

No. 62756-2-1

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FILED
COURT OF APPEALS
STATE OF WASHINGTON

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID BROWN,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in denying David Brown's request for a Special Sex Offender Sentencing Alternative (SSOSA).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where a person is otherwise eligible for a SSOSA the trial court must consider whether the community and defendant will benefit by use of the alternative. The court may not deny a SSOSA based upon its belief that a category of offenders is inappropriate for the sentencing alternative. Here the trial court did not consider the potential benefit to either the community or Mr. Brown, and denied a SSOSA because Mr. Brown only accepted responsibility after his arrest and because the offense was not an isolated offense or aberrational.. Did the trial court abuse its discretion in denying a SSOSA?

C. STATEMENT OF THE CASE

Mr. Brown pleaded guilty to two counts of rape of a child in the first degree. CP 7-32. In doing so, Mr. Brown admitted that between July 1997 and October 1998 he had sexual intercourse with his step daughter K.B. CP 18.

Prior to sentencing, Mr. Brown obtained an evaluation from Dr. William Satoran, who agreed to begin treatment of Mr. Brown should the court impose a SSOSA. In that evaluation, Mr. Brown acknowledged and expressed remorse for what he had done to K.B. CP 54. Mr. Brown candidly revealed another potential victim. Id. A polygraph revealed no deception when asked about other potential child victims. CP 57-58. Dr. Satoran noted Mr. Brown properly admitted guilt, understood the wrongfulness of his acts, had family support, and demonstrated a willingness to change. Dr. Satoran noted Mr. Brown “is clearly similar to other offenders found acceptable for SSOSA.” CP 59.

Despite Dr. Satoran’s recommendation, the trial court denied MR. Brown’s request for a SSOSA. RP 34-35. In doing so, the court relied the fact that Mr. Brown accepted responsibility only after his arrest, and that he his offenses were not an aberration. RP 35.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN
DENYING A SSOSA IN THIS CASE

1. A trial court’s decision not to impose a SSOSA is reviewable upon a showing of an abuse of discretion. Generally,

RCW 9.94A.585 bars a party from appealing the imposition of a standard range sentence. However, this limitation does not prevent a defendant from appealing the denial of a sentencing alternative where he contends the court applied the incorrect legal standard or abused its discretion. State v. McNeair, 88 Wn.App. 331, 337, 944 P.2d 1099 (1997); see also State v. Smith, 118 Wn.App. 288, 292, 75 P.3d 986 (2003) (citing State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1241 (2003)); State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (citing Williams for proposition that appellate review exists for correction of legal errors and abuses of discretion in determining which sentence applies). This is consistent with the Supreme Court's view that this statutory bar on appeals "applies only to challenges to the amount of time imposed within the standard range." State v. Onefrey, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992) (citing State v. Ammons, 105 Wn.2d 175, 182, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986)).

A trial court's refusal to order alternative treatment under the SSOSA is reviewed for an for an abuse of discretion State v. Frazier, 84 Wn.App 752, 753, 930 P.3d 345, review denied, 132 Wn.2d 1007 (1997). A sentencing court abuses its discretion in

denying a sentence alternative where it fails to properly consider the appropriate legal standard. See McNear, 88 Wn.App at 337.

As set forth below, the trial court abused its discretion in refusing to impose a SSOSA in this case.

2. By basing its decision on matters outside of RCW

9.94A.670, he trial court abused its discretion in denying a SSOSA.

[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). In

considering whether to impose a SSOSA

the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim

RCW 9.94A.670(4).¹

¹ At the time of Mr. Brown's offenses, the provisions concerning SSOSA were codified in former RCW 9.94.120. In 2001, the SSOSA provisions were recodified as RCW 9.94.670. While the statute in effect at the time of sentencing controls an offender's sentence, RCW 9.98A.345, because the amendments did

The trial court's ruling is silent as to the proper standard governing its decision. The ruling does not address the risk to the community. Dr. Satoran's evaluation noted that "assessing [Mr. Brown's] offenses. . . versus other sex offenders who are community treatable with regard to risk to the community he compares favorably." CP 59. The court's ruling does not address the potential benefit of SSOSA to either Mr. Brown or the community. Dr. Satoran noted further that Mr. Brown "is clearly similar to other offenders found acceptable for SSOSA." Id. The court's ruling does not address Mr. Brown's amenability to treatment. Dr. Satoran's report concluded Mr. Brown was amenable to treatment Id.

Rather than look to the information provided by the evaluation, and to consider it in light of the statutory framework, the court employed a standard which does not come from the statute. The court concluded Mr. Brown's acceptance of responsibility came only after his arrest. RP 35. The court added that "this wasn't an aberration, this was one of the most profound abuse of trust imaginable." Id.

not alter the relevant portions of the statute and for ease of reference, Mr. Brown will cite to current statute.

Nothing in RCW 9.94A.670 hinges the availability of a SSOSA upon a defendant having voluntarily reported his offense before charging or having voluntarily surrendered himself. Further, the Legislature did not exempt from consideration for a SSOSA those crimes in which the victim or even a member of the offender's household. It is hard to imagine the Legislature was unaware of the abuse of trust that often accompanies crimes with child victims, yet the statute has never been limited in that fashion. Finally, the Legislature did not limit the availability of a SSOSA to those case in which the offense was an aberrational or isolated event.

Rather than apply the considerations outlines in RCW 9.94A.670(4) governing the decision to impose a SSOSA, the court's ruling is a categorical decision to deny SSOSA to all individuals who are convicted of sexual abuse of a child. Certainly those who fail to voluntarily surrender themselves prior to charging. The trial court abused its discretion in denying a SSOSA in this case. Grayson, 154 Wn.2d at 342.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Brown's sentence and remand the matter to permit the court to properly consider whether to impose a SSOSA.

Respectfully submitted this 30th day of June, 2009.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62756-2-I
v.)	
)	
DAVID BROWN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DAVID BROWN 236839 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2009.

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