

66004-7

66004-7

NO. 66004-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GILBERT WHITE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Is the sentencing court required to follow an agreed recommendation, or is the Court entitled to exercise its discretion independently when imposing a sentence?

2. Whether some conditions of community custody should be stricken because they are not crime related?

B. STATEMENT OF THE CASE

For purposes of these pleadings, the State generally accepts the defendant's recitation of the procedural and substantive history of this matter with a couple of clarifications. First, the sentencing court never stated that the sole reason it refused to grant a SSOSA sentence was because it would be clearly too lenient, as the appellant's brief seems to suggest. Second, the two victims' position was not that they *preferred* a SSOSA sentence to a prison sentence as indicated in the appellant's brief. It was simply that they were willing to support a SSOSA to avoid being put through the trauma of testifying and enduring a full blown trial.

7/23/10RP 6.

C. ARGUMENT

1. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR A SSOSA.

A defendant is generally presumed to be given a standard range sentence. State v. Law, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). In situations where a defendant is eligible and requests a Special Sex Offender Sentencing Alternative, the court is obligated to determine whether such a sentence is appropriate. State v. Osman, 157 Wn.2d 474, 480, 139 P.3d 334 (2006).

RCW 9.94A.670(4) explains the procedure once a court determines a defendant is eligible for a SSOSA:

After receipt of the reports, 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 victims 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, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. . . . The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.

Whether the court imposes the alternative, however, is entirely within the trial court's discretion. State v. Ziegler, 60 Wn. App. 529, 534, 803 P.2d 1355, *review denied*, 116 Wn.2d 1029 (1991); State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). This discretion cannot be reversed absent a manifest abuse of discretion. State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992).

As established by the record, the sentencing court did very carefully consider a SSOSA - in fact, the Court permitted a continuance for White to present additional information or argument as to why a SSOSA would be appropriate. 7/23/10RP 14-16. On July 23, 2010, at the first scheduled sentencing hearing, the Court expressed a number of reasons why it was reluctant to impose a SSOSA sentence. Among the things the Court was concerned about were the fact that recent to the time of sentencing, White was very guarded with his treatment provider, refused to disclose certain pertinent details, and the fact that he constantly minimized his behaviors. 7/23/10RP 9. He demonstrated a lack of remorse, and failed to acknowledge the impact his crimes had on his victims. 7/23/10RP 9. Clearly the Court was considering whether White would be amenable to treatment, and what risk White would pose to the community and other potential victims in light of his

demonstrated attitude. Considering the entire record, it is inaccurate for White to argue that the only factor the Court considered was the fact that the sentence was too lenient.

At the second portion of the sentencing hearing that was held on August 13, 2010, the Court permitted further argument from White's counsel, and gave White the opportunity to address the court. The Court acted well within its discretion when it declined to impose a SSOSA sentence. Though she may not have expressly stated which factors she was addressing in declining to impose the SSOSA, the reasons stated obviously take into consideration the factors required. In addition to the comments from the July 23, 2010 hearing, the Court went on to state that White's blaming of the victims instead of accepting accountability on his own was of concern. 8/13/10RP 7-8. Further, that White was not engaging in treatment. 8/13/10RP 8. These concerns again speak to White's amenability to treatment and the risk he posed to the community. These considerations, together with the Court's finding that the SSOSA sentence would be too lenient in light of the extent and circumstances of the offense, demonstrated an appropriate exercise of discretion by the sentencing court.

2. THE STATE AGREES THAT SOME CONDITIONS OF COMMUNITY CUSTODY SHOULD BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.

White claims that the trial court exceeded its statutory authority in imposing conditions of community custody prohibiting the possession or purchase of alcohol and prohibiting use of the internet. The State agrees that these particular conditions should be stricken from White's judgment and sentence because they are not crime-related. Further, White claims the condition of paying for counseling costs for victims and their families is not an appropriate condition of community custody. The State agrees this condition is properly addressed with a restitution order, not as a condition of community custody.

First, as to the conditions of community custody prohibiting White from purchasing or possessing alcohol, the State agrees that these prohibitions are also not crime-related, as there is no evidence that White was using alcohol at the time of the offenses. The sentencing court is expressly authorized to order the defendant not to consume alcohol. Former RCW 9.94A.700(5)(d). Moreover, the court may impose monitoring conditions, such as alcohol and drug testing, to assure the offender's compliance with its orders.

See State v. Riles, 135 Wn.2d 326, 342, 957 P.2d 655 (1998).

However, a sentencing court's order prohibiting the purchase and possession of alcohol is not valid in the absence of evidence that alcohol use was related to the defendant's crimes. See State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). Therefore, White is correct that the trial court lacked the statutory authority to order these conditions in this case. As a result, condition number 23 on Appendix H of White's judgment and sentence should be modified to strike the words "purchase, possess or," while leaving the word "use" as written in accordance with the applicable statute. CP 46.

Second, there is no indication that usage of the internet contributed to the commission of White's offenses. Therefore, condition number 24 on Appendix H of White's judgment and sentence should be stricken. CP 46.

Lastly, payment of counseling costs for the victim are properly addressed with a restitution request instead of a condition of community custody and condition number 26 of White's judgment and sentence can be stricken. CP 46.

D. CONCLUSION

Nothing in the record suggests that the Court did not consider the required factors before declining to impose the SSOSA sentence. On the contrary, the court gave great consideration to the factors laid out in RCW 9.94A.670. The fact that the Court ultimately disagreed with the opinion that the defendant should be given a SSOSA sentence is not an abuse of discretion. Some of the conditions that are not crime related that were imposed by the sentencing court should be stricken from the conditions of community custody.

DATED this 17 day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GILBERT WHITE, Cause No. 66004-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Holly L Gilmore
Name Holly Gilmore
Done in Kent, Washington

3/21/2011
Date

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