter, AT on a number of occasions between the child's ages of twelve and fourteen. She described fellatio, cunnilingus and Mr. Stogsdill touching her vaginal area and breasts on a number of occasions during that two-year period. She said she was forced to fellate him, but in the interview with the law enforcement investigator denied she was physically coerced or threatened. Mr. Stogsdill's admissions are consistent with the victim's report. She is now eighteen-years-old. He was also accused of assaulting another eighteen-year-old female, HW, who reported when she was seventeen-years-old. She described him assaulting her on a number of occasions a few years ago. She specifically described him touching her breasts and vaginal area and implied digital penetration of her vagina as often as three-to-four times a week over a period of time. She said on one occasion he threatened to kill her if she disclosed. He admits to sexually assaulting her on a number of occasions, but denied ever threatening her. She is not related to him. He said when they initially met, she approached him, because she recognized him as the father of his nineteen-year-old son, Blake. After their initial discussion, he acknowledges sexually exploiting and abusing her on a number of occasions. *He is now admitting in his thirty-third year sexually assaulting his four-year-old daughter on four occasions over a one-year period by fondling her unclothed vaginal area and performing cunnilingus twice.* ***He also admits in his thirty-third year sexual contact with six females between the ages of thirteen and seventeen,*** *which involved mutual sexual fondling, mutual oral sex and penile-vaginal intercourse in his vehicle. He denied coercing the girls. He did not*

[1] In an attempt to make Stogsdill accept responsibility for his conduct, the State amended one count in the information which also referenced another victim, H.W., who was technically too old for the State to file second degree rape charges. In the right margin of the guilty plea form next to the description of the crimes, Stogsdill wrote, "I am pleading to the [a]mended [information] even though a factual basis may not exist for Rape Child 2-on HW due to her age." Clerk's Papers (CP) at 35.

> *provide specifics regarding their names nor the locations of the assaults.*

Clerk's Papers (CP) at 42-43 (emphasis added).

> He presents with a number of risk factors that are concerning. Sobriety and drug abstinence will be key to control of his sexual and other impulses.

CP at 46.

> Under the influence of alcohol, methamphetamine or other controlled substances, he would be at extreme risk for further antisocial behavior, including sexual assault.

CP at 47.

> He became involved with the mother of his nine-year-old daughter over a decade ago. [This is the child who was four at the time he had sexual contact with her.] That woman, Cynthia "Cindy" Peterson is also the mother of the alleged victim, AT.

CP at 48.

> AT said Mr. Stogsdill sexually abused her between her ages of twelve and fourteen and she described numerous instances of mutual oral sex and Mr. Stogsdill touching her vaginal area and breasts. She said he ejaculated in her mouth on at least one occasion. He said it is possible that he did, but he could not recall that occurrence. He admits the oral-genital contact and touching that she described. He also admitted to the specifics of abuse as described by HW, but denied threatening her. He is now admitting sexually molesting his daughter, who is now nine-years-old. He said she was four when he sexually abused her by touching her vaginal area and performing cunnilingus on her. He also admits to sexual contact with possibly six females, who were between the ages of thirteen and seventeen.

CP at 49.

> [H]e has been diagnosed with herpes.

CP at 48.

While allocuting at his March 31, 2006 sentencing, Stogsdill stated,

> I'm at the bottom. I went from one addiction to another. I went from alcohol, which I was sober for 6 years, 5 years, to methamphetamines for the last 4 years. I've hit rock bottom. I just agree with everything that Mr. McCann has

> said. I understand the implications of me re-offending. I understand that methamphetamine is the worse thing that I've ever came across in my life. This is what it's took, my life, and my kids may not get to see me for a long time because of my selfishness, *because of what I've done to [A.T.] and everybody else, my daughter.*

Report of Proceedings (RP) (March 31, 2006) at 33 (emphasis added).

A.T. also addressed the sentencing court and made the following statement,

> [Stogsdill] had first hurt me when I was 12. It took me 3 years to stop lying to myself for the horrible person he is. Partially I think my older sister Angela had known it had happened to me before I had come forward. She just basically thought that it wasn't a big deal and ignored it, and then I continued to live with him for years, I believe as his girlfriend. I wanted to continue to see my older sister, plus I had considered [Stogsdill] as a friend of mine.
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> When I had found out about HW when I was 14, when she was in one of my classes, I thought that was very weird, and I continued to tell myself that it's not that big a deal. My sister didn't care. No one seemed to care what had happened to me.
>
> And then my cousin had tried to come forward, and because she was 15 the police officer said that she was old enough, and eventually I did not want it to happen to my little sister, and in order to do that, I had to stop lying to myself and understand all of the people and girls he has hurt.
>
> It hurts me now that -- when I found out about [my little sister], that he had hurt her while I was lying to myself, I wish I would have come forward and that it didn't happen to her.
>
> My mother and my older sister do not care what has happened to me or [my little sister]. They have done nothing but tell me to get over it, and my mother tried to bribe me with [Stogsdill], this man, $10,000 to do a plea deal. I wouldn't do it. She won't protective [sic] me and keep him away from her.
>
> I don't understand why my sister and my mother are so sick, just like him. I think it's sick that he has allowed his sons to bring [my little sister] here and to keep -- she's a victim of him and try to play off of that, that she's of some good to him even though she's a victim. She's just young.
>
> He has -- [Stogsdill] has a granddaughter. I believe if he gets out, that his granddaughter is the next on his list. I have never met her. I don't care to meet her. She is a niece to [my little sister]. I'm sure [my little sister] cares about her a lot. I firmly believe that he will hurt his granddaughter next, not only her but anyone else that crosses him. And that's not fair to them, and it's not fair that he doesn't get justice for me, my cousin who's not here, who's not strong enough to be here. HW is not strong enough to be here and everyone else that he's admitted in his lie detector test who's not strong enough to be here, to not get justice for us.
>
> Finding out what he did to all of us and my younger sister, I wish I could

> kill him, but I can't. I just hope that justice according to the State and this law how it seems and deems its worst punishment on him. It's not my worst punishment, but if it is the best justice I can get, there's nothing I can do about it.

RP (March 31, 2006) at 19-21.

Stogsdill's standard range for second degree child rape with an offender score of 3 was 102 to 136 months (to life). The court sentenced him to the maximum, 136 months to life. Stogsdill appealed, contending that he did not enter his plea knowingly, voluntarily, and intelligently. We affirmed. *State v. Stogsdill*, noted at 139 Wn. App. 1013 (2007). Later, Stogsdill filed a CrR 7.8 motion that the trial court summarily denied without a show cause hearing. We reversed and remanded for hearing on the CrR 7.8 motion. *State v. Stogsdill*, noted at 148 Wn. App. 1020 (2009). Following a show cause hearing on July 24, 2009, the trial court denied Stogsdill's CrR 7.8 motion, stating in relevant part,

> [Stogsdill's] motion to modify the conditions of his Judgment and Sentence which bars him from having contact with his own minor children is denied. The court enters this finding pursuant to *State v. Ancira*, 107 Wn. App. 650[, 27 P.3d 1246 (2001)], finding that his children were properly included in this order since it relates directly to the circumstances of the crime for which he was convicted. The court notes that [Stogsdill] admitted to sexual contact with his own biological child during his sexual deviancy evaluation. The court further orders that [Stogsdill's] motion under CrR 7.8 to withdraw his plea of guilty is denied. The court finds that the record adequately reflects that [Stogsdill's] plea was entered into knowingly, intelligently and voluntarily after being fully advised of the direct consequences of this plea. [Stogsdill's] claim that the State breached it's [sic] plea agreement by amending the information to crimes whose sentencing range exceeded eleven years on the high end is without merit. The State did not violate the plea agreement.

CP at 19-20.

Stogsdill appeals the portion of the trial court's order denying his CrR 7.8 motion to modify his sentence.

Discussion

Standard of Review

Former RCW 9.94A.505(8) (2001) authorizes the trial court to impose "crime-related prohibitions" as part of *any* sentence. "'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." Former RCW 9.94A.030(12) (2001). 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. *Ancira*, 107 Wn. App. at 653.

Parents have a fundamental right to raise their children without State interference. *See In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (recognizing a parent's right to rear his or her children without State interference as a constitutionally-protected fundamental liberty interest), *aff'd*, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *see also Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). But parental rights are not absolute and may be subject to reasonable regulation. *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Limitations on fundamental rights must be "'reasonably necessary to accomplish the essential needs of the state and the public order.'" *State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998) (concluding that a prohibition on a convicted sex offender's contact with minors was not a justified limitation on freedom of association rights where the victim was not a minor) (quoting *Riley*, 121 Wn.2d at 37-38)).

Sentencing courts can restrict the fundamental right to parent by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008); *Ancira*, 107 Wn. App. at 654; *see State v. Letourneau*, 100 Wn. App. 424, 438-39, 997 P.2d 436 (2000); *see also In re Dependency of C.B.*, 79 Wn. App. 686, 690, 904 P.2d 1171 (1995) (stating prevention of harm to children is a compelling State interest), *review denied*, 128 Wn.2d 1023 (1996).

Crime-Related Prohibition

Stogsdill challenges his judgment and sentence only insofar as it prohibits him from contact with his biological minor children during his incarceration and community custody, contending that this prohibition is an unconstitutional infringement on his fundamental parenting rights and unrelated to the crime for which he was convicted. Stogsdill argues that the sentencing condition is unnecessary to prevent harm to his biological children and that his daughter, who is now 14, needs his supervision and contact. Specifically, Stogsdill denies that he ever molested any of his biological children and that he may not lawfully be prevented from having contact with them.[2] The State argues that the prohibition on contact with his biological children is necessary to

[2] Although Stogsdill attempts to deny that he sexually assaulted any of his biological children, the evidence in the record does not support his claim. Stogsdill's psychosexual evaluation and statements that he made at sentencing established that he abused the daughter with whom he now seeks to have contact. We need not address arguments or facts argued on appeal that are inconsistent with positions previously taken at trial. *See McCormick v. Lake Wash. Sch. Dist. No. 99*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999) ("Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact. 'When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.'") (quoting *Kontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998))); *see also Almquist v. Finley Sch. Dist. No. 53*, 114 Wn. App. 395, 403, 57 P.3d 1191 (2002) ("We also need not

protect Stogsdill's children from harm. We agree with the State and note that the prohibition only applies to Stogsdill's children until they reach the age of majority.[3]

The decision in *Berg* by Division One of this court is instructive, and we note some important similarities with the current case. A jury convicted Berg of third degree child rape and two counts of third degree child molestation after he sexually molested a 14-year-old girl (A.A.) who lived with him. *Berg*, 147 Wn. App. at 927, 930. Berg parented A.A., but she was not his biological child. *Berg*, 147 Wn. App. at 927-30. Berg challenged the reasonableness of a no-contact order covering all minor females, including his then two-year-old biological daughter (A.B.). *Berg*, 147 Wn. App. at 927, 941. 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 live[s] in the home as his child, the court reasonably fear[s] 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, Stogsdill's abuse of A.T. is analogous to Berg's action. A.T. lived with her mother and Stogsdill during the time Stogsdill raped her. Just as Berg did, Stogsdill abused his

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entertain arguments that are patently inconsistent with positions advanced at trial."), *review denied*, 149 Wn.2d 1035 (2003). Accordingly, Stogsdill's sexual assault of the very daughter with whom he now seeks contact in and of itself would provide support for the no-contact order's application to his biological children while they are minors. But because in this case Stogsdill was not charged and convicted with raping his own child, we resolve this case on other grounds.

[3] Thus, as a practical matter, because at the time of this appeal Stogsdill's children are approximately ages 26, 23, 20, and 14, this case primarily concerns Stogsdill's rights with regard to his daughter (age 14).

parenting role to sexually abuse a minor girl in his care. There is no distinction between Berg's actions and Stogsdill's actions and we affirm the no-contact order based on the *Berg* court's analysis. We also note that Stogsdill's minor daughter is now the age of his preferred victims, 13 to 17 years old. The provision of Stogsdill's sentence prohibiting him from having contact with his minor children is necessary to protect them from his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children. *See Berg*, 147 Wn. App. at 944.

Because we apply *Berg* to Stogsdill's case, we do not address arguments based on *Letourneau* and *Ancira*, which are inapposite because, even if we agree that Stogsdill did not admit to abusing his biological daughter, which we do not, Stogsdill victimized a child whom he parented. The defendants in the other cases did not. In *Letourneau*, Division One of this court struck down a no-contact order with biological children because insufficient evidence existed to show it was reasonably necessary to protect her children. 100 Wn. App. at 441-42. Letourneau did not have sex with a family member or with a child living in her home and evaluators did not find her to be a pedophile. *Berg*, 147 Wn. App. at 943 (citing *Letourneau*, 100 Wn. App. at 441-42). In *Ancira*, Division One struck down a no-contact order with biological children when the defendant committed domestic violence against his wife and not their minor children. 107 Wn. App. at 654-57; *see also State v. Sanford*, 128 Wn. App. 280, 289, 115 P.3d 368 (2005). In contrast, the crime for which Stogsdill was convicted was perpetrated against a minor he parented.

Accordingly, we affirm Stogsdill's sentencing condition prohibiting contact with all minor children, including his biological children, as a valid crime-related prohibition that does not unduly burden his fundamental parenting rights.

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.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.