

ENTRY ORDER

SUPREME COURT DOCKET NO. 2013-138

APRIL TERM, 2013

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Windham Unit
	}	Criminal Division
Charles Muldowney	}	
	}	DOCKET NO. 741-6-12 Wmcr
	}	
	}	Trial Judge: David Suntag

In the above-entitled cause, the Clerk will enter:

Defendant appeals a condition prohibiting discussion with his wife about their four children or the charges pending against him. Defendant contends the condition is an unconstitutional infringement on his fundamental right to marriage and impermissibly overbroad in its scope. The State offers to amend the condition to prohibit discussion about the pending case and about only two of the children—one who is the putative complainant in the instant case and another in foster care stemming from an earlier complaint, and who are not so young as to render them unlikely as potential witnesses—and about past circumstances in the home prior to the instant charges. The condition as amended is affirmed.

The relevant facts for the purposes of this appeal, and as set forth in the arresting officer’s affidavit of probable cause, are as follows. E.M. is six years old and the child of defendant. E.M. is in foster care; she has not lived with defendant since September 2011 but sees him during supervised visits twice a week. Defendant has three other children. One child, A.F., is eleven years old and lives in foster care. The other children are age two and three and reside with defendant and wife.

The investigation in this case commenced after E.M. was observed displaying sexualized behavior, including masturbation, at school. Upon a discussion of this behavior with E.M., she disclosed that “My dad did it to me with pencils and crayons and I didn’t stop him. Why is it OK for him to [do] it but not OK for me to do it?” E.M. indicated the alleged acts between her and defendant took place in E.M.’s bedroom. She also stated that wife was in the house when the acts occurred.

Defendant was arrested and charged with engaging in a sexual act with a child under the age of thirteen, 13 V.S.A. § 3253(a)(8), lewd and lascivious conduct with a child under the age of sixteen, 13 V.S.A. § 2602, and cruelty to a child under ten, 13 V.S.A. § 1304. At arraignment the court held defendant without bail and imposed a condition barring defendant from contact with his wife. Defendant moved to amend the condition by striking it. On March 4, 2012, the court amended the condition to allow contact between defendant and wife, but prohibited defendant from discussing the children or his pending charges.

Defendant appealed and a hearing was held on April 10, 2012, before Associate Justice Brian L. Burgess of the Vermont Supreme Court as provided by 13 V.S.A. § 7556(b) and V.R.A.P. 9(a). No new record evidence was admitted. On appeal, defendant asserted that the condition places an unconstitutional burden on defendant's right to marriage, that the condition is overbroad, and that the State's public safety interest is insufficient to support the condition. The State argued that the risk of collusion between defendant and wife warranted the condition.

Review of conditions is limited by statute. See 13 V.S.A. § 7556(b). Conditions "shall be affirmed if . . . supported by the proceedings below." *Id.*; State v. Parada, 142 Vt. 261, 262, 455 A.2d 323, 324 (1982).

The proceedings below support the amended condition. Section 7554(a)(3) provides that a "judicial officer may order that a defendant not . . . contact . . . [a] potential witness." 13 V.S.A. § 7554(a)(3). Section § 7554(a)(3) contains no requirement that the condition be the "least restrictive" condition capable of achieving its objective. *Id.*; State v. Winston, Nos. 2011-410, 2011-411, 2011 WL 9367401, at *2 (Dec. 23, 2011 Vt.). It is established that courts may impose no-contact or limited-contact conditions between a defendant and family members under § 7554. Winston, 2011 WL 9367401, at *2 (affirming condition prohibiting parents from contacting children who were witnesses in case against them under § 7554(a)(3)); see also State v. Mahoney, No. 2010-104, 2010 WL 7798871, at *2 (Mar. 25, 2010 Vt.) (approving condition precluding defendant from in-person communication with sister, girlfriend, and seven-month-old daughter under § 7554(a)(2)).

The proceedings below justify restricting defendant and wife's conversations regarding the underlying facts of home life preceding, during, and after the time of the assaults alleged. Wife is a witness in the case. The purported acts took place during the pendency of the marriage and while wife was physically present in the household. The State articulated a compelling interest in preventing cross contamination of or potential collusion in testimony by excluding such topics from defendant's and wife's discussion. Communication regarding defendant's pending charges necessarily encompasses the same concerns and underlying facts. It was within the court's power to impose reasonable no-contact conditions under § 7554(a)(3), and the proceedings below support the limitations imposed.

Finally, contrary to defendant's assertion, the condition does not effectively terminate or unduly interfere with the marital relationship. Assuming the constitutional interest in the marriage as claimed, the court's intrusion is minimal and rationally supported. See Winston,

2011 WL 9367401, at *2; see id. (rejecting defendants’ argument that no-contact condition with children terminated parental rights, where condition “is a temporary measure pending a trial on the criminal charges”). As discussed above, the proceedings support the scope of the condition, which eliminates three—albeit significant—topics of conversation from the otherwise unlimited possibilities available for defendant and wife’s telephone interactions.

The condition prohibiting defendant from discussing with wife the pending charges, the two children in foster care and their domestic circumstances preceding the pending charges is affirmed.

FOR THE COURT:

Brian L. Burgess, Associate Justice