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Court of Appeals  
Division II  
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No. 53247-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

HEATH MCMILLIAN,

Appellant.

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

The Honorable Erik D. Price, Judge  
Cause No. 18-1-00396-34

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BRIEF OF RESPONDENT

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Joseph J.A. Jackson  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion by denying a request for a special sex offender sentencing alternative by considering a teenage victim's opinion in context with her mother's opinion regarding the imposition of the alternative.

2. The State concedes that the community custody terms regarding a curfew and hitchhiking are not crime related and should be stricken.

3. Whether the term "romantic" is unconstitutionally vague such that a condition requiring disclosure of romantic relationships should be modified to "dating relationships."

4. Whether community custody supervision assessments are costs under the definition of RCW 10.01.160(2), where the definition specifically refers to pretrial supervision.

5. Whether any of the claims raised in McMillian's Statement of Additional Grounds have merit.

B. STATEMENT OF THE CASE.

The appellant, Heath McMillian, was charged with two counts of rape of a child in the third degree and two counts of child molestation in the third degree based on information that he engaged in sexual contact and intercourse with T.T.C. when she

was 14 years old. CP 3-4; 1-2. Pursuant to a plea agreement, McMillian pled guilty to two counts of rape in the third degree. CP 7-19; 1 RP 8.<sup>1</sup>

Pursuant to the plea agreement, the State recommended that the trial court impose a suspended sentence pursuant to RCW 9.94A.670, the Special Sex Offender Sentencing Alternative (SSOSA) statute. CP 11; 2 RP 4-5. An independent presentence investigation report expressed concerns about McMillian's willingness to take responsibility for his actions and recommended against a SSOSA sentence. CP 28. During the sentencing hearing, T.T.C.'s mother discussed the affect that the offenses had on T.T.C. and asked the trial court to weigh the case with "the severity that it deserves." 2 RP 7-9. While speaking to the trial court, T.T.C.'s mother discussed T.T.C.'s opinion, stating, "She doesn't want him to go to prison because she loves him and because she still feels like it's her fault that he did this to her." 2 RP 7. The prosecutor indicated that she had spoken with T.T.C. and

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<sup>1</sup> The report of proceedings in this case are reported in three volumes. The change of plea hearing that occurred on January 7, 2019, will be referred to as 1 RP. The sentencing hearing that occurred on February 25, 2019, will be referred to as 2 RP. The motion to stay and for an appeal bond heard on July 3, 2019, will be referred to as 3 RP.

T.T.C. was in agreement with the recommendation of the State. 2 RP 9.

McMillian's defense attorney noted that it was an agreed recommendation and made efforts to address the concerns from the presentence investigation report. 2 RP 10. Defense counsel indicated that McMillian had told the presentence investigator that he did what he admitted to doing. 2 RP 10. Defense counsel stated, "he acknowledges and admits, it wasn't just inappropriate touching with massages, that it included penetration, vaginal penetration, digital penetration." 2 RP 10-11. Defense counsel then focused on the psychosexual evaluation of Dr. Thompson and Dr. Thompson's finding that McMillian was an appropriate candidate for a SSOSA sentence. 2 RP 11-12.

In pronouncing its sentence, the trial court stated,

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. I can't do it, not with the horrific abuse of this love and affection that this little girl gave to you and your abuse of that.

2 RP 19-20.

The trial court imposed a sentence of 17 months. 2 RP 20; CP 45. The trial court also imposed 36 months of community custody with conditions included in an appendix to the judgment

and sentence. CP 46, 51-52. This appeal follows. After the notice of appeal was filed, McMillian requested a stay of the judgment and an appeal bond, both of which were denied by the Thurston County trial court. 3 RP 14.

C. ARGUMENT.

1. The trial court did not abuse its discretion when it denied McMillian's request for a SSOSA sentence.

When considering a request for a SSOSA sentence, a trial court is required to consider whether the offender and the community will benefit from use of the alternative, whether the alternative is too lenient in light of the circumstances of the case, whether there are other victims other than that charged, whether the defendant is amenable to treatment, the risk the offender poses to the community and to the victim, and consider the victim's opinion whether the defendant should receive a treatment disposition. RCW 9.94A.670(4). The SSOSA statute gives the trial court discretion about whether to impose a SSOSA sentence. State v. Onefrey, 119 Wn.2d 572, 575, 835 P.2d 213 (1992).

An abuse of discretion occurs only when the decision of the court "is manifestly unreasonable, or exercised on untenable grounds, or untenable reasons." State v. McCormick, 166 Wn.2d

689, 706, 213 P.3d 32 (2009). Here, McMillian argues that the trial court applied an incorrect legal standard by giving great weight to the opinion of T.C.C.'s mother over the opinion of T.C.C. RCW 9.94A.670(4) states "The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section."

Victim is defined as "any person who has sustained emotional, psychological, physical or financial injury to person or property as a result of the crime charged" and also means "a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense." RCW 9.94A.670(1)(c). In this case, both the prosecutor and T.C.C.'s mother indicated that T.C.C. was in favor of the treatment alternative. 2 RP 7, 9. T.C.C.'s mother indicated "She doesn't want him to go to prison because she loves him and because she still feels like it's her fault that he did this to her." 2 RP 7.

While the trial court did state that T.C.C.'s mother's voice was "the voice that the court must give great weight to," it is clear that T.C.C.'s mother's statements included the opinion of T.C.C. 2 RP 7, 17. RCW 9.94A.670(1)(c) recognizes that minor victims will often have confused feelings about sexual abuse. Allowing a

parent to provide an opinion along with the child's opinion accounts for the very sensitive nature of child sexual assault cases.

The trial court's ruling made it clear that by giving great weight to the opinion of T.C.C.'s mother, he was also giving great weight to the opinion of T.C.C. The trial court was clearly aware of the confines of RCW 9.94A.670. 2 RP 17. The trial court noted that T.C.C. was the "young victim in this case," and noted that McMillian had abused the trust and affection that T.C.C. gave him. 2 RP 17, 18. The trial court then discussed, in detail, how the love that T.C.C. had for McMillian allowed McMillian to commit the offense. 2 RP 18. The trial court's comments were directly related to the feelings of T.C.C. which were relayed by her mother. 2 RP 7. The trial court continued to give great weight to T.C.C.'s opinion, noting, "that allows, after you do this horrific thing to her, for her to say to the State, I want this. I want leniency for him." RP 18-19.

Even the trial court's statements made while denying the SOSSA sentence reflected that the trial court was giving great weight to the opinions of both T.C.C. and her mother. The trial court stated

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. I can't do it, not with the

horrific abuse of this love and affection that this little girl gave to you and your abuse of that.

2 RP 19-20. It is clear in the record that the trial court was giving great weight to the opinions of all victims, properly analyzing those opinions within the confines of RCW 9.94A.670 and acting well within its discretion by denying the request for a SSOSA sentence.

There was no abuse of discretion. Even if this Court were to find that the trial court somehow erred, the facts considered by the Court and the trial court's comments leave no doubt that the trial court would have imposed the same sentence even if he had not specifically stated that he was giving great weight to the statement of T.C.C.'s mother. State v. Sims, 171 Wn.2d 436, 446, 256 P.3d 285 (2010). McMillian is not entitled to a new sentencing hearing.

2. The State concedes that the community custody conditions regarding hitchhiking and imposing a curfew where not crime related and must be stricken.

RCW 9.94A.703(3)(f) authorizes the trial court to order that a defendant "comply with any crime-related prohibitions." This Court reviews de novo whether the trial court had statutory authorization to impose a community custody condition. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). The State notes that the offenses in this case did not involve hitchhiking, therefore, the

State does not oppose an order remanding the matter to strike condition 16 of Appendix F of the Judgment and Sentence. CP 52.

Likewise, condition 14 of Appendix F, imposing a curfew does not appear to be crime related. The incidents occurred in McMillian's home. See, State v. Fernandez, 2018 Wn. App. LEXIS 106 at 20. (a curfew condition is not crime related when the offender was not outside of their home when they committed the crime).<sup>2</sup> The State concedes that this condition of community custody should be stricken.

3. The State concedes that per caselaw, the term "romantic" is unconstitutionally vague, condition 19 of Appendix F should be amended to change the word "romantic" to "dating."

In the unpublished opinion of State v. Green, 2018 Wn. App. LEXIS 2571, this Court found that a community custody term requiring an offender to report "any romantic relationship" to his or her CCO was inherently subjective and, therefore, unconstitutionally vague. Id. at 13.<sup>3</sup> This Court's opinion was consistent with the holding in United States v. Reeves, 591 F.3d 77 (2<sup>nd</sup> Cir. 2010). As noted in Green, our State Supreme Court found

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<sup>2</sup> Unpublished opinion, not offered as precedential authority. GR 14.1.

<sup>3</sup> This is an unpublished decision, not offered as precedential authority, but for whatever persuasive value the Court deems appropriate.

that a similar prohibition using the term “dating relationship” is not unconstitutionally vague in State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018).

The purpose of the community custody condition here was clearly related to the fact that T.C.C. was McMillian’s step daughter. CP 21. The State requests that this Court remand with direction that the condition be modified to replace the unconstitutionally vague term “romantic” with the constitutionally permissible term “dating,” thereby maintaining the obvious purpose of the condition while rendering the provisions constitutionally valid.

4. Community custody supervision fees are not costs pursuant to RCW 10.01.160, therefore the trial court did not err in ordering that McMillian pay community custody supervision fees.

RCW 10.01.160 states that the trial court shall not order a defendant to pay costs if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 9.94A.760(1) states that the trial court cannot order costs as described in RCW 10.01.160 if the defendant is indigent. This Court has found that community supervision fees are discretionary legal financial obligations. (LFOs). State v. Lundstrom, 6 Wn. App.2d 388, 396 n. 3, 429 P.3d

1116 (2018), *review denied*, 193 Wn.2d 1007 (2019). However, that fact does not make community supervision assessments “costs.”

The community custody supervision assessment is imposed under RCW 9.94A.703(2)(d), which states, “Unless waived by the court, as part of any term of community custody, the court shall order an offender to pay supervision fees as determined by the DOC.” RCW 10.01.160(2) states “Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” A community custody supervision assessment is not included in the definition of costs. A trial court is not required to conduct an inquiry into the ability to pay prior to assessing the community custody supervision assessment because it is not a cost pursuant to RCW 10.01.160(2). State v. Abarca, 2019 Wn. App. LEXIS 2890, at 28,<sup>4</sup> *citing*, State v. Clark, 191 Wn. App. 369, 374-75, 362 P.3d 309 (2015).

In Abarca, this Court declined to accept a concession from the State to strike a community custody supervision assessment. Id. at 28. This Court reached a similar conclusion in the

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<sup>4</sup> This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

unpublished decision of State v. Estravillo, 2019 Wn. App. LEXIS 2617, at 11-14.<sup>5</sup> Division I seems to have taken a different approach in its unpublished decisions on this issue. See, State v. Reamer, 2019 Wn. App. LEXIS 2008, at 13; State v. Lilly, 2019 Wn. App. LEXIS 2907, at 2.<sup>6</sup> Given that the community supervision assessment is clearly not contemplated by the definition of costs in RCW 10.01.160(2), this Court's approach is correct and should be followed.

The State further notes that the inclusion of the community supervision assessment in the judgment and sentence does not mean that an offender's financial status will not be taken into account. RCW 9.94A.780(1) allows the Department of Corrections to exempt or defer a person from offender supervision intake fees for several reasons including inability to obtain employment and undue hardship. State statutes take indigency into account when it comes to community supervision fees. The trial court did not err by including the provision that McMillian shall pay supervision fees as determined by DOC.

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<sup>5</sup> This is an unpublished decision, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

<sup>6</sup> These are also unpublished decisions, not offered as precedential authority but to be given whatever persuasive value this Court deems appropriate. GR 14.1.

5. McMillian's claims in his Statement of Additional Grounds are without merit.

The State notes that this Court has not requested a response to McMillian's statement of additional grounds; however, the State will respond to the claims in this brief. At the outset, the State notes that McMillian's claims are somewhat difficult to follow, and lack references to the record in many areas, therefore, this response is an attempt to address the issues raised and may not be comprehensive.

McMillian was notified at the time of his plea that the trial court did not have to follow the State's recommendation but could sentence him anywhere within the standard range. CP 11, 1 RP 7. McMillian never filed a motion attempting to withdraw his guilty plea pursuant to CrR 4.2(f) or CrR 7.8, nor would denial of a special sex offender alternative be a basis for withdrawal of his guilty plea where he was specifically advised that the trial court could impose a standard range sentence.

His assertions that he was misrepresented (sic) are not reflected in the record and should not be considered in this appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Moreover, his assertions are belied by the record, which clearly

indicates that the trial court informed him that it did not have to follow the recommendation of either party. CP 11, 1 RP 7.

His statement that the prosecutor “flipped at the stay of sentencing hearing” is without merit. The State abided by the plea agreement. 2 RP 4-5. Once the trial court imposed a standard range sentence, there was no requirement for the State to join in a motion to stay the imposition of the sentence.

McMillian seems to argue that his counsel provided ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). McMillian does not and cannot demonstrate that his defense counsel was ineffective. His defense attorney negotiated a recommendation from the State for a SSOSA sentence and capably argued for such a sentence on McMillian’s behalf. 2 RP 10-16.

McMillian waived any speedy trial claim by pleading guilty. State v. Wilson, 25 Wn. App. 891, 611 P.2d 1312, review denied,

94 Wn.2d 1016 (1980); overruled on other grounds, State v. Ardlington-Kelly, 95 Wn.2d 917, 918, 631 P.2d 954 (1981). Moreover, McMillian's vague claims make no reference to the record before this Court, except to say that the continuance was agreed to by counsel. A defense attorney acts as the defendant's agent in seeking a continuance of trial. State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013). McMillian signed the order on trial continuance entered on September 24, 2018. Supp CP \_\_\_.

McMillian's discussion of CrR 7.2 has no bearing on any issue raised in this appeal. He was represented by counsel at his plea and sentencing hearings, he was advised that his rights to appeal are limited following a guilty plea, his Judgment and Sentence advises him of limitations of collateral attacks, and perhaps most importantly, the State does not argue that his appeal was untimely. CP 47, CP 7-8, 2 RP 20.

McMillian's claims in his statement of additional grounds are difficult to ascertain and entirely unsupported by the record. The State does not concede any issue raised in the statement of additional grounds that is not specifically addressed herein. The State maintains that all of the claims raised therein are without merit.

D. CONCLUSION.

The trial court did not abuse its discretion by denying a Special Sex Offender Sentencing Alternative. The trial court clearly gave great weight to both T.C.C.'s opinion and that of her mother. The State concedes that the conditions of community custody regarding a curfew and hitchhiking are not crime related and should be stricken. The condition requiring McMillian to disclose any "romantic relationships" to his community corrections officer should be modified to "dating relationships." The trial court did not err by imposing community custody supervision fees.

The State respectfully requests that this Court affirm all other aspects of McMillian's Judgment and Sentence.

Respectfully submitted this 11<sup>th</sup> day of December, 2019.

  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 25, 2019

Signature: 

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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