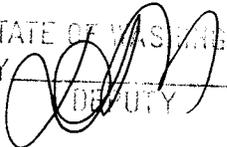


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 36999-1-II

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

DON WESLEY WINTON, APPELLANT,

V.

STATE OF WASHINGTON, RESPONDENT.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The trial court committed error, in violation of the “real facts” doctrine set forth in RCW 9.94A.530(2), by reading and considering portions of victim’s impact statements that referred to uncharged criminal acts involving people and acts other than those which the defendant admitted to in his plea of guilty.

ASSIGNMENT OF ERROR NO. 2

The trial court erred in failing to insure Mr. Winton received due process in his sentencing hearing and by failing to hold a hearing on the admissibility of evidence of uncharged criminal acts

ASSIGNMENT OF ERROR NO. 3

The trial court erred in failing to impose a SSOSA sentence on Mr. Winton.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Winton is entitled to a new sentencing hearing based upon the trial court considering evidence of uncharged criminal behavior involving non-charged “victims” in violation of the “real facts” doctrine set forth in RCW 9.94A.530(2). (Assignment of Error No. 1)
2. Whether Mr. Winton’s rights to Due Process and Confrontation at sentencing was denied. (Assignment of Error No. 2)
3. Whether the trial court abused its discretion in not

imposing a SSOSA sentence on Mr. Winton. (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

Don Winton, Appellant, plead guilty on July 5, 2007 to two counts of child molestation in the first degree involving Genna Dearing, his wife's niece, and one count child molestation in the third degree involving his step-daughter, Addi Dearing. Sentencing was originally scheduled on September 21, 2007 before the Honorable Roger L. Bennett. Prior to that time, an ex parte e-mail communication was forwarded to Judge Woolard of the Clark County Superior Court, who provided a copy to Judge Bennett. Judge Bennett, based upon the improper nature of the contact as well as content of the communication of the e-mail, recused himself, sealed the objected to email, and sent the matter to the Honorable Robert L. Harris for sentencing, which took place on October 23, 2007.

Prior to sentencing, Mr. Winton filed a Motion in Limine, seeking to preclude the State from introducing evidence that was not provided to the defendant prior to a sentencing hearing. In addition, the defense sought to have the court preclude the State or any of the proposed witnesses from introducing evidence outside the "Real Facts" doctrine. Mr. Winton also asked the State to disclose to the defendant and make available for interview, any individuals that would or might be testifying at sentencing. Winton also sought to obtain copies of statements regarding the proposed subject matter of the statements of any witnesses at sentencing (CP 55).

At sentencing, the State indicated that an attorney, Todd Pascoe, had been hired to represent “all victims” (RP. 4, Line 1-2). The State represented that Danielle Winton, Mr. Winton’s soon to be ex-wife, was “authorized to speak on behalf of 10 people whom she alleges are victims” (RP. 5, Line 7-10). The defense objected. The defense further took exception to the fact that it had not been provided the “victim impact statement list” until approximately 5 minutes before the start of the sentencing hearing.¹ Mr. Winton also objected to consideration of any facts outside the “real facts” doctrine (RP 5, Line 16-24) and to the State not providing to the defense a copy of any “victim impact statement” so as to provide notice to Mr. Winton as to what was being offered and to preclude the possibility that facts would not be presented to the court outside the “real facts” doctrine (RP 6, Line 1-6).

Despite Mr. Winton’s objections that the State had violated previous Orders to Disclose who would be testifying at sentencing as well as the contents the proposed witnesses statements, the trial court allowed the following individuals to present oral and written statements to the court: Addi Dearing (Count 3); Genna Dearing (Counts 1 and 2); Danielle Winton (mother of Addi and Aunt of Genna); and 12 year old Alexandre Winton, Mr. Winton’s biological son. Alexandre was not a victim of any criminal acts by Mr. Winton, but was nonetheless allowed to

¹ CP 57, entitled “Victim Impact Statement List,” attempted to put before the court several alleged victims of sexual abuse by Mr. Winton, including Renee Pratt as an uncharged rape victim, and Cameron Winton, his son, as an uncharged rape victim.

speak to the court in a statement read to the court by Mr. Winton's son from a prior marriage, Cameron Winton, who claimed that he too was sexually abused by Mr. Winton. (RP.10, Line 17-19; RP. 12, Line 8-9).²

Despite this, the State continued to attempt to introduce evidence of other uncharged acts and "additional victims" (RP 26, Line 1-2).

The court then allowed Sharon Ensley, a family friend, to read into the record Addi Dearing's written statement (CP 63). The defense objected to consideration of portions of the document based upon the "real facts" doctrine (RP 41, Line 17-20). Mr. Winton further objected to not being provided a copy of the statement prior to sentencing (RP 42, Line 1-10) and requested that the court direct the State to provide a copy of any victim's impact statement before it was read in to the record. The trial court denied the request (RP 46, Line 11-25).

Genna Dearing next spoke, saying she was "not Mr. Winton's first victim" and stated to the court that her cousins "Addi and Cameron, 23, have also disclosed" sexual abuse by Don Winton. The defense objected and moved to strike any reference or consideration of Cameron, as he was not charged and the defense had not been provided any notice of his claim of abuse. The court allowed her to proceed, indicating "it's the victim statement" (RP 50, Line 24-25; RP 51, Line 1-5). Genna Dearing's written statement also stated that her cousin Cameron Winton

²

Cameron Winton is Mr. Winton's natural son by another marriage, Alexandre Winton is his son by marriage to Danielle Winton (RP 52, Line 21-25; RP 53, Line 1-4).

had had been sexually abused by Mr. Winton and that she believed that Mr. Winton was lying when he denied that he “sexually victimized others”. (CP 64, Page 4, Line 8-9).

As noted, and despite defense objection, Cameron Winton was then allowed to read into the record a statement from his step brother, Alexandre Winton, despite the fact that Alexandre was never sexually abused by Mr. Winton. The court instructed Cameron Winton to skip the second paragraph of Alexandre’s statement , starting with the words “I don’t” (CP 65, Page 1; RP 53, Line 16-19). It is clear that the court read and considered paragraph 2 of Alexandre’s statement, as it instructed Cameron Winton to skip reading that paragraph and proceed to the next paragraph. Paragraph 2 of Alexandre’s statement, CP 65, reads as follows:

“I’ve been asked to read Cameron’s statement, and I believe it is true. One day Cameron came to stay at our house for about 3 days and said that Don had abused him since he was 5 years old until he was 15 years old.”

Mr. Winton objected to the entire statement being read, but the trial court overruled, stating that “both boys, obviously when a family member is abused in the situation occurring, he also is a person who is a victim.”. The court noted that it “has a direct impact” (RP 55, Line 2-9).

The court then allowed Danielle Winton, over defense objections, to state that “CSW,” (her stepson Cameron) and Mr. Winton’s “biological son and victim, Cameron was 5, and for him the abuse had already begun.”. (RP 57, Line 14-20). She stated that he reported “abuse

spanning...nine years.” (RP 56, Line 1-22).

Danielle Winton continued to talk about facts outside the real facts of the case when she told the court that Mr. Winton “savagely raped and molested” his own “biological son” who maintained the abuse in “secrecy for nine years”. (RP 59, Line 23-25; RP 60, Line 1-3).

The trial court directed Mrs. Winton to not read aloud a portion of her prepared written statement from Lines 12 -20 (RP 62, Line 5-14), in an apparent attempt to keep her from continuing to talk aloud about how Cameron had been sexually abused by Mr. Winton. This omitted passage, which the court clearly read and considered, reads as follows:

“Don’s failure to disclose his third victim, his own biological son Cameron, to any of his professional evaluators and handlers, in combination of his reported ability to pass a polygraph denying the existence of any other victims, and specifically no male victims should give the court pause. The court should also consider his post-being-caught-aspiration to continue his relationship with our 12-year-old son. It should not escape the observation of this court that our son fits the age group and close relative category of each of the defendant’s previous victims.” (CP 66, Page 5).

Seeing there was little risk in continuing to inject evidence of uncharged “victims”, Danielle Winton continued, indicating that Mr. Winton had lied about “having other victims and the existence of male victims” RP 66, Line 6-7) and that Mr. Winton had “caused substantial bodily harm to his son Cameron” (RP 66, Line 10-11).

Mr. Winton presented the reports and testimony of three qualified sex abuse treatment providers, each of whom recommended that Mr. Winton be sentenced under the Special Sex Offender Sentencing

Alternative (SSOSA) statute, RCW 9.94A.670, and indicated that Mr. Winton was an ideal candidate for this program. (See generally RP 76-112).

The trial court specifically found that Mr. Winton is a person who is “amenable to treatment and that Mr. Winton represented a person who had a “minimal likelihood of reoccurrence” if he received treatment.

Nonetheless, the trial court rejected Mr. Winton’s request that he be granted the SSOSA option, noting that the punishment available under SSOSA was “too lenient” given the long duration of abuse of the children (RP 132, Line 10-25; RP 133, Line 1-4).

The court sentenced Mr. Winton to a standard range sentence of 98 months on Count 1, 98 months to life on Count 2, and 44 months on Count 3 (CP 74, Page 6-7) and community custody. This appeal followed.

IV. ARGUMENT

ISSUE NO. 1

Mr. Winton is entitled to a new sentencing hearing based upon the trial court allowing in and considering evidence of uncharged criminal behavior involving uncharged “victims” in violation of the “real facts” doctrine as set forth in RCW 9.94A.530(2).

The trial court’s consideration of evidence of other alleged victims violates the statutory provisions of RCW 9.94A.530(2), which states:

In determining *any sentence* other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proved pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information

stated in the pre-sentence reports. When the defendant disputes material facts, the court must either *not consider the fact or grant an evidentiary hearing on the point.* (Emphasis added)

While RCW 9.94A.585 provides that a sentence within the standard sentence range “shall not be appealed,” case law has long recognized that appellate review is available to correct legal errors in sentencing or abuses of discretion in determining which sentence applies. *State v. Williams*, 149 Wn.2d 143, 147 (2003). A defendant may appeal a standard range sentence if the sentencing court fails to comply with a procedural requirements of RCW 9.94A, the Sentencing Reform Act, (SRA) or the defendant raises a constitutional issue. The latter exception is said to alleviate concerns that the SRA does not override Article 1, Section 22 of the Washington State Constitution which provides that in “criminal prosecutions the accused shall have...the right to appeal in all cases.”.

A person is not “precluded from challenging on appeal, the procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 183 (1986). In a procedural appeal, it must be shown that the court “had a duty to follow some specific procedure required by the SRA, and that the court failed to do so.” *State v. Mail*, 127 Wn.2d 707, 712 (1993). Specifically, the *Mail* Court noted at 713:

In order to bypass the prohibition on appeals found at RCW 9.94A. 210(1), this petitioner must show either that the trial

court refused to consider information mandated by RCW 9.94A.110, or that the petitioner timely and specifically objected to consideration of certain information and that no evidentiary hearing was held.

Additionally, where the issue is whether the trial court correctly sentenced an individual to a standard range sentence when alternative sentences such as SSOSA are available, review on appeal is permitted as the issue involves one of statutory construction, not the amount of time one serves. *State v. Mail, supra*, at 713, fn4; *State v. Henderson*, 99 Wn.App. 369 (2000); *State v. Onefrey*, 119 Wn.2d 572, 574 n. 1 (1992).

The “real facts” doctrine set out in RCW 9.94A.530(2) requires that the trial court only consider a defendant's current conviction, criminal history and circumstances of the crime in determining the appropriate sentence. *State v. Cannon*, 130 Wn.2d 313, 331 (1996).

State v. Houf, 120 Wn.2d 327,334 (1992) states what is not permitted under the “real facts: doctrine:

The “real facts” doctrine does not allow facts which establish the elements of crimes completely unconnected to those charged to be considered in meting out an exceptional sentence. Moreover, the 1986 amendments to the SRA indicate that any aggravating factors considered in imposing an exceptional sentence should be related to the crime with which the defendant is charged.

While *State v. Houf, supra*, discusses the “real facts” doctrine in terms of exceptional sentences, this reasoning is equally applicable to standard range sentence cases. See also *State v. Tierney*, 74 Wn.App. 346, 352 (1994) (“real facts” doctrine bars facts “wholly unrelated to current

offense”). In this case, the trial court clearly went beyond the directive set forth in the “real facts” statute by allowing the victims, either personally or by proxy, to present evidence of other uncharged criminal acts involving individuals who were not victims in the charges to which Mr. Winton plead guilty.

The record shows that the trial court was impacted and moved by the victims’ statements.³ Furthermore, the trial court knew of, heard of, and read about evidence of uncharged criminal activity allegedly committed by Mr. Winton against others, including his own son, who were not charged in any action, let alone the one in which Mr. Winton admitted guilt. Despite the directive of *State v. Mail, supra*, the trial court not give Mr. Winton an evidentiary hearing to deal with these untimely revealed and unsubstantiated allegations. While RCW 9.94A.500(1) provides that the trial court “shall consider”... “any victim impact statement” and “allow arguments from...the victim”, the “real facts” doctrine precludes the very type of evidence the state presented.

The State argued that RCW 9.94A.670(4), the SSOSA statute, allows evidence of uncharged criminal activity allegedly committed by Mr. Winton with other” victims” to be admitted at sentencing even if not admitted to by the defendant. RCW 9.94A.670(4) provides as follows:

³ The trial judge noted this was the first major case it had heard since the SSOSA statute was amended in 2006, directing the trial court to give “great weight” to the victim’s opinion in deciding whether to allow a defendant into SSOSA. RP.129 Line 14-25.

After receipt of the reports, the court shall consider whether the offender and the community will benefit from the 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 a similar age and circumstances of 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...

It would be incongruous that one provision within the SRA would allow introduction of evidence of uncharged criminal activity under RCW 9.94A.670(4) when it is expressly precluded by another portion of the SRA, namely RCW 9.94A.530(2). Conflicting statutes will, if possible, be read so as give each statute a reading that would not render it absurd or meaningless. *State v. J.P.*, 149 Wn.2d 444, 450 (2003). Given the apparent conflict between the provisions of these two statutes, Mr. Winton submits that limits need to be placed upon the type of information a court may consider in SSOSA sentencing hearings in order to give effect to the "real facts" doctrine. A reading of the two statutes that renders each meaningful would be that a court should only consider whether there is more than one "victim" in the case to which the offender plead guilty. To allow the expanded reading of RCW 9.94A.670(4) advanced by the state would truly render the prohibition set forth in RCW 9.94A.530(2) meaningless in all sex cases when SSOSA is at issue.

While the two statutes in question are not ambiguous on their faces, the interpretation of each, when read in conjunction with the other,

creates an ambiguity as to who is a “victim” and what evidence of uncharged criminal behavior might be introduced at a sentencing hearing where SSOSA is being sought by an accused. If there exists some ambiguity in a statute, the “rule of lenity” requires that the interpretation of a statute most favorable to the defendant is to be given. *State v. Gore*, 101 Wn.2d 481, 486 (1984).

The failure of the trial court to follow the mandates of the “real facts” doctrine by excluding evidence of other “victims” and not having an evidentiary hearing to determine the existence of such “victims” requires that this matter be sent back for re-sentencing before another judge, with directions that at sentencing all uncharged criminal activity be excluded, regardless of whether the defendant moves to be granted SSOSA.

ISSUE NO. 2

Mr. Winton’s right to Due Process and Confrontation at sentencing was denied when the trial court allowed into evidence uncharged criminal behavior against people other than those to which Mr. Winton admitted to in his plea of guilty.

Article I, Section 3 of the Washington State Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.”. The Fifth Amendment of the United States Constitution, made applicable to states through the Fourteenth Amendment of the United States Constitution, similarly provides: “No person shall...be deprived of life, liberty, or property, without due process of law.”.

Mr. Winton was denied due process at sentencing in a number of ways. First, the State failed to provide, at any time, let alone prior to the sentencing hearing, any so-called victim's impact statements, despite previous orders of the court to do so, and inform Mr. Winton as to what those speaking at sentencing would be saying. The end result was, in essence, a free-for-all in which Mr. Winton was kept in the dark and forced to continually object to inadmissible evidence as it was revealed to the court.

Second, the trial court did little to insure that Mr. Winton was afforded an opportunity to rebut accusations of uncharged criminal activity by precluding inadmissible evidence, directing the State to provide copies of the statements read to the court, or by granting an evidentiary hearing on the same. Due process at sentencing requires, at a minimum, that a defendant be afforded the opportunity to review the evidence that will be presented and that the evidence presented is reliable. The "real facts" doctrine, set out in RCW 9.94A.530(2) sets forth the minimum process that is due, requiring the trial court not consider facts unless they are admitted by the defendant or proven at trial or at the sentencing hearing following an evidentiary hearing. *State v. Moro*, 117 Wn.App. 913, 920 (2003). A sentence which is based upon information that is false, unreliable, or is not supported by the record violates due process. *State v. Ford*, 137 Wn.2d 472, 481 (1999).

Mr. Winton was denied any opportunity to be informed before the hearing what any of the alleged “victims” would be saying, an occurrence that was orchestrated by the State’s refusal to provide this information in a timely manner. The following colloquies illustrate the total disregard shown by the State, and the trial court, to Mr. Winton’s right to be advised of the information that was being presented at the sentencing hearing:

Defense Counsel: I have not seen the written statement, so...

The Court: Okay RP 38, Line 10 (referring to Addi’s statement)

Defense Counsel: Your Honor, I’d ask that we be provided a copy of that and any others that are going to be read into the record, apparently today.

The Court: It’s filed.

Defense Counsel: Well, we’re supposed to receive these beforehand.

The Court: I’ve never received a victim’s impact statement beforehand in any sentencing.

Defense Counsel: I have.

The Court: I haven’t.

Defense Counsel: Well, I don’t even have a copy to follow like your honor does, so..

Prosecutor: Call the next witness?

The Court: Yes. RP 46, Line 11-25 (referring to Genna’s statement and any others to be introduced)

Defense Counsel: I don’t have what she’s gonna read, so I have to object for the record to anything outside..

The Court: All right, noted.

Defense Counsel: ... of the facts RP 56, L. 15-19.(Referring to Mrs. Winton’ statement as the mother and aunt of the victims.)

This disregard for Mr. Winton’s rights violated a fundamental tenet of due process, that is the right to be advised of what evidence will be presented, and the right to be meaningfully heard and defend against such information.

Third, by failing to hold an evidentiary hearing on the uncharged criminal acts, Mr. Winton's rights to confrontation was impaired or denied. Mr. Winton's rights to due process and confrontation were also violated when the trial court failed to hold an evidentiary hearing regarding uncharged criminal activity. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

Article I, Section 22 of the Washington State Constitution states:

In criminal prosecutions, the accused shall have the right to appear and defend in person or by counsel...to meet the witnesses against him face to face..

The confrontation clause applies to criminal prosecutions, including through sentencing. *State v. Abd-Rahmaan*, 154 Wn.2d 280, 288 (2005) (Due process in criminal prosecutions differs from post-conviction settings). In post conviction settings, due process includes the right to confront adverse witnesses unless the fact finder decides good cause exists to excuse live testimony. *State v. Nelson*, 103 Wn.2d 760, 763 (1985); *State v. Abd-Rahmaan*, *supra* at 290. Given that one who is on probation or parole, under diminished rights, still has a limited right to confrontation, it stands to reason that someone who is not yet sentenced enjoys this same, if not greater right to due process.

Lastly, Mr. Winton's sentencing proceeding was tainted by the trial court allowing into evidence the evidence of uncharged criminal acts and then denying SSOSA, in violation of the "appearance of fairness" doctrine.

The trial court was clearly apprised of the allegations of uncharged criminal acts attributed to Mr. Winton against other children. While the trial court does not say that it relied on this inadmissible evidence, the record is equally void of any reference that the trial court did not consider this information in deciding against SSOSA. The general tenor of this sentencing hearing leaves much to be desired in the way of appearing to be fair or comporting with the minimal requirements of due process. In this respect, the “appearance of fairness” doctrine was violated. This fact alone compels that this case be sent back for consideration by a new judge. “The law goes further than requiring an impartial judge, it also requires that the judge appear to be impartial”. *State v. Romano*, 34 Wn.App 567, 569 (1983) (Re-sentencing required even though judge acted in “forthright and open manner” when Judge contacted witnesses before sentencing)

The combined failure of the trial court to insure that the accused was given “victim” impact statements before or even during the hearing, the failure of the State to provide such evidence before and even during the hearing, and the failure to hold an evidentiary hearing at which Mr. Winton could test the disputed facts, led to a violation of Mr. Winton’s due process rights and his right to a fair hearing. The court in *State v. Ford*, *supra* at 484, emphasizes how the cumulative effect of these due process violations cannot be understated:

Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. Determinations regarding the severity of criminal sanctions are not

to be rendered in a cursory fashion. Sentencing courts require reliable facts and information. To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants and the public.

The manner in which Mr. Winton was sentenced in this case deprived him of due process. A new sentencing hearing is required.

ISSUE NO. 3

The trial court abused its discretion in denying Mr. Winton a SSOSA sentence under RCW, 9.94A.670.

A trial court has discretion as to whether to impose a SSOSA sentence. The failure of the trial court to impose a SSOSA sentence is reviewed under an abuse of discretion standard. A trial court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *State v. Osman*, 157 Wn.2d 474, 482 (2006); *State v. Onefrey*, 119 Wn.2d 572 (1992).

Mr. Winton submits the trial court denied SSOSA on an impermissible basis in two respects. First, the trial court admitted that it had in the past, denied SSOSA to anyone similarly situated as Mr. Winton.

I've tried to review in my mind similar cases, and historically where I've had a pattern of sexual abuse of more than one child over a long period of time, I've elected not to use SSOSA. I have sentenced to the Department of Institutions. Looking at this particular case, it appears it does fit the same pattern RP. 132, Line 7-13.

This pronouncement indicates that the trial court "categorically" denies SSOSA if there is more than one victim and it occurs over some unspecified period of time. Second, the trial court abused its discretion by

giving "great weight to the opinion of the victim." to the virtual exclusion of all other factors it appears. While acknowledging that there was little risk of re-offense, that Mr. Winton was amenable to treatment, and that both Mr. Winton and the community would benefit from a SSOSA option, the trial court instead considered whether granting SSOSA would be an "excessive rebuke to the children and the community" RP 132 Line.3-5.

This abuse of discretion was compounded by the fact that the trial court allowed those speaking at sentencing to introduce, continually over defense objections, evidence of uncharged criminal sexual abuse against other family members. Furthermore, the trial court does not indicate that it is limiting his assessment to deny SSOSA to only the two named victims, but uses the term "sexual abuse of more than one child over a long period of time" as a basis to deny SSOSA. This means that the trial court may well have considered the evidence of other uncharged acts in denying SSOSA, which is impermissible. Lastly, the trial court essentially ignored testimony of three well credentialed sex abuse therapists recommending that Mr. Winton, with no prior criminal history, be given SSOSA and instead solely focused on the wishes of the "victims"⁴ that Mr. Winton be

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Furthermore, the pre-sentence investigative report writer concurred that SSOSA was appropriate for Mr. Winton, but was recommending incarceration based upon the statutory directive to give "great weight to the opinion of any victim." Mr. Winton believes that the PSI writer should not be exercising his/her discretion based on statutory directives to the court, as the ultimate decision lies with the trial court. This attitude however is illustrative of the nature of the sentencing proceeding in this case. All concerned noted that the "great weight" language essentially overrode all other factors set forth in the SSOSA statute. RP 34, Line 24-25.

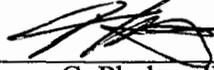
sent to prison. This decision, in the context of this hearing, was no doubt the result of the trial court feeling compelled to slavishly adhere to the statute's directive to give the opinion of the "victim" great weight.

V. CONCLUSION

The trial court's failure to adhere to the "real facts" doctrine alone compels reversal and re-sentencing before another judge. This statutory violation is compounded by the due process violations that occurred in this case due to the trial court not requiring the State to produce copies of any victim's impact statements, and the trial court's failure to hold an evidentiary hearing on any uncharged criminal acts involving uncharged "victims", and the wholesale denial of Mr. Winton's right to confrontation. Finally, the trial court's denial of SSOSA case was an abuse of discretion, given the overwhelming applicability of the statutory criteria mitigating in favor of SSOSA.

Mr. Winton requests that this court vacate the judgement and sentence and remand this case for sentencing before another judge with directions that evidence of any uncharged criminal acts be excluded from the sentencing hearing. Mr Winton further requests the State be ordered to produce, prior to the hearing, a list of witnesses it intends to call at sentencing, as well as a copy of all written statements or summaries of any oral statements that will be given by those witnesses.

Respectfully Submitted this 16th day of July, 2008.



Thomas C. Phelan WSB 11373
Attorney for Appellant

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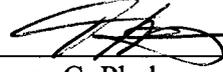
STATE OF WASHINGTON,)	No. 36999-1-II
)	
Respondent,)	CERTIFICATE OF
v.)	SERVICE
)	
DON WESLEY WINTON,)	
)	
Appellant.)	

I hereby certify that on July 16, 2008, I served Appellant's Brief on the Appellant, Don W. Winton and the State of Washington, a named party, by mailing a true copy thereof, via U.S. Mail, contained in a sealed envelope, addressed to each party at the addresses as follows:

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Signed at Vancouver, Washington this 16 day of July, 2008.



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