

NO. 49232-6-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JORDAN W. PITTMAN,

Appellant.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

In general, the State agrees with appellant's rendition of the facts. If any relevant disputes exist, they will be addressed in the body of the argument.

II. ISSUES

- I. Was it error for the trial court to deny Pittman SSOSA, where at trial he claimed he did not rape the victim, blaming her behavior and sexual curiosity, where he was determined to be marginal candidate, and where the victim and her guardians objected to its imposition?
- II. Was it error to sentence the defendant to an enhanced sentence under RCW 9.94A.835, after RCW 9.94A.030 was amended to include RCW 9.68A.070 as a sex offense?
- III. Did the trial court erroneously state the defendant stipulated to an exceptional sentence?

III. ANSWERS

- I. No. It was not an abuse of discretion for the trial court, after familiarizing itself with all the facts and circumstances of the case, including the trial admissions, the Pre-sentence Investigation (PSI), and the victim's wishes, to deny Pittman SSOSA.
- II. Yes. RCW 9.94A.835 specifically precludes an enhancement of any crime defined as a sex offense.
- III. Yes. Though the trial court found aggravating reasons to sentence Pittman to an exceptional sentence, Pittman did not stipulate to any exceptional sentence.

IV. ARGUMENT

I. It was not abuse of discretion for the trial court to deny sentencing under SSOSA.

The decision to impose a SSOSA is entirely within the trial court's discretion. *State v. Onefrey*, 119 Wash.2d 572, 575, 835 P.2d 213 (1992). Sentencing is reviewed under the abuse of discretion standard. *State v. Hays*, 55 Wash.App. 13, 776 P.2d 718 (1989). A court abuses its discretion only if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *State v. Khanteechit*, 101 Wash.App. 137, 139, 5 P.3d 727 (2000). RCW 9.94A.670 lists the process for determining whether SSOSA is appropriate. SSOSA does not limit the court to those factors. *State v. Hays*, 55 Wash.App. 13, 776 P.2d 718 (1989).

RCW 9.94A.670(4) guides a sentencing court's decision whether to sentence under SSOSA, or not. It lists plainly several factors that must be considered, once initial eligibility is met:

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, 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. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. RCW 9.94A.670(4).

The trial court denied Pittman SSOSA because it was not the right thing for either the victim or the community. RP: 115-117. It ruled “there’s some deep-seated issues that even with the treatment, I’m not sure would...would be healing and curing of the issue.” RP June 16, 2016; 117:1-5. It further reasoned that “the best option, at this point, is to keep Mr. Pittman away from children and others for a significant period of time.” RP June 16, 2016; 117: 6-25.

The trial court made its ruling for several reasons, not least of which was the fact the defendant would not fully account for his actions. As the court in *State v. Frazier* reasoned, where a defendant who denies committing the offense until after his conviction suggests neither he nor the community will benefit from a SSOSA sentence. 84 Wash.App. 752, 754, 930 P.2d 345 (1997). During trial, Mr. Pittman either diminished his actions or outright lied. As the court found during its March 22, 2016 ruling, “his story of what happened, at least in my estimation, under reports his involvement.” RP June 16, 2016; 62:19-20. The court was also unimpressed by Mr. Pittman’s recitation of the frequency of the abuse, noting that it

likely occurred more than the single instance described by Pittman. RP June 16, 2016; 63:5-9. The court's skepticism was clear when it stated that "notwithstanding Mr. Pittman's expression of sorrow and regret, and taking the responsibility for expressing sorrow for breaking trust and hoping forgiveness, I'm not convinced that the SSOSA is the right thing." RP June 16, 2016; 116:21-25.

In the presentence investigation (PSI), Pittman blamed the victim. He claimed the cause of his actions was her own nascent and precocious sexual curiosity. He claimed that she found the pocket pussy and the vibrator, and that she was the one who placed it on her own bottom as well as inserted it into her anus. His recitation of that facts did not change from his statement to Detective Stumph. RP March 2, 2016; 171-175. The sentencing court found that he "under reported" his involvement. RP June 16, 2016; 62: 19-20

Further, the victim's father and stepmother were not in favor of SSOSA, and requested the defendant go to prison. This is a valid consideration. *Frazier*, 84 Wash.App. at 754, 930 P.2d 345 citing *Hays*, 55 Wash.App. at 17-18, 776 P.2d 718 (stating a court's refusal to sentence under SSOSA is appropriate when court considers testimony from the mother of the victim requesting a stiff sentence). Indeed, under RCW

9.94A.670(4), a sentencing court is to give great weight to the victim's opinion whether the defendant should receive a treatment disposition.

At the June 16, 2016, sentencing, the victim's stepmother was adamant Mr. Pittman not receive SSOSA, stating:

I am so far convinced that he has robbed this little girl in more ways than imaginable. I suspect she will grow to become a very challenged individual, and trust issues, I'm sure, will be just one of the many ailments she will suffer from. Jordan's sick, selfish crime, as well as the loss of her immediate family members, will have an immense impact on her life.

I'd ask the court to remember testimony, to take into consideration his denial, which pressed for this trial could go on for so long, it's been over a year, which also resulted in those two little girls to be forced into such a position as to be testifying, which yet should be another crime. How scary for them. I believe had [the victim] had not told her story, his acts of raping her would still be ongoing.

I believe a lengthy sentence is in order. No SSOSA, no special services. Is that a fair trade for a ruined life of a little girl? Probably not, but definitely a fair trade. RP June 16, 2016; 100:5-24.

In a letter to the court, the victim's father, Pittman's brother, also requested the court not award Pittman the extraordinary alternative to prison. He wrote that Pittman betrayed brotherly trust, a trust held between uncle and nieces, and that "he does not deserve the SSOSA program after what he did." RP June 16, 2016; 101: 15-22.

Even still, the PSI and Dr. Carey, the writer of the psycho-sexual evaluation, both indicated that the Pittman was a "marginal candidate, at best" for SSOSA. RP 116:4-5. Over any of the arguments made by defense

counsel, the sentencing court was persuaded by this point. RP June 16, 2016; 116.

II. It was error for the court to sentence Pittman to a sexual motivation enhancement.

While earlier precedent did permit a sexual motivation special allegation for charges under RCW 9.68A.070, RCW 9.94A.030(38) was amended as RCW 9.94.A.030(47), which now includes 9.68A.070 in the definition of “sex offense.” Inclusion of this offense prohibits filing a special allegation under RCW 9.94A.835. Consequently, due to an oversight made by the State and the sentencing court, Pittman was improperly sentenced to a 12 month, enhanced term. The Court should remand for resentencing on this specific issue.

III. It was error to note in the judgment and sentence that Pittman stipulated to an aggravated sentence.

This is conceded and can be addressed upon remand and entry of an amended judgment and sentence.

V. CONCLUSION

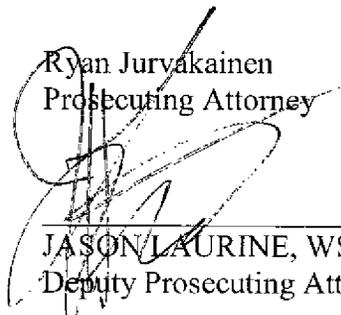
While the trial court did not abuse its discretion by declining to sentence Pittman under SSOSA rather than a standard sentence, it did error by imposing a sexual motivation, sentencing enhancement and by notating in the judgment and sentence that Pittman stipulated to an aggravating

factor. For the above reasons, the State respectfully requests this court deny Pittman's appeal on the issue of SSOSA and remand to address the two conceded issues.

Respectfully submitted this 19 day of April, 2017.

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By:



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 19th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR
April 19, 2017 - 10:49 AM
Transmittal Letter

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