

[Cite as *Lakewood v. Radostitz*, 2018-Ohio-1971.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105620

CITY OF LAKEWOOD

PLAINTIFF-APPELLEE

vs.

JOSEPH RADOSTITZ

DEFENDANT-APPELLANT

JUDGMENT:
VACATED IN PART AND REMANDED

Criminal Appeal from the
Lakewood Municipal Court
Case No. 2016 CRB 01662

BEFORE: McCormack, P.J., Blackmon, J., and Keough, J.

RELEASED AND JOURNALIZED: May 17, 2018

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TIM McCORMACK, P.J.:

{¶1} Defendant-appellant Joseph Radostitz (“Joseph”) appeals his sentence for one count of assault in violation of Lakewood Codified Ordinances 537.03, a first-degree misdemeanor. On appeal, Radostitz contends that the trial court abused its discretion when it imposed a sentence of five years of community control that included the condition that he have no contact with his minor children. The city of Lakewood did not oppose Radostitz’s brief on appeal. Rather, it filed a notice advising the court that the city had “no opposition to resentencing.” In its notice, the city consented to the remand “based on the stay granted” in this

matter, “which has been functioning satisfactorily for all parties.” Following an independent and thorough review of the record, we vacate in part and remand.

Procedural and Substantive Background

{¶2} In October 2016, Joseph Radostitz was charged in Lakewood Municipal Court with one count of domestic violence against his wife, Molly Radostitz (“Molly”), resulting from an altercation that occurred when Molly went to the home of her estranged husband to gather some of her belongings. According to the complaint filed by Molly, Joseph pushed Molly “to the ground several times during an altercation.” Joseph explained at his sentencing that the altercation involved a “tussle” over the family pet.

{¶3} At the initial plea hearing, Joseph entered a plea of not guilty, and the court imposed a domestic violence protection order, listing Molly and the couple’s three minor children as protected persons. On December 22, 2016, however, the parties agreed to an amended charge of assault in violation of Lakewood Codified Ordinances 537.03, which is a first-degree misdemeanor. The trial court found Joseph guilty and scheduled the matter for sentencing.

{¶4} Shortly thereafter, Joseph filed a motion to terminate the temporary protection order as it related to the children. In support of his motion, Joseph advised the court that prior to the altercation, he was separated from Molly and he was an involved father of their three children who fully exercised his rights under a temporary shared parenting agreement that was in place during the pendency of the divorce from Molly. Joseph requested termination of the protection order only as it related to the children, and he suggested “the use of third parties to transport the children so the temporary protection order in favor of his wife would be honored.” In its opposition, the city noted its objection to a complete termination of the order but stated that

Molly, the victim, had no objection to a modification of the protection order to allow Joseph's visitation with the children. The city noted its concerns that Joseph's motion did not name a specific third party "to handle the drop-offs or pick-ups, so that Defendant would not have contact with Molly * * *."

{¶5} On January 26, 2017, the court held a hearing on defendant's motion. At the hearing, defense counsel advised the court that there was a pending divorce action between the parties that included a temporary custody plan approved by the domestic relations judge presiding over that matter. The trial court in this matter noted its concern about a modification of the protection order being in conflict with an order out of domestic relations court. The court also noted that its job was to ensure the "protection and safety of the people involved in this case," including "the victim and the [couple's] children." Finding that Joseph failed to provide the court with a copy of the domestic relations order, the trial court denied Joseph's motion.

{¶6} On February 22, 2017, the court proceeded to sentencing. At the sentencing hearing, the court stated that it had reviewed the presentence investigation report, the defendant's statement, and the police report. The court heard from the victim, who acknowledged the couple's shared parenting plan that existed prior to the assault, the defendant, and defense counsel. The court then sentenced Joseph to five years community control sanctions with the condition, among others, that he have no contact "with Molly * * * or her children."¹ After imposing sentence, the trial court indicated that Joseph's sentence was "subject to reconsideration after review of any court order from the domestic relations court."

¹ Although the trial court's sentencing entry refers to the minor children as "her" children, we note that there is nothing in the record indicating that the minor children at issue in this case are not the children of both Molly and Joseph.

{¶7} On March 10, 2017, Joseph filed a “motion for modification of sentence relating to paternal visitation right only.” In support, Joseph indicated that the incident with Molly and the family dog occurred outside the presence of the children; at the time of the incident, the couple was litigating custody of the children and visitation by the parents; he is very involved in the children’s lives; he was a stay-at-home father for five years while Molly attended school and attained her teaching and master’s degrees; and he has no prior criminal record. Joseph also asserted that because of the no-contact order, he had not seen his children since October 11, 2016.

{¶8} Joseph attached to his motion a copy of a letter from Molly’s counsel, stating that “Molly proposes that she will immediately join [Joseph] in seeking a termination of the protection order regarding the children”; plaintiff’s motion to modify temporary allocation of parental rights, in which Molly stated that she believes it is in the best interest of her children to have visitation with their father; and a copy of the agreed judgment entry from the domestic relations court governing the temporary allocation of parental rights. The agreed entry, that was signed by all parties, counsel, and the domestic relations judge, provided that both parents are “designated shared custodians of the minor children.” The agreement further provided that the parties entered into an agreed judgment entry regarding the temporary allocation of parental rights and “by this agreement, both parties agree to seek a modification of the temporary protection order so that the defendant may have contact with the minor children.” Finally, the parties agreed that “[Joseph and Molly] shall have no communications or contact with the other,” providing that “all communication and interaction (pick-ups and drop-offs) regarding the children [will] be through Patrick (PJ) Flanagan and Defendant.” The agreement had been filed with the domestic relations court on February 13, 2017.

{¶9} The trial court held a hearing on Joseph's motion to modify his sentence. The court denied his motion, stating that

[t]he court has reviewed the order of the domestic relations court. While the primary purpose of the defendant's motion to modify is to permit the defendant to have time with his children, the terms of the domestic relations order would also permit the defendant to have contact with the victim in violation of community control supervision.

{¶10} Thereafter, Joseph appealed his sentence, assigning two errors for our review:

- I. The trial court erred and abused its discretion in imposing as a condition of probation that Defendant have no contact with his minor children.
- II. The trial court erred and abused its discretion in not terminating the condition of probation that Defendant have no contact with his minor children.

{¶11} On April 3, 2017, Joseph filed with this court a motion to stay execution of sentence of the trial court's imposition of the no-contact order concerning his children, which the city of Lakewood did not oppose. We granted the appellant's motion, conditioned upon the appellant complying with the domestic relations order entered on April 10, 2017, which provides as follows:

It is hereby ordered that the Father, Joseph Radostitz, shall have immediate parenting time rights with his three (3) minor children as stated in the Court's Agreed Order dated February 13, 2017;

It is further ordered that consistent with the attached Order from the Lakewood Municipal Court, there shall be no contact between the Father, Joseph Radostitz, and the Mother, Molly Radostitz, at any time, as the third party designee identified in the Court's prior Order shall be the only person to have contact with Mr. Radostitz for the parenting exchanges;

Mr. P.J. Flanagan (or other agreed upon designee) shall continue to be the sole contact person for both parties in order to exchange the minor children to facilitate these Orders.

Law and Analysis

{¶12} Joseph contends that the trial court abused its discretion in imposing as a condition of community control that he have no contact with his minor children. He also contends that the trial court erred in not terminating this condition.

{¶13} We review the trial court's imposition of community control sanctions for an abuse of discretion. *State v. Cooper*, 2016-Ohio-8048, 75 N.E.3d 805, ¶ 31 (8th Dist.), citing *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 10. And “[a]lthough a trial court is granted broad discretion in imposing community control sanctions, its discretion is not limitless.” *State v. White*, 10th Dist. Franklin No. 14AP-1027, 2015-Ohio-3844, ¶ 5, citing *Talty* at ¶ 11.

{¶14} R.C. 2929.25(A) authorizes a court to impose community control sanctions when sentencing an offender for a misdemeanor. The statute provides that the court may impose conditions under a community control sanction that “the court considers appropriate.” R.C. 2929.25(A)(1)(a). Community control conditions, however, must not be overbroad and must reasonably relate to the goals of community control: “rehabilitation, administering justice, and ensuring good behavior.” *Talty* at ¶ 11; R.C. 2929.25(C)(2).

{¶15} In determining whether community control sanctions are reasonably related to such goals, 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 the conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation.” *Talty* at ¶ 12, quoting *State v. Jones*, 49 Ohio St.3d 51, 53, 550 N.E.2d 469 (1990); *Cooper*; *White* at ¶ 8. All three prongs of the *Jones* test must be satisfied for the reviewing court to find that the trial court did not abuse its discretion. *White* at ¶ 10.

Additionally, the conditions “cannot be overly broad so as to unnecessarily impinge upon the [offender’s] liberty.” *Talty* at ¶ 13, quoting *Jones* at 52.

{¶16} Courts have upheld community control conditions that restrict parental rights when the conditions pass the *Jones* test. *See, e.g., State v. Sommerfeld*, 8th Dist. Cuyahoga No. 84154, 2004-Ohio-6101 (the court’s community control condition prohibiting the appellant/father “from being a custodial parent of any minor child” upheld as the condition was related to the crime of child endangering); *State v. Emery*, 12th Dist. Clermont No. CA2014-09-062, 2015-Ohio-1487 (no-uninvited-contact condition imposed on the mother upheld where the condition is reasonably related to the 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” and protects the daughter from future abuse by the mother); *State v. McClure*, 159 Ohio App.3d 710, 2005-Ohio-777, 825 N.E.2d 217 (1st Dist.) (no-contact condition of community control imposed on legal guardian who tried to kill the child victim is related to the crime and serves the purpose of protecting the child from future domestic violence incidents while the appellant is being rehabilitated).

{¶17} On the other hand, courts have also found the trial court abused its discretion where it imposed no-contact conditions of community control that fail the *Jones* test. *See, e.g., Univ. Hts. v. Roders*, 8th Dist. Cuyahoga No. 76252, 1999 Ohio App. LEXIS 3862 (Aug. 19, 1999) (community control condition prohibiting the appellant from contacting his wife or their children is not related to the crime of telephone harassment of the police department, as the wife and children were not victims of the crime, and prohibiting appellant from contacting the wife and children will not prevent future harassing phone calls to the police); *State v. Marcum*, 4th Dist. Hocking Nos. 11CA8 and 11CA10, 2012-Ohio-572 (the condition that wife have no contact with

husband is not reasonably related to rehabilitating the wife who was convicted of misuse of 911 because the condition fails to ensure that she only use 911 for legitimate purposes); *State v. Brillhart*, 129 Ohio App.3d 180, 717 N.E.2d 413 (9th Dist.1998) (the condition that defendant not see his children for two years when he was convicted of domestic violence against his wife is unrelated to the particular crime of which he was convicted).

{¶18} Here, we find the community control condition that Joseph have no contact with his children is not reasonably related to the assault on his wife. Nor does it reasonably relate to future criminality or serve the statutory ends of probation, such as rehabilitation, administering justice, and ensuring the offender's good behavior.

{¶19} Joseph was convicted of assaulting his wife during an altercation that involved the family dog. The children had no involvement in the incident, nor were they present during the altercation. The children were not the victims of the crime in this case. Furthermore, there is no evidence in the record that Joseph has ever assaulted or otherwise abused his children, or that he posed a threat to the children in any way. On the contrary, the record demonstrates that Joseph was very involved in his children's lives in a positive way and his wife, the victim of the assault, believed it was in the best interest of the children for Joseph to remain in the children's lives.

{¶20} Furthermore, the parties had entered into an agreement in the divorce proceeding whereby both Joseph and Molly shared custodial responsibilities. Through this agreement, both parties sought a modification of the trial court's temporary protection order to allow Joseph contact with his children, and they devised a visitation schedule for both parents. And contrary to the trial court's stated concern in its order denying Joseph's motion to modify his sentence, the agreed judgment entry provided a means by which Joseph would continue to refrain from

contacting Molly directly, as all communication and interaction regarding the children would go through a designated third party.

{¶21} While we understand the trial court's desire for the "protection and safety of the people involved in this case," there is nothing in the record to indicate the children were at risk at the hands of their father. And a general, unsupported concern for the "safety of the people involved" is an insufficient basis to justify the imposition of a community control condition that would completely separate a father and his three young children for five years.

{¶22} For these reasons, we find the community control condition concerning no contact with the minor children does not satisfy the requirements outlined in *Jones*, 49 Ohio St.3d at 53, 550 N.E.2d 469, and we must find the trial court abused its discretion in imposing such a condition of community control. We therefore find the no contact with the children condition invalid and vacate that portion of the trial court's sentencing order. *See Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, at ¶ 25; *Roders*, 8th Dist. Cuyahoga No. 76252, 1999 Ohio App. LEXIS 3862, at 7, citing *State v. Livingston*, 53 Ohio App.2d 195, 198, 372 N.E.2d 1335 (6th Dist.1976) (a finding that one of the conditions of community control is invalid does not affect the validity of the other conditions).

{¶23} Appellant's first assignment of error is sustained. Given our disposition, we need not address his second assignment of error.

{¶24} Judgment vacated in part and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIM McCORMACK, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
KATHLEEN ANN KEOUGH, J., CONCUR