

No. 49232-6

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

STATE OF WASHINGTON, Respondent

v.

JORDAN PITTMAN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF COWLITZ COUNTY
THE HONORABLE JUDGE MICHAEL EVANS

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred and abused its discretion when it declined to grant Mr. Pittman a Special Sex Offender Sentencing Alternative. (SSOSA).
- B. The judgment and sentence incorrectly notes the defendant stipulated to an exceptional sentence.
- C. The trial court exceeded its statutory authority when it imposed a 12-month enhancement.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Did the sentencing court abuse its discretion in denying a SSOSA?
- B. Did the judgment and sentence erroneously state that the defendant stipulated to an exceptional sentence?
- C. Did the trial court exceed its statutory authority when it imposed a 12 month enhancement for a crime that is specifically not eligible for the enhancement?

II. STATEMENT OF FACTS

Nineteen-year-old Jordan Pittman (Pittman) lived with his mother and worked with his older brother installing siding on homes. 3/2/16 RP 79; 251. He was arrested on May 18, 2015, and

Cowlitz County prosecutors charged him by second amended information with two counts of rape of a child first degree, one count of child molestation first degree, one count of possessing depictions of minors engaged in sexually explicit conduct second degree. CP 35-37. The state gave notice of intent to seek an exceptional sentence on three bases: use of position of trust, multiple current offenses, and destructive and foreseeable impact on persons other than the victim. CP 2-3;36. The information also alleged that possession of depictions of minors was committed with sexual motivation. CP 36. Mr. Pittman remained in the community on bail without incident. 3/22/16 RP 68. The matter proceeded to a bench trial. CP 38.

Trial

Between January 1, 2015 and May 18, 2015, Pittman spent several weekends caring for his nieces, seven-year old J.P. and six-year old R.P. 3/2/16 RP 79-81;209. During some of the visits, Pittman used his cell phone to photograph the girls, with and without underwear, focusing on the genital area and their bottoms. 3/2/16 RP 106-109; 161-162;235;238-39;243.

Pittman was arrested, voluntarily spoke with Detective Stumph and gave permission for a cell phone search. 3/2/16 RP 208;236-237.

Pittman told Stumph that on one Saturday J.P. found a sex toy vibrator in his nightstand. 3/2/16 RP 174. He said that she had placed it on her own belly, and it slipped into her vaginal area and then she rolled over and put it on her "butt crack". 3/2/16 RP 172. He said after it fell off, he put it back on for 30 seconds to a minute, but did not put it inside of her. 3/2/16 RP 173. He took it back and returned it to the nightstand drawer. 3/2/16 RP 174. He threw it in the garbage shortly after that. 3/2/16 RP 181.

In May 2015, J.P. told her stepmother that Pittman had touched her private area with a "buzzy thing." 3/2/16 RP 83.

J.P. testified that while she lay clothed on the bed, Pittman placed a "buzzy thing" on or near her "privacy" and it hurt. 3/2/16 RP 54-55; 57;60. She said he did not put his finger inside of her "privacy" and he did nothing to her "bottom". 3/2/16 RP 60.

The elementary school nursing assistant testified that in spring of 2015, J.P. came into the office complaining of not feeling well. After J.P. used the bathroom she asked the nurse if it was normal to have blood in her stool. 3/2/16 RP 123;125. The

assistant did not check the toilet to determine if there was any blood but notified J.P.'s father of the incident. 3/2/16 RP 128.

Forensic interviewer Jeannie Belcoe testified that J.P. said , Mr. Pittman used a vibrating toy on her "bottom" and vaginal area once. 3/3/16 RP 34;59. She reported that he pushed the vibrator into her bottom, it hurt, and later she wiped away a little blood. 3/3/16 RP 64;69. In a second interview, conducted on June 2, J.P. said that Mr. Pittman urinated in her mouth¹. 3/3/16 RP 75;86;138.

Dr. Kim Copeland, a pediatrician, examined J.P. on June 8th, after her second interview. 3/3/16 RP 99. She testified that during the examination J.P. told her that Pittman had touched the inside of her vaginal area with his fingers. 3/3/16 RP 103.

The court found Pittman not guilty of Count IV, rape of a child, but guilty of Count I, rape of a child and Count III, possession of depictions of a minor engaged in sexually explicit conduct second degree, with sexual motivation. CP 76. Count II was dismissed. The court entered findings of fact and conclusions of

¹ The court later determined that because there were concerns that J.P.'s parents had coached J.P. or exerted undue influence between the time of the first and second interviews, and the court believed the relative inexperience of the interviewer led to possible unduly suggestive questions, the court could not find beyond a reasonable doubt that the incident discussed in that interview qualified as rape of a child and dismissed Count IV. 3/22/16 RP 67.

law. CP 72-77. The court found that Pittman abused a position of trust but did not find a destructive and foreseeable impact on others. 3/22/16 RP 61.

Sentencing

DOC completed a pre-sentence investigation report noting Pittman had worked for several months part-time with a local construction company installing siding. CP 44. He did not drink alcohol or use drugs and had no previous experience with the criminal justice system. CP 4;44-45. Pittman's parents kept him somewhat socially isolated, but he had one friend he had maintained contact with after high school. CP 45.

Although Pittman admitted to his conduct and expressed remorse for it, the DOC PSI concluded that he had "not accepted responsibility for his criminal behavior." CP 45. At sentencing, defense counsel told the court the DOC evaluator told him that because the family was against a SSOSA, the evaluator simply would not recommend it. 6/16/16 RP 109.

The court was also presented with a psychosexual evaluation, which included information about Pittman's childhood, polygraph, risk level, and recommendations for treatment in the community. CP 50-70.

The report informed the court that an older stepbrother sexually abused Pittman between the ages of 3 and 8 years old. RP 56-58. CPS advised his mother to remove him from the environment, which she did off and on for many years. CP 56-57.

Mr. Pittman's sexual history polygraph indicated that he was truthful and not attempting deception. The evaluator concluded that Mr. Pittman had taken responsibility for his offenses. CP 68. He was rated as a low to moderate risk category on the STATIC 99R and STABLE 2007; statistically, this meant the potential for sexual recidivism over the next four years was 6.4%. CP 68. He had no other victims and was not predatory. CP 68.

Mr. Pittman wanted to participate in sex offender treatment and the evaluator determined that Pittman's risk level could be further reduced through community based sex offender treatment and DOC supervision. CP 68. The evaluator recommended a 36-month treatment program, which included group and individual therapy and strict oversight. CP 69. The evaluator opined that the chances of successfully completing treatment could be enhanced if

Mr. Pittman could reside with his mother, who had already agreed to help him get a job and assist in paying for treatment². CP 68.

At sentencing, Pittman requested a special sex offender sentencing alternative (SSOA). 6/16/16 RP 106. Defense counsel pointed out to the court that Mr. Pittman was only twenty years old, and facing a potential lifetime in prison. 6/16/16 RP 108-109. He reiterated for the court that Pittman had admitted his behavior and taken responsibility for it. 6/16/16 RP 110. Counsel stated that the quality of treatment available in the community was of much higher quality than the rudimentary sex offender treatment available in prison and could offer Pittman a future. 6/16/16 RP 108.

While acknowledging that he could succeed if the proper conditions were in place, the court declined to impose a SSOSA. 6/16/16 RP 116-117. The court stated:

Sex crimes, and the things –the thoughts and actions that lead up to those are deep-seated and deep-rooted. For a person to make changes and to go from that takes a lifetime of work. A lifetime. It doesn't happen overnight; it doesn't happen in five years, it's a lifetime of work....

6/16/16 RP 116.

² The evaluator considered Pittman a “marginal candidate” for treatment based on the fact that he did not have a positive supportive environment and was unemployed. CP 68.

And I think that here, notwithstanding Mr. Pittman's expression of sorrow and regret, and taking the responsibility for expressing sorrow for breaking trust and hoping for forgiveness, I'm not convinced that the - - SSOSA is the right thing, so I'm not going to grant that. I'm not going to grant the SSOSA, I don't think that's the right thing in this instance. I think that there's some deep-seated issues that even with the treatment I'm not sure would - - be healing and curing of the issue.

6/16/16 RP 116-117.

The court imposed the high end of the standard range of 155 months to life on Count I, and 17 months on Count III to run concurrent with a 12- month enhancement based on the sexual motivation, for a total of 167 months to life. CP 83.

The judgment and sentence provided:

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

X above the standard range for Counts I and III.

X The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

CP 82.

The court imposed \$600 in legal financial obligations. CP 85. The court found Mr. Pittman indigent for purposes of appeal. CP 110-112. He makes this timely appeal. CP 94.

III. ARGUMENT

A. The Trial Court Erred In Declining To Impose A SSOSA.

The decision to impose a special sex offender-sentencing alternative is entirely within the discretion of the trial court. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). The sentencing court need not provide a reason for its denial, but a court abuses its discretion if it denies a sentencing request on an impermissible basis. *State v. Sims*, 171 Wn.2d 436, 256 P.2d 285 (2011); *State v. Khanteechit*, 101 Wn.App. 137, 139, 5 P.3d 727 (2000); *State v. Hays*, 55 Wn.App. 13, 15, 776 P.2d 718 (1989). A defendant may challenge the procedure involved in denial of a SSOSA. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).

RCW 9.94A.670 outlines the procedure for a SSOSA. It provides the criteria for determining eligibility, the requirements the defendant must meet to be considered for a SSOSA, and the factors the court must consider when making its determination whether to impose a SSOSA.

Here, Mr. Pittman met the eligibility criteria. He was a first time offender convicted of sex offenses that were not serious

violent offenses. RCW 9.94A.670(2)(a)(b). He had no prior convictions for any violent offenses and the current offenses did not result in substantial bodily harm to the victim. RCW 9.94A.670(2)(c)(d).

The offenses involved a victim with whom he had an established relationship, and his standard range for the offenses included the possibility of confinement of ten years, below the threshold of eleven years. RCW 9.94A.670(2)(e)(f). Mr. Pittman was eligible for a SSOSA and the court properly ordered an evaluation report on the relative risk to the larger community and to determine whether he was amenable to treatment. RCW 9.94A.670(3).

A court-ordered evaluation must include the defendant's version of the facts, an official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors; the defendant's social and employment history; all evaluation measures utilized and a detailed proposed treatment and monitoring plan. RCW 9.94A.670(3)(a)-(c).

Mr. Pittman's evaluation by Dr. Thomas Carey met these requirements. CP 50-70. Dr. Carey's report indicated that Mr. Pittman's was within the low to moderate risk for recidivism, 6.4%

over a four-year period. CP 66. He has no specific personality diagnosis and is devoid of an anti-social disposition or psychopathy. CP 67. He was truthful on his sexual history polygraph. CP 68. He had no other victims and is not predatory. CP 68. He admitted his offenses and took responsibility for them. CP 68. He acknowledged the seriousness of his sexual behaviors and wanted to participate in sex offender treatment. Cp 68.

Dr. Carey concluded that Mr. Pittman's ability to succeed in treatment required moving back home with his mother, having family assistance to pay for treatment and strict supervision through the DOC. CP 68. Dr. Carey recommended 36 months of treatment comprising group and individual therapy and standard conditions of supervision. CP 69.

The statute directs the sentencing court to consider several factors in exercising its discretion whether to impose a SSOSA including whether the offender and the community will benefit from use of this alternative; whether a SSOSA is too lenient in light of the extent and circumstances of the crime; whether the offender has other victims in addition to the victim of the offense; whether the offender is amenable to treatment; the risk the offender presents to the community, the victim or other persons of similar ages and

circumstances; and, the victim's opinion whether the offender should receive a treatment disposition. RCW 9.94A.670(4).

Here, the trial court's decision to deny the SSOSA was made on an impermissible basis. Of significance was the court's belief that people who committed sex crimes had "deep seated problems" that could not be "cured" or "healed" in the statutory timeframe of five years or even a lifetime. 6/16/16 RP 115-116.

The court's decision conflicts with the legislative purpose of the SSOSA: The legislature enacted the special sex offender-sentencing alternative on the belief that the behavior of sex offenders is compulsive and likely to continue without treatment. The legislature believed that providing an alternative to confinement would lead to increased reporting of sex crimes, particularly in intra-family situations, and requiring participation in rehabilitation programs is often effective in preventing future criminality. *State v. Jackson*, 61 Wn.App. 86, 92-93, 809 P.2d 221(1992).

"[J]udges are expected to bring their common sense to bear in making sentencing determinations" but the court here went far beyond that by discounting the legislative purpose and its understanding of sex offender treatment. *State v. Wellington*, No.

48134-1-II, 2016 WL 7468228 at *3³. The court's decision should have been informed by the tenet that sex offender treatment is effective in offender rehabilitation.

Instead, the court here acted based on an untenable reason by relying on an incorrect standard. *State v. Rundquist*, 79 Wn.App. 786, 905 P.2d 922 (1995). The court's ruling was based on its belief that sex offenders could not be rehabilitated even with a lifetime of work. The assumption should have been that treatment is effective. The question was whether Mr. Pittman could be successful at a SSOSA. The major barrier to Mr. Pittman's success, according to the evaluator, was the need for a stable living situation and payment for his treatment. His mother had the ability and willingness to solve those problems.

Mr. Pittman respectfully asks this Court to remand for resentencing with a SSOSA.

³ GR 14.1 allows that unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. *Wellington* is an unpublished case.

B. The Judgment and Sentence Errors Must Be Corrected.

1. The Trial Court Erroneously Cited The Defendant Stipulated To An Exceptional Sentence.

Under the heading of Exceptional Sentence § 2.4, the judgment and sentence indicates that the court was imposing an exceptional sentence for both counts and that the defendant and prosecution had so stipulated. CP 82. Nothing in the record evidences a stipulation to an exceptional sentence on either count. Mr. Pittman is entitled to the benefit of having a corrected judgment and sentence that accurately reflects the record. In *State v. Nallieux*, 158 Wn.App. 630, 646, 241 P.3d 1280 (2010) the same error was made. The judgment and sentence recited that Naillieux had stipulated to an exceptional sentence, which he had not. The proper remedy is remand to the trial court for correction of the clerical error. *In re Personal Restraint of Mayer*, 128 Wn.App. 694, 701, 117 P.3d 353 (2005).

2. The Trial Court Exceeded Its Authority When It Imposed A Sexual Motivation Enhancement On A Sex Offense.

A court's sentencing authority is limited to that granted by statute. *In re Postsentence Review of Combs*, 176 Wn.App. 112,

117, 308 P.3d 763 (2013). Whether a sentencing court has exceeded its statutory authority is a question of law reviewed de novo. *State v. Mann*, 146 Wn.App. 349, 357, 189 P.3d 843 (2008). If a court exceeds its sentencing authority, it commits reversible error. *State v. Winborne*, 167 Wn.App. 320, 330, 273 P.3d 454 (2012). An erroneously imposed sentence may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The information in this case alleged Count III was committed with sexual motivation, citing to RCW 9.94A.030, RCW 9.94A.835 and RCW 9.94A.533(8). CP 36. The court found that Count III, possession of depictions of minors engaged in sexually explicit conduct was committed with sexual motivation. 3/22/16 RP 65; 3/24/16 RP 72; CP 76. The court imposed a 12 -month enhancement, to run consecutive, based on that finding. 6/16/16 RP 117.

RCW 9.94A.835(1) authorizes the prosecuting attorney to file a special allegation of sexual motivation in every criminal case, felony, gross misdemeanor, or misdemeanor, *other than sex offenses as defined in RCW 9.94A.030* when sufficient evidence exists, which, when considered with the most plausible, reasonably

foreseeable defense that could be raised under the evidence, would justify a finding of sexual motivation by a reasonable and objective fact finder. (Emphasis added).

Further, where there has been a special allegation, the fact finder must make finding that sexual motivation was present during the commission of the crime. RCW 9.94A.835(2). The statute provides “*This finding shall not be applied to sex offenses as defined in RCW 9.94A.030.*” (Emphasis added).

Possession of depictions of minors engaged in sexually explicit conduct is defined as a sex offense. RCW 9.94A.030(47)(a)(iii)⁴. Because RCW 9.94A.835(1) only authorizes a special allegation and findings of sexual motivation in non-sex offense cases, the court exceeded its authority when it made its finding and imposed additional time to the underlying sentence.

The remedy is remand for resentencing with directions to strike the 12-month enhancement for Count III.

⁴Prior to July 1, 2007, possession of pictures depicting minors engaged in sexually explicit conduct was defined as not a sex offense. However, in 2007, it was removed from the list of non-sex offenses under RCW 9.94A.030(42)(a)(iii).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Pittman respectfully asks this Court to remand with instructions for imposition of a SSOSA. Alternatively, he asks this Court to strike the 12-month enhancement for Count III and correct the errors on the judgment and sentence.

Dated this 23rd day of February 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jordan Pittman, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on February 23, 2017 to:

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And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Cowlitz County Prosecuting Attorney (at appeals@co.cowlitz.wa.us).

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