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NO. 51290-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

V.A.C., JR.,
Appellant.

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

The Honorable Jonathon H. Lack, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court abused its discretion when it revoked V.A.C.'s Special Sex Offender Disposition Alternative.

B. ISSUE PRESENTED ON APPEAL

1. Whether the trial court abused its discretion in revoking V.A.C.'s Special Sex Offender Disposition Alternative when V.A.C.'s juvenile probation officer learned V.A.C. may have had mental health and/or substance abuse issues, and did not re-assess V.A.C. to determine a proper treatment plan, and the trial court did not modify the terms of V.A.C.'s SSODA to achieve the rehabilitative purpose of the Juvenile Justice Act?

C. STATEMENT OF THE CASE

1. Procedural History

The probation officer related: "The very first time we meet, it's important for the parents to fully understand their child's behavior. And [V.] sat there and courageously, in front of me and his mother, explained exactly what he did in total honesty" RP 32 (11-15-18). Seventeen-year-old V.A.C., Jr. pled guilty to third degree rape on February 25, 2016. CP 98-103. As part of the order

of disposition V.A.C. was given a Special Sex Offender Disposition Alternative (SSODA). Juvenile probation officer, Pete Feliciano, brought four motions to modify V.A.C.'s disposition and moved to revoke V.A.C.'s SSODA on the fifth violation. RP 31 (11/15/17). After a contested fact finding, the juvenile court granted the motion and revoked V.A.C.'s SSODA. CP 24-34. V.A.C. timely appeals. CP 64.

2. Substantive History

Seventeen-year-old V.A.C. pleaded guilty to one count of third degree rape in juvenile court. CP 98-103. In lieu of a traditional disposition, he qualified for a SSODA that placed him on probation and under treatment for two years. CP 104-09. V.A.C. submitted to a psychosexual evaluation which revealed that V.A.C. had a history of drug use, but the examiner did not recommend drug treatment. CP 116, 120, 127.

The terms of the SSODA required V.A.C. to comply with sex offender treatment, comply with regular polygraph examinations, comply with and be in good standing with sex offender treatment, and to obey all other laws. CP 112-13 (Attachment B to Guilty Plea). In addition, V.A.C. was prohibited from possessing, perusing

or viewing pornography and from using alcohol or drugs. Id. Juvenile probation officer Pete Feliciano was assigned to supervise V.A.C. CP 5.

During V.A.C.'s treatment and probation, Feliciano became aware of V.A.C.'s history of depression and anxiety, but did not offer or recommend formal treatment. RP 16 (11/15/17). Feliciano spoke to V.A.C., but not his mother, about addressing V.A.C.'s mental health issues with a doctor. RP 17-18 (11/15/17). When Feliciano learned V.A.C. was smoking marijuana, he did not suggest that V.A.C. undergo a re-assessment or offer a chemical dependency or mental health evaluation. RP 16-17, 19 (11/15/17).

Throughout V.A.C.'s probation and treatment, Feliciano brought four motions to modify V.A.C.'s sentence based on violations of V.A.C.'s SSODA conditions prior to the motion for revocation. RP 31 (11/15/17). The fourth motion to modify V.A.C.'s sentence was partially based on V.A.C.'s use of marijuana. CP 5-6. The fifth motion to modify V.A.C.'s sentence was also partially based on V.A.C.'s marijuana use and Feliciano requested V.A.C.'s SSODA be revoked. RP 5, 11-12 (11/15/17); CP 10-12.

Feliciano was the only witness at the contested fact-finding

hearing. RP 7 (11/15/17). He testified that V.A.C. failed his most recent polygraph and admitted to smoking marijuana on several occasions and to accompanying some friends who were under 21 to buy marijuana. RP 9-10 (11/15/17). According to Feliciano, on one occasion, V.A.C.'s friend took marijuana from the seller without paying. RP 10 (11/15/17). Feliciano further testified that V.A.C. admitted to viewing pornography. RP 11-12 (11/15/17).

The sex offender treatment provider submitted a report in favor of terminating V.A.C.'s SSODA. The sex offender treatment provider made the recommendation based on V.A.C.'s self-reporting that he smoked marijuana, was in the company of people who bought marijuana, he held a bullet his father gave him and returned the bullet to his father, and drove a car with his mother without a permit. CP 3-4, 13-19, 20-21, 47-58. The report concluded:

He does not take responsibility for his offense, engages in behavior that could contribute to future crime, does not abide by laws, conditions of release and treatment contract and possesses attitudes supportive of rule-breaking behavior. Research has shown that the predictor of future offending is cooperation of supervision. His behaviors are exceedingly high risk, and he needs to receive the clear message from the court that this behavior will not be tolerated.

Confidential Report filed 11/15/17, pg. 3, Second Supplemental Designation of Clerk's Papers. V.A.C. attended 9 sessions during the third reporting period. Per the treatment provider, V.A.C. missed several appointments and the facility cancelled others. Id. This provider assessed V.A.C. to be only a moderate risk of re-offending. Id.

The juvenile court found that V.A.C. violated the conditions of his SSODA by smoking marijuana, being present during the sale of marijuana, viewing pornography and failing his polygraph. RP 30 (11/15/17). The court revoked V.A.C.'s SSODA and sentenced him to custody. CP 24-34; RP 42-43 (11/15/17).

Counsel for V.A.C. explained during the revocation hearing that V.A.C. struggled with stress and anxiety but probation never referred V.A.C. to a doctor to help with these issues or informed V.A.C.'s parents. RP 36-37. Probation also failed to offer Moral Reconciliation Therapy when it appeared necessary for V.A.C. to succeed. RP 38.

The court revoked the SSODA and expressed its concern that V.A.C. was not offered a chemical dependency evaluation. RP 40-

41. The court held that V.A.C. was responsible for informing probation that he was depressed and asking for help and his failure to do so meant V.A.C. was dishonest. RP 41-42. When revoking the SSODA, the court did not acknowledge that V.A.C. is an adolescent.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REVOKED V.A.C.'S SSODA WITHOUT CONSIDERING THE LIMITATIONS OF THE JUVENILE BRAIN AND THE DISTINCT APPROACH NEEDED WHEN WORKING WITH ADOLESCENTS.

Juveniles facing a first-time conviction for certain sex offenses in Washington may seek an alternative to traditional sentencing called a special sex offender disposition alternative (SSODA). *State v. Sanchez*, 177 Wn.2d 835, 840, 306 P.3d 935 (2013); RCW 13.40.162. If a juvenile is SSODA eligible, the court may order an evaluation to determine the offender's amenability to treatment. *Sanchez*, 177 Wn.2d at 840; RCW 13.40.162.

At a minimum, this evaluation must include a description of the juvenile's offense history, an assessment of problems in addition to alleged deviant behaviors, social and educational

history, employment situation, his or her version of the facts in the case, and proposed treatment terms. *Sanchez*, 177 Wn.2d at 840; RCW 13.40.162(2)(a)(i)–(v), (b)(i)–(v). “Assessment” means an individualized examination of a child to determine the child’s psychosocial needs and problems, including the type and extent of any mental health, substance abuse, or co-occurring mental health and substance abuse disorders, and recommendations for treatment.” RCW 13.40.020(1). Assessment also includes drug and alcohol evaluations. RCW 13.40.020(1).

The proposed treatment plan shall include at a minimum:

- (i) The frequency and type of contact between the offender and therapist;
- (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members, legal guardians, or others;
- (iv) Anticipated length of treatment; and
- (v) Recommended crime-related prohibitions.

RCW 13.40.162(2)(b)(i-v).

The court then considers whether this alternative sentence will benefit the offender and the community. *Sanchez*, 177 Wn.2d at 840; RCW 13.40.162(3). The typical SSODA sentence includes two years of outpatient treatment under a probation officer’s

supervision. *Sanchez*, 177 Wn.2d at 840.

Revocation of a suspended sentence due to violations rests within the discretion of trial court. It will not be disturbed absent an abuse of discretion. *State v. Miller*, 180 Wn. App. 413, 416-17, 325 P.3d 230 (2014). An abuse of discretion occurs only when the decision of the court is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *State ex.rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Here, the State presented no information that V.A.C. was not progressing in his treatment. Rather V.A.C. was not in full compliance, but he was making some progress in his treatment. Confidential Report, pg. 2, Second Supplemental Designation of Clerk's Papers. The sex offender treatment provider wanted V.A.C.

punished because V.A.C. struggled. The sex offender treatment provider and probation were aware of V.A.C.'s history of depression and struggle with marijuana use, but did not offer services to address these issues. Additionally, the sex offender treatment provider blamed V.A.C. for being in his father's presence when his father broke the law. Confidential Report, pg. 3, Second Supplemental Designation of Clerk's Papers. V.A.C. is a child, not an adult. The issue here on revocation, is the utter failure of the State agencies to monitor V.A.C.'s safety, and to provide adequate support for success.

The court failed to appreciate the context within which this child had been operating. The environment was a set up for failure without the support, monitoring, and engagement of the providers with the family. It makes no sense to require compliance with sex offender treatment if no treatment is provided for the substance abuse issues and depression. It makes little sense to require adherence to probation conditions if the probation officer does not educate and engage the family in the child's treatment goals.

It does not meet the reasonableness test for the court to hold the SSODA child responsible for the criminal behavior of his father.

or to punish the SSODA child for his untreated depression for which he appears to self-medicate with marijuana. It is also unreasonable to expect a child to reach out for help with depression and anxiety and to blame the child when he is unable to do so.

Here, the State presented no evidence from the sex offender therapist that V.A.C. was not progressing in treatment. Rather the sex offender therapist complained that V.A.C. made bad decisions around marijuana use and being in the company of his father and viewing pornography. Confidential Report, pg. 3, Second Supplemental Designation of Clerk's Papers. The therapist did not recommend appropriate treatment for V.A.C. but rather just wanted the court to punish V.A.C. Confidential Report, pg. 3, Second Supplemental Designation of Clerk's Papers.

The Juvenile Justice Act of 1977, RCW 13.40, ("JJA") encapsulates the twin principles of rehabilitation and punishment. *Matter of Smiley*, 96 Wn.2d 950, 953, 640 P.2d 7 (1982). The dual goals of the JJA to protect community safety while simultaneously responding to the treatment needs of juvenile offenders are inherent in a SSODA. *State v. T.E.C.*, 122 Wn. App. 9, 27, 92 P.3d 263 (2004). A SSODA achieves the rehabilitative purposes of the

JJA, allowing the court, in appropriate cases, to fit the disposition to the offender. *T.E.C.*, 122 Wn. App. at 27; *State v. Hayden*, 72 Wn. App. 27, 31, 863 P.2d 129 (1993). Further, the goal of the Juvenile Justice Act is to “provide for the rehabilitation and reintegration of juvenile offenders” and to “provide necessary treatment, supervision, and custody for juvenile offenders.” RCW 13.40.010(2)(f), (g).

A juvenile court has broad discretion to modify a juvenile’s SSODA terms to fit the disposition of the offender. *Hayden*, 72 Wn. App. at 28 (*citing State v. Rice*, 98 Wn.2d 384, 397, 655 P.2d 1145 (1982) *reversed on other grounds by State v. Coria*, 120 Wn. 2d 156, 170, 839 P.2d 890 (1992)). This is because the Legislature “built [flexibility] into the system” to achieve the rehabilitative purpose of the JJA. *Hayden*, 72 Wn. App. at 31 (*citing Rice*, 98 Wn.2d at 397).

The court’s stated reason for incarcerating V.A.C. was to provide him the opportunity to “refocus and take advantage of the resources that are available”. RP 42 (11/15/17). This justification runs entirely counter to evidence on the harms of incarcerating youth, which has been found to further expose youth to severe

violence and trauma, and to exacerbate recidivism.

a. Incarceration is Not the Answer For Juveniles

The United State Supreme Court has acknowledged the negative and counterproductive impacts of incarceration on juveniles. In *Roper v. Simmons*, 543 U.S. 551, 569–70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Court abolished the death penalty for juveniles. Later, in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), the Court struck down the imposition of mandatory life sentences for youth convicted of non-homicide crimes. Finally, in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Court held that mandatory life without parole sentences are unconstitutional for juveniles convicted of homicide crimes. In developing these decisions, the Court relied upon newly-developed research and science demonstrating that the adolescent brain functions very differently than the adult brain.

Delinquent behavior is common in youth. It is estimated that about one third of young people engaged in some sort of deviant behavior before “aging out” of such conduct. Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in*

Detention and Other Secure Facilities, 6 (2011).¹ However, for youth who are incarcerated for delinquent behavior, their normal pattern of aging out is interrupted and delayed due to their forced disconnect from family, school, and employment. *Id.*

Additionally, congregating juveniles accused of delinquent behavior leads to high recidivism rates and worse outcomes. This phenomenon is referred to as “peer deviancy training.” See James Snyder, et. al., *Peer Deviancy Training and Peer Coercion: Dual Processes Associated With Early-Onset Conduct Problems* (2008). Researchers studying this phenomenon have found higher levels of substance abuse, difficulty in school, violence, and difficult adjusting throughout adulthood in juveniles. Justice Policy Institute, *The Dangers of Detention at 6* (*citing* Thomas J. Dishion, et. al., *When Interventions Harm: Peer Groups and Problem Behavior* (1999)).²

Youth who are incarcerated are more likely to be

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http://www.justicepolicy.org/images/upload/0611_rep_dangersofdetention_jj.pdf

2

https://www.researchgate.net/publication/12789140_When_Interventions_Harm_Peer_Groups_and_Problem_Behavior

incarcerated as adults. See Joseph Doyle, et. al., Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-assigned Judges (2015).³ Incarceration has been proven no more effective than probation or other sentencing alternatives in reducing juvenile criminality. The Annie E. Casey Foundation, No Place for Kids: The Case for Reducing Juvenile Incarceration, 12 (2011). Correctional placements may actually exacerbate criminality. Id.; Office of Juvenile Justice and Delinquency Programs, Highlights From Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders, 2 (2010).⁴ Notably, incarcerated youth committing low-level crimes have been found to be more likely to reoffend than those who were not incarcerated. Id.; see Center on Juvenile and Criminal Justice, Study: Long-term Juvenile Incarceration Fails to Decrease

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http://www.mit.edu/~jjdoyle/aizer_doyle_juvenile_incarceration_january2015.pdf Details (With Text),

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http://www.mit.edu/~jjdoyle/aizer_doyle_juvenile_incarceration_january2015.pdf

Reoffending Rates (2012).⁵

A majority of incarcerated youth have to cope with trauma, abuse and mental illness. In Washington, 60% of jailed youth have mental health issues, and more face drug or alcohol dependency.

City of Seattle, Resolution 31614, Legislation (2015).⁶

Further, incarceration itself exposes youth to physical and sexual abuse. 9.5 percent of youth detained in state juvenile facilities reported at least one incident of sexual victimization by another youth or staff in the past 12 months or since admission. Sexual Victimization in Juvenile Facilities Reported by Youth, 2012, 9 (2013).⁷ Of those who reported being victims of staff sexual misconduct, 85.9 percent reported more than one incident, while 20.4 percent reported being victimized more than 10 times. Id. at 24.

Incarcerated youth are also subjected to physical abuse.

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<http://www.pathwaysstudy.pitt.edu/documents/Highlights%20from%20the%20Pathways%20to%20Desistance%20Study.pdf>

6 <http://www.cjcj.org/news/5476>

7 <https://seattle.legistar.com/View.ashx?M=F&ID=4019767&GUID=7C099120-9DED-4455-B5F9-81F0AA0D25E5;>
<https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>

13,000 claims of abuse had been reported from 2004 through 2007 in state-run juvenile facilities nationwide. Holbrook Moore, AP: 13K Claims of Abuse in Juvenile Detention Since '04 (2008).⁸ An estimated 45 percent of youth confined in secure correctional facilities and camp programs report staff use unnecessary force, while 30 percent of those youth report that staff use solitary confinement as a discipline tool. Id.

Incarceration is inherently incapable of addressing the underlying anxiety, depression and substance abuse problems in V.A.C.'s life that result in his delinquent behavior. Furthermore, incarceration will fundamentally impede his ability to mature, rehabilitate, and, ultimately, reintegrate into society as a productive member. Justice Policy Institute, *The Dangers of Detention* at 6.

When the court entered V.A.C.'s disposition in February 2016, it found he was amenable to treatment and set the disposition to meet the needs recommended in the PSE. However when Feliciano discovered V.A.C.'s drug use and history of mental health issues were hindering V.A.C.'s treatment, Feliciano did not offer help. Instead of requesting a mental health and/or a chemical

⁸ https://www.usatoday30.usatoday.com/news/nation/2008-03-02-juviledetention_N.htm

dependency evaluation to further V.A.C.'s rehabilitation, Feliciano reported V.A.C.'s drug use as a violation of the SSODA terms. Because the PSE did not recommend drug treatment, and V.A.C. was not re-assessed when Feliciano discovered there was an issue with drug abuse, V.A.C. was not properly assessed. V.A.C.'s treatment plan was insufficient to achieve the rehabilitative purpose of the JJA, through no fault of his own.

When it became apparent that V.A.C. was self-medicating with marijuana, Feliciano should have requested a modification to fit V.A.C.'s community supervision plan. RCW 13.40.162(2)(a)(i)–(v), (b)(i)–(v). RCW 13.40.020. The juvenile court here should have modified V.A.C.'s disposition terms to include a mental health and/or chemical dependency evaluation.

Properly assessing and treating V.A.C. also protects community safety goal of the JJA because V.A.C. was amenable to treatment and if he was properly assessed and treated he may not constitute a threat to the community in the future. The trial court's decision to revoke the SSODA without requiring proper treatment was an abuse of discretion because no reasonable judge would incarcerate a youth for his anxiety, depression and self-medication

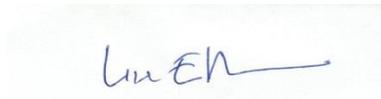
with marijuana when the child was not offered appropriate treatments for these issues.

E. CONCLUSION

V.A.C. respectfully requests that this court remand this matter to the juvenile court to reinstate V.A.C.'s SSODA and to offer V.A.C. a mental health and/or chemical dependency evaluation.

DATED this 3rd day of July 2018.

Respectfully submitted,

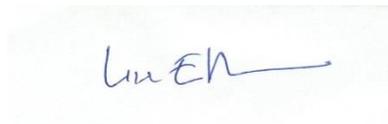


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I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and V.A.C., Jr., 6625 Kinwood Park Lane SE Apt III, Lacey, WA 98503 a true copy of the document to which this certificate is affixed on July 3, 2018. Service was made by electronically to the prosecutor and V.A.C., Jr. by depositing in the mails of the United States of America, properly stamped and addressed.



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LAW OFFICES OF LISE ELLNER

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