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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 Jonathan H. Lack, Commissioner
Cause No. 15-8-00509-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion when it revoked the originally imposed Special Sex Offender Dispositional Alternative.

2. Whether the trial court erred by not considering youth and juvenile brain science when it revoked the Special Sex Offender Dispositional Alternative.

3. Whether the issue of revocation of the Special Sex Offender Dispositional Alternative is rendered moot by the fact that the V.A.C. has completed his term of incarceration.

B. STATEMENT OF THE CASE.

The appellant, V.A.C., Jr., pled guilty to the charge of Rape in the Third Degree on February 25, 2016, for an offense committed on October 10, 2015. CP 98-103. As a factual basis for his plea, V.A.C. provided "I sexually violated [victim] when she was appearing to be asleep. We were at my home in Lacey, WA." CP 102. The trial court entered an Order on Adjudication and Disposition, which suspended a local sanction of 30 days pursuant to the Special Sex Offender Dispositional Alternative (SSODA) and

imposed a period of 24 months community supervision. CP 104-109.

V.A.C. had several violations of his community supervision conditions. On May 16, 2017, the trial court entered an Order Modifying Disposition, which noted that the modification was based on V.A.C.'s third probation violation. CP 3-4. The trial court found that V.A.C. was in violation of his conditions because he had "unapproved sexual contact with a peer aged female." CP 3. On August 28, 2017, the trial court again found that V.A.C. had violated his conditions of supervision, this time for "viewing pornography" and "testing positive for and/or admitting to consuming/ingesting" marijuana. CP 7-8.

On November 7, 2017, the State filed a Motion and Affidavit to Revoke SSODA Disposition. CP 10-12. The motion alleged violations including knowingly being with friends when they purchased marijuana, smoking marijuana on several occasions, being with a friend who went to purchase marijuana and then stole the marijuana from the seller, viewing internet pornography two times, and failing a monitoring polygraph. CP 11.

A hearing was held on the motion to revoke on November 15, 2017. RP 1.¹ During the hearing, Juvenile Probation Officer Pete Feliciano testified that following a polygraph, V.A.C admitted to smoking marijuana a number of times. RP 7-8. V.A.C. informed Feliciano that he had smoked marijuana on Halloween, November 1, November 3, November 4, and November 5. RP 9. He further informed Feliciano that he had driven his mother's car without a license. RP 10. V.A.C. also discussed other high risk behavior with Feliciano, which included going with a friend to buy marijuana and the friend snatching the marijuana out of the seller's hand and running. RP 10. V.A.C. also admitted to viewing pornography on his mother's computer or iPad-type device. RP 11-12. V.A.C. also failed a monitoring polygraph. RP 13.

Feliciano testified that he had filed four prior motions to modify or revoke V.A.C.'s SSODA, and therefore, as the violation was V.A.C.'s fifth, Feliciano was recommending that the SSODA be revoked. RP 14. The prosecutor also asked the trial court to consider the quarterly report of sex offender treatment provider Renee Newton. RP 29, Confidential CP 94-97. Newton noted that V.A.C.

¹ For purposes of this brief, RP will refer to the verbatim report of proceedings dated November 15, 2017.

“has demonstrated an inability to follow court, probation and treatment rules. He has been out of compliance more than he has been complying while in treatment. It is concerning [V.A.C.] continues to engage in high-risk behaviors which are part of his offense cycle, therefore, increasing his risk to the community. It appears he has been deceptive in treatment and lacks regard for the court. Therefore, [V.A.C.]’s terminated from treatment with Newton and Associates, PLLC.”

CP 96. The trial court excluded consideration of the quarterly report for purposes of determining whether a violation had occurred. RP 29.

The trial court found that V.A.C. violated the conditions of the SSODA disposition by smoking marijuana on “October 31st, November 1st, 3rd, 4th, and 5th,” “being with someone during the purchase or sale of marijuana on October 31st,” and by “viewing pornography between August 9th... and November 5th.” RP 30.

The trial court then heard recommendations regarding the whether the SSODA should be revoked. Feliciano stated, “I’ve been doing, I think, a SSODA caseload for well over 20 years, and I’ve never had an individual with five probation violations or even four for that matter.” RP 31. Feliciano briefly described V.A.C.’s offense stating, “this is a young man on probation for raping” a family member who trusted him. RP 30-31. Feliciano stated,

“Full disclosure is what we do in my office. The very first time we meet, it’s important for the parent’s to fully understand their child’s behavior. And [V.A.C.] sat there and courageously, in front of me and his mother, explained exactly what he did in total honesty.”

RP 32. Feliciano went on, stating,

“He doesn’t have that courage today that he had two years ago when he sat in my office and fully disclosed raping his [family member]. Unfortunately, it’s been almost two years, and [V.A.C. has worked harder to keep secrets and tell lies than he has to work towards someone who is a low risk sex offender who is working on convincing Your Honor and myself and the State and the world, really is the way I put it, that they’re no longer a sex offender.”

RP 32.

Feliciano noted that V.A.C.’s “mother is flat-out amazing,” and that she “has worked really, really hard to support her son.”

RP 33. Feliciano stated, “after five probation violations, I feel like I had no choice,” and ultimately asked the trial court to revoke the

SSODA. RP 33-34. The prosecutor emphasized,

“this individual is to the point of five probation violations. That demonstrates, and I hope the court recognizes the fact that Mr. Feliciano and his mom have worked really hard. And unfortunately, the appearance is that adults in [V.A.C.]’s life are working harder than [V.A.C].”

RP 36.

The trial court found that “there’s a basis to revoke the SSODA disposition at this time.” RP 42. The court imposed the remaining 28 days of the original sentence and an additional 30 days for the probation violation, pursuant to RCW 13.40.162(8)(b). RP 42. The Court further noted that V.A.C.’s probation “would end at the time he completes his sentence,” which would be “58 days from” the date of the adjudication. RP 45. The trial court entered a first amended order on adjudication and disposition consistent with its oral ruling. CP 24-34. This appeal follows.

C. ARGUMENT.

1. The trial court did not abuse its discretion when it revoked the SSODA disposition.

A special sex offender sentencing alternative (SSOSA) is a special procedure that allows a sentencing court to suspend a sex offender's felony sentence if the offender meets certain statutory criteria. Doe v. Thurston County, 199 Wn. App 280, 291, 399 P.3d 1195 (2017). Similar to SSOSA, a Special Sex Offender Sentencing Disposition Alternative (SSODA) provides an “alternative to traditional sentencing” for juveniles facing a first-time adjudication for certain sex offenses. Doe v. Thurston County, 199 Wash. App at 291, citing State v. Sanchez, 177 Wash.2d 835, 840, 306 P.3d 935

(2013); RCW 13.40.162 (1)(a)(b). A SSODA is the juvenile equivalent to its adult counterpart SSOSA. State v. S.H., 75 Wash. App. 1, 18, 877 P.2d 205 (1994). Like the SSOSA statute, the SSODA statute allows a trial court to order an evaluation to determine the offender's "amenability to treatment," and the evaluation must include the same information as a SSOSA evaluation, including a proposed treatment plan. Doe v. Thurston County, 199 Wash. App. at 291; RCW 13.40.162(2)(a)-(b). The trial court must then consider whether a SSODA will benefit the offender and the community to determine whether a SSODA is appropriate. Doe v. Thurston County, 199 Wash. App. at 291; RCW 13.40.162(3).

If a juvenile is SSODA eligible, the court, on its own motion or the motion of the state or the respondent, *may* order an evaluation to determine the offender's amenability to treatment. RCW 13.40.162. At a minimum, this evaluation must include a description of the juvenile's offense history, psychological evaluation, social and educational history, employment situation, his or her version of the facts in the case, and proposed treatment terms. RCW 13.40.162(2)(a)(i)-(v), (b)(i)-(v). The court then considers whether this alternative sentence will benefit the offender

and the community. RCW 13.40.162(3). The typical SSODA sentence includes two years of outpatient treatment under a probation officer's supervision. Id. However, a SSODA is a privilege that can be revoked. RCW 13.40.162 (8)(a-c) reads:

(8)(a) If the offender violates any condition of the disposition *or* the court finds that the respondent is failing to make satisfactory progress in treatment, the court *may* revoke the suspension and order execution of the disposition or the court may impose a penalty of up to thirty days confinement for violating conditions of the disposition.

(b) The court may order both execution of the disposition and up to thirty days confinement for the violation of the conditions of the disposition.

(c) The court shall give credit for any confinement time previously served if that confinement was for the offense for which the suspension is being revoked.

“Revocation of a suspended sentence rests within the discretion of the court. Proof of violations need not be established beyond a reasonable doubt but only must ‘reasonably satisfy’ the court the breach of condition occurred.” State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992); accord State v. Ramirez, 140 Wn. App. 278, 290, 165 P.3d 61 (2007).

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159

Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view that “no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” Id.

The Court of Appeals in State v. T.E.C., 122 Wn. App 9, 29, P.3d 263 (2004) held that the trial court did not abuse its discretion when it revoked the defendant's SSODA because a residential treatment facility was unavailable to him. The court may, after a disposition has been ordered, either revoke or modify the disposition order if a juvenile offender violates any of the conditions of his or her SSODA. T.E.C., 122 Wn. App 9, 29, citing State v. Hayden, 72 Wn. App. 27, 863 P.2d 129 (1993).

Here, the trial court’s decision to revoke the SSODA disposition was clearly within the court’s discretion. V.A.C. was found to be in violation of the terms of his supervision five times over the course of the SSODA program. V.A.C. admitted to high

risk behavior, smoking marijuana and viewing pornography. All of those behaviors occurred after he had already been before the trial court four times for previous probation violations which included unauthorized sexual contact with a peer aged female and viewing pornography.

Given the multiple violations of the conditions of the SSODA disposition, the trial court was well within its discretion when it revoked the SSODA disposition.

2. V.A.C.'s reliance on juvenile brain science is misplaced given all of the factors and circumstances of this case.

V.A.C. argues that incarceration is not the answer for juveniles, but fails to recognize that V.A.C.'s entire case was handled in the juvenile court pursuant the Juvenile Justice Act. RCW 13.40. The stated intent of the Juvenile Justice Act was to create "a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims." RCW 13.40.010(2). One of the stated purposes of the chapter is to "Provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender." RCW 13.40.010(2)(d).

Our State Supreme Court has recognized that youth and the differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure, may justify a finding that a youthful offender sentenced under the adult sentencing reform act (SRA) had a diminished criminal culpability. State v. O'dell, 183 Wn.2d 680, 691, 358 P.3d 359 (2015). However, contrary to the SRA, every offender subject to the Juvenile Justice Act is youthful. In addition to punishment, the Juvenile Justice Act is designed to “provide for the rehabilitation and reintegration of juvenile offenders.” RCW 13.40.010(2)(f). Thus, proceedings in juvenile court “remain rehabilitative in nature and distinguishable from adult criminal prosecutions.” State v. Schaaf, 109 Wn.2d 1, 4, 743 P.2d 240 (1987).

It is in that rehabilitative context that the proceedings involving V.A.C. occurred. V.A.C. simply failed to take advantage of the opportunities he was given. V.A.C. cites to cases which have looked at the Eighth Amendment concept of cruel and unusual punishment for sentences pertaining to youth. In Roper v. Simmons, 543 U.S. 551, 569-70, 1183, 171 L.Ed.2d 825 (2015), the United States Supreme Court held that the Eighth Amendment

prohibited the death penalty for all offenders under the age of 18. In Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) and Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the Court applied the Eighth Amendment to prohibit mandatory life sentences for juveniles.

To compare the 58 additional days in local confinement that V.A.C. was ordered to serve following his fifth probation violation to the sentences at issue in those cases borders on the absurd. “The concept of proportionality is central to the Eighth Amendment.” Graham, 560 U.S. at 59. Here, even if no SSODA disposition had been granted, a sentence of 60 days in local detention would not violate the concept of proportionality, given that this case involved a 17 year old defendant who raped a family member. The law takes into account the effect that offenses have on victims, even in the Juvenile Court. RCW 13.40.010(I). Here, V.A.C. was given multiple opportunities to modify his behavior prior to the imposition of his sentence. His probation officer and his mother worked hard to try to help him grow and mature. He chose not to.

The application of juvenile brain science is an area of the law that is still developing. “In many respects, neuroimaging research is still in its infancy; there is much to be learned about how changes

in brain structure and function relate to adolescent behavior.”

Johnson, Sarah; Blum, Robert W; Giedd, Jay N. Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, Journal of Adolescent Health, Vol. 45, Issue 3 (Sept. 2009). That article included a discussion of Roper v. Simmons, specifically pointing to Justice Scalia’s dissenting opinion noting conflicting studies that had been argued in an adolescent abortion case, Hodgson v. Minnesota, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed 2d 344 (1990), as highlighting the peril of leaving nonscientist to arbitrate and translate neuroscience for policy. Id. Ultimately, that article called for a “proactive approach to research and research-to-policy translation that includes neuroscientists, adolescent health professionals, and policy makers,” as an important next step. Id.

V.A.C. is essentially asking this Court to bypass the legislature and find that the trial court was required to offer more services to him, despite his repeated violations, simply because of his youth. The legislature has created no such requirement. While the trial court does have discretion to modify a SSODA disposition, State v. Hayden, there is no requirement that the trial court do so when faced with a violation of previously ordered conditions. The

legislature granted the trial court the discretion to revoke a SSODA disposition "if the offender violates any condition of the disposition." RCW 13.40.162(8)(a).

"Laws will always be regarded as unreasonable by those whose interests are deleteriously affected by such laws; but, as [our State Supreme Court has] intimated, the proper forum for a discussion and determination of such question is the Legislature." State v. Pomeroy, 68 Wash. 389, 393, 123 P. 514 (1912). The Legislature is the fundamental source for the definition of this state's public policy and the courts must avoid stepping into the role of the Legislature by actively creating the public policy of Washington. Sedlacek v. Hillis, 145 Wn. 2d 379, 390, 36 P.3d 1014, 1019 (2001). "The doctrine of separation of powers is reciprocal. 'Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded.'" Carrick v. Locke, 125 Wn.2d 129, 136, 882 P.2d 173 (1994).

This Court should not invade the separate power of the legislature to form public policy through the enactment of laws and create obligations for the trial court that do not exist in the RCW.

There will no doubt be future cases before this Court and the high courts of this state and country which further examine youth brain science and incarceration in appropriate situations; however, there is absolutely no reason for this Court to engage in such an analysis in this case. This is especially true where the record demonstrates that the trial court allowed V.A.C. to remain on the SSODA disposition after four previous violations.

V.A.C. argues that the trial court abused its discretion because no reasonable judge would incarcerate a youth for his anxiety, depression and self-medication with marijuana. That did not occur here. The unmistakable truth in this case is that V.A.C. ultimately faced time in custody because he sexually assaulted another person, and when provided an opportunity to make changes and better himself, he repeatedly violated his conditions by having unauthorized sexual contact, viewing pornography, smoking marijuana, and other risk taking behaviors, all of which led to his termination from treatment and the ultimate decision to revoke his SSODA disposition.

3. There is no relief that this court can grant to V.A.C., he has completed the terms of his sentence and this matter is moot.

An appeal is moot if the court cannot provide effective relief. State v. Gentry, 125 Wn.2d 570, 616 P.2d 1105, 1134 (1995); State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225, 1229 (2004). In Gentry, the Supreme Court of Washington declined to review issues relating to pretrial motions by the State because no effective relief was available. Gentry at 616-617. "It is too late for an effective remedy in this case, and any expression of disapproval or approval of the action challenged would be "purely academic" and thus inappropriate." Id. In Ross, the Supreme Court of Washington declined to review the accuracy of the defendant's offender score because he had already been released from confinement and post incarceration supervision so the issues were moot. 152 Wn.2d at 228.

Release from confinement renders an appeal moot unless it involves issues of major public interest. State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 588 (2012). The factors the court considers in making that determination are 1) the public or private nature of the question 2) the desirability of an authoritative determination for guiding future decisions, and 3) the likelihood of the recurrence of the question. Id. There, the court applied the exception because it dealt with the constitutionality of statutes related to sentencing

practices which was a state-wide issue. Id. at 908. There, the defendant's constitutional rights were violated because the State failed to prove the prior convictions impacting his offender score by a preponderance of evidence. Id. at 909-910.

The majority of cases in which courts have utilized this exception involve issues of constitutional or statutory interpretation. In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736-737, 214 P.3d 141, 145-146 (2009). See also Hunley 175 Wn.2d 901 (where the defendant's constitutional rights were violated because the state failed to meet their burden); In re Pers. Restraint of Mines, 146 Wn.2d 279, 45 P.3d 535 (2002) (the sentencing review board's failure to record a parole hearing involved a continuing and substantial public interest).

In Mattson, 166 Wn.2d at 736-738, the State Supreme Court decided to utilize the exception because, though Mattson's sentence had expired, the Department of Corrections had an ongoing interest in assessing the risk of releasing sex offenders. The review related specifically to the interpretation of RCW 9.94A.728(2) and whether the language created a "due process liberty issue." The court held that for a state law to create a substantial liberty issue the law must place limits on the official

decision making process “in the form of ‘specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome must follow.” Id. (internal citations omitted). Only statutes that prescribe a given outcome for a specific set of facts create these ‘due process liberty interests’; ‘laws granting a significant degree of discretion cannot.” In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144; 866 P.2d 8 (1994); Mattson, 166 Wn.2d at 736-738. Because RCW 9.94A.728(2) lacked those elements the Mattson court held it did not create a liberty interest, Mattson, 166 Wn.2d at 740.

Following the revocation of the SSODA sentence in this case, the trial court imposed an additional 58 days in custody. The trial court specifically noted that term of supervision would expire upon his release. The revocation and amended order on adjudication and disposition was entered on November 15, 2017. V.A.C. acknowledged in his Motion for Order of Indigency that he has completed the terms of his detention. CP 79. There is no meaningful relief that V.A.C. seeks that could be granted by this Court.

The trial court’s decision to revoke the SSODA disposition involved considerable discretion as authorized by RCW 13.40.162.

As such, there is no basis for this Court to consider the issue raised. V.A.C. asks this Court to reinstate the SSODA disposition, but as a practical matter, that is no longer available. He has already served the suspended sentence and no term of confinement remains to be suspended. There is no relief that this Court can grant, the issue is moot.

D. CONCLUSION.

This appeal is moot as there is no relief that this Court can grant V.A.C.. The trial court acted within its discretion when it revoked the SSODA disposition. V.A.C. asks this court to impose requirements on the trial court that do not exist in the RCW. There is no reason for this case to be considered along with the line of cases that have applied juvenile brain science to the Eighth Amendment. V.A.C. was charged as a juvenile and sentenced according the law proscribed by the legislature to govern juvenile crime in Juvenile Court. The State respectfully requests that this Court affirm the trial court's decision to revoke the SSODA disposition and affirm V.A.C.'s conviction.

Respectfully submitted this 30 day of August, 2018.


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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 30th day of August, 2018, at Olympia,
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JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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