

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Harold Amos Harvey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2023

Court of Appeals Case No.
23A-CR-380

Appeal from the
Porter Superior Court

The Honorable
Jeffrey W. Clymer, Judge

Trial Court Cause Nos.
64D02-2205-F5-3918
64D02-2208-CM-6386

Memorandum Decision by Senior Judge Baker
Judge Brown concurs.
Judge Bradford concurs in result with separate opinion.

Baker, Senior Judge.

Statement of the Case

- [1] Harold Amos Harvey appeals from the trial court's imposition of a no-contact order in favor of his young son, after Harvey pleaded guilty to one count of Level 5 felony possession of child pornography and one count of Class A misdemeanor invasion of privacy. Harvey claims that the no-contact order is illegal because there is no nexus between it and the crime to which it relates. The State contends that Harvey waived his right to appeal the order by the terms of his plea agreement, which included a sentencing appeal waiver. Concluding that: (1) Harvey did not waive the ability to challenge the no-contact order as contrary to law because it was imposed pursuant to statute and not as part of a bargain achieved through his plea agreement; and (2) there is a nexus between the crime and the person protected by the no-contact order, we address the merits and affirm.

Facts and Procedural History

- [2] The Indiana State Police Internet and Crimes Against Children Task Force received numerous cyber tips¹ from the National Center for Missing and Exploited Children indicating that Harvey had uploaded four files containing child pornography to Facebook accounts associated with him. Police officers examined the approximately eighty additional videos or images later discovered as the result of cyber tips. Randomly selected videos uploaded by Harvey formed the basis for five Level 5 felony charges which were filed against him. The videos depicted: (1) a man having anal sex with a prepubescent girl between the ages of seven and ten; (2) a man forcing his penis into the mouth of a prepubescent girl between the ages of four and six; (3) a prepubescent girl between the ages of eight and ten exposing her breasts and genitals; (4) a man engaged in sexual intercourse with a prepubescent girl between the ages of five and seven; and (5) bestiality involving a dog and a prepubescent girl between the ages of seven and ten.
- [3] Harvey was a single father to his eleven-year-old son K.H. At least one of Harvey's Facebook profile pictures at issue was an image of K.H. Harvey sent

¹ The National Center for Missing & Exploited children developed the Cyber Tipline. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/cybertipline-your-resource-reporting-sexual-exploitation-children#:~:text=The%20CyberTipline%20was%20created%20in,enticement%20of%20children%20for%20sexual> [https://perma.cc/FK8J-HRM8] (last visited December 12, 2023). "The CyberTipline was created in order for children and their parents to quickly and easily report suspected incidents of child sexual exploitation that occur on the Internet, including activities involving the possession, manufacture, and distribution of child pornography, online enticement of children for sexual purposes, child prostitution, child sex tourism, child sexual molestation, and unsolicited obscene material sent to a child." *Id.*

messages to other Facebook users, stating: “I like young young[,]” “O my god is very young[,]” “Do you like very young porn[,]” “Your[sic] welcome I have more young one[sic] if you like[,]” and “Do you like young young porn[.]” Appellant’s App. Conf. Vol. II, pp. 19-20. Harvey’s other chats described the difficulties of being a single father. K.H.’s mother, with whom Harvey had been in a six-year relationship, had passed away. Harvey’s phone number was on file as the emergency contact for K.H. at his school, and it was the same phone number associated with Harvey’s Facebook account and one of the cyber tips.

[4] Law enforcement officers discovered an additional 897 videos of suspected child pornography related to Harvey’s social media accounts. They were so numerous investigators were unable to review them all. While executing a search warrant at Harvey’s home, officers discovered handwritten notes containing social media usernames and references to “CP,” “CP Trade,” and “Rough CP Trade.” *Id.* at 21. Notes were written on a utility bill envelope addressed to Harvey, and an empty envelope addressed to “Parent of[sic] Guardian of [K.H.]” was among those papers referencing child pornography. *Id.*

[5] Harvey was arrested and charged with five counts of Level 5 felony possession of child pornography under cause number 64D02-2205-F5-3918 (F5-3918). K.H. was placed in the custody of Harvey’s mother and brother.

- [6] On May 11, 2022, the trial court placed Harvey on pretrial release. At that hearing, the trial court imposed a no-contact order against Harvey, preventing him from contacting his son by any other means than telephonically. The court further ordered Harvey to stay away from schools, parks, playgrounds, fairs, or anywhere else children might be present.
- [7] On August 1, 2022, however, Harvey was observed dropping off K.H. at a relative's home. The State charged Harvey with one count of Class A misdemeanor invasion of privacy in cause number 64D02-2208-CM-6386 (CM-6386). And on September 2, 2022, someone saw Harvey engaging in contact with K.H. at K.H.'s school. The State charged Harvey with one count of Class A misdemeanor invasion of privacy in cause number 64D04-2209-CM-7432 (CM-7432).
- [8] On November 4, 2022, the State and Harvey entered into a written plea agreement whereby Harvey would plead guilty to one count of Level 5 felony possession of child pornography and the State would dismiss CM-6386 and CM-7432 in their entirety. Although the plea agreement did not explicitly state as much, the State agreed to and did dismiss the four remaining counts in F5-3918 of Level 5 felony possession of child pornography. In the plea agreement, Harvey agreed to "waive all right to appeal my conviction, my sentence, any restitution order imposed, and/or the manner in which my conviction, my sentence, and/or the restitution order was/were determined or imposed on any grounds in this cause." Appellant's App. Conf. Vol. II, p. 92.

- [9] Next, on November 18, 2022, the court issued a protective order against Harvey in favor of his family members after he threatened them from the Porter County Jail. On November 28, 2022, the State charged Harvey with Class A misdemeanor invasion of privacy in case number 64D03-2211-CM-9918 (CM-9918).
- [10] Due to the new case under CM-9918, the parties orally moved to amend the plea agreement at a hearing held on January 27, 2023. Harvey agreed to plead guilty to one count of Class A misdemeanor invasion of privacy under CM-6386 in addition to pleading guilty to one count of Level 5 felony possession of child pornography, charged as Count II, under F5-3918. The trial court entered its judgment of conviction and imposed a sentence of six years executed for his Level 5 felony conviction, and a sentence of six months executed for his Class A misdemeanor conviction to be served concurrently in the Department of Correction. The court also entered a written order that Harvey have no contact with K.H. for the duration of his sentence in F5-3918.

Discussion and Decision

I. Waiver Issue

- [11] The State claims that Harvey is foreclosed from appealing the trial court's decision to impose the no-contact order because of the waiver provision of his plea agreement. We disagree.
- [12] Harvey's plea agreement contained a waiver of the right to appeal. *See id.* at 92. The agreement also provided that the parties would present arguments about

sentencing within the statutory range for the offenses. *Id.* at 90. However, Indiana Code section 35-38-1-30 (2008) provides that “[a] sentencing court may require that, as a condition of a person’s executed sentence, the person shall refrain from any direct or indirect contact with *an individual.*” (emphasis added). The no-contact order was an option available to the trial court in sentencing, but it was not a term of either the written or orally amended version of his plea agreement.

[13] In *Howe v. State*, a panel of this Court interpreted Indiana Code section 35-38-1-30 to require a “nexus” between the individual in whose favor the no-contact order is entered and the crime committed by the defendant. 25 N.E.3d 210, 214 (Ind. Ct. App. 2015). Here, Harvey challenges the no-contact order, claiming it is contrary to law because there is no nexus between his son and his convictions.²

[14] The State directs us to *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008), which held that “a defendant may waive the right to appellate review of his sentence as part of a written plea agreement.” And, where a plea agreement explicitly contains an illegal sentencing provision, and the defendant has benefitted from the plea,

² Both Harvey and the State agree that there is a nexus between K.H. and Harvey’s Class A misdemeanor conviction for invasion of privacy in CM-6386. *See* Appellant’s Br. p. 13; Appellee’s Br. p. 12 n. 2.

appellate courts have enforced those appeal waiver provisions. *See Lee v. State*, 816 N.E.2d 35, 39-40 (Ind. 2004).

[15] In response to the State’s argument, Harvey points us to *Crider v. State*, 984 N.E.2d 618 (Ind. 2013). In *Crider*, the Supreme Court held that “the waiver of a right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the Defendant did not bargain for the sentence.” *Id.* at 619.

[16] The terms of Harvey’s plea agreement called for the parties to argue sentencing within the range provided by statute. *See* Appellant’s App. Conf. Vol. II, p. 90. And Harvey is challenging the trial court’s statutorily authorized imposition of the no-contact order, which is outside the terms of the plea agreement. We are satisfied that Harvey did not waive his right to appeal the trial court’s sentencing choice in this regard and turn to the merits.

II. Validity of No-Contact Order

[17] The trial court imposed the no-contact order for the duration of Harvey’s sentence in F5-3915. In *Howe v. State*, a panel of this Court interpreted Indiana Code section 35-38-1-30 to require a “nexus” between the individual in whose favor the no-contact order is entered and the crime committed by the defendant. 25 N.E.3d at 214. Harvey argues that there is no nexus between his conviction for F5-3915, possession of child pornography, and the protected person, his son K.H., as is required by *Howe*. We cannot agree.

[18] Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

[19] Harvey used his Facebook account to trade and discuss child pornography with other Facebook users. His Facebook profile image was a picture of K.H. In his chats, Harvey said things like, “I like young young[,]” “O my god is very young[,]” “Do you like very young porn[,]” “Your [sic] welcome I have more young one if you like[,]” “Do you like young young porn[.]” Appellant’s App. Conf. Vol. II, pp. 19-20. In other chats, Harvey discussed having a young son and the challenges presented by being a single father. Summarizing, he used Facebook to solicit and send child pornography, using a profile image of his son, and discussing the challenges involved in raising his son. The profile image of K.H. used on Harvey’s Facebook account was taken in Harvey’s and K.H.’s home.

[20] Additionally, in the Presentence Investigation Report, Harvey stated that he “was looking at child porn for my son and his maternal grandfather who molested him.” *Id.* at 78. He also said, “I was looking for evidence to put him ([K.H.’s] maternal grandfather) in jail so he would not be around my son.” *Id.* The trial court described Harvey’s rationalization as follows:

Mr. Harvey indicated that he was looking at child porn for [K.H.'s maternal grandfather] to determine whether or not [K.H.'s maternal grandfather] was, in fact, molesting [K.H.]. The way that I look at that, Mr. Harvey was conducting his own police investigation to determine whether someone was molesting [K.H.] But it took him 897 tries to find that. Did Mr. Harvey call the police? Did Mr. Harvey call [the Indiana State Police Internet and Crimes Against Children Task Force]? Did Mr. Harvey make a tip to the tip line? Did Mr. Harvey call CHINS? Did Mr. Harvey call DCS? Did Mr. Harvey call the school to say perhaps [K.H.] is being molested? No. That explanation simply is not believable.

Tr. Vol. II, p. 92.

[21] We do not hesitate to conclude that the trial court was well within its discretion to impose the no-contact order.

Conclusion

[22] In light of the foregoing, we conclude that Harvey's challenge to the no-contact order was not waived by the terms of his plea agreement, and that the trial court did not abuse its discretion by entering the no-contact order.

[23] Affirmed.

Brown, J., concurs.

Bradford, J., concurs in result with separate opinion.

Bradford, J., concurring in result.

[24] Indiana Code section 35-38-1-30 provides that “[a] sentencing court may require that, as a condition of a person’s executed sentence, the person shall refrain from any direct or indirect contact with an individual.” In this case, the trial court did just that, prohibiting Harvey from contacting K.H. for the duration of his executed sentence. Moreover, in pleading guilty, Harvey waived “all right to appeal [his] conviction, [his] sentence, any restitution order imposed, and/or the manner in which [his] conviction, [his] sentence, and/or the restitution order was/were determined or imposed on any grounds in this cause.” Appellant’s App. Vol. II p. 69. In my view, given Harvey’s explicit waiver of the right to challenge his sentence on any grounds, coupled with the fact that the no-contact order entered by the trial court was a part of Harvey’s sentence, I would conclude that Harvey has waived the right to challenge the no-contact order on appeal. As such, while I concur with the majority’s decision to affirm the trial court’s entry of the no-contact order, I would do so on the waiver issue rather than the merits of Harvey’s appeal.