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SUPREME COURT NO. 99275-4
COA NO. 79736-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSE ALLEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Ramsey Scott, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jesse Allen asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Allen requests review of the decision in State v. Jesse Lee Allen, Court of Appeals No. 79736-1-I (slip op. filed Nov. 2, 2020), attached as an appendix.

C. ISSUE PRESENTED FOR REVIEW

The court ran Allen's state sentence consecutive to a previously imposed federal sentence. Where the State deliberately refrained from prosecuting charges against Allen until he was sentenced in his federal case, should the sentencing statute be interpreted to preclude imposition of consecutive sentences because the State manipulated the timing of the charges and subsequent sentencing to take advantage of the statute?

D. STATEMENT OF THE CASE

The King County Prosecutor's Office (the State) originally filed charges against Jesse Allen in 2016. CP 3; RP¹ 21-22. Allen was arraigned on November 7, 2016. CP 3. Allen was then charged in federal court with the production and possession of child pornography. CP 3; RP

¹ The verbatim report of proceedings is cited as follows: RP - two consecutively paginated volumes consisting of 1/17/19, 3/1/19.

22. The State dismissed its case on November 18, 2016. CP 3. Allen pleaded guilty in federal court. CP 3. His federal sentencing was set for August 2, 2018. CP 3. He received a total of 20 years in prison. RP 22.

On the same day as Allen's federal sentencing, the State refiled charges against Allen in state court, alleging two counts of first degree child molestation. CP 1-2. Allen later pleaded guilty to these charges. CP 7-37.

The State recommended that the sentence run consecutive to the federal sentence. RP 22. The defense asked the court to run the sentences concurrent. CP 76-79.

The defense memorandum set forth the procedural history of the case in additional detail. CP 77. The federal charges stemmed from the same incidents originally charged by the State and were based on the fact that Allen took videos of his molestation of the child. CP 77. The decision to prosecute the conduct in two different courts was made by Senior Deputy Prosecuting Attorney Cecelia Gregson who, as a "cross-designated" prosecutor, worked at both the King County Prosecutor's Office and the U.S. Attorney's Office. CP 77. The reason Allen's conduct was divided and charged in different courts was because he faced a longer federal prison sentence on the manufacturing charges (20 years) than he would have faced had he been charged with sexual exploitation in state

court, which carried a 10-year sentence and would have run concurrently with the molestation charges. CP 77.

Defense counsel argued that while the law permitted the court to run the sentences consecutively, there was a presumption that they run concurrently. CP 100. Counsel asked the court to follow legislative intent "in this type of circumstance." RP 32-33. Counsel asked the court to consider RCW 9.94A.589(1)(b), which governs how sentences for multiple "serious violent" offenses are structured. RP 33-34. That statute calls for consecutive sentencing on such offenses but they are not scored against one another to ameliorate the harshness of the result. RP 33-34. In that circumstance, the legislature does not allow the State to "double dip" by permitting the offenses to both be scored against one another and to run consecutive. RP 33-34.

Counsel contrasted that scenario with the one Allen faced if the State's attempt to run the sentences consecutive were successful. RP 35-36. Prosecutor Gregson made the decision to pull the initial charges from state court so that the case could first be prosecuted in federal court. RP 35. According to defense counsel, "this was done for a very obvious reason" — to increase the sentence Allen faced for the offenses prosecuted in state court. RR 35-36. In waiting to prosecute in state court once the federal case had ended, the State sought to do an end run around

legislative intent by not only taking advantage of the tripling provision for scoring sex offenses but also running the sentences consecutively. RP 36-37. Allen's offender score was drastically increased by his federal convictions, such that his total sentence, if run consecutive, would be longer than if he had been convicted of murder. CP 78-79.

Counsel rhetorically asked: "Was the legislative intent really to tell the State that, hey, if you don't like what the sentencing structure is here, if you don't like the amount of time that we said that the Court can and should give, what you should do is try to find a whole 'nother jurisdiction and send it over there so that he can get a whole bunch of time, and then end it back over, and we'll run it consecutively, so that he can get a lot more time than what is our intent[?]" RP 37-38. Counsel continued: "That's clearly not what the legislature intended this Court to do. It's not how the law is set up, it's not the way the statutes read." RP 38. "Considering the increase in the offender score due to the federal charges and the fact that the government has essentially engaged in a form of forum shopping by taking conduct that occurred simultaneously (i.e. the molestation and the recording of it) and separating it out by prosecuting it in two different jurisdictions, disregarding the presumption of concurrence and running the sentence consecutively seems patently unfair." CP 79.

Counsel asked the court to follow legislative intent and run the sentences concurrently. RP 38.

During allocution, Allen expressed remorse for what he had done. RP 40. The court imposed an indeterminate sentence of 198 months in prison for each molestation offense, the top of the standard range. CP 48, 51. Describing the offenses as horrifying and sickening, the court expressly ordered the current sentence to run consecutive to the federal sentence under "the egregious facts of this case." CP 51; RP 42-43.

On appeal, Allen argued a consecutive sentence was not permitted because the State purposefully delayed prosecution of the state charges so that the state sentence could run consecutive to the federal sentence. Brief of Appellant (Corrected) at 8-15; Reply Brief at 1-10. The Court of Appeals rejected this argument, concluding the trial court properly exercised its discretion to run the sentences consecutively. Slip op. at 10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THE LEGISLATURE DID NOT INTEND TO ALLOW THE COURT TO RUN A SENTENCE CONSECUTIVE TO A PRIOR SENTENCE WHERE THE STATE INTENTIONALLY DELAYS CHARGES TO MANIPULATE THE TIMING OF THE SENTENCES.

This Court recognizes the integrity of the sentencing process must be protected. State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999). The legislature did not intend for any party to game the Sentencing

Reform Act by intentionally delaying proceedings to reap the benefit of a sentencing rule.

The State withdrew its original charges and refrained from refileing in state court until Allen was sentenced in federal court. By delaying the charges and subsequent sentencing in this manner, the State was able to rely on RCW 9.94A.589(3), which permits consecutive sentencing, to ramp up Allen's prison time. The legislature did not intend for RCW 9.94A.589(3) to operate in this manner because the legislature does not intend strained, unlikely or absurd results, nor unconstitutional ones. Correctly interpreting the statute to preclude consecutive sentences under these circumstances, the trial court lacked authority to impose consecutive sentences under RCW 9.94A.589(3).

This case involves interpretation of a commonly used sentencing statute and its constitutional implications. This case thus raises an issue of substantial public importance warranting review under RAP 13.4(b)(4).

In justifying its refusal to allow a defendant to manipulate the sentencing scheme through deliberate delay, the Court of Appeals in State v. Moore, 63 Wn. App. 466, 471, 820 P.2d 59 (1991) proclaimed "we would not countenance a prosecutor's action of deliberately scheduling sentencing hearings for a defendant's multiple convictions in such a way as to avoid the presumption of concurrent sentences under the provisions

of the [Sentencing Reform Act]." Allen's case provided an opportunity for the Court of Appeals to show it really meant what it said. Turns out, it didn't. Not for this panel of judges anyway. A defendant will not be permitted reap the reward of a more lenient sentencing through deliberate delay, but the State, under the cloak of prosecutorial discretion, is free to deliberately delay and manipulate the timing of the sentencing process to obtain a harsher sentence. Slip op. at 8-10. That is what the Court of Appeals decision stands for. That is not fair. That is a double standard.

The purpose of statutory interpretation is to give effect to the legislature's intent. State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). In determining legislative intent, statutory interpretation begins with the statute's plain language and ordinary meaning. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). But courts must "avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences." Elgin, 118 Wn.2d at 555. The courts employ this "stopgap principle" because it is presumed the legislature does not intend such results. J.P., 149 Wn.2d at 450.

RCW 9.94A.589(3) provides in relevant part:

whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court

subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

Generally speaking, "[a] sentencing court is granted broad discretion in choosing whether to impose a consecutive sentence." State v. Mathers, 77 Wn. App. 487, 494, 891 P.2d 738, review denied, 128 Wn.2d 1002, 907 P.2d 297 (1995). The question posed by Allen's case, however, is whether the legislature intended to authorize consecutive sentences when the State intentionally delays its prosecution until a felony sentence is entered in another court. Permitting the State to secure consecutive sentences by deliberately manipulating the timing of the charge and subsequent sentence is an unlikely, absurd, or strained consequence that cannot be what the legislature intended in enacting this provision. Statutes are interpreted to avoid "consequences unintended by the Legislature." Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 802, 808 P.2d 746 (1991).

Moore is instructive because it shows an attempt to manipulate the timing of sentencing to achieve advantage will not be condoned. In that case, defendant Evans argued the trial court erred by running his sentence for second degree assault consecutively with the sentences imposed at the same hearing for two prior burglary convictions. Moore, 63 Wn. App. at

467. On appeal, the court addressed former RCW 9.94A.400(1)(a) and (3),² which provided:

(1)(a) Except as provided in (b) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score[.] ... Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.120 and 9.94A.390(2)(e) or any other provision of RCW 9.94A.390[.]

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

Evans argued section (1)(a), not (3), controlled his sentence because all three felony convictions were sentenced during the same hearing and, thus, were current offenses pursuant to subsection (1)(a). Id. at 470. Since no exceptional sentence was imposed, the sentences needed to run concurrent under (1)(a). Id. If the plain language of the statute controlled, Evans was undoubtedly correct. See State v. Smith, 74 Wn. App. 844, 852-53, 875 P.2d 1249 (1994), review denied, 125 Wn.2d 1017,

² Now codified at RCW 9.94A.589.

890 P.2d 19 (1995) (under plain language of statute, former RCW 9.94A.400(1)(a) rather than (3) applied where multiple offenses were sentenced on the same day, requiring the sentences to run concurrent absent a finding supporting an exceptional sentence).

The State, however, successfully argued "the unique facts of this case" required that the trial court be able to sentence Evans under section (3), which permitted consecutive sentences, rather than (1)(a), which did not. Moore, 63 Wn. App. at 470. The unique fact was that Evans absconded to avoid sentencing on prior burglary convictions and, in doing so, prevented those sentences from being entered when they normally would have been. Id. To order sentence for the assault conviction to run concurrently with the burglary sentences "would in effect reward Evans for evading the punishment for the burglary convictions. This could not have been the Legislature's intent when it created the presumption of concurrent sentences in subsection (1)(a)." Id. at 471. To reach this result, the Moore court relied on a familiar principle of statutory construction: "Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided." Id. (quoting State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)).

Of importance to Allen's appeal, the Moore court reasoned: "Clearly, we would not countenance a prosecutor's action of deliberately

scheduling sentencing hearings for a defendant's multiple convictions in such a way as to avoid the presumption of concurrent sentences under the provisions of the SRA." Id. Evans "directly caused the sentencing delay for the burglary convictions" and so the trial court properly acted under the authority of subsection (3) to run the sentences consecutively with the burglary sentences. Id.

In short, Moore, interpreting the sentencing provisions, did not allow a party to game the system. Smith, in subsequently distinguishing Moore, recognized subsection (3) did not apply "where multiple independent charges were sentenced in the same hearing without any fault on the defendant in manipulating sentencing dates." Smith, 74 Wn. App.at 852 n.6.

Here, the State manipulated Allen's sentencing date by delaying its case against him in state court until he was sentenced in federal court. There was no impediment to prosecuting Allen in state court while his federal case was pending. The State was the first to file charges against Allen. CP 3; RP 21-22. Defense counsel identified the State's strategy in dismissing the initial charges and then refiling them later. Counsel informed the court of the procedural history of this case and the State's deliberate decision to let the federal case run its course so that it could increase Allen's sentence in the state case by running it consecutive to the

federal case. RP 36-38; CP 79. The State did not dispute any of this in the trial court. It did not dispute that it withdrew the initial charges and waited to prosecute Allen in state court until a federal sentence was imposed so that it could ask for consecutive sentences under RCW 9.94A.589(3).

The Moore court refused to interpret the plain language of a statute in a manner that would have allowed the defendant to reap a sentencing benefit based on deliberate delay, relying on the principle that to do so would produce an absurd result. Moore, 63 Wn. App. at 470-71. The same reasoning should apply to a circumstance where the State is the manipulator of timing, as recognized in Moore. Id. at 471. In that circumstance, the trial court lacks statutory authority to impose a consecutive sentence because the statute cannot be read in a manner that permits that result.

The doctrine of constitutional avoidance also supports Allen's interpretation. Statutes are construed to avoid constitutional problems if possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). "Due process requires the government to treat its citizens in a fundamentally fair manner." In re Detention of Ross, 114 Wn. App. 113, 121, 56 P.3d 602 (2002), review denied, 149 Wn.2d 1015, 69 P.3d 875 (2003); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Pre-accusatorial

delay may constitute a violation of due process if "the delay is caused by the prosecutor solely to gain a tactical advantage over the defendant." State v. Madera, 24 Wn. App. 354, 355, 600 P.2d 1303 (1979) (citing United States v. Lovasco, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). Consistent with due process, RCW 9.94A.589(3) cannot be read to permit the State to gain a tactical advantage by intentionally delaying the timing of a charge and subsequent sentencing to reap the benefit of the consecutive sentence provision. The Court of Appeals' contrary interpretation in this case violates due process of law.

The Court of Appeals, dismissing its warning in Moore as dicta, said Allen's reliance on Moore was misplaced because "Allen does not claim the prosecutor purposefully delayed sentencing hearings for multiple convictions in the same court." Slip op. 8-9. That is an artificial distinction, one that ignores the spirit of fair play at issue in Moore. The integrity of the sentencing laws can be compromised in different ways. Intentional delay to gain a sentencing benefit is one way. Purposefully delaying sentencing hearings for multiple convictions in the same court to obtain a harsher sentencing result, as in Moore, and purposefully delaying a state prosecution to secure a later sentencing hearing and a harsher sentencing result, as in Allen's case, both amount to intentional manipulation of the sentencing process to the detriment of the defendant.

The Court of Appeals reframed the issue as one of prosecutorial discretion, seeking to find safe harbor in the nearly unfettered discretion the State has in bringing charges. Slip op. at 9. Does prosecutorial discretion give the State a free pass to manipulate the sentencing laws for its own benefit?

The Court of Appeals shrugged off the question by chastising Allen for not challenging the State's exercise of its discretion "when the State dismissed the charges without prejudice and again when the State refiled the charges." Slip op. at 9 (citing State v. Oppelt, 172 Wn.2d 285, 287, 257 P.3d 653 (2011) (where a defendant is prejudiced from either negligent or intentional delay in prosecuting an offense so that "fundamental conceptions of justice would be violated by allowing the prosecution," he is entitled to relief.)). This ignores the fact that such a challenge would have been premature and doomed to fail. Allen could not show prejudice at that stage. Nothing in the record shows the State announced its intention to seek consecutive sentences when the State originally dismissed the charges or when it refiled them. Prejudice only became real at the sentencing stage, when the State successfully exhorted the court to impose a consecutive sentence.

The Court of Appeals concluded the trial court properly exercised its discretion to run the sentences consecutively due to the "egregious facts

of the case." Slip op. 9-10. The missed point, though, is that whatever reason the trial court had for running the sentence consecutively, it lacked authority to do so because RCW 9.94A.589(3) cannot be interpreted to allow for consecutive sentences when the State manipulates the timing of the sentencing hearing to achieve such a result. The trial court was in a position to impose consecutive sentences only because of the State's deliberate delay and manipulation of the sentencing process.

In a footnote, the Court of Appeals observed that if the "state court convicted him before his federal conviction, the federal judge would also have broad discretion to impose a consecutive sentence." Slip op. at 10, n.12.³ Allen never suggested otherwise. See Reply Brief at 8. But the Court of Appeals is correct that predicting the outcome in that hypothetical scenario is speculative. The Court of Appeals might be suggesting that this case presents a "no harm, no foul" situation because the sentencing outcome would have been the same had Allen been prosecuted in state court first. If so, the suggestion fails. What a federal court might have done if the case had proceeded differently is unknown. What is known is that the State deliberately sequenced the prosecutions to obtain the benefit of the state rule on consecutive sentencing in state court.

³ The State cited no authority for this assertion in its briefing. See Brief of Respondent at 12. The Court of Appeals found some for it.

Whatever may have happened had the sequence of prosecution been reversed does not speak to the extant problem of the State manipulating the timing of the state sentencing process.

RCW 9.94A.589(3) should be interpreted to bar consecutive sentences when the State intentionally delays prosecution in an effort to take advantage of the provision. Following this interpretation, the trial court lacked authority to run Allen's sentence consecutive to his federal sentence. The case should be remanded for his state and federal sentences to run concurrently.

F. CONCLUSION

For the reasons stated, Allen requests that this Court grant review.

DATED this 2nd day of December 2020.

Respectfully submitted,


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

THE STATE OF WASHINGTON,)	No. 79736-1-1
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
JESSE LEE ALLEN,)	
)	
Appellant.)	

BOWMAN, J. — Jesse Lee Allen appeals his sentence for two counts of child molestation in the first degree. Allen challenges the trial court’s authority to impose a sentence consecutive to his federal sentence for production and possession of child pornography arising from the same incidents. He claims his sentence goes against the intent of RCW 9.94A.589(3) because the State purposefully delayed filing child molestation charges until after his convictions in federal court. Allen also challenges several conditions of community custody and the imposition of supervision fees. We affirm Allen’s sentence but remand to strike or modify certain conditions of community custody and strike the supervision fees.

FACTS

In October 2016, Allen's girlfriend discovered three videos on his cell phone showing him sexually abusing her six-year-old daughter in Allen's home. She confronted Allen about the videos and he confessed to the incidents, admitting that he "has a problem."

The State charged Allen with one count of first degree child rape and one count of first degree child molestation. Three weeks later, the United States Attorney's Office charged Allen in federal court with one count of production of child pornography and one count of possession of child pornography because he recorded and kept images of the sexual assaults on his cell phone.¹ The next day, the State dismissed its charges without prejudice, noting it "may refile charges following the federal prosecution." Allen did not object.

About 15 months later, Allen pleaded guilty as charged in federal court. The federal judge sentenced Allen in August 2018 to 20 years of confinement on one count and 10 years of confinement on the other count, running concurrently with one another.² On the same day as Allen's federal court sentencing, the State filed a new information charging him with two counts of first degree child molestation stemming from the same 2016 incidents. Allen did not object to the refiled charges.

Allen pleaded guilty to both charges in January 2019. The State's sentencing recommendation indicated the prosecutor planned to seek a

¹ Federal jurisdiction attached because a foreign country manufactured Allen's phone.

² Allen did not designate his federal judgment and sentence for this appeal. We rely on the parties' representations and the prosecutor's certification of criminal history for the details of his federal sentence.

sentence consecutive to that imposed for Allen's federal convictions. The felony plea agreement also included a "real facts" stipulation to the certification for determination of probable cause and the prosecutor's case summary.

The trial court sentenced Allen in March 2019. Defense counsel argued for a sentence within the standard range. He also urged the court to impose a sentence concurrent with Allen's federal sentence because all charges stemmed from "conduct that was occurring at the same time" and because Allen was already subject to an enhanced offender score based on the federal convictions.³ Counsel argued the legislature presumed that "conduct that occurred simultaneously" would be sentenced concurrently, despite convictions for the conduct in different jurisdictions, and asked the judge to "look at the statutes and to look at the legislative intent and apply that to this situation." He asserted that a consecutive sentence was "clearly not what the legislature intended this Court to do."

The State requested a sentence at the high end of the standard range to run consecutive to Allen's federal sentence. The State argued Allen's conduct warranted such a sentence. The State also pointed out that if the case had stayed in state court, it could have charged one of the molestation counts as rape of a child in the first degree and could have added counts for possession of depictions of minors engaged in sexually explicit conduct. It argued that "[e]ach

³ Under RCW 9.94A.525(17), each prior conviction for a sex offense is assigned 3 points, which in Allen's case raised his offender score from 3 to 9 on each count. His standard sentence range was 149 to 198 months.

of those would have counted and each would have scored and the State could have potentially asked for the three crimes or some exceptional sentence.”

The victim’s mother and grandmother addressed the court at sentencing. They spoke about the continued impact of the crimes on the victim and their family. Allen submitted a written letter and addressed the court on his own behalf. Allen’s mother and brother also submitted letters supporting him and were present at the sentencing hearing. The court imposed an indeterminate sentence of 198 months to life on each count to run concurrently with each other but consecutive to the federal sentence.

The prosecutor asked for the “standard” community custody conditions listed in a preprinted form attached to the judgment and sentence as “Appendix H.” Appendix H included a requirement that Allen “[p]ay supervision fees as determined by the Department of Corrections [(DOC)].” The prosecutor also asked for “special” crime-related conditions, arguing that the conditions “all . . . have a nexus to this particular offense.” Appendix H listed the special conditions related to “sex offenses,” requiring that Allen:

5. Inform the supervising CCO^[4] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.
-
17. . . . Stay out of areas where children’s activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or the CCO.

⁴ Community corrections officer.

-
19. . . . Do not purchase or possess alcohol.
-
23. . . . No [I]nternet access or use, including e[-]mail, without the prior approval of the supervising CCO.
24. . . . No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor compliance with this condition.

The court imposed all of the requested conditions but amended condition 19 prohibiting Allen from purchasing or possessing alcohol to include “or any other controlled substances under [the] Uniform Controlled Substances Act[, chapter 69.50 RCW].” It also imposed only nondiscretionary legal financial obligations, ordering that Allen pay the mandatory victim penalty assessment of \$500 and the mandatory DNA⁵ collection fee of \$100. Two weeks later, the court also signed an “Order of Indigency,” waiving fees and appointing counsel at public expense on appeal. Allen appeals.⁶

ANALYSIS

Consecutive Sentence

Allen claims the trial court erred by imposing a sentence consecutive to his federal confinement. He argues we must vacate his sentence and impose a concurrent sentence because the trial court lacked authority to impose a

⁵ Deoxyribonucleic acid.

⁶ Allen moved under RAP 9.11 to supplement the record with the federal complaint and plea agreement so he could argue that we should reverse the superior court convictions on double jeopardy grounds. The State opposed the motion. A commissioner of this court ordered Allen to address the motion in his opening brief. Allen failed to include the issue in his brief so we do not reach the merits of his motion. See RAP 12.1(a).

consecutive sentence where the State “intentionally delays charges to manipulate the timing of the sentences.”

We review a trial court’s imposition of consecutive sentences for an abuse of discretion. State v. Champion, 134 Wn. App. 483, 487, 140 P.3d 633 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). An abuse of discretion occurs when the trial court applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Ramirez-Estevez, 164 Wn. App. 284, 289-90, 263 P.3d 1257 (2011).

Here, the trial court imposed a consecutive sentence under RCW 9.94A.589(3),⁷ which states, in pertinent part:

[W]henever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that the confinement terms be served consecutively to each other.

When a statute is unambiguous, we derive the legislature’s intent from the plain language alone. State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Allen concedes that the language of RCW 9.94A.589(3) unambiguously gives broad discretion to a sentencing court to impose either a concurrent or consecutive sentence for a crime the defendant committed before serving a

⁷ We note the legislature amended RCW 9.94A.589(3) in 2020. LAWS OF 2020, ch. 276, § 1. Because the amendment does not substantially change the pertinent language quoted here, we cite the current statute.

felony sentence for a different crime. See State v. Mathers, 77 Wn. App. 487, 494, 891 P.2d 738 (1995). The court need only expressly order that the defendant serve the sentence consecutively. RCW 9.94A.589(3); Mathers, 77 Wn. App. at 494.

But Allen argues that “courts must ‘avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences.’ ”⁸ He asserts that imposing a consecutive sentence after the State intentionally delayed events to “ramp up Allen’s prison time” goes against legislative intent. Allen urges us to interpret the statute “to preclude consecutive sentences under these circumstances.” Allen offers State v. Moore, 63 Wn. App. 466, 820 P.2d 59 (1991), in support of his argument.

In Moore, the defendant was convicted of two separate second degree burglary charges in 1987. Moore, 63 Wn. App. at 467. He then failed to appear for sentencing. Three years later, the defendant was arrested and convicted of felony assault. Moore, 63 Wn. App. at 467. The court sentenced him on all three convictions at the same hearing. Moore, 63 Wn. App. at 467-68. It first imposed concurrent sentences for the burglary convictions. It then expressly ordered the sentence for the assault to run consecutive to the burglary sentences under former RCW 9.94A.400(3) (1988).⁹ Moore, 63 Wn. App. at 468. The defendant argued that because he was sentenced for all three crimes at the same time, the convictions were “current offenses” under former RCW 9.94A.400(1)(a) and he

⁸ Quoting State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

⁹ The legislature recodified RCW 9.94A.400 in 2001 as RCW 9.94A.589. LAWS OF 2001, ch. 10, § 6.

should have received concurrent sentences. Moore, 63 Wn. App. at 470. We affirmed the consecutive sentence because the defendant “directly caused the sentencing delay for the burglary convictions,” and imposing concurrent sentences would “reward [him] for evading the punishment” for those convictions. Moore, 63 Wn. App. at 471. We reasoned, “This could not have been the Legislature’s intent when it created the presumption of concurrent sentences in subsection (1)(a)” of former RCW 9.94A.400. Moore, 63 Wn. App. at 471.

Allen argues that Moore is “instructive” here “because it shows an attempt to manipulate the timing of sentencing to achieve advantage will not be condoned.” He points to dicta¹⁰ in the opinion that states:

Clearly, we would not countenance a prosecutor’s action of deliberately scheduling sentencing hearings for a defendant’s multiple convictions in such a way as to avoid the presumption of concurrent sentences under the provisions of the SRA.^[11]

Moore, 63 Wn. App. at 471. Allen’s reliance on Moore is misplaced.

Moore addressed a defendant’s purposeful delay in sentencing for multiple convictions in the same court where his crimes would have been sentenced separately but for his own misconduct. We concluded he should not benefit from that delay. Moore, 63 Wn. App. at 471. We also implied that we would not tolerate intentional delays by the State to sentence concurrent convictions separately in an attempt to gain an unfair advantage. Moore, 63 Wn. App. at 471. But here, Allen does not claim the prosecutor purposefully delayed

¹⁰ “A statement is dicta when it is not necessary to the court’s decision in a case.” State v. Burch, 197 Wn. App. 382, 403, 389 P.3d 685 (2016) (citing Protect the Peninsula’s Future v. City of Port Angeles, 175 Wn. App. 201, 215, 304 P.3d 914 (2013)). Dicta is not binding authority. Burch, 197 Wn. App. at 403.

¹¹ Sentencing Reform Act of 1981, chapter 9.94A RCW.

sentencing hearings for multiple convictions in the same court. Instead, he challenges the State's exercise of its filing discretion, which subjected him to the possibility of a consecutive sentence under RCW 9.94A.589(3). See State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) (prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges).

The conduct about which Allen complains—that the State intentionally delayed charges to manipulate the timing of sentencing—occurred well before he chose to plead guilty to the state charges, and he had the chance to challenge the State's exercise of its discretion when the State dismissed the charges without prejudice and again when the State refiled the charges. See State v. Oppelt, 172 Wn.2d 285, 287, 257 P.3d 653 (2011) (Where a defendant is prejudiced from either negligent or intentional delay in prosecuting an offense so that “fundamental conceptions of justice would be violated by allowing the prosecution,” he is entitled to relief.). Instead, Allen sought relief at the discretion of the sentencing court. After receiving his federal sentence, he pleaded guilty to the State's charges, understanding that it would seek a consecutive sentence. He then asked the judge to exercise discretion under RCW 9.94A.589(3) and grant him a concurrent sentence to offset what he believed would be an unduly harsh result.

The trial court considered, and soundly rejected, Allen's argument. It determined that “[u]nder the egregious facts of this case,” a consecutive sentence was appropriate despite Allen's perceived overreaching by the State.

The court found Allen’s crimes were “horrifying offenses, extremely serious,” and “have harmed the victim and her family and will continue to harm them for the rest of their lives.” It also explained that Allen’s written statement to the court before sentencing did not “begin to explain or show appropriate remorse for his conduct.” And while the judge found Allen’s oral statements at sentencing to be “more appropriate,” Allen’s words did not “go far enough to convince this Court that leniency is in any way appropriate under the circumstances of this case.”

Unhappy with his sentence, Allen now argues the trial court “lacked authority to impose consecutive sentences under RCW 9.94A.589(3)” because it produced an absurd result. We disagree and conclude that the trial court properly exercised its broad discretion when it considered Allen’s arguments and expressly determined his crimes warranted a sentence consecutive to his federal confinement.¹²

Community Custody Conditions

We review community custody conditions for abuse of discretion and will reverse only conditions that are manifestly unreasonable. State v. Wallmuller, 194 Wn.2d 234, 238, 449 P.3d 619 (2019); State v. Irwin, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). We usually uphold conditions of community custody if they are “crime-related.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A “crime-related prohibition” is “an order of a court prohibiting conduct

¹² Allen also suggests his sentences could not have run consecutively if the State had refiled charges before his federal conviction. His claim is speculative at best. Had state court convicted him before his federal conviction, the federal judge would also have broad discretion to impose a consecutive sentence. See 18 U.S.C. § 3584(a); United States v. Lynn, 912 F.3d 212, 217 (4th Cir.), cert. denied, 140 S. Ct. 86, 205 L. Ed. 2d 82 (2019) (federal judges have discretion to impose a consecutive or concurrent sentence as they deem appropriate).

that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). The prohibited conduct need not be identical to the crime of conviction, but there must be “some basis for the connection.” Irwin, 191 Wn. App. at 657. A court’s imposition of an unconstitutional condition is manifestly unreasonable. Wallmuller, 194 Wn.2d at 238. We review constitutional questions de novo. Wallmuller, 194 Wn.2d at 238.

1. Internet and Computer Restrictions

Allen argues that the ban on his “[I]nternet access or use, including e[-]mail, without the prior approval of the supervising CCO” and the ban on “use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes” are unconstitutionally overbroad. We agree.

“Overbreadth analysis is intended to ensure that legislative enactments do not prohibit constitutionally protected conduct, such as free speech.” City of Seattle v. Ivan, 71 Wn. App. 145, 149, 856 P.2d 1116 (1993). “Overbreadth goes to the question of whether State action is couched in terms so broad that it may not only prohibit unprotected behavior but may also prohibit constitutionally protected activity as well.” In re Pers. Restraint of Sickels, ___ Wn. App. 2d ___, 469 P.3d 322, 332 (2020). The mere fact that a community custody condition “impinges upon a constitutional right” does not invalidate it. Sickels, 469 P.3d at 332-33. “ ‘[L]imitations upon fundamental rights are permissible, provided they are imposed sensitively.’ ” Sickels, 469 P.3d at 333 (quoting Riley, 121 Wn.2d at

37); accord State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); State v. K.H.-H., 185 Wn.2d 745, 751-52, 374 P.3d 1141 (2016).

In Sickels, the State conceded and Division Three of our court agreed that the same conditions of community custody challenged here were not “sensitively imposed or reasonably necessary to accomplish the essential needs of the State.” Sickels, 469 P.3d at 333-34, 335.

Balancing the SRA’s purposes against what would otherwise be Sickels’s inviolate right to computer and [I]nternet access and use, we hold that [the] limitation of [I]nternet use to employment purposes is overly broad and [the] provision for “[n]o [I]nternet access or use, including e[-]mail” is even more objectionable. Delegating authority to Mr. Sickels’s supervising CCO to approve [I]nternet access does not solve the problem; a sentencing court may not wholesaledly abdicate its judicial responsibility for setting the conditions of release.

Sickels, 469 P.3d at 335¹³ (citing State v. Sansone, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005)).

We agree with the reasoning and holding in Sickels and conclude that the community custody conditions restricting Internet use and use of electronic devices with access to the Internet as written are overbroad. We remand to strike or modify the conditions.

2. Dating Restrictions

Allen challenges the community custody provision requiring that he must “[i]nform the supervising CCO and sexual deviancy treatment provider of any dating relationship” and “[d]isclose sex offender status prior to any sexual contact,” and that “[s]exual contact in a relationship is prohibited until the

¹³ Fifth alteration in original.

treatment provider approves of such.” He argues the condition is not crime-related, overbroad, and impermissibly impacts his “constitutional freedoms” because his offenses were against a child, not an adult. The State concedes that prohibiting sexual contact in a relationship without prior approval is not crime-related. We accept the State’s concession and remand to strike that portion of the condition.

Allen urges us to narrow the requirements to disclose any dating relationship to his CCO and treatment provider and to disclose his sex-offender status prior to any sexual contact to only adults who “have minor children.” In State v. Autrey, 136 Wn. App. 460, 468, 150 P.3d 580 (2006), we rejected a similar challenge and held an “offender’s freedom of choosing even adult sexual partners is reasonably related to their crimes because potential romantic partners may be responsible for the safety of live-in or visiting minors.” We again affirmed identical conditions in Sickels, concluding that the conditions

are reasonably related to the safety of the community. They protect individuals who Mr. Sickels dates or with whom he embarks on a sexual relationship by providing them with knowledge of the potential risk he presents to minors. They make it possible for Mr. Sickels’s CCO and treatment provider to take whatever additional steps they might deem appropriate to protect anyone embarking on a dating or sexual relationship with [him].

Sickels, 469 P.3d at 328. We reach the same conclusion here.¹⁴

¹⁴ Further, the requirements that Allen disclose dating relationships and his sex-offender status do not prohibit conduct:

They are affirmative conduct requirements governed by RCW 9.94A.703(3)(d), which provides for a related but arguably broader standard: they must be “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Sickels, 469 P.3d at 328.

3. Possession of Controlled Substances Restriction

Allen argues that the prohibition against “purchas[ing] or possess[ing] alcohol, or any other controlled substances under [the] Uniform Controlled Substances Act,” is too broad and should be amended to add language that provides an exception for “lawfully issued prescriptions.” The State concedes. We accept the State’s concession and remand to modify the condition.

4. Areas Where Children Congregate Restriction

Allen challenges the condition that he

[s]tay out of areas where children’s activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by DOC or the CCO.

Recognizing that Wallmuller, 194 Wn.2d at 245, rejected a challenge to the same notice condition, Allen objects only to the portion of the condition that he stay out of “any specific location identified in advance by DOC or the CCO.” He argues that the condition is unconstitutionally vague and that DOC or his CCO could arbitrarily enforce the condition.

We also addressed the same condition in Sickels.¹⁵ We determined that “[t]he condition simply places a burden on DOC or the CCO to affirmatively identify locations they deem to be prohibited by the command.” Sickels, 469 P.3d at 331. We concluded the condition does not invite arbitrary enforcement because the language does not empower a CCO to define prohibited areas

¹⁵ See also State v. Terrones, No. 79781-6-I (Wash. Ct. App. Apr. 27, 2020) (unpublished), <http://www.courts.wa.gov/opinions/pdf/797816.pdf>.

unrelated to the nonexhaustive list, and the condition requires notice to the defendant in advance when adding any restricted locations to the list. Sickels, 469 P.3d at 331-32. We affirm the condition.

Supervision Fees

Allen argues that we should strike the imposition of supervision fees because the court found him to be indigent. We agree.¹⁶ RCW 9.94A.703(2)(d) gives the sentencing court discretion to order that the defendant “[p]ay supervision fees as determined by [DOC].” Here, the trial court imposed only nondiscretionary costs or assessments at sentencing. The court also declared Allen indigent for appellate purposes. Despite the court’s finding of indigence, Appendix H to Allen’s judgment and sentence includes the discretionary supervision fee as a condition of community custody. Because the record reflects the court’s intent to waive all nondiscretionary legal financial obligations, we remand for the trial court to strike the provision. See State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020).

¹⁶ The State argues Allen waived his right to appeal this issue because he failed to object to supervision fees below. While appellate courts normally decline to review issues raised for the first time on appeal, “RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right.” State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). We exercise our discretion to do so here.

We affirm Allen's consecutive sentence but remand to strike or modify certain community custody conditions consistent with this opinion and to strike the supervision fees.

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WE CONCUR:

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Handwritten signature of Mann, C.J. in cursive script, positioned above a horizontal line.

NIELSEN KOCH P.L.L.C.

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