STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0706

State of Minnesota,
Respondent,

vs.

Marc Wade Fylstra,
Appellant.

Filed June 3, 2008
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. K3-06-1012

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Jason Hungerford (certified student attorney), Thomas R. Ragatz, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Eric J. Nelson, Halberg Criminal Defense, 3800 American Boulevard West, Suite 1590, Bloomington, MN 55431 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges a probation condition that prevents all contact with children, including appellant's own children, except as approved by appellant's probation officer in conjunction with his sex-offender treatment. Appellant asserts three challenges to the probation condition: (1) the district court abused its discretion by imposing a probation condition that is not reasonably related to the purposes of sentencing and unduly restricts his liberty; (2) his right to procedural due process was violated; and (3) the district court abused its discretion by imposing a probation condition that was defined by a non-judicial officer. We conclude that the district court did not err and affirm.

FACTS

In March 2006, Ramsey County charged appellant Marc Wade Fylstra with felony criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343 (2004), alleging that the offense was committed in January 2005. In August 2006, appellant pleaded guilty to a lesser offense, gross-misdemeanor fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1(1) (2004). In October 2006, appellant moved to withdraw his guilty plea, arguing that he "ha[d] steadfastly maintained that any contact was horseplay and horseplay only" and vehemently denied that there was anything sexual about his contact with the victim. Appellant had become acquainted with the victim, age 12, when she came to his house with one of his children. Thereafter, appellant invited the victim to his house alone, chased her, touched her breast, pinched her nipple, and persisted even though she told him several times to stop.

The district court denied appellant's motion to withdraw his plea and proceeded to sentencing. The court stayed the imposition of sentence for two years, conditioned on appellant's compliance with a number of probationary terms that included appellant's participation in sex-offender treatment and prohibition against contact with the victim or any minor children unless approved by probation in conjunction with appellant's treatment providers. Soon after sentencing, appellant complained that he was not allowed contact with his own minor children and sought review of the condition. Appellant argued that his probation officer had incorrectly interpreted the no-contact condition to prohibit such contact with his own children.

At a hearing in December 2006, appellant's counsel stated his belief that the district court "did not intend for its order to extend to [appellant's] own biological children." The district court responded, "But I did intend that." At a later hearing in December 2006, appellant's counsel made an oral motion for supervised contact between appellant and his children over the holidays or, at a minimum, telephone contact. The district court denied the request.

A final hearing occurred in February 2007. Nikklaus Tatro, a counselor with Project Pathfinder, testified as a witness for respondent. Tatro testified that appellant was in the process of completing the orientation phase of treatment with Project Pathfinder. He further testified that although there was no information suggesting that appellant was a risk to his own children, there was inadequate information on appellant's sexual history and the extent to which appellant uses, or has used, his children to gain access to other children. Moreover, at that time, Project Pathfinder had no information about appellant's

arousal patterns, which would be addressed later in treatment. Appellant's expert, James Alsdurf, Ph.D., testified that he had completed a psychosexual evaluation of appellant, that no data suggested that appellant is a risk to his children, but that it is possible that appellant would use his children as a vehicle to offend against other children. Dr. Alsdurf recommended monitored contact between appellant and his children and recommended that such contact should be integrated into appellant's treatment.

The district court denied appellant's request to modify the no-contact probationary condition.[1] This appeal followed.

D E C I S I O N

I.

We review a sentence imposed or stayed by a district court under an abuse-of-discretion standard, *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000), to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2 (2006).

"Generally, conditions of probation must be reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer's liberty or autonomy." *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989). Although *Friberg* addressed a geographical restriction, the *Friberg* standard has been applied to a release condition prohibiting a sexual offender from having contact with minors. *See State v. Schwartz*,

[1] During oral argument, appellant's counsel acknowledged that since the district court's order, appellant has begun to have supervised contact with his children.

628 N.W.2d 134, 141 (Minn. 2001) (characterizing release conditions and probation conditions as analogous and applying the *Friberg* standard to a no-contact release condition imposed on a sexual offender). The *Friberg* standard applies in this case.

Appellant argues that the condition prohibiting his contact with all minors unless approved by his probation officer is invalid under both parts of the *Friberg* standard, arguing first that it is not reasonably related to the purposes of sentencing and second that it unduly restricts his rights. "The purpose of sentencing is to prevent future unlawful conduct by defendants and establish reasonable consequences for their unlawful conduct." *Friberg*, 435 N.W.2d at 516. In *Friberg*, where the defendants had trespassed at an abortion clinic, as a condition of probation, the district court prohibited the defendants from going within 500 feet of the clinic. *Id.* at 511. The supreme court concluded that the probation condition was reasonably related to the purposes of sentencing and stated that the district court's "obvious intent in imposing the [restriction] was to prevent defendants from committing repeated offenses and to protect the clinic employees and patients from further unwanted intrusions." *Id.* at 516. Thus, the supreme court sanctioned a probation condition imposed to prevent future offenses like the offense of which the defendants were convicted.

In this case, the probation condition is reasonably related to the purposes of sentencing. By prohibiting contact with all minors, including appellant's children, through whom appellant might obtain access to future victims, the district court advanced the purpose of preventing future offenses like the offense of which appellant was convicted.

Appellant argues that the condition also fails the second part of the *Friberg* test by unduly restricting his fundamental right to make choices about the upbringing of his children and that this restriction is subject to strict scrutiny. While appellant is correct that parents have a fundamental right to make decisions about the upbringing of their children, s*ee Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 2060 (2000) (stating "we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children"), he is incorrect in arguing that this probation condition is subject to strict scrutiny. The standard for reviewing probation conditions, including those that limit constitutional rights, is set forth in *Friberg*, in which the supreme court addressed a condition that limited First Amendment rights. The supreme court tested the condition not by subjecting it to heightened scrutiny, but by asking whether the restriction, under careful review, unreasonably restricted those rights. 435 N.W.2d at 516.

Applying the analysis in *Friberg*, we look at the extent of the deprivation and consider the reason for the deprivation to determine whether appellant's rights have been unreasonably restricted. We conclude that the probation condition is not unduly restrictive. The probation condition allows contact between appellant and his children when deemed appropriate, in conjunction with appellant's sex-offender treatment. This condition protects appellant's children and protects against appellant using his children to gain access to other children. As disclosed at oral argument, the enforcement of this condition has allowed for supervised contact between appellant and his children. As such, the condition does not unreasonably restrict appellant's rights.

II.

Appellant next argues that the condition was imposed in a way that violated his right to procedural due process because he was not provided an opportunity to be heard about the condition at a meaningful time and in a meaningful manner.

"Generally, due process requires adequate notice and a meaningful opportunity to be heard." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). The notice-and-opportunity-to-be-heard standard of *Mathews* has been applied to no-contact probation conditions in at least two other cases. The Maine Supreme Court rejected due-process challenges by sexual offenders to no-contact provisions because the offenders knew that such a condition could be imposed and had the opportunity to address the district court on the issue. *State v. King*, 692 A.2d 1384, 1385 (Me. 1997); *State v. Coreau*, 651 A.2d 319, 320 n.2 (Me. 1994). This suggests that the due-process analysis in *Mathews*, which asks if a litigant had notice and an opportunity to be heard, should be applied in this case.

Here appellant had the opportunity to be heard before the district court on the no-contact condition at least twice: first when he had the opportunity to address the court at sentencing and later when he had a full hearing challenging the no-contact condition. Appellant's argument that he was deprived of a right without an opportunity to be heard is unsupported by the facts.

III.

Appellant's final argument is that the no-contact condition was imposed by his probation officer, not by the district court, and that this procedure impermissibly allowed

a non-judicial officer to determine the conditions of probation. By this argument, appellant asks us to review the terms of a sentence and, accordingly, the abuse-of-discretion standard applies. *Franklin*, 604 N.W.2d at 82 (providing that abuse-of-discretion standard applies to review of a sentence).

"Determining conditions of probation is exclusively a judicial function that cannot be delegated to executive agencies." *State v. Henderson*, 527 N.W.2d 827, 829 (Minn. 1995). Under *Henderson*, the authority to impose probation conditions is with the district court, not with probation officers. *Id.* As required by *Henderson*, the district court set the condition itself, on the record, when it sentenced appellant. The condition was not imposed by appellant's probation officer. That the district court allowed appellant's probation officer to permit contact, in conjunction with appellant's sex-offender treatment, does not mean that appellant's probation officer set the terms of the condition; rather, the district court provided appellant with a mechanism for relief from the no-contact condition under circumstances defined by the district court. Appellant's argument that the no-contact condition was impermissibly imposed by a probation officer is unsupported by the record.

Affirmed.