Supreme Court No. 100229-7
No. 37204-9-III

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

SUSAN BURNAROOS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Susan Burnaroos, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued its opinion on August 24, 2021. The opinion is attached in the appendix.

B. ISSUE FOR WHICH REVIEW SHOULD BE GRANTED

A trial court must meaningfully consider a request for an alternative sentence with the correct view of the law in mind. Ms. Burnaroos requested a Parenting Sentencing Alternative. She was eligible and this sentence would have permitted her to continue to be the primary parent to her son. Still, the trial court rejected her request, reasoning the alternative was intended only in "very special cases" where no other parent is available to care for the child. Neither the plain language of the statute nor the legislative history supports this limited view. Does the Parenting Sentencing Alternative apply to ordinary cases where a child has two available parents?

C. STATEMENT OF THE CASE

Susan Burnaroos is a mother in her late 30s. RP[1] 23; 1 CP 27.[2] She was the primary custodial parent of her son, who was 13 years old in mid-2019. 2 CP 47-48

Unfortunately, Ms. Burnaroos has suffered from a substance use disorder. 2 CP 53-54; RP 30. Her problem with drugs led to her prosecution in late 2017 for possession of a controlled substance with intent to deliver and unlawful possession of a firearm. 2 CP 4-5, 68-69. In early 2019, Ms. Burnaroos was charged with additional drug related offenses that had recently occurred. 1 CP 4-6, 8-9.

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[1] Unless noted, the citations to the report of proceedings refer to the volume containing the proceedings from 8/29/19 and 11/07/19. These transcripts were filed in No. 37204-9-III.

[2] The clerk's papers from No. 37204-9-III (trial no. 19-100089-39) are cited as "1 CP." The clerk's papers from No. 37637-1-III (trial no. 17-1-02004-0) are cited as "2 CP."

Ms. Burnaroos pleaded guilty in both cases. RP 3-12; 1 CP 10-23; 2 CP 70-83. This included pleading guilty to one charge of possession of a controlled substance. 1 CP 27-28.

Ms. Burnaroos sought a Parenting Sentence Alternative. RP 22-26, 30. Under this alternative, Ms. Burnaroos would serve one-year of community custody while engaging in treatment and programming. See RCW 9.94A.655. This alternative would let Ms. Burnaroos be treated for her drug problem and allow her to parent her son.

At the sentencing hearing, Ms. Burnaroos apologized to Yakima County for her drug activity, acknowledging her drug problem. RP 30. She asked for the opportunity to make a positive change, stating that she owed it to her son to be there for him if it was possible. RP 30. When being evaluated by the Department of Corrections for the requested sentence, Ms. Burnaroos stated, "There is not a thing in the world that I would not do for my son, no matter how hard of an obstacle it would be." 2 CP 49. Ms. Burnaroos's request was supported by her

friend Brandy and her lawyer, both of whom had seen positive changes in Ms. Burnaroos in recent months. RP 23, 29.

Ms. Burnaroos's son lived with her. 2 CP 47. He occasionally saw his father on weekends. 2 CP 44. He attended middle school. RP 23. He had special needs and was enrolled in an Individual Education Program (IEP). RP 23.

The Department of Corrections ("DOC") recognized that Ms. Burnaroos's son "could benefit from her being sentenced under [the Parenting Sentence Alternative], so long as long as [sic] she follows her conditions and requirements, by entering into mental health services, works on a treatment plan, stays clean and sober, puts her child first, has a pro-social network, and is cooperative with DOC." 2 CP 51.

Despite recognizing that the alternative sentence could benefit Ms. Burnaroos's son, the community corrections officer who authored the risk assessment report concluded that the Department of Corrections did "not feel like [Ms. Burnaroos]

was a suitable candidate for [the Parenting Sentence Alternative].” 2 CP 51.

The prosecution opposed Ms. Burnaroos’s requested alternative. The prosecution asked the Court to impose a sentence of 108 months (nine years) of incarceration and one year of community custody.[3] RP 14; 1 CP 25. Based on Ms. Burnaroos’s drug problem, the prosecution contended that Ms. Burnaroos was a danger to her son and the community. RP 19.

Rebutting the prosecution, Ms. Burnaroos submitted letters, including a letter summarizing a report from Comprehensive Healthcare. RP 23, 34. The provider indicated that Ms. Burnaroos had been in treatment and was currently doing well. RP 34. As summarized in the letter, Ms. Burnaroos appeared “willing and motivated to follow her treatment recommendations.” CP 54-55. She was “in compliance” with

[3] With an offender score of 6, the delivery and possession with intent to deliver convictions carried standard range sentences of 60 to 120 months. 1 CP 29; 2 CP 88; RCW 9.94A.517.

the provider's recommendations and was meeting the provider's expectations. CP 54-55.

Nevertheless, the court rejected Ms. Burnaroos's request for the Parenting Sentence Alternative. The court reasoned the legislature had intended this alternative only in "very special cases," meaning cases where parents "are required to be there for their children." RP 31. The court stated the guidelines for imposing the alternative were "very strict." RP 31-32. Applying this framework, the court explained the alternative was not appropriate because this was "not an unusual case" and "the child had contacts with his father and has spent time with his father, albeit may not be consistent time." RP 34-35, 42-43. The court imposed a mid-range sentence of 90 months' total confinement. RP 39-40.

Ms. Burnaroos appealed, contending primarily that the trial court had misinterpreted the Parenting Sentencing Alternative and that she was entitled to consideration of that alternative with a proper understanding of the law. The Court of

Appeals acknowledged the trial court made the above recounted comments, but reasoned that because the trial court considered "many factors"—including the convictions Ms. Burnaroos' pleaded guilty to, there was no error. The appellate court commented that the trial court had "wisely exercised its discretion" by sentencing Ms. Burnaroos to seven and half years' in prison rather than permit her to reform herself through a strict program in the community, which would also permit her to parent her special needs son, whom she had cared for all of her life. Slip op. at 12.

Based on State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), the Court of Appeals remanded to vacate the conviction for simple drug possession and for resentencing. Slip op. at 7-8. The Court granted the trial court discretion on remand to revisit the request for a parenting sentencing alternative. Slip op. at 12. So that the trial court does not repeat its error on remand and to provide guidance to others, Ms. Burnaroos seeks this Court's review.

D. ARGUMENT

The Court should grant review so it can provide a proper interpretation of the Parenting Sentencing Alternative. This will provide much needed guidance and help ensure that children are not needlessly deprived of a parent.

a. The Parenting Sentencing Alternative or Family and Offender Sentencing Alternative.

In 2010, the legislature enacted and the governor signed into law "AN ACT Relating to creating alternatives to total confinement for nonviolent offenders with minor children." Laws of 2010, ch. 224. This law created the Parenting Sentencing Alternative (PSA), also known as the Family and Offender Sentencing Alternative (FOSA).

Under this sentencing alternative, the court waives imposition of a sentence within the standard range and imposes a sentence consisting of 12 months of community custody upon the parent. Former RCW 9.94A.655(4).[4] The court imposes

[4] RCW 9.94A.655(5). In 2020, the legislature amended the law. Laws of 2020, ch. 137 § 2. The former provisions are

conditions, which may include requiring the parent to engage in treatment or programs. Former RCW 9.94A.655(5).[5] The court is authorized to bring the offender back to court to evaluate the progress in treatment or to decide if there have been any violations of the sentence. Former RCW 9.94A.655(7)(a).[6] Violations empower the court to order the offender to serve a term of total confinement within the standard range. Former RCW 9.94A.655(7)(c).[7]

To be eligible for the Parenting Sentencing Alternative, five requirements must be met: (1) the high end of the standard sentence range for the current offense is greater than one year; (2) the offender has no prior or current felony conviction that is a sex offense or violent offense; (3) the offender has not been

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cited because those were the provisions in effect at sentencing. The current parallel provisions will cited to in footnotes.

[5] RCW 9.94A.655(6).

[6] RCW 9.94A.655(8)(a).

[7] RCW 9.94A.655(8)(d).

found by the United States attorney general to be subject to a deportation detainer or order and will not become subject to a deportation order during the period of the sentence; (4) the offender signs release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the Department of Corrections and the court; and, (5) at the time of the offense, the child was under age eighteen and the offender had physical custody of the child or was a legal guardian or custodian with physical custody of a child. Former RCW 9.94A.655(1).[8]

Testimony in support of this law recounted that the idea for it "came out of the Children of Incarcerated Parents workgroup and [the Department of Corrections] looking at cost reductions."[9] This testimony recognized that "[i]ncarceration of

[8] The amended statute modified or eliminated some of these requirements, and expanded eligibility. RCW 9.94A.655(1)

[9] Senate Bill Report SSB 6639 2009-10, p. 3, available at http://lawfilesext.leg.wa.gov/biennium/2009-

a parent has a significant impact on a child and can destroy a parent's tie with their child."[10] In fact, "[i]ncarceration of a household member has been identified as one of the adverse childhood experiences (ACEs) that can impact a child's development and lifelong health." The Honorable Cathy Hollenberg Serrette, Jade McDuffie, J.D., It's Time We Consider the Best Interest of the Child When Sentencing Parents and Caretakers, 51-OCT Md. B.J. 24, 26 (2018).

The Family Sentencing Alternative has largely been successful, with about three-fourths of persons sentenced to the alternative having completed their sentences without revocation.[11] Evidence indicates that this law provides an

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10/Pdf/Bill%20Reports/Senate/6639-S%20SBR%20HA%2010.pdf?q=20200812140319

[10] Id.

[11] Final Bill Report E2SSB 5291 2020, p. 1. Available at http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/Senate/5291-S2.E%20SBR%20FBR%2020.pdf?q=20200812165643

"alternative to incarceration that would otherwise separate children from their parents, while serving as an effective recidivism reduction tool resulting in substantial savings." Serrette & McDuffie, 51-OCT Md. B.J. at 26.

b. Reading language into the Parenting Sentencing Alternative that the legislature did not include, the trial court failed to meaningfully consider Ms. Burnaroos's request for this alternative sentence.

In this case, the trial court misinterpreted the Parenting Sentencing Alternative and, through its misinterpretation, failed to meaningful consider Ms. Burnaroos's request. Remand for a new sentencing hearing is required.

"[A]n offender may always challenge the procedure by which a sentence was imposed." State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A trial court's failure to follow the proper procedure and meaningfully consider a request for an alternative sentence is an abuse of discretion. Id. at 342; State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). Relatedly, if a trial court's ruling is based on an erroneous view

of the law, the trial court has necessarily erred. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Mohamed, 187 Wn. App. 630, 641, 350 P.3d 671 (2015).

To determine whether the trial court meaningfully considered Ms. Burnaroos's request for a parenting sentence alternative, interpretation of RCW 9.94A.655 is necessary. The meaning of a statute is an issue of law reviewed de novo. State v. Yancey, 193 Wn.2d 26, 30, 434 P.3d 518 (2019).

In interpreting a statute, the Court uses the plain meaning rule. Id. Plain meaning is determined based on "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Id. (cleaned up). Plain meaning interpretation does not add words that the legislature has chosen not to include. Id.

Ms. Burnaroos met the statutory requirements for the Parenting Sentencing Alternative. Former RCW 9.94A.655(1). Beyond eligibility, the statute instructs that:

> [i]f the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody. The court shall consider the offender's criminal history when determining if the alternative is appropriate.

Former RCW 9.94A.655(4) (emphasis added). Another provision states that "[t]o assist the court in making its determination," the court may order the Department of Corrections to complete a risk assessment report or a chemical dependency screening report. Former RCW 9.94A.655(2). Besides these provisions, the statute does not otherwise provide guidance on how a court is to exercise its discretion and determine whether a Parenting Sentencing Alternative "is appropriate."

In this case, the trial court erred by reading language into the statute that the legislature did not to include. The court reasoned that the legislature intended the Parenting Sentencing

Alternative to apply only "in very special cases" where the parent is "required to be there for their children," and that the requirements under the statute are "very strict" on when the alternative may be granted:

> And let me make a few comments about FOSA. The legislature -- when dealing with the sentencing guidelines saw -- that sometimes in very special cases that there should be a sentencing alternative for parents that -- are required to be there for their children. And that mandatory sentencing could have an impact upon innocent victims, being children. Those sentencing guidelines are very strict. They require certain conduct. And -- one of the factors that this court considers is whether or not that -- the degree of success for a FOSA sentence. It's not a free pass. But on the other side it's designed to recognize the needs of a child rather than the needs of the defendant.

RP 31-32.

In other words, the trial court reasoned that a Parenting Sentencing Alternative was appropriate only in very special cases where a parent must be present for his or her child, and only if very strict requirements are met. These heightened requirements are found nowhere in the Parenting Sentencing

Alternative statute. Former RCW 9.94A.655. The trial court read requirements into the statute that legislature chose not to include. This was error. Yancey, 193 Wn.2d at 32.

Based on this misreading of the statute, the court rejected Ms. Burnaroos's request for a Parental Sentencing Alternative. The court reasoned this alternative was not appropriate for Ms. Burnaroos because the father of her son was somewhat involved in the child's life: "It appears that the child had contacts with his father and has spent time with his father, albeit may not be consistent time, but there's no showing to this court that the father is not an appropriate custodian to guide this child." RP 34-35 (emphasis added). The court later reiterated that a Parenting Sentencing Alternative was not appropriate because "this is not an unusual case, especially where we have another parent ready, willing and able to care for the child in this particular circumstance." RP 42-43 (emphasis added). Beyond the evidence that the father saw the child, there was no

evidence the father was willing and able to care for Ms. Burnaroos's son.

Nowhere in the statute does it say that a Parenting Sentencing Alternative is appropriate only in unusual or special cases. Nowhere does the statute state, let alone imply, that the alternative is appropriate only for single parents or children with only one parent. Indeed, the statute plainly indicates otherwise by making eligible those who have "physical custody" of the child "at the time of the current offense." Former RCW 9.94A.655(1)(e).[12] And, in general, children benefit from having both of their parents involved in their life, so it is unlikely that the legislature intended this requirement. State v. Schwartz, 194 Wn.2d 432, 443, 450 P.3d 141 (2019) (statutes are generally interpreted to avoid absurd or strained

[12] Indeed, recognizing this benefit, the legislature expanded the statute so it applies not only to biological or adoptive parents, but also to expectant parents and stepparents with a proven, established, ongoing, and substantial relationship with a minor child that existed at the time of the offense. RCW 9.94A.655(1)(e).

results). Indeed, the legislature has declared "that the family unit is a fundamental resource of American life which should be nurtured" and "should remain intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized." RCW 13.34.020. The notion that the Parenting Sentencing Alternative is only appropriate for single parents or children who only have one parent should be rejected by this Court.

The recent amendments to the Parenting Sentencing Alternative statute support this conclusion. Laws of 2020, ch. 137, § 2. The amendments modify the eligibility requirements to largely expand eligibility. Laws of 2020, ch. 137, § 2; RCW 9.94A.655(1). They clarify that the "existence of a prior substantiated referral of child abuse or neglect or of an open child welfare case does not, alone, disqualify the parent from applying or participating in this alternative." Laws of 2020, ch. 137, § 2; RCW 9.94A.655(4)(e). They further clarify that a court considering a Parenting Sentencing Alternative must "give great weight to the minor child's best interest." Laws of

2020, ch. 137, § 2; RCW 9.94A.655(5). Nowhere in these amendments did the legislature endorse the trial court's view that the Parenting Sentencing Alternative is limited to special cases or that it is for single parents.

The final bill report for these amendments recognizes that, "[a]ccording to [the Department of Corrections], research shows children of incarcerated parents are significantly more likely to end up in the criminal justice system themselves."[13] A goal of the Parent Sentencing Alternative "is to stop the cycle of criminal activity by maintaining family bonds." (emphasis added).[14] Thus, recent legislative history shows the trial court's view of the Parenting Sentencing Alternative to be incorrect.

Based on its erroneous interpretation, the trial court did not meaningfully consider Ms. Burnaroos's request for

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[13] Final Bill Report E2SSB 5291, p. 1. Available at http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/Senate/5291-S2.E%20SBR%20FBR%2020.pdf?q=20200812165643

[14] Id.

Parenting Sentencing Alternative. This procedural error required remand for a new sentencing hearing with instruction to the trial court to reconsider Ms. Burnaroos' request for a Parenting Sentence Alternative. Grayson, 154 Wn.2d at 342-43; McFarland, 189 Wn.2d at 58-59.

Still, the Court of Appeals held the trial court did not err. The Court reasoned that despite Ms. Burnaroos accurately recounting the trial court's ruling, she had had "focuse[d] on only a small portion of the sentencing ruling" and that the trial court had recounted "many factors" in denying the parenting sentencing alternative. Slip op. at 11. These "many factors" were the facts of the underlying drug convictions, which Ms. Burnaroos had pleaded guilty to. Slip op. at 11. The Court of Appeals highlighted that the trial court was concerned that Ms. Burnaroos had sold drugs from her home, where she had parented her son. Slip op. at 11. The Court also recounted that the trial court's comment that Ms. Burnaroos recent progress over the previous two months' "were only recent." Slip op. at

11-12. Notwithstanding that a parent with a drug addiction can change, the Court of Appeals wrote that the trial court had "considered the interests of the child" and "wisely exercised its discretion" in sending Ms. Burnaroos to prison rather than home to parent her son under a rigorous and strict program. Slip op. at 12

The trial court's consideration of these other "factors" does not excuse the trial court in fundamentally misreading the Parenting Sentencing Alternative. The alternative is not just for "special" cases or single parents. Ms. Burnaroos was entitled to consideration of her request free of an erroneous understanding of the parenting sentencing alternative. This Court should grant review and hold that the trial court's interpretation of the Parenting Sentencing Alternative statute was erroneous.

c. Trial courts do not have guidance on when to grant or deny a parenting sentencing alternative, creating a risk of arbitrary and disparate treatment. Review is in the public interest to ensure the parenting sentencing alternative will be imposed in the appropriate cases.

There is a dearth of authority on the parenting sentencing alternative. No reported case squarely interprets it. Trial courts are left to interpret it on their own. The result is this case, where at least one superior court judge thinks the alternative is only appropriate in "very special cases" where another parent is unavailable. This decision is likely only the tip of the iceberg. Without definitive guidance from this Court, trial courts will continue to impose their own subjective requirements on the parenting sentencing alternative. This will inevitably lead to disparate treatment, including disparate treatment based on race, ethnicity, gender, and class. Accordingly, this is an "issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Review should be granted.

E. CONCLUSION

For the foregoing reasons, this Court should grant Ms. Burnaroos' petition for review.

Respectfully submitted this 20th day of September, 2021. This brief complies with RAP 18.17, containing 3551 words, exclusive of the exceptions.

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Appendix

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CASE # 372049
State of Washington v. Susan Elizabeth Burnaroos
YAKIMA COUNTY SUPERIOR COURT No. 191000894
Consolidated with #376371
YAKIMA COUNTY SUPERIOR COURT No. 171020040

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
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TLW:sh
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FILED
AUGUST 24, 2021
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. SUSAN ELIZABETH BURNAROOS, Appellant.	)	No. 37204-9-III consolidated with No. 37637-1-III UNPUBLISHED OPINION

FEARING, J. — On appeal, Susan Burnaroos seeks vacation, based on *State v. Blake*, of her one conviction for possession of a controlled substance and resentencing based on a lower offender score. She also asks that, during resentencing, the trial court readdress her request for a parenting sentencing alternative, strike the imposition of her community custody supervision fees, and enter a notation that legal financial obligations may not be collected from her Social Security funds. We grant Burnaroos partial relief.

FACTS

This appeal consolidates two Yakima County prosecutions against Susan Burnaroos. The charges in Yakima County Superior Court cause number 17-1-02004-39 stem from drug activity that occurred on October 8, 2017. RP 10. The incidents underlying the charges in Yakima County Superior Court cause number 19-1-00089-39

arise from acts that occurred between December 1, 2018 and January 14, 2019. The 2019 charges stem from a narcotics investigation, in which law enforcement determined that Burnaroos participated in four sales of methamphetamine and heroin. At the time of the 2018-2019 investigation, Burnaroos' 2017 case was pending. Further facts are not relevant to this appeal.

PROCEDURE

On October 13, 2017, in cause number 17-1-02004-39, the State of Washington charged Susan Burnaroos with possession of methamphetamine with intent to deliver and first degree unlawful possession of a firearm. The State twice amended the information and, on August 29, 2019, the State ultimately charged Burnaroos with possession of methamphetamine with intent to deliver, first degree unlawful possession of a firearm, and possession of a stolen motor vehicle.

On January 17, 2019, in cause number 19-1-00089-39, the State of Washington charged Susan Burnaroos with six charges. In an amended information, filed August 29, 2019, the State charged Burnaroos with four counts of delivery of a controlled substance, possession of a controlled substance, and third degree possession of stolen property.

On August 29, 2019, Susan Burnaroos pled guilty to eight total crimes. In cause number 17-1-02004-39, Burnaroos pled guilty to possession of methamphetamine with intent to deliver and unlawful possession of a firearm in the first degree. She also pled guilty to all six of her charges under cause number 19-1-00089-39, four counts of

delivery of a controlled substance, possession of a controlled substance, and third degree possession of stolen property.

At a sentencing hearing, Susan Burnaroos sought a parenting sentencing alternative. The parenting sentencing alternative would permit Burnaroos to avoid prison, serve one year of community custody, and engage in controlled substance treatment. RCW 9.94A.655(4)-(6). The State requested a standard range sentence of 108 months' confinement and a year of community custody.

At the sentencing hearing, the State introduced a Department of Corrections (DOC) risk assessment report. The fifteen-page report mentioned Susan Burnaroos' son. According to the report, Burnaroos' son lived with her. The son possessed special needs and was enrolled in middle school. The son's father visited him on the weekends.

The risk assessment mentioned that Susan Burnaroos registered for drug dependency services twenty-two times between 1995 and 2005. The report further revealed that Burnaroos reported to the DOC evaluator that she used controlled substances at times when her son attended school. She also used drugs, with friends and the son's father, when the son was at home, but occupying another room.

The risk assessment report read:

> Ms. Burnaroos is not actively working on a prevention plan, she is not in any treatment.
>
> Ms. Burnaroos was notified that drug use, misuse, abuse, possession, associating with drug users, and/or congregating at known drug locations

> will not be tolerated is [sic] she's sentenced to FOSA [Family and Offender Sentencing Alternative].
>
> Note—Despite being told this, Ms. Burnaroos was not being forthcoming or fully transparent with DOC. It was after further attempts to get the truth that Ms. Burnaroos admitted to using methamphetamine on 07/20/2019. Furthermore, during a home investigation on 07/25/2019, Ms. Burnaroos had the signs and symptoms of someone who was under the influence of drugs. Symptoms included: twitching, eyes were blood shot, eyes were dilated, rapid eye movement, rapid talking, moving at a fast pace, repeating words, and trying to avoid conversation with DOC. Also, on 07/23/2019 and 07/25/2019, she was not being forthcoming by naming the adult males that were on her property. She claimed to know their names, but would not disclose their names to DOC herself.

Clerk's Papers (# 17-1-2004-39) (CP) at 17. The report continued:

> Due to Ms. Burnaroos's admission to using methamphetamine on 07/20/2019; the signs and behaviors that she was continuing to use methamphetamine on 07/25/2019; discharging from mental health programming; not participating in chemical dependency treatment, and no[t] fully cooperating with DOC for the purpose of this investigation, she has the potential to put the community at risk if she continues this pattern of behavior.

CP (# 17-1-2004-39) at 19.

The risk assessment report ended by stating a parenting sentencing alternative was not appropriate. The author of the report wrote:

> Based on the information obtained, DOC does not feel like [Burnaroos] is a suitable candidate for FOSA. Furthermore, a Plea has not been agreed in court and the sentencing range must meet FOSA criteria, "The high end of the defendant's sentence range is more than one year". If a guilty plea is guaranteed and his [sic] sentencing range meets FOSA criteria, then Ms. Burnaroos will be eligible for a FOSA sentence.
>
> Ms. Burnaroos's child could benefit from her being sentenced under FOSA, so long as long [sic] she follows her conditions and

> requirements, by entering into mental health services, works on a treatment plan, stays clean and sober, puts her child first, has a pro-social network, and is cooperative with DOC.

CP (# 17-1-2004-39) at 21 (boldface omitted).

At the sentencing hearing, Susan Burnaroos submitted a report and a letter summarizing the report from her treatment provider, Comprehensive Healthcare. The letter read that Burnaroos started treatment on September 16, 2019. The letter added that, as of October 15, 2019, she was performing well and appears willing and motivated to follow her treatment recommendations. At the sentencing hearing in November 2019, the State argued for prison time and against imposition of a parenting sentencing alternative. The State stated that Susan Burnaroos' offender score was six with the most serious charge being possession of a controlled substance with intent to deliver. The State, based on the DOC report, contended that Burnaroos had past opportunities for treatment, but had not been successful and her drug use posed a danger to her son. The State highlighted that the 2019 charges occurred when the 2017 case was pending. The State maintained that a FOSA sentencing alternative would present a danger to the community.

Susan Burnaroos acknowledged her drug problem and apologized to the court and Yakima County for her drug activity. She asked for the opportunity to change. RP 30. Burnaroos' attorney asserted that Burnaroos had recently "sobered up." Report of Proceedings (RP) at 23. He added that he and Burnaroos had improved their communications. Burnaroos' friend, Brandy, spoke on her behalf and stated that, over

the past two months, Burnaroos had changed more than Brandy had ever witnessed before. She claimed that Burnaroos was attending her treatment program.

The trial court denied Susan Burnaroos' request for a parenting sentencing alternative and in doing so remarked:

> The legislature—when dealing with the sentencing guidelines saw—that sometimes *in very special cases* that there should be a sentencing alternative *for parents that—are required to be there for their children*. And that mandatory sentencing could have an impact upon innocent victims, being children.
>
> *Those sentencing guidelines are very strict*. They require certain conduct. And—one of the factors that this court considers is whether or not that—the degree of success for a FOSA sentence. It's not a free pass. But on the other side it's designed to recognize the needs of a child rather than the needs of the defendant.
>
> . . . .
>
> Ms.—Burnaroos was—my recollections, originally released from custody. And she ran into problems. She didn't show up for court, we had to issue warrants for her arrest. Those warrant—the warrant was quashed, though we eventually had to set bail on that particular case, because she continued [having] problems abiding by the court's orders. Pretty classic for somebody that's addicted to drugs.
>
> . . . .
>
> While she is out on bail on $10,000, and her pretrial (inaudible) is revoked, she picks up new charges. Significant charges. Four incidences where law enforcement was involved in controlled buys. They suspected there were many other controlled buys but she's not charged with those.
>
> And she was dealing significant amounts.

RP at 31-33 (emphasis added).

When denying the family sentencing alternative, the trial court commented that Susan Burnaroos started improving only two months earlier. She continued to use drugs

around her son. The court emphasized the recommendation in the DOC risk assessment report. At the end of its ruling, the sentencing court commented:

> Ms. Burnaroos, my—my concern—for your son, for—the community, and your activities in this case, have led me to this decision. It is not out of any malice or anything. It's just that my concern is is [sic] that there just is not evidence in this case that a FOSA sentence would be successful.
>
> *And also in the court's opinion, this is not an unusual case*, especially where we have another parent ready, willing and able to care for the child in this particular circumstance.
>
> So it's for those reasons that I've imposed those sentences.

RP at 42-43.

The trial court imposed a mid-range sentence of ninety months' total confinement. Susan Burnaroos stated that she received disability income for mental health issues and child support payments. The court imposed only $500 of mandatory fines. The boilerplate language on Burnaroos' judgment and sentence form, which set conditions of community custody, required Burnaroos to pay supervision fees.

LAW AND ANALYSIS

Drug Possession Conviction

The Washington State Supreme Court recently declared the felony drug possession statute, RCW 69.50.4013, unconstitutional because of its strict liability nature. *State v. Blake*, 197 Wn.2d 170, 193-95, 481 P.3d 521 (2021). As a result, Susan Burnaroos asks this court to order the vacation of her one conviction for a controlled substance and remand for resentencing on the other convictions. The State concedes this conviction

should be vacated and agrees to resentencing of Burnaroos on all the remaining convictions. We accept the State's concession and remand for resentencing because, with the vacation of the one conviction, Burnaroos' offender score will move lower.

Parenting Sentencing Alternative

Susan Burnaroos contends that the trial court misinterpreted the parenting sentencing alternative statute and, as a result, failed to meaningfully consider her request for a sentencing alternative. She argues that this court should remand for the sentencing court to reconsider her request. The State responds that our remand for resentencing because of the vacation of one conviction renders this assignment of error moot. According to the State, the resentencing court may address the contention on remand. Susan Burnaroos asks this court to still address the merits of her assignment.

A case is not moot if a court is able to provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). Further, if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, this court may still reach a determination on the merits to provide guidance to lower courts. *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004).

Susan Burnaroos worries that, if this court declines to address this assignment of error, the trial court will repeat the assigned error and adhere to its previous ruling. She would need to appeal a second time. We agree to address the assignment of error.

This court reviews a trial court's decision to deny a sentencing alternative for an abuse of discretion. *State v. Mohamed*, 187 Wn. App. 630, 645, 350 P.3d 671 (2015). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Former RCW 9.94A.655 (2018), in effect at the time Susan Burnaroos committed the crimes of conviction, read:

> (1) An offender is eligible for the parenting sentencing alternative if:
>
> (a) The high end of the standard sentence range for the current offense is greater than one year;
>
> (b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;
>
> (c) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;
>
> (d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and
>
> (e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

The statute declares further:

> *If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed*, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody. *The court shall consider the offender's criminal history when determining if the alternative is appropriate.*

Former RCW 9.94A.655(4) (2018) (emphasis added). The statute permits the sentencing court to consider a risk assessment report or chemical dependency screening report when making its determination. Former RCW 9.94A.655(2) (2018).

When declining to impose the parenting sentencing alternative, the sentencing court remarked:

> The legislature—when dealing with the sentencing guidelines saw—that sometimes *in very special cases that there should be a sentencing alternative for parents that—are required to be there for their children*. And that mandatory sentencing could have an impact upon innocent victims, being children.
>
> *Those sentencing guidelines are very strict*. They require certain conduct. And—one of the factors that this court considers is whether or not that—the degree of success for a FOSA sentence.

RP at 31-32 (emphasis added). The court later observed that Susan Burnaroos' son maintained contact with his father. The court commented that no information suggested that the father was an inappropriate custodian for the child. The court deemed the case a typical case where another parent may care for the child.

Susan Burnaroos emphasizes the sentencing court's comment about the case being typical and contends, based on this remark, that the sentencing court misinterpreted the parenting sentencing statute as applying only in unique or special cases, such as the lack of another parent to care for the child. She highlights that the statute's requirements indicate that defendants with "physical custody" of a child "at the time of the current offense" are eligible. Former RCW 9.94A.655(1)(e) (2018). Burnaroos also emphasizes

legislative history and recent changes to RCW 9.94A.655 which support the goal of maintaining family bonds. She underscores that a sentencing court must "give great weight to the minor child's best interest." RCW 9.94A.655(5); LAWS OF 2020, ch. 137, § 2.

Although Susan Burnaroos accurately characterizes some of the sentencing court's comments, she focuses on only a small portion of the sentencing ruling. The sentencing court issued a four page ruling that listed the many factors considered when denying the parenting sentencing alternative. Those factors included Burnaroos' many convictions, multiple convictions for delivery of a controlled substance, and unlawful possession of a firearm. The court emphasized that the court released Burnaroos from custody pending the 2017 charges, but she struggled to comply with the court's orders. Instead, she engaged in further criminal activity. The court reviewed the purpose behind the parenting sentencing alternative and astutely commented:

> If we go back to the concept of a FOSA sentence, the concept is is [sic] to have that parent be available to the child. And in this particular circumstance, Ms. Burnaroos, by her conduct, was exposing this child—to criminal behavior, she was exposing this child to drug addicts, much like herself, that would have a profound impact on the child.

RP at 33.

During sentencing, the trial court noted that, although Susan Burnaroos had progressed beginning two months earlier, her past history, as declared by DOC, showed her to be a poor candidate for a parenting sentencing alternative. The positive changes

were only recent and occurred once she faced charges that could put her in prison for thirty years. The sentencing court expressed fear for the consequences of Burnaroos' actions on her son and the example that she provided her son.

In short, the sentencing court particularly considered the interests of the child. The court did not create new requirements under the statute. The court wisely exercised its discretion.

Despite affirming the sentencing court's denial of Susan Burnaroos' request for a parenting sentence alternative, we grant the resentencing court discretion to revisit the request on remand. Changes since the initial sentencing might warrant consideration of the request again.

Supervision Fees

For the same reason that the State argues mootness with Susan Burnaroos' assignment of error to the sentencing court's parenting sentence decision, the State argues Burnaroos' assignment of error to the imposition of supervision fees is moot. For the same reason that we decided to address the parenting alternative sentencing, we address the imposition of the fees.

Susan Burnaroos contends that her two judgment and sentences incorrectly read that she must pay supervision fees while in community custody. Community custody costs are discretionary legal financial obligations. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). RCW 9.94A.703(2)(d) provides:

> [u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department.

The trial court found Susan Burnaroos indigent. The trial court imposed only the mandatory $500 penalty assessment in both cases. Nevertheless, on Burnaroos' judgment and sentence forms, the trial court indicated that Burnaroos shall "Pay supervision fees as determined by DOC."

The sentencing court's ruling implies that it intended to impose only mandatory legal financial obligations. Because we remand for a new sentencing hearing in both cases, we direct the resentencing court, in the event such was its intention, to strike the supervision fees from the two judgment and sentences.

Social Security Benefits Notation

For the same reason that the State argues mootness with regard to Susan Burnaroos' assignment of error to the sentencing court's parenting sentence alternative decision, the State argues mootness to Burnaroos' assignment of error to the failure to note, on the judgment and sentences, the receipt of Social Security benefits. For the same reason that we decided to address the parenting sentencing alternative, we address the assignment of error.

Susan Burnaroos contends that she receives Social Security benefits and, on remand, the trial court should place a notation in her sentences indicating that the State may not collect legal financial obligations from funds subject to 42 U.S.C. § 407(a).

Pursuant to 42 U.S.C. § 407(a), Social Security disability benefits may not be used to satisfy legal financial obligations. *State v. Catling*, 193 Wn.2d 252, 264, 438 P.3d 1174 (2019). On remand, the judgment and sentence should indicate that legal financial obligations may not be satisfied from any Social Security funds. *State v. Catling*, 193 Wn.2d at 264.

CONCLUSION

We vacate Susan Burnaroos' one conviction for possession of a controlled substance. We remand for resentencing. During resentencing, the court should strike the imposition of community custody supervision fees, if it so intended, and note on the judgment and sentences that the State may not collect legal financial obligations from money derived from Social Security benefits. During resentencing, the court may reconsider, at its discretion, the denial of the parenting alternative sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Siddoway, A.C.J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SUSAN BURNAROOS, Petitioner.	)))))))))	COA NO. 37204-9-III

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[X] SUSAN BURNAROOS 824177 WACC FOR WOMEN 9601 BUJACICH RD. NW GIG HARBOR, WA 98332-8300	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF SEPTEMBER, 2021.

X_____

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Appellate Court Case Number:	37204-9
Appellate Court Case Title:	State of Washington v. Susan Elizabeth Burnaroos
Superior Court Case Number:	19-1-00089-4

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