

66004-7

66004-7

NO. 66004-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

GILBERT WHITE,

Appellant.

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COURT OF APPEALS
DIVISION ONE

JAN 31 2011

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. The trial court misconstrued the statutory requirements and abused its discretion in denying the jointly recommended special sex offense sentencing alternative (SSOSA).

2. The court lacked authority to prohibit White from accessing the internet as a condition of community custody.

3. The court lacked authority to prohibit White from purchasing, possessing, or using alcohol as a condition of community custody.

4. The court lacked authority to order White to pay non-crime related restitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Where a person is eligible for a SSOSA, the trial court must meaningfully consider the mandatory statutory criteria, including whether the community and defendant will benefit by use of the alternative and the opinion of the victims. The court may not deny a SSOSA based upon its disagreement with the application of the sentencing laws. Here the trial court did not consider the potential benefit to either the community or White, ignored the wishes of the victims, and disregarded each of the criteria favoring this sentence. Where the court did not consider the mandatory

criteria set forth under a strict statutory framework, and expressed a dislike with the law requiring it to impose a certain term of treatment, did the trial court deny the SSOSA for impermissible reasons?

2. A court may impose conditions of community custody that are authorized by statute or are reasonably related to the offense of conviction. White was not accused of committing any internet-related offense whatsoever, and a ban on internet access is not dictated by statute. Did the court lack authority to prohibit White from accessing the internet as a condition of community custody?

3. White was not accused of abusing alcohol and the court made no finding that purchasing or possessing alcohol contributed to the offenses. Did the court abuse its discretion by prohibiting White from purchasing, possessing, or using alcohol?

4. Restitution may be ordered by the court for crime-related injuries, including the victim's counseling costs. The court did not order White to pay restitution, but as a condition of community custody, it required White to pay any costs of counseling for victims or their families. Did the court impermissibly authorize the

Department of Corrections to impose restitution that was not permitted by statute?

C. STATEMENT OF THE CASE.

The prosecution and victims agreed to recommend that Gilbert White receive a SSOSA as the sentence for his guilty plea. CP 14, 35; 7/23/10RP 6. White pled guilty to one count of rape of a child in the first degree and one count of second degree rape of a child. CP 20. He was alleged to have had sexual contact with two stepdaughters several years earlier, but had sought treatment voluntarily, was found amenable to treatment, and met all criteria for SSOSA eligibility. CP 20; 24-25; 8/13/10RP 6-7; RCW 9.94A.670.

The prosecution recommended that the court impose a sentence near the high end of the standard range, 131 months to life imprisonment, but agreed that he should be required to complete three years of community-based treatment first. CP 14, 35. If he successful completed and succeeded in treatment, he would not have to serve his prison term. CP 35. But if he failed to comply with the conditions of his treatment, as well as the conditions imposed by the Department of Corrections to monitor his

behavior, he would be required to serve his entire prison term.

8/13/10RP 4-5.

Even though White pled guilty, was eligible for a SSOSA, and the prosecution as well as the victims supported the recommended SSOSA, the court refused to impose this sentencing alternative. The court imposed a sentence near the high end of the standard range prison, requiring that he serve 131 months to life in prison, as well as conditions of community custody including many no-crime related prohibitions. 8/13/10RP 13; CP 37-47. The court rejected the recommended SSOSA because it viewed a SSOSA as “clearly too lenient,” without addressing the remaining statutory criteria the court was required to weigh. 8/13/10RP 7-13. The pertinent facts are addressed in more detail in the relevant argument sections below.

D. ARGUMENT.

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

a. A trial court abuses its discretion when it decides not to grant a recommended SSOSA based on a misapplication of the statutory criteria. 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 the court applied the incorrect legal standard or abused its discretion. State v. McNear, 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 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 necessarily 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.

b. The trial court abused its discretion in denying the jointly-recommended SSOSA. There was no question that White was eligible for a SSOSA under the controlling statute, RCW 9.94A.670. CP 35 (“the State believes that the defendant is eligible for and the community will benefit from use of the [SSOSA]”). He pled guilty, as required by RCW 9.94A.670(2)(a); he had no prior criminal history, including no felony or sex offenses, as required by RCW 9.94A.670(2)(b) & (c); he did not cause substantial bodily harm to anyone, as required by RCW 9.94A.670(2)(d); the victim was not a stranger to him and the standard range included the possibility of confinement for less than 11 years, as required by RCW 9.94A.670(2)(e) & (f).

Furthermore, White was engaged in and amenable to treatment. The court credited that recommendation at sentencing, agreeing that the treating doctor said White would benefit from treatment. 8/13/10RP 7. The court felt “sure” White would benefit from treatment. 8/13/10RP 7. Neither the court nor prosecution disputed the adequacy of White’s treatment program.

The victims supported the recommendation, as did the prosecution. 7/23/10RP 6. The legislature expressly directs the trial court to heavily weigh the victim's perspective on the treatment alternative. It mandates, "The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section." RCW 9.94A.670(4). Although the court was aware that the victims knew about and preferred the treatment sought, the court gave no affirmative consideration to their opinion when pronouncing sentence.

The statutory framework further specifies:

Additionally, 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).

The sole factor motivating the court to reject the proposed agreed SSOSA was the court's belief that the sentence was too lenient. The court agreed it was "sure" White would benefit from treatment. 8/13/10RP 7. Although the court noted that the crimes

were “really heinous” and it disliked the fact that White had initially denied his guilt, the court was “impressed” that White had changed course, admitted his involvement, and had been engaging in treatment . 8/13/10RP 7-8. Id. at 8. But in this case, the court ruled, the SSOSA is “clearly too lenient.” Id. “For that reason,” and only citing that reason, the court imposed a prison term of 131 months on each offense as a minimum, with a lifetime maximum. Id.

The court wholly ignored the remaining aspects of the statute. It did not weigh the victims’ opinion favoring the SSOSA, to which it was supposed to give great weight under RCW 9.94A.670(4). It believed White would benefit from treatment and there were no claims presented of other victims in need of protection or favoring added punishment for White.

The court’s “clearly too lenient” finding was most likely based on the court’s disagreement with the term of treatment required by the legislature. At the first sentencing hearing, the court questioned why the SSOSA would be imposed for three years, rather than five years, based on a change in the law that was effective July 1, 2005. 7/23/10RP 12-13; CP 35. White was charged with two counts, both spanning the period from May 5,

2004, to August 8, 2005. CP 1-2. Defense counsel explained that there was no evidence that the offenses occurred after June 30, 2005, when the law changed, and the charging period should not have reflected that broader period. 7/23/10RP 13-14. The prosecution explained that when the charging period spans a change in the law, the accused person is sentenced under the law in effect at the time of the offense, with principles of lenity favoring the more lenient sentence. 7/23/10RP 13.¹ The court requested more information before it would impose a SSOSA and continued the sentencing hearing. *Id.* at 15.

At the second sentencing hearing, the court expressed less doubt about whether White was committed to his treatment and actively engaging in it. White explained that he had been “ashamed and afraid” when he started treatment, and it was hard to admit what he had done. 8/13/10RP 6-7. He assured the court he no longer harbored reservations about it and was devoted to “preventing something like this from ever happening again.” 8/13/10RP 6-7. The court seemed swayed by the assurances it

¹ See *In re Personal Restraint of Hartzell*, 108 Wn.App. 934, 945, 33 P.3d 1096 (2001) (“When the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed before the increase went into effect, the lesser sentence must be imposed.”).

received and stated it was “sure” White would benefit from treatment. 8/13/10RP 7. Although the court did not repeat its belief that White’s SSOSA should be five years, not three years, under the change in the statute, the court was plainly motivated by its disagreement with the term White would receive under the recommended SSOSA. The only reason the court gave for refusing to impose the sentence was the length of the term imposed. 8/13/10RP 13.

The statute mandates that the court “shall” consider factors including the benefit of treatment to the offender and the community, the victim’s opinion, the lack of additional victims, the offender’s amenability to treatment, and the risk the offender would present. RCW 9.94A.670. Here the trial court never properly identified any aspects of the statute beyond the benefit from treatment as weighed against the leniency of the sentence. It ignored the various statutory factors as well as the evidence before it.

But beyond its failure to even consider the relevant facts, the court’s ruling does not apply the facts to the critical question of whether White and the community benefit from a SSOSA. By focusing on the punishment it wanted White to receive, rather than

upon the potential benefit to be derived from a SSOSA, the court applied the incorrect legal standard. Its failure to acknowledge, weigh, and give consideration to each of the statutory criteria, when almost every one of those criteria favored the imposition of the requested and recommended SSOSA, constitutes an abuse of discretion.

The trial court abused its discretion in denying a SSOSA in this case.

2. THE CONDITIONS OF COMMUNITY
CUSTODY RESTRICTING INTERNET USE,
ALCOHOL POSSESSION, AND REQUIRING
NON-CRIME RELATED RESTITUTION ARE
NOT AUTHORIZED BY LAW

There was no evidence presented at trial or sentencing that demonstrated that internet access or alcohol use contributed to White's involvement in his offenses or required treatment. The trial court nonetheless entered a special condition of community custody forbidding White from accessing the internet absent DOC approval and prohibited him from possessing alcohol. It also ordered him to pay counseling costs to unnamed victims or relatives of victims without regard to whether they are crime-

related. These conditions are not authorized by the sentencing statutes.

a. The SRA authorizes the sentencing court to require an offender to comply with sentencing conditions that are crime-related. When a person is convicted of a felony, the sentencing court must impose punishment as authorized by the Sentencing Reform Act (SRA). Former RCW 9.94A.505 (effective until August 1, 2009); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). White was convicted of two offenses occurring during the time period of May 2004 until August 8, 2005.

In this case, former RCW 9.94A.505 directed the sentencing court to impose a standard range sentence and community custody. Former RCW 9.94A.505(2)(a)(i), (ii) (effective until August 1, 2009) (2004); Former RCW 9.94A.505(2)(a)(i), (iii) (2005). Because White was convicted of offenses classified as sex offenses, he was subject to a term of community custody under the

conditions authorized in RCW 9.94A.700(4), (5). Former RCW 9.94A.030(42) (effective until July 1, 2007), Former RCW 9.94A.710 (effective until August 1, 2009); Former RCW 9.94A.715 (2004).

Former RCW 9.94A.700(4) sets forth the mandatory standard conditions of community custody, such as reporting to the Department of Corrections (DOC). In addition, the court may order special discretionary conditions set forth at RCW 9.94A.700(5), such as having no contact with the crime victim or a class of individuals, participating in crime-related treatment or counseling, not consuming alcohol, or other “crime-related prohibitions.”² State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). In addition, former RCW 9.94A.505(8) authorizes the sentencing court to impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” Former RCW 9.94A.030(13) (2008).

² Former RCW 9.94A.715(2)(a) permits the court to require the defendant, as a condition of community custody, to participate in rehabilitative programs or other affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Logically, the burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

Here, several of the conditions of community custody imposed by the sentencing court are not crime-related and should be stricken. Erroneous sentences may be challenged for the first time on appeal, so White may challenge conditions of community custody even if he did not pose an objection in the trial court. Bahl, 164 Wn.2d at 744-45; Ford, 137 Wn.2d at 477.

b. The court lacked authority to prohibit White from accessing the internet. When use of the internet does not contribute to a crime, the court may not restrict internet access as a sentencing condition. State v. O'Cain, 144 Wn.App. 772, 775, 184 P.3d 1262 (2008). In O'Cain, the defendant was convicted of rape,

but that offense bore no direct relationship to the defendant's use of the internet. Id. This Court struck the sentencing court's imposition of a community custody condition prohibiting unapproved use of the internet because it was not crime-related, and the controlling statute permits the court to impose only crime-related prohibitions. Id. (citing Former RCW 9.94A.700(5)(e)).

O'Cain dictates the same result here. Like O'Cain, the record contains no allegations that White used the internet for any purpose to commit or in relation to committing the charged crimes. 144 Wn.App.at 775. The trial court made no finding that the internet contributed to the crime. Id. The prohibition on accessing the internet without preapproval is not crime-related, is not limited to restrictions required as part of treatment, and it exceeds the court's sentencing authority. Id. It should be stricken.

c. The sentencing court lacked authority to enter orders forbidding White from possessing, consuming or acquiring alcohol, from entering an establishment where alcohol is the primary commodity sold. The court ordered White not to "purchase, possess, or use alcohol" and to submit to testing and searches to monitor compliance. The court did not find and the State did not assert the basis for the recommendation.

There was no evidence in the charging documents that White was under the influence of alcohol during the offenses. Although White conceded drugs had a negative impact on his life, he offered that assessment in the course of a long list of his efforts to rectify any possible cause of his negative behavior. 8/13/10RP 6.

A similar issue was before the federal appellate court in United States v. Betts, 511 F.3d 872 (9th Cir. 2007). There, a defendant sentenced for conspiracy was ordered to abstain from illicit drugs and alcohol as a condition of supervised release. Id. at 874, 877. There was, however, nothing in the record to suggest alcohol played any role in the defendant's crime or that he had any past problems with alcohol. Id. at 878. The trial court did not believe the defendant had an alcohol problem, but imposed the condition as part of his routine, finding the defendant had the burden of convincing the court that the discretionary condition was not required. Id. at 880.

The Betts Court found the condition was improper because the government did not meet its burden of demonstrating prohibiting the defendant from consuming alcohol was appropriate in his individual case, as the condition did not meet the statutory

goals of rehabilitation, protection of the public, or deterrence of future criminal behavior. Betts, 511 F.3d at 878, 880.

Moderate consumption of alcohol does not rise to the dignity of our sacred liberties, such as freedom of speech, but the freedom to drink a beer while sitting in a recliner and watching a football game is nevertheless a liberty people have, and it is probable exercised by more people than the liberty to publish a political opinion. Liberties can be taken away during supervised release to deter crime, protect the public, and provide correctional treatment, but that is not why it was taken away in this case.

Id.

The SRA provides even more limited power to the sentencing court to prohibit conduct as a condition of community custody than does the federal statute at issue in Betts. In Washington, prohibitions must be crime-related, although affirmative conduct may be imposed as needed for rehabilitation or community protection. Former RCW 9.94A.715(2)(a). As this Court explained in State v. Jones, 118 Wn.App. 199, 204, 76 P.3d 258 (2003), it is error to mandate alcohol counseling without evidence to indicate the requirement of alcohol counseling was crime related. Likewise, the prohibition on use, possession, or purchase of alcohol, subject to mandatory searches of private property, is not crime related.

There is no indication or finding that alcohol played a part in the offenses White committed in 2004 or 2005. Thus, the conditions of community custody forbidding him from purchasing, possessing or using alcohol and requiring him to submit to bodily intrusions and property searches for the purpose of ascertaining his alcohol use is not authorized by the SRA.

d. The sentencing court may not order DOC to circumvent the restitution statute. RCW 9.94A.753 sets forth the court's authority to order restitution as part of a sentence for a criminal offense. State v. Davison, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Whether a trial court exceeded its statutory authority is reviewed de novo. State v. Murray, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003).

In any case, restitution must be related to and caused by the crime of conviction. State v. Kinneman, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004). Restitution must be ordered within 180 days of sentencing. RCW 9.94A.753(1). The court may not simply order the defendant to pay whatever costs are later asserted without trying to ascertain those costs within 180 days of the sentence. State v. Burns, __Wn.App. __, 2010 WL 5141283, *2 (Dec. 20, 2010).

Furthermore, the sentencing court has narrowly limited authority to order counseling costs: “Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense.” RCW 9.94A.753. It allows restitution for victims, not for any relatives of the victim.

Here, the court imposed as condition of community custody that White must “pay for counseling costs for victims and their families.” CP46. This condition is far broader than the court’s restitution authority and is not related to or constrained by the court’s restitution order. See State v. Woods, 90 Wn.App. 904, 907, 953 P.2d 834 (1998) (causal relationship required between injury and crime for restitution). There is no statutory authority for DOC to create its own restitution scheme or to order restitution for counseling not reasonably related to the offense of conviction.

e. This Court should strike the unauthorized conditions of community custody. The conditions of community custody prohibiting White from internet access, purchasing, consuming or possessing alcohol, and paying undetermined counseling costs, are not reasonably related to his offense of conviction and are not authorized by statute. This Court should

vacate the portions of the Judgment and Sentence requiring White to comply with these unauthorized conditions of community custody that he (1) not use the internet without prior approval, and (2) not purchase, possess or use any alcohol. State v. Riles, 135 Wn.2d 326, 353-53, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense and therefore not authorized by statute); O'Cain, 144 Wn.App. at 775 (same).

E. CONCLUSION.

For the reasons stated above, Mr. White respectfully asks this Court to remand his case for a new sentencing hearing, where the court fairly evaluates his eligibility for a SSOSA and imposes properly crime-related sentencing conditions.

DATED this 31st day of January 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
)
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)
 Appellant.)

NO. 66004-7-I

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DIVISION ONE

JAN 31 2011

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2011, 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:

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