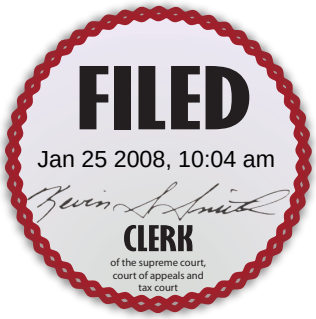

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IN THE
COURT OF APPEALS OF INDIANA

FRANK DAVIS, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A04-0709-CR-528
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0607-FB-869

January 25, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Frank Davis appeals the terms of his probation imposed as part of his sentence for Class B felony attempted child molesting. We affirm and remand.

Issue

Davis raises one issue, which we restate as whether the conditions of probation imposed by the trial court were proper.

Facts

On July 31, 2006, the State charged Davis with two counts of Class A felony attempted child molesting, arising from an incident with his twelve-year-old adopted daughter B.D. On July 23, 2007, the State amended the information to include a charge of Class B felony attempted child molesting. That same day, Davis pled guilty to the Class B felony charge and the State dismissed the Class A felony charges.

The trial court sentenced Davis to ten years executed and five years probation, for a total sentence of fifteen years. Davis now appeals the terms of his probation.

Analysis

Davis argues that some of the conditions of his probation are improper and overbroad. A trial court's broad discretion in determining the conditions of probation is limited only by the principle that the conditions must be reasonably related to the treatment of the defendant and protection of public safety. Stott v. State, 822 N.E.2d 176, 179-80 (Ind. Ct. App. 2005), trans. denied.

Davis first challenges the probation condition prohibiting him from having contact with the victim's family. This condition provides:

> 16. You shall have no contact with your victim or victim's family unless approved in advance by your probation officer and treatment provider for the benefit of the victim. Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties.

App. p. 14.

Davis argues that this condition unconstitutionally prohibits him from having contact with his biological daughter, E.D., who is also B.D.'s half-sister.[1] Generally, a condition of probation may impinge on the probationer's exercise of an otherwise constitutionally protected right. Fitzgerald v. State, 805 N.E.2d 857, 864-65 (Ind. Ct. App. 2004). When a defendant claims that a probation condition is unduly intrusive on a constitutional right, we balance (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. Id. at 865.

Davis asserts that E.D. was not the victim and that "there is no evidence Davis has acted out sexually against her." Appellee's Br. p. 7. Davis claims that this term of probation effectively terminates his ability to be a parent to E.D. for the five years he is on probation. Even if that is the case, Davis was convicted of Class B felony attempted child molesting involving B.D., his daughter. That Davis adopted B.D. and E.D. is his biological daughter is of no distinction. It is undisputed that Davis was a father figure to both children and he attempted to molest one of them. The trial court did not abuse its

[1] Davis and the children's mother are now divorced.

discretion in prohibiting Davis from having contact with the victim's family, including E.D.

Davis also argues that the condition of probation prohibiting him from having contact with any person under eighteen is overbroad. The specific condition states:

> 17. You must never be alone with or have contact with any person under the age of 18. Contact includes, face-to-face, telephonic, written, electronic, or any indirect contact via third parties. You must report any incidents in which you were alone with persons under age 18 to your probation officer within 24 hours of the contact.

App. p. 14.

In support of his argument, Davis relies on McVey v. State, 863 N.E.2d 434, 449 (Ind. Ct. App. 2007), trans. denied, in which we concluded that a similar condition of probation was overbroad. At issue in that case was the requirement that McVey report any "incidental contact" with persons under the age of eighteen to his probation officer. McVey, 863 N.E.2d at 449. The State argues that Davis's reliance on McVey is misplaced because, unlike McVey, Davis need not report incidental contact to his probation officer. The State asserts that the problematic condition in McVey is not included as a term of Davis's probation and nothing needs to be altered.

We disagree and believe the State's interpretation is too strict a reading of McVey. Davis's conditions of probation clearly show that he may not "have contact with any person under the age of 18." App. p. 14. Regardless of whether such conduct must be reported, this term is overbroad because it prohibits, as discussed in McVey, Davis from being handed food by someone under eighteen while dining at McDonald's, for example.

It is the prohibition on any incidental contact with someone under eighteen that is troublesome, not just the reporting requirement. Accordingly, we remand for the trial court to clarify the probation order in that Davis may never be alone with or initiate more than incidental contact with someone under eighteen.

Davis also argues that the condition prohibiting him from being at a park is overboard. This condition provides:

> 18. You shall not be present at any parks, schools, school-sponsored activities, public beaches, amusement parks, playgrounds, day care centers, or any other place designated by your probation officer unless given permission by the Court or your probation officer.

App. p. 14. Davis relies on Fitzgerald, in which we concluded that a similar instruction was overbroad because "it is quite possible and likely that children and teenagers do not congregate at all parks." Fitzgerald, 805 N.E.2d at 868.

We agree with Davis that this condition is overbroad. On remand, the trial court should clarify that Davis is prohibited from being present at any park location where children are known to congregate.

Finally, Davis asserts that the Condition 19 prohibits him from attending church. This condition states:

> 19. You shall not attend or participate in any activity which involves children under 18 years of age, such as, but not limited to, youth groups, Boy Scouts, Cub Scouts, Brownies, 4-H, YMCA, YWCA, or youth sports teams, unless given permission by the Court or your probation officer.

App. p. 14. We believe Davis's interpretation is too literal. This term is clearly intended to prohibit Davis from attending and participating in youth-oriented activities. As the

State contends, "The mere fact that children may be present in a church does not transform communal worship into an 'activity which involves children' along the lines of the specified examples that are provided." Appellee's Br. p. 10. This condition of probation is proper.

Conclusion

We affirm the terms of Davis's probation but remand for the modification of Condition 17 and Condition 18. We affirm and remand.

Affirmed and remanded.

SHARPNACK, J., and VAIDIK, J., concur.