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NO. 53247-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

HEATH MCMILLIAN,

Appellant.

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

The Honorable Erik D. Price, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in denying a special sex offender sentencing alternative (SSOSA) based on the opinion of the victim's mother.

2. The court erred in ordering appellant, as conditions of community custody, to abide by a curfew and refrain from hitchhiking.

3. The community custody condition requiring appellant to report any "romantic relationship" is unconstitutionally vague.

4. The court erred in requiring appellant to pay the costs of his community custody supervision.

Issues Pertaining to Assignments of Error

1. As per the plea agreement in this case, the prosecutor recommended a SSOSA and informed the court that the minor victim was in favor of it. The victim's mother then spoke strongly about the impact of the offense. Giving great weight to the victim's mother's opinion, the court denied the SSOSA and imposed a standard range sentence. Under RCW 9.94A.670, did the court abuse its discretion when it gave great weight to only the victim's mother's opinion rather than to the opinion of the victim herself?

2. Must the community custody conditions imposing a curfew and prohibiting hitchhiking be stricken because they are not crime-related?

3. Must the community custody condition requiring appellant to inform his CCO of any “romantic relationships” be stricken because it is unconstitutionally vague?

4. The sentencing court found appellant indigent and waived all non-mandatory fees and costs. However, the judgment and sentence requires appellant to pay supervision fees as a condition of community custody. Must this requirement be stricken in light of State v. Ramirez¹ and recent statutory amendments?

B. STATEMENT OF THE CASE

Appellant Heath McMillian pled guilty to two counts of third-degree rape of his former wife’s teenaged daughter. CP 7, 16. Under the plea agreement, the prosecutor agreed to recommend a special sex offender sentencing alternative. CP 11. Under that proposed sentence, McMillian would have received a 20-month suspended sentence with 36 months of community custody during which he would be required to engage in sex offender treatment and abide by other conditions. CP 11.

¹ State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

At the sentencing hearing, the State recommended the SSOSA and informed the court that the victim was also in favor of that sentence. 2RP² 4, 9. However, the victim's mother, McMillian's former wife, also addressed the court. 2RP 6-9. She did not expressly oppose the SSOSA, but she did speak forcefully about the harm McMillian's conduct had caused to her family, both her older daughter (the victim) and her younger daughter (McMillian's biological child). 2RP 6-9. She told the court her daughter did not want McMillian to go to prison because she loves him and feels that what happened is her fault. RP 7. She thanked the court for "seeing this case and for weighing it with the severity that it deserves." 2RP 9.

The court recited its obligations to undertake an independent evaluation of whether a SSOSA was appropriate and to give great weight to the victim's opinion. The court concluded it could not simultaneously give great weight to the mother's opinion while affording McMillian the leniency of a SSOSA. 2RP 19-20. The court imposed a standard range sentence of 17 months followed by the statutorily required 36 months of community custody. CP 45-46. As a condition of his community custody, McMillian is required to

² There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 7, 2019; 2RP – Feb. 25, 2019; 3RP – Mar. 7, 2019.

successfully complete sex offender treatment. CP 52. Notice of appeal was timely filed. CP 54.

C. ARGUMENT

1. THE COURT MISAPPLIED THE LAW IN DENYING MCMILLIAN'S REQUEST FOR A SSOSA.

When a request is made for an alternative sentence, the offender is entitled to have that request actually considered under the correct legal standard. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009). The SSOSA law requires the court to give “great weight” to the victim’s opinion about the propriety of the sentencing alternative and mandates that the parent of a minor child is “also” a victim. RCW 9.94A.670. The law does not mandate how the court is to weigh the opinions when two victims disagree. Here, the court gave great weight only to the parent’s opinion and disregarded the teenaged victim’s opinion in favor of the SSOSA. This court should vacate the sentence and remand for resentencing so the court may properly give weight to both victims’ opinions.

a. In considering a SSOSA, the court must give great weight to all victims’ opinions.

The court’s authority to impose a criminal sentence is limited to that granted by statute. State v. Button, 184 Wn. App. 442, 446,

339 P.3d 182 (2014). Absent proof of aggravating or mitigating factors, the court generally must impose a sentence within the standard range prescribed by statute. RCW 9.94A.505. However, when the court finds that an eligible offender and the community would both benefit from imposition of a SSOSA, it may impose the sentencing alternative, which combines reduced prison time and treatment. RCW 9.94A.505; RCW 9.94A.670. The decision whether to grant a SSOSA is largely within the discretion of the sentencing court. Adamy, 151 Wn. App. at 587.

But that discretion is not unbounded. First, the court must truly exercise its discretion, rather than categorically deny a sentencing alternative. Grayson, 154 Wn.2d at 342. Second, the court may not deny a sentencing alternative on an impermissible basis such as the offender's race, sex, or religion. State v. Sims, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). Third, the court's decision must be supported by the record. State v. Oliva, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003). Fourth, the court must correctly apply the statute; denial of a SSOSA is an abuse of discretion when it is based on an incorrect legal standard or a misapprehension of the law. Adamy, 151 Wn. App. at 587; City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). It is this last criteria that is at issue here. The court's

decision to deny a SSOSA involved an incorrect interpretation of the statutory requirements.

Interpretation of the SSOSA statute's requirements is a legal question that courts review de novo. State v. Landsiedel, 165 Wn. App. 886, 889, 269 P.3d 347 (2012). While the length of a standard range sentence may not be appealed, the sentencing court's interpretation of the sentencing statutes is appealable. RCW 9.94A.585; Adamy, 151 Wn. App. at 587. Once an offender is eligible, the court is to consider numerous factors:

- whether the offender and the community will benefit from use of this alternative, . . .
- whether the alternative is too lenient in light of the extent and circumstances of the offense, . . .
- whether the offender has victims in addition to the victim of the offense, . . .
- whether the offender is amenable to treatment, . . .
- the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, . . .
- the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4). The last factor, the victim's opinion, is particularly important; "[t]he court shall give great weight to the

victim's opinion." Id. This case requires interpretation of this statutory provision.

The goal of statutory interpretation is to discern the Legislature's intent. In re Parental Rights to K.J.B., 187 Wn.2d 592, 596, 387 P.3d 1072 (2017). When that intent is clear from the plain language of the statute, no further interpretation is necessary. Id. at 596-97.

"It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty." Id. at 601. Thus, it is mandatory for the court not only to consider the victim's opinion but to give it great weight. Id.; RCW 9.94A.670(4).

The question of who constitutes a victim is also answered by the plain language of the statute. A victim is "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime." RCW 9.94A.670(1)(c). The term "'victim' also means a parent or guardian of a victim who is a minor child." RCW 9.94A.670(1)(c).

However, the statute is ambiguous when applied in a case of multiple victims with differing opinions. The definition allows for the existence of more than one victim. RCW 9.94A.670(1)(c). But the "great weight" provision assumes a singular victim and does not

specify how the differing opinions of multiple victims are to be weighed. RCW 9.94A.670(4).

One possible interpretation is that the court could simply choose a victim and give great weight to that person's opinion. Another interpretation would be that a minor child's opinion should always be disregarded in favor of the parent's opinion. A third interpretation would be that the court should listen to all the victims' opinions, give great weight to each, and make its decision based on a careful consideration of all the opinions. The legislative history and rule of lenity support this last interpretation. The court must consider all victims' opinions.

The SSOSA statute resulted from a joint recommendation by professionals involved in treating sex offenders, advocates for sexual assault victims, and the Superior Court Judges Association. State v. Jackson, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991). These groups recommended a sentencing alternative that would require treatment and offer alternatives to confinement for sex offenders. Id. They cited data indicating the SSOSA would lead to increased reporting of sex offenses, particularly within the family sphere. Id. The Legislature adopted the proposal unchanged. Id.

Thus, the heart of the SSOSA law is concern for the person who bears the burden of reporting a sex offense. Id. Family members are more likely to report if they know the court will give great weight to their opinion that treatment rather than lengthy incarceration, is called for. On the other hand, they will also be more likely to report if they can be assured that the court will give great weight to their opinion that incarceration is necessary. Either way, the concern is for the person who must voluntarily subject him or herself to the pain and embarrassment of reporting a sex offense.

In a case such as this, where the minor victim was 14 years old, that pain and embarrassment falls largely on the teen. CP 1. She is the one who must tell her story repeatedly, usually to a parent, a police officer, a detective, a forensic child interviewer, sometimes a jury. She has an opinion and the ability to voice that opinion. The legislative history of this statute does not condone ignoring it.

The rule of lenity also requires the court to give great weight to both victims' opinions in case of disagreement. When a statute is subject to more than one interpretation, "the rule of lenity requires courts to construe the statute strictly against the State and in favor of the accused." Jackson, 61 Wn. App. at 93 (citing e.g., State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)). This rule

requires courts to construe any ambiguity in the SSOSA statutes in favor of the accused. Id. Construing the statute to require the court to give great weight to both opinions in cases of disagreement is in line not only with the legislature's intent but also with the rule of lenity.

Requiring the court to give great weight to both victims' opinions is also consistent with the Legislature's rules of statutory construction. Although the provision mentions giving great weight to a single "victim's" opinion, "[w]ords importing the singular number may also be applied to the plural of persons and things." RCW 1.12.050. Thus, it is reasonable for this Court to conclude that the mandate to give great weight to the victim's opinion should be correctly read to require the court to give great weight to "all the victims' opinions."

If the Legislature had intended to substitute the opinion of the parent for that of a minor child victim, it could certainly have said so. Instead, it mandated the placing of great weight on the victim's opinion, and defined victim expansively to include the parent. Properly construed, the SSOSA statute requires the court to give great weight to the opinions of all victims. Here, however, the court gave heed only to the mother.

- b. The court abused its discretion when it gave great weight only to the mother's opinion, completely ignoring the teenaged victim's opinion.

In this case, the court gave great weight to the mother's opinion and ignored the teenaged victim's opinion entirely. 2RP 17, 19-20. This was an abuse of discretion because it is based on a misinterpretation of the law. Adamy, 151 Wn. App. at 587; City of Kennewick v. Day, 142 Wn.2d 1, 8. As discussed above, the court was required to give great weight to the opinion of all victims. RCW 9.94A.670. Instead, the court disregarded entirely the fact that the teenaged victim supported the SSOSA. 2RP 17, 19-20.

The court mentioned that the victim supported the SSOSA, but then declared that the mother opposed it, and stated "that is the voice that this court must give great weight to." 2RP 17. It is notable that the court did not say it weighed the mother's opinion against that of her daughter. Nor did it say, for example, that the mother's opinion was "a voice" the court had to listen to. On the contrary, it dismissed the daughter's opinion, saying that the mother's was "the voice that this court must give great weight to." 2RP 17 (emphasis added). The court emphasized that it was the mother's opinion that mattered when it declared, "I can't in good

conscience give great weight to the opinion of the mother and provide the leniency that a SSOSA would give you.” 2RP 19-20.

A defendant may appeal a standard range sentence when the court failed to comply with procedural requirements of the SRA or constitutional mandates. State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). “[I]t is well established that appellate review is still available for the corrections of legal errors or abuses of discretion in the determination of what sentence applies.” State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (State may appeal imposition of drug offender sentencing alternative). A party may “challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (quoting Williams, 149 Wn.2d at 146-47). “Remand for resentencing is often necessary where a sentence is based on a trial court’s erroneous interpretation of or belief about the governing law.” State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002).

Because the court misapplied, the law, a new sentencing hearing is required. When an improper consideration played a role in the sentencing procedure, the sentence must be vacated, and the

case remanded for a new sentencing hearing. Sims, 171 Wn.2d at 446. The only exception is if the court can be certain the court would have imposed the same sentence without the error. Id. That is not the case here. Because the court dismissed the teenager's opinion, it is impossible to discern how the court would have weighed that opinion if it had given it the required "great weight."

2. THE CURFEW AND HITCHHIKING
CONDITIONS OF COMMUNITY CUSTODY
MUST BE STRICKEN BECAUSE THEY ARE
NOT CRIME-RELATED.

The court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id. Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326. Defense counsel did not object to the improper community custody conditions below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The court ordered McMillian to abide by a curfew set by the CCO. CP 52. This condition prohibits McMillian from leaving his home during for any time period specified by the CCO. CP 52. The court also ordered McMillian to refrain from hitchhiking. CP 52. Neither of these conditions is authorized by law.

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable. Neither curfews nor hitchhiking are expressly mentioned. RCW 9.94A.703. However, a court may impose other “crime-related prohibitions.” RCW 9.94A.703(3)(f). A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). Substantial evidence must support a determination that a condition is crime-related. State v. Motter, 139 Wn. App. 797, 801, 162 P. 3d 1190 (2007), overruled on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Here, the evidence in the record does not establish that a curfew bears any relation to the circumstances of the offense. McMillian pled guilty after allegations relating to conduct that occurred in his home. CP 1-2. This is not a case where someone committed an offense outside his residence during late night or early morning hours. The curfew condition makes no sense in relation to the circumstances of the offenses for which McMillian was convicted. The same is true for the ban on hitchhiking. The court exceeded its authority in imposing the curfew and the hitchhiking prohibition because these conditions are not crime related. These conditions should be stricken. See State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (remanding to the trial court to strike a condition of community custody that was not crime related).

3. THE COMMUNITY CUSTODY CONDITION REQUIRING MCMILLIAN TO INFORM HIS COMMUNITY CORRECTIONS OFFICER OF ANY ROMANTIC RELATIONSHIPS IS UNCONSTITUTIONALLY VAGUE.

The condition requiring McMillian to report any romantic relationships to his CCO is unconstitutionally vague in violation of the Fourteenth Amendment. CP 52. The Fourteenth Amendment due process vagueness doctrine and article I, section 3 of the Washington Constitution both require the State to provide citizens

with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

A prohibition is void for vagueness if it does not (1) define the prohibition with sufficient definiteness such that ordinary people can understand what is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

Generally, “imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” Sanchez Valencia, 169 Wn.2d at 791-92. The imposition of an unconstitutional condition is, however, manifestly unreasonable. Id. at 792.

The condition requiring McMillian to inform his CCO of any “romantic” relationship is unconstitutionally vague because it does not provide him with adequate notice of what he must do to avoid sanction and does not prevent arbitrary enforcement. McMillian’s liberty during three years of supervised release should not hinge on the accuracy of his prediction about whether a given CCO, prosecutor, or judge would conclude that a “romantic

relationship” had been formed without first informing the CCO. The condition, as written, does not provide a standard by which a reasonable person can understand what qualifies as “romantic relationship.”

First, the term “romantic relationship” is extremely subjective. “Subjective terms allow a ‘standardless sweep’ that enables state officials to ‘pursue their personal predilections’ in enforcing the community custody conditions.” Johnson, 180 Wn. App. at 327 (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 180 n.6, 795 P.2d 693 (1990) (internal quotation marks omitted).

United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held that a condition of supervision requiring the defendant to notify the probation department upon entry into a “significant romantic relationship” was vague, in violation of due process. Id. at 79, 81. The federal court observed that “people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a ‘significant romantic relationship.’” Id. at 81. “What makes a relationship ‘romantic,’ let alone ‘significant’ in its romantic depth, can be the subject of endless debate that varies across generations, regions, and

genders.” Id. The condition had “no objective baseline,” as “[n]o source provides anyone—courts, probation officers, prosecutors, law enforcement officers, or Reeves himself—with guidance as to what constitutes a ‘significant romantic relationship.’” Id.

This Court adopted the Reeves court’s reasoning in a recent unpublished decision, State v. Green, 6 Wn. App. 2d 1016, 2018 WL 5977988, at *4–5 (No. 50396-4-II, Nov. 14, 2018).³ There, the trial court imposed a community custody condition requiring Green to inform his community corrections officer of “any romantic relationships.” Id. at *1.

Relying on Reeves, this Court held the condition was unconstitutionally vague because “Given the inherent subjectivity in the term “romantic relationship,” condition 19 fails to provide ordinary people with fair warning of the conduct proscribed and fails to protect Green from arbitrary enforcement of the condition.” Green, 2018 WL 5977988, at *5.

The Green court did not overlook the Washington Supreme Court’s decision in State v. Nguyen, 191 Wn.2d 671, 683, 425 P.3d 847 (2018), which held that the term “dating relationship”

³ This unpublished decision, cited under GR 14.1, has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

was not unconstitutionally vague. The Green court explained, “based on the dictionary definitions of “romantic” and “relationship,” the term “romantic relationship” refers to a state of affairs between two people involving highly subjective emotions and feelings.” Green, 2018 WL 5977988 at 4-5. This was distinguishable from the “dating relationship” condition at issue in Nguyen. Green, 2018 WL 5977988 at 4-5. Moreover, the Nguyen court recognized in dicta that the term “romantic” is “highly subjective.” 191 Wn.2d at 683.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The “romantic relationships” condition here is unconstitutional because it fails to provide reasonable notice as to what McMillian must do to comply with it. It also exposes him to arbitrary enforcement. As such, the condition violates due process and should be stricken.

4. THE SENTENCING COURT ERRED WHEN IT REQUIRED PAYMENT OF COMMUNITY CUSTODY SUPERVISION FEES.

The recently amended statute on legal financial obligations (LFOs) generally prohibits the imposition of discretionary costs on

indigent defendants. RCW 9.94A.760. Here, the court imposed discretionary community custody supervision costs. CP 46. Because McMillian is indigent, this discretionary LFO must be stricken.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary; the statute states the court “may require the defendant to pay costs.” RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of discretionary costs on indigent defendants. “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). This language became effective on June 7, 2018, more than six months before McMillian was sentenced. Ramirez, 191 Wn.2d at 738; CP 41 (sentenced on February 25, 2019).

The statute defines “indigent” as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW

10.101.010(3). The superior court found McMillian entitled to counsel for review “wholly at public expense.” CP 71.

Despite McMillian’s indigency, the court required him to pay “supervision fees as determined by DOC” while on community custody. CP 46; see also CP 51. The judgment and sentence does not cite to any legal authority for this requirement, but the cost appears to be authorized by RCW 9.94A.703(2)(d), the statute discussing allowable community custody conditions.

The statutory language establishes that these costs are discretionary. Subsection (2) of the statute is titled, “Waivable conditions” and provides, “Unless waived by the court, ... the court shall order an offender to: ... (d) Pay supervision fees as determined by the department.” RCW 9.94A.703(2)(d). Given this language, this Court recently noted these fees are discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) (quoting RCW 9.94A.703(2)(d)). This Court should likewise find the fees discretionary and thus improper when imposed upon an indigent party. The proper remedy is to remand to the sentencing court to strike this unauthorized charge. Ramirez, 191 Wn.2d at 750.

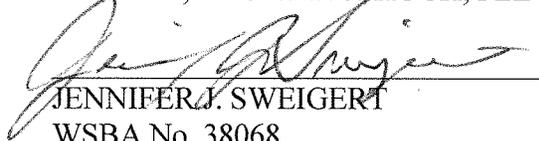
D. CONCLUSION

For the foregoing reasons, McMillian asks this Court to vacate his judgment and sentence and remand for resentencing. Alternatively, he asks this Court to strike the improper community custody conditions.

DATED this 28th day of October, 2019.

Respectfully submitted,

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