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NO. 51242-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BENTON RAGLAND,

Appellant.

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

The Honorable Mary Sue Wilson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred when it sentenced appellant without the benefit of a current presentence investigation report (PSI) prepared by the Department of Corrections.

2. A community custody condition pertaining to appellant's presence in places where children might congregate is unconstitutionally vague.

Issues Pertaining to Assignments of Error

1. By statute, the sentencing court is required to order and consider a PSI before imposing sentence on a defendant who has been convicted of a felony sex offense. While a current investigation and report were ordered, there was no new investigation and the report was not completed until after appellant had been sentenced. Is resentencing required?

2. As a condition of community custody, appellant is prohibited from loitering or frequenting places where children congregate. In State v. Wallmuller,¹ this Court recently found a similar condition unconstitutionally vague. Must the condition be stricken or revised?

¹ State v. Wallmuller, ___ Wn. App. 2d ___, WL 3737093 (2018).

B. STATEMENT OF THE CASE

In July 2015, a jury convicted John Ragland of one count of Rape of a Child in the First Degree, three counts of Child Molestation in the First Degree, and two counts of Incest in the Second Degree. CP 5. Using an offender score of 15, the Honorable Mary Sue Wilson imposed a total sentence of 318 months to life. CP 7, 10; 1RP² 20. Ragland appealed, and this Court reversed his rape and incest convictions. CP 40-63.

On remand, the parties appeared before Judge Wilson on October 9, 2017. 2RP 3. The State indicated it would not retry Ragland on the three charges for which convictions were reversed and asked Judge Wilson to proceed with resentencing on the remaining convictions. 2RP 3-4. Defense counsel asked for a 30-day continuance, citing the need for additional discussions with Ragland and the need for an updated PSI, since the previous one had been completed two years earlier and addressed a greater number of convictions. 2RP 4-5.

Although individuals had travelled to court for resentencing that day, Judge Wilson continued the matter to November 6, noting

² This brief refers to the verbatim report of proceedings as follows: 1RP – August 27, 2015; 2RP – October 9, 2017; 3RP – November 6, 2017.

that the PSI should be requested immediately to ensure it would be available. 2RP 5, 7-8. Judge Wilson also indicated the matter would not be continued again past November 6. 2RP 7.

On October 12, Judge Erik Price entered an order requiring the Department of Corrections to conduct an investigation and submit a new PSI. The order informed DOC that Ragland could be contacted at the Thurston County Jail, and the new report was to be completed by the November 6 resentencing. CP 64. DOC failed to comply with the order.

At the November 6 hearing, Judge Wilson asked about the missing report. 3RP 3-4. The prosecutor indicated her understanding the report was being written by DOC Community Corrections Officer Damon Brown and that he had already prepared a draft. But her attempt to reach Brown by phone had been unsuccessful. 3RP 4. Defense counsel expressed his view that Brown had not made a good faith effort concerning the new PSI. Ragland had informed him that Brown stopped by the jail, was with him for less than a minute, and “basically told him that he got off on a technicality and that he wasn’t going to change any of his recommendations” 3RP 5. Defense counsel had not seen any drafts of the report. 3RP 5.

Despite the absence of a report, and after noting that neither party was asking for another continuance,³ Judge Wilson moved forward with the resentencing. 3RP 5.

Ragland's new offender score was 6, resulting in a standard range of 98-130 months on the three surviving convictions. CP 68-71, 73. The State requested a minimum sentence of 130 months to life on each count and argued against a defense assertion that two of Ragland's convictions involved the same criminal conduct for scoring purposes. 3RP 7-9; CP 65-67. The grandmother of Ragland's children read a written statement from the children's mother, in which she described the "continuous emotional suffering" of both children and asked for the maximum sentence possible. 3RP 10-11. The grandmother then expressed her own thoughts, similarly indicating the children were suffering and joining her daughter and the prosecutor in requesting the longest possible sentence. 3RP 11.

Defense counsel argued the scoring issue, noted that Ragland maintained his innocence, read a short statement from Ragland, and asked for mandatory minimum sentences at the low

³ Judge Wilson may have forgotten that she previously ruled there could be no more continuances.

end of the range. 3RP 12-17. Ragland spoke briefly, complimenting his attorney. 3RP 17.

Judge Wilson found that none of the convictions involved the same criminal conduct for scoring. 3RP 20-21. She noted that she had presided at the trial years earlier and recalled the evidence. 3RP 19-20. In deciding the appropriate sentence, Judge Wilson considered the nature of the offenses and “the impacts to the victims in particular,” noting that she had just heard from both the children’s mother and their grandmother and was disappointed to hear what they reported on the subject. 3RP 20. She expressed hope “the children are seeing counselors and are working through that.” 3RP 20. In light of the nature of the offenses and her “understanding of the impacts to the victims,” Judge Wilson decided to impose the maximum sentence of 130 months to life on all counts. 3RP 22-23.

At Ragland’s request, defense counsel had Judge Wilson once again note on the record that there had been no PSI prepared for the resentencing. 3RP 29. Judge Wilson reiterated that, despite a court order requiring a supplemental report by November 6, no such report was ever filed. 3RP 30.

Two days later, on November 8, DOC finally provided the court-ordered report. CP 86. That report – titled “Updated Pre-

Sentence Investigation” – was signed by Damon Brown (the original reporter) and approved for submission on November 7. CP 98. The report begins with a “special note” making clear the narrow scope of the updated information:

This document is essentially the same Pre-Sentence Investigation report ordered by the Honorable James J. Dixon [sic] in 2015. Changes in this document include changes to reflect the currently presiding judge (Wilson), the deletion of crimes won on appeal, offender scoring due [to] the deletion of crimes won on appeal, the Conclusion section to reflect crimes which have fallen off due to appeal and minor corrections in spelling, grammar or format.

Also, let it be known, that I met with Ragland on 10/18/2017. I informed him similarly of the changes I would be making to his Pre-Sentence Investigation report and I would not be making any changes to the information he already provided. Ragland replied “You lied your ass off.” Ultimately, Ragland declined to participate in his Pre-sentence Investigation update interview.

CP 86.

True to his word, Brown changed nothing substantive in his “updated” report beyond the reduced number of convictions and reduced offender scores. Compare CP 108-122 (original) with CP 86-101 (“updated”). Under the subheading “Victim Concerns,” no updated information was sought or obtained concerning counseling the children have received the past two years and benefits obtained

as a result. See CP 87-90. Under “Risk/Needs Assessment” and “Education/Employment,” Brown did not obtain any information on work or educational opportunities Ragland had taken advantage of while in prison the past two years. See CP 91-92. Under “Family/Marital,” Brown included no new information on how Ragland’s children were doing; instead, he simply left Ragland’s comments from 2015 that Ragland had heard his daughter was not doing well and his son was acting out aggressively. See CP 93. Brown did not even bother to change the name of defense counsel, erroneously indicating Ragland was represented by the same attorney that represented him in 2015. See CP 86 (identifying counsel as Paul Strophy).

The “updated” report also includes numerous observations and conclusions from Brown’s interview of Ragland two years earlier and lifted verbatim from the original report. Citing the original interview, he notes Ragland’s “grandiosity,” “need for admiration beyond reality,” “and extreme lack of empathy for his victims” expressed back in 2015. See CP 95. Brown also concludes, “It was as if he believed he was special or unique in some way and deserves to be vindicated and his wife be punished.” CP 95. Further, Brown notes Ragland’s failure to communicate any

understanding of what he had done (believing that Ragland “delighted” in stealing his children’s innocence) and describes Ragland as “the most self-centered, self-absorbed, self-righteous, ego-centric, dishonest, and apathetic individual [Brown] had the opportunity to interview.” CP 96. Brown raised the possibility in 2015 that “Ragland is not capable of such upper divisional thinking at this time and needs a serious intervention.” CP 96. He provided no update, however, in 2017 regarding whether he believed that intervention had since taken place or there was reason to change any of his other opinions of Ragland. See CP 96. Brown also left his 2015 recommendations intact, asking the court to impose the high end of the standard ranges. See CP 96-97.

Ragland subsequently filed his Notice of Appeal. CP 102-104.

C. ARGUMENT

1. DOC'S FAILURE TO CONDUCT A CURRENT INVESTIGATION AND PROVIDE A CURRENT REPORT REQUIRES RESENTENCING.

RCW 9.94A.500 provides :

[t]he court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. . . .

RCW 9.94A.500(1). This statute is mandatory, and a violation requires remand for compliance. State v. Brown, 178 Wn. App. 70, 312 P.3d 1017 (2013).

In Brown, the defendant – who absconded during trial – was convicted of child rape and incest and not apprehended by authorities for nine years. Id. at 73. At sentencing, defense counsel noted the absence of a presentence report and asked for a continuance so that one could be prepared. The trial court proceeded with sentencing anyway and imposed concurrent high-end standard range terms. Id. at 75. Examining former RCW 9.94A.110 (2000), recodified as RCW 9.94A.500, the Brown court found the statute mandatory and unambiguous. Id. at 79. Moreover, because the court could only guess what information might have

been contained in a report, and its effect on the judge's sentencing decision, the failure to prepare such a report could not be found harmless and required remand for resentencing. Id. at 80-85; see also State v. Ellis, ___ Wn. App. 2d. ___, WL 2946200, at *4-*5 (unpublished 2018) (reversing and remanding for violation of RCW 9.94A.500(1)).⁴

RCW 9.94A.500(1) and Brown similarly require resentencing here.

Consistent with the statute, and following remand, once the crimes Ragland would be convicted of were identified ("at the time of conviction"), a presentence report was ordered for the resentencing hearing.⁵ But contrary to the statute, DOC failed to make completion of the report a priority (completing it after resentencing). Moreover,

⁴ Under GR 14.1, Ragland does not cite unpublished decisions as binding authority. Rather, he cites them for whatever persuasive authority this Court deems appropriate.

⁵ In an unpublished portion of Wallmuller, this Court held that a new PSI was not necessary for resentencing where Wallmuller had asked the trial court to waive the PSI requirement at his original sentencing, the matter had been remanded solely for resentencing on the original convictions (i.e., there was no change to the number of convictions), and Wallmuller did not object when the trial court failed to order a new PSI. Wallmuller, WL 3737093, at *3-*4; see also State v. Wallmuller, 191 Wn. App. 1020 (unpublished 2015) (remanding for resentencing based solely on scoring issue involving prior criminal history). This situation bears little resemblance to Ragland's. Ragland did not waive the original PSI, his resentencing involved a reduced number of criminal convictions, he requested a continuance for the express purpose of obtaining a new PSI, and there was a court order requiring the new PSI prior to resentencing.

as discussed in detail above, DOC also failed to make a good faith effort to update the report's content with new information concerning the children (leaving original information untouched) or concerning Ragland ("I informed [Ragland] . . . I would not be making any changes to the information he already provided."). CP 86.

CCO Damon Brown made little attempt in his initial PSI to hide his disdain for John Ragland. See, e.g., CP 86 (describing Ragland as "the most self-centered, self-absorbed, self-righteous, ego-centric, dishonest, and apathetic individual [Brown] had the opportunity to interview."). But Brown's negative views of Ragland did not excuse his noncompliance with the court's proper order for a new report under RCW 9.94A.500(1). That report was mandatory.

As in Brown, it is impossible to declare the absence of a report harmless. Judge Wilson imposed concurrent high-end standard range sentences based, in part, on information she had received from the children's mother and grandmother at sentencing concerning lingering impacts on them. Those impacts were obviously an important factor for Judge Wilson. See 3RP 20-23. A good faith effort on DOC's part to investigate and determine the impacts of counseling the children are receiving may have revealed information suggesting they are, in fact, doing better than indicated

by family members. That information – along with information since 2015 on any positive developments concerning Ragland (e.g., good behavior, program participation, work) – could have resulted in sentences lower in the ranges.

Ultimately, as in Brown, in the absence of a timely and complete updated report, “we can only speculate as to what information a report might have contained and what effect that information might have had on the outcome.” Brown, 178 Wn. App. at 80-81. And, as in Brown, there is no need to speculate further because the error can be rectified with a proper report and new sentencing hearing.

One last point on this issue. When there is reason to question a judge’s impartiality based on what the judge has already heard or decided, remand to a different judge following appeal is sometimes appropriate to ensure fair proceedings. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (without “cast[ing] aspersions on the trial court,” Supreme Court provides for a new judge on remand “in light of the trial court’s already-expressed views” on appropriate disposition); State v. Harrison, 148 Wn.2d 550, 559, 563, 61 P.3d 1104 (2003) (prosecutor’s breach of plea agreement at sentencing requires de novo

sentencing hearing on remand, preferably before a different judge); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge where disposition was clearly excessive); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to a different judge where initial sentencing hearing suffered from appearance of unfairness).

Ragland does not seek to replace Judge Wilson. But it does appear a substitution is in order for Damon Brown. Brown's failure to file a timely and updated report (despite a court order) and his utter unwillingness to include new information from Ragland reveals a bias on his part that leaves any future report subject to legitimate question. Ragland asks this Court to order, or expressly authorize Judge Wilson to order, that an updated report be prepared by a different DOC officer.

2. THE COMMUNITY CUSTODY CONDITION PROHIBITING RAGLAND FROM PLACES WHERE CHILDREN CONGREGATE IS UNCONSTITUTIONAL.

In State v. Wallmuller, the defendant challenged – for the first time on appeal – the constitutionality of a community custody condition that provided: “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” WL 3737093, at *1. This Court found the condition unconstitutionally vague and remanded for it to be stricken or modified to remove the language “such as” and identify with specificity those locations off limits. Id. at *1-*3.

The condition imposed on Ragland is nearly identical and provides: “The defendant shall not loiter in nor frequent places where children congregate such as parks, video arcades, campgrounds, water parks, and shopping malls.” CP 83. It suffers from the same constitutional deficiency as the condition in Wallmuller and must be stricken or revised.

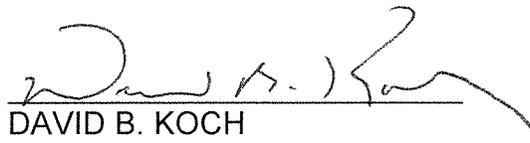
D. CONCLUSION

This Court should remand for an adequate investigation and properly updated PSI reflecting current events, followed by a new sentencing hearing where the judge has the benefit of this important information. At that same sentencing hearing, the community custody condition prohibiting Ragland from loitering or frequenting places where children congregate should be stricken or modified to comply with constitutional requirements.

DATED this 10th day of August, 2018.

Respectfully submitted,

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