95324-4

Supreme Court No. _____

Court of Appeals No. 49232-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JORDAN PITTMAN, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Jordan Pittman, through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION BELOW

Mr. Pittman seeks review of the October 31, 2017, unpublished decision of Division Two of the Court of Appeals. A copy of the Court's opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Did the trial court abuse its discretion when it declined to impose a Special Sex Offender Sentencing Alternative, pursuant to RCW 9.94A.676?

IV. STATEMENT OF FACTS

Nineteen-year-old Jordan Pittman lived with his mother and worked with his older brother installing siding on homes. 3/2/16 RP 79; 251. He was arrested on May 18, 2015, and Cowlitz County prosecutors charged him by second amended information with two counts of rape of a child first degree, one count of child molestation first degree, and one count of possessing depictions of minors engaged in sexually explicit conduct second degree. CP 35-37.

The state gave notice of intent to seek an exceptional sentence on three bases: abuse of a position of trust, multiple current offenses, and destructive and foreseeable impact on persons other than the victim. CP 2-3;36. The information also alleged that possession of depictions of minors was committed with sexual motivation. CP 36. Mr. Pittman remained in the community on bail without incident. 3/22/16 RP 68. The matter proceeded to a bench trial. CP 38.

The court found Mr. Pittman *not guilty* of one count rape of a child, but guilty of Count I, rape of a child and Count III, possession of depictions of a minor engaged in sexually explicit conduct second degree, with sexual motivation. CP 76. Count II was dismissed. The court entered findings of fact and conclusions of law. CP 72-77. The court found he abused a position of trust but did not find a destructive and foreseeable impact on others. 3/22/16 RP 61.

Sentencing

DOC completed a pre-sentence investigation report noting that Pittman did not drink alcohol or use drugs and had no previous experience with the criminal justice system. CP 4;44-45. Although Pittman admitted to his conduct and expressed remorse for it, the

DOC PSI concluded that he had not accepted responsibility for his criminal behavior. CP 45. However, the psychosexual evaluation indicated that Mr. Pittman had progressively accepted responsibility for the offenses. 6/16/16 RP 110-111.

The psychosexual evaluation indicated the main concern regarding amenability to treatment was whether Mr. Pittman would have a stable living situation and be able to cover the cost of treatment. 6/16/16 RP 107. At sentencing, counsel pointed out that Mr. Pittman's mother indicated he could live with her and she could provide him with employment. 6/16/16 RP 107.

Counsel stated that the quality of treatment available in the community was of much higher quality than the rudimentary sex offender treatment available in prison and could offer Pittman a future. 6/16/16 RP 108.

During his allocution, Mr. Pittman said, in part:

> Your Honor, I would like to start off by saying I am extremely sorry for what I did. It was terrible in all ways.
> I am taking full responsibility for my disgraceful actions that I have done. I am sorry for breaking the trust of [child] and my family, and for all the emotional and physical pain I have caused them. I would hope that the family will eventually be able to forgive me, and if they can't, I will understand.
> I would like to rectify what I did by enrolling in a certified treatment program for sex offenders, and during the program I will follow all of the guidelines and I will successfully

complete the treatment so I can ensure that something of this nature will never happen again.
Again, I would like to say how truly sorry I am, and if given the chance I will succeed.

6/16/16 RP 112-113.

While acknowledging that he could succeed if the proper conditions were in place, the court declined to impose a SSOSA.

6/16/16 RP 116-117. The court reasoned :

> Sex crimes, and the things –the thoughts and actions that lead up to those are deep-seated and deep-rooted. For a person to make changes and to go from that takes a lifetime of work. A lifetime. It doesn't happen overnight; it doesn't happen in five years, it's a lifetime of work....

6/16/16 RP 116.

Relying on the notion of broken trust within the family , the family's objection to a SSOSA, and the court's visualizations of potential impact on the child, the court concluded:

> And I think that here, notwithstanding Mr. Pittman's expression of sorrow and regret, and taking the responsibility for expressing sorrow for breaking trust and hoping for forgiveness, I'm not convinced that the - - SSOSA is the right thing, so I'm not going to grant that. I'm not going to grant the SSOSA, I don't think that's the right thing in this instance. I think that there's some deep-seated issues that even with the treatment I'm not sure would - - be healing and curing of the issue.
>
> So, I think the best option at this point is to keep Mr. Pittman away from children and others for a significant period of time.

6/16/16 RP 116-117.

The court imposed the high end of the standard range of 155 months to life on Count I, and 17 months on Count III to run concurrent with a 12- month enhancement based on the sexual motivation[1], for a total of 167 months to life. CP 83.

The Court of Appeals held that the trial court did not abuse its discretion in denying Mr. Pittman's request for a SSOSA on an impermissible basis. *Slip Op.* at 5. Mr. Pittman makes this timely petition.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The decision to impose a special sex offender-sentencing alternative is entirely within the discretion of the trial court. *State v. Onefrey,* 119 Wn.2d 572, 575, 835 P.2d 213 (1992). The sentencing court need not provide a reason for its denial, but a court abuses its discretion if it denies a sentencing request on an impermissible basis. *State v. Sims,* 171 Wn.2d 436, 256 P.ed 285 (2011); *State v. Khanteechit,* 101 Wn.App. 137, 139, 5 P.3d 727 (2000); *State v. Hays,* 55 Wn.App. 13, 15, 776 P.2d 718 (1989). A

[1] The Court of Appeals reversed the 12-month sentence enhancement. *Slip Op.* at 7.

defendant may challenge the procedure involved in denial of a SSOSA. *State v. Grayson,* 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

The legislature, pursuant to RCW 9.94A.670 outlines the procedure for a SSOSA. It provides the criteria for determining eligibility, the requirements the defendant must meet to be considered for a SSOSA, and the factors the court must consider when making its determination whether to impose a SSOSA. The legislature created the SSOSA program to give certain first-time sex offenders the opportunity and incentive to receive sex offender treatment. *State v. Wheeler,* 183 Wn.2d 71, 75, 349 P.3d 820 (2015).

Where an individual meets the eligibility criteria does the trial court abuse its discretion when it places undue emphasis on its own opinion of whether sex offender treatment is effective, and denies the requested SSOSA?

Mr. Pittman met the eligibility criteria. He was a first-time offender convicted of sex offenses that were not serious violent offenses. RCW 9.94A.670(2)(a)(b). He had no prior convictions for

any violent offenses, and the current offenses did not result in substantial bodily harm to the victim. RCW 9.94A.670(2)(c)(d).

The offenses involved a victim with whom he had an established relationship, and his standard range for the offenses included the possibility of confinement of ten years, below the threshold of eleven years. RCW 9.94A.670(2)(e)(f). Mr. Pittman was eligible for a SSOSA and the court properly ordered an evaluation report on the relative risk to the larger community and to determine whether he was amenable to treatment. RCW 9.94A.670(3).

A court-ordered evaluation must include the defendant's version of the facts, an official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors; the defendant's social and employment history; all evaluation measures utilized and a detailed proposed treatment and monitoring plan. RCW 9.94A.670(3)(a)-(c). Mr. Pittman's evaluation by Thomas Carey met these requirements. 6/16/16 RP 106.

The statute directs the sentencing court to consider several factors in exercising its discretion whether to impose a SSOSA

including (1) whether the offender and the community will benefit from use of this alternative; (2) whether a SSOSA is too lenient in light of the extent and circumstances of the crime; (3) whether the offender has other victims in addition to the victim of the offense; (4) whether the offender is amenable to treatment; (5) the risk the offender presents to the community, the victim or other persons of similar ages and circumstances; and, (6) the victim's opinion whether the offender should receive a treatment disposition. RCW 9.94A.670(4).

The statute requires the court to consider *all* the factors in making a balanced sentencing decision. Here, the record shows the court only considered factors (4) and (6).

The court acknowledged that the major barriers to treatment were finances and housing stability, both of which Mr. Pittman's mother was prepared to furnish.

The court gave great weight to the victim's opinion whether the offender should receive a SSOSA. RCW 9.94A.670(4). But, by the court's reasoning here, a SSOSA should not be imposed for a sex offense sentencing which as a result of the offense involved broken family relationships, marked by anger.

The legislature enacted the special sex offender-sentencing alternative on the belief that the behavior of sex offenders is compulsive and likely to continue without treatment. It believed that providing an alternative to confinement would lead to increased reporting of sex crimes, particularly in *intra-family situations*, and requiring participation in rehabilitation programs *is often effective in preventing future criminality*. *State v. Jackson,* 61 Wn.App. 86, 92-93, 809 P.2d 221(1992).(emphasis added).

However, the court most heavily relied on its own opinion which conflicted with the legislative purpose of the SSOSA and this Court's reasoning that the SSOSA program is to incentivize treatment. The court's decision should have been informed by the tenet that sex offender treatment is effective in offender rehabilitation, and may be in the best interest of the offender, and of benefit to the community.

Instead, the court here acted based on an untenable reason. *State v. Rundquist,* 79 Wn.App. 786, 905 P.2d 922 (1995). The court's ruling was strongly based on its belief that sex offenders could not be rehabilitated even with a lifetime of work.

VI. CONCLUSION

Based on the preceding facts and authorities, Mr. Pittman respectfully asks this Court to accept his petition for review.

Dated this 30th day of November 2017.

Respectfully submitted,

Marie Trombley

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253-445-7920

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jordan Pittman, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid, on November 30, 2017 to:

Jordan Pittman/DOC#389774
Monroe Correctional Complex-TRU
PO Box 777
Monroe, WA 98272

And I electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to the Cowlitz County Prosecuting Attorney (at appeals@co.cowlitz.wa.us).

Marie Trombley

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

October 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JORDAN WAYNE PITTMAN, Appellant.	No. 49232-6-II UNPUBLISHED OPINION

LEE, J. — Jordan Wayne Pittman appeals his aggravated exceptional sentence of 167 months for first degree rape of a child and second degree possession of depictions of a minor engaged in sexually explicit conduct with sexual motivation. He argues that the sentencing court erred by (1) denying his request for a special sex offender sentencing alternative (SSOSA), (2) stating on the judgment and sentence that Pittman stipulated to an exceptional sentence, and (3) imposing a 12-month sentence enhancement on the possession conviction based on sexual motivation. We hold that the sentencing court did not abuse its discretion in denying Pittman's request for a SSOSA, but accept the State's concession regarding Pittman's other two assignments of error. We affirm the trial court's denial of a SSOSA but remand for correction of Pittman's judgment and sentence.

FACTS

A. INCIDENT, CHARGES, AND TRIAL

Between January 1 and May 18, 2015, nineteen-year-old Pittman spent several weekends with his nieces, seven-year-old J.P.[1] and six-year-old R.P. On one visit Pittman placed a "buzzy thing" on J.P.'s stomach and her bottom. Clerk's Papers (CP) at 74. He also placed it into J.P.'s anus. R.P. witnessed Pitman place the device on her sister.

In May 2015, J.P. told her stepmother that Pittman had touched her private area. J.P. also told the elementary school nursing assistant that she was not feeling well and asked if it was normal to have blood in her stool. Later, J.P. told forensic interviewer Jeannie Belcoe that Pittman used a vibrating toy on her bottom and vaginal area once. She reported that he pushed the vibrator into her bottom, it hurt, and later she wiped away a little blood. In a second interview, J.P. told Belcoe that Pittman urinated in her mouth.

Pittman was arrested. Officers searched Pittman's cellular phone and found pictures on the phone depicting his nieces' genital areas and bottoms, with and without underwear.

The State charged Pittman with two counts of first degree rape of a child, first degree child molestation, and second degree possession of depictions of a minor engaged in sexually explicit conduct. The State also gave notice of its intent to seek an exceptional sentence based on use of position of trust, multiple current offenses, and destructive and foreseeable impact on persons other

[1] Pursuant to General Order 2011-1, we use initials for minor witnesses in sex crime cases. Gen. Order 2011-1 of Division II, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases* (Wash. Ct. App.), http://ww.courts.wa.gov/appellate_trial_courts/.

than the victim. The State also alleged that the possession offense was committed with sexual motivation. The case proceeded to a bench trial.

The trial court found Pittman guilty of only one count of first degree rape of a child and second degree possession of depictions of a minor engaged in sexually explicit conduct. The trial court also found that Pittman committed the possession offense with sexual motivation and that he used his position of trust to facilitate the offenses.

B. SENTENCING

Prior to sentencing, the Department of Corrections (DOC) conducted a pre-sentence investigation (PSI). The PSI report concluded that "Pittman has not accepted total responsibility for his criminal behavior" and that he "was hesitant to talk about or take responsibility for physically injuring JP." CP at 45. The PSI report also concluded that Pittman does not have "any strong connection to the community." CP at 46. DOC recommended an exceptional sentence.

Thomas Carey, a sex offender treatment provider, conducted a psychosexual evaluation and provided the sentencing court with his report. Carey reported that Pittman was sexually abused as a child and that Pittman wanted to participate in sex offender treatment. Assessments showed that Pittman had a low to moderate risk for recidivism. Carey opined that Pittman's risk level could be further reduced through community-based sex offender treatment and DOC supervision. But Carey considered Pittman a "marginal candidate" for treatment based on the fact that he did not have a positive supportive environment and was unemployed. CP at 68.

At sentencing, Pittman requested a SSOSA. Defense counsel argued Pittman was a good candidate for a SSOSA based on his age and that the quality of treatment available in the

community was of much higher quality than the sex offender treatment available in prison. Counsel also argued that Pittman had admitted his behavior and taken responsibility for it.

J.P. provided a letter to the sentencing court stating that she "hate[d]" Pittman. 1 Verbatim Report of Proceedings (VRP) at 101. J.P. and R.P.'s father and stepmother both asked the sentencing court to not impose a SSOSA sentence. The girls' stepmother stated, "I believe a lengthy sentence is in order. No SSOSA, no special services. Is that a fair trade for a ruined life of a little girl? Probably not, but definitely called for." 1 VRP at 100. The girls' father expressed his opinion that Pittman does not deserve a SSOSA.

The sentencing court declined to impose a SSOSA, stating that it "listened carefully" to what the victim and the victim's family stated and the court agreed that Pittman was selfish and betrayed the girls' trust of their uncle. 1 VRP at 114. The sentencing court also stated that the PSI and Carey "both indicated that Mr. Pittman would be a marginal candidate, at best" for a SSOSA. 1 VRP at 116.

The sentencing court continued, "Sex crimes, and the things—the thoughts and actions that lead up to those are deep-seated and deep-rooted. For a person to make changes and to go from that takes a lifetime of work." 1 VRP at 116. The sentencing court further stated, "I'm not convinced that the—the SSOSA is the right thing, so I'm not going to grant that. . . . I think that there's some deep-seated issues that even with the treatment I'm not sure would—be healing and curing of the issue." 1 VRP at 116-17. Finally, the court stated, "I think the best option at this point is to keep Mr. Pittman away from children and others for a significant period of time." 1 VRP at 117.

The sentencing court imposed the high end of the standard range of 155 months on the rape of a child conviction and 29 months on the possession conviction to run concurrently with the rape sentence plus a 12-month enhancement based on the sexual motivation finding, for a total of 167 months. On the judgment and sentence, the sentencing court checked the box that states, "The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act." CP at 82.

Pittman appeals.

ANALYSIS

A. SSOSA

Pittman argues the trial court abused its discretion in denying his request for a SSOSA based on an impermissible basis. Specifically, Pittman points to the sentencing court's comments about his thoughts and actions being deep-seated. We disagree.

We review a sentencing court's denial of a SSOSA sentence for an abuse of discretion. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). A sentencing court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003 (1996)). A sentencing court also abuses its discretion if it categorically refuses to impose a particular sentence

or if it denies a sentencing request on an impermissible basis. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006).

Sentencing courts must generally impose sentences within the standard range. *Id.* at 480. However, if an offender is eligible for and requests a SSOSA, the court must decide whether that alternative is appropriate. *Id.* at 480-81 (interpreting former RCW 9.94A.120(8)(a) (2001)). The decision to impose a SSOSA "is entirely within the trial court's discretion." *Onefrey*, 119 Wn.2d at 575. In determining whether the SSOSA is appropriate, the trial court must consider several factors, including:

> [(1)] . . . [W]hether the offender and the community will benefit from use of [the SSOSA],
> [(2)] . . . whether [a SSOSA] is too lenient in light of the extent and circumstances of the offense,
> [(3)] . . . whether the offender has victims in addition to the victim of the offense,
> [(4)] . . . whether the offender is amenable to treatment,
> [(5)] . . . the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, [and]
> [(6)] . . . the victim's opinion whether the offender should receive [a SSOSA].

RCW 9.94A.670(4). The sentencing court is not limited to these factors. *State v. Frazier*, 84 Wn. App. 752, 754, 930 P.2d 345, *review denied*, 132 Wn.2d 1007 (1997). Moreover, the sentencing court must give great weight to the victim's opinion whether the offender should receive a SSOSA. RCW 9.94A.670(4).

Here, the sentencing court stated that its sentencing decision was based on the victims' and their families' objection to a SSOSA; the conclusion in the PSI and Carey's report that Pittman was "a marginal candidate, at best" for a SSOSA; and that Pittman should be "away from children and others for a significant period of time." 1 VRP at 116-17. The sentencing court also added that "the thoughts and actions that lead up to those are deep-seated and deep-rooted" and that "even

with the treatment I'm not sure would—would be healing and curing of the issue." 1 VRP at 116-17. Contrary to Pittman's assertion, these final comments are permissible considerations about whether Pittman would be amendable to treatment.

Because the factors considered by the sentencing court in denying Pittman's request for a SSOSA are all set forth in RCW 9.94A.670(4), Pittman's argument that the sentencing court abused its discretion by relying on an impermissible reason for denying a SSOSA fails. The sentencing court did not err in denying Pittman's request for a SSOSA.

B. Agreed Exceptional Sentence

Pittman next argues that the sentencing court erred by checking a box on the judgment and sentence stating that he agreed to an exceptional sentence. The State concedes the error. Because there is nothing in our record to show Pittman agreed to an exceptional sentence, we accept the State's concession.

A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention, as expressed in the record at trial. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). We, therefore, remand for correction of the judgment and sentence.

C. Sexual Motivation

Pittman lastly argues that the sentencing court erred by imposing a 12-month sentence enhancement on his second degree possession of depictions of a minor engaged in sexually explicit conduct conviction because the State improperly filed a special allegation of sexual motivation. The State also concedes this error. We accept the State's concession.

Under RCW 9.94A.835(1), the State may not file a special allegation that a crime is sexually motivated to support a sentence enhancement if the crime is a sex offense. Possession of depictions of a minor engaged in sexually explicit conduct is a sex offense. RCW 9.94A.030(47)(a)(iii). A special allegation of sexual motivation, therefore, was improper in this case. Accordingly, we remand for correction of the judgment and sentence by striking the 12-month enhancement on the second degree possession of depictions of a minor engaged in sexually explicit conduct conviction. *See In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (citing CrR 7.8(a)) (mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time).

We affirm the sentencing court's denial of a SSOSA, but we remand for correction of the judgment and sentence consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.