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

STATE OF WASHINGTON,

Respondent,

v.

LYNN JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 19-1-00048-05

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the exceptional sentence of 420 months for nine felony child sex offenses involving five different child victims and multiple aggravating factors was not clearly excessive?
2. Whether the community custody condition restricting Johnson's internet access should be modified?

II. STATEMENT OF THE CASE

The State charged Johnson with nine felony sex offenses: Counts I and II, Child Molestation in the Third Degree; Counts III and IV, Rape of a Child in the Second Degree, a class A felony; Count V, Rape of a Child in the Third Degree; Counts VI through VIII, Child Molestation in the Second Degree; and Count IX, Communication with a Minor for Immoral Purposes. CP 77–83. Each of the counts except Count IX included special aggravating allegations. CP 77–83. The maximum sentence for Counts III and IV, Rape of a Child in the Second Degree, is life in prison. CP 79.

The amended information shows that there were five victims ranging in ages. The victim in Counts I and II, Child Molestation in the Third Degree, was between 14 and 16 years old. CP 77–78. The victim of Counts III and IV, Rape of a Child in the Second Degree, was between 12 and 14 years old. CP 79. The victim in Count V, Rape of a Child in the Third Degree, was between the ages of 14 and 16 years old. CP 80. The

victim in Counts VI, VII, and VIII, Child Molestation in the Second Degree, was between the ages of 12 and 14 years old. CP 81–82. The victim in Count IX, Communication with a Minor for Immoral Purposes was under the age of 18. CP 83. The crimes against these children occurred from June 2017 through early 2019. CP 43–44.

Johnson pleaded guilty to the charges of the amended information. CP 96–97. Johnson stipulated (CP 97–98) and the trial court found (CP 40, no. 4) that Johnson committed the following special aggravating allegations:

- Counts I–IV and VI–VIII were part of an ongoing pattern of sexual abuse of three different victims under eighteen as manifested by multiple incidents over prolonged periods of time. CP 39.
- Counts IV and V, the defendant knew or should have known that the two victims of Counts IV and V were particularly vulnerable or incapable of resistance. CP 39–40.
- Counts I–III and VI–VIII, that Johnson engaged the victims in sexual conduct in return for a fee. CP 40.

For purposes of sentencing, the trial court entered an order for a presentence investigation (PSI) to be conducted by the Department of Corrections (DOC). CP 173. DOC filed its initial report on Dec. 2, 2019 and filed an amended report on Dec. 4, 2019 which adds the standard

sentence range for each count and the community custody ranges. CP 132, 153. The amended PSI also includes the defendant's prior criminal history, statements by the victims, Johnson's statement regarding the offenses, a risk assessment, conclusions, and recommendations. CP 132–52.

The PSI shows Johnson had a prior sex offense conviction for Child Molestation in the Second Degree and one prior conviction for Child Molestation in the Third Degrees in 1996. CP 142. The judgment and sentence shows an additional prior conviction for Child Molestation in the Second Degree, also in 1996. CP 46. Johnson committed these crimes between May 1990 through April 1994. CP 46. Johnson indicated that his 11 year-old niece was the victim of those prior offenses listed in the PSI. CP 144.

Johnson recognized that the victims of the current offenses are young and they may not understand the full impact of his crimes upon them until they are older. CP 147. Johnson knew he would be arrested at some point and was surprised it didn't happen sooner. CP 147. When asked why he did what he did knowing the likely consequences, Johnson stated, "I liked to do it." CP 147.

The victims' statements regarding the impact Johnson's repetitive sexual abuse continues to have upon their lives are set forth in the PSI. CP 139–41. The victim of Counts III and IV (CP 79), Rape of a Child in the

Second Degree, indicated in the PSI that in addition to performing oral sex on her when she was 11 years of age and attempting to perform penile to vaginal penetration, Johnson had digitally penetrated her approximately 72 times while she was between the ages of 11 and 13 years old while she was intoxicated. CP 135–36.

The trial court entered findings of fact and conclusions of law on the aggravating factors. CP 39. The trial court found that since the defendant admitted the existence of the aggravating factors, that there were substantial and compelling reasons justifying an exceptional sentence. CP 40. The trial court also found that it was authorized to impose an aggravated exceptional sentence based on the fact the defendant committed multiple current offenses and the defendant's high offender score results in "free crimes", i.e., some of the current offenses go unpunished. CP 40. The trial court pointed out that the defendant's three prior sex offenses already gave Johnson a score of 9 and that if all the current offenses were actually scored, Johnson's offender score would be 33 for each of the current convictions. CP 40. This means that a standard range sentence results in most of his offenses going unpunished. CP 40.

At sentencing, although the State's recommendation was for 280 months prison and lifetime community custody, the trial court imposed a sentence of 420 months and lifetime community custody. CP 49–50, 92;

RP 10, 11, 45–46, 82. Although the maximum sentence for Counts III and IV is lifetime imprisonment, the maximum standard sentence range with all the sex offenses running concurrently would have been 280 months. RP 10–11. The trial court added an additional 80 months on top of the maximum standard sentence range for a total of 360 months. RP 76. Then the court added 12 months enhancement on each of counts I, II, VI, VII, and VIII for engaging the victims in sexual conduct in return for a fee and ran those enhancements consecutively. RP 76. This added an additional 60 months for the enhancements for a final total of 420 months.

The trial court also adopted the community custody conditions proposed by DOC in appendix F of the judgment and sentence. CP 60. Condition no. 20 requires: “You shall not access internet unless previously authorized by CCO and/or SOTP therapist. You shall provide CCO with all computer passwords to monitor compliance.” CP 61.

III. ARGUMENT

A. THE EXCEPTIONAL SENTENCE WAS SUPPORTED BY THE RECORD AND WAS NOT UNREASONABLE CONSIDERING THE NUMBER AND AGE OF THE VICTIMS AND THE MULTIPLE AGGRAVATING FACTORS.

“If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).” RCW 9.94A.535(4).

“To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.” RCW 9.94A.585(4).

“An exceptional sentence must be reversed if the reasons for the exceptional sentence are not supported by the record or if those reasons do not justify an exceptional sentence. RCW 9.94A.210(4). If the reasons are supported by the record, and justify an exceptional sentence, then, to reverse an exceptional sentence, we must find “that the sentence imposed was clearly excessive or clearly too lenient.” *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995) (quoting former RCW 9.94A.210(4)(b)).

“[T]he ‘length of an exceptional sentence should not be reversed as ‘clearly excessive’ absent an abuse of discretion.” *Id.* (quoting *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)) (other citations omitted). “Action [sentence] is excessive if it ‘goes beyond the usual, reasonable, or lawful limit.’ Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.” *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d

1123 (1986); *State v. Branch*, 129 Wn.2d 635, 649–50, 919 P.2d 1228 (1996) (citing *Oxborrow*, 106 Wn.2d at 53) (“A sentence is clearly excessive if it is based on untenable grounds or untenable reasons, or an action no reasonable judge would have taken.”)

When examining whether the trial court abused its discretion by imposing a sentence that is clearly excessive, the reviewing court does not engage in a proportionality review to determine whether the sentence is comparable to sentences in other similar cases. *Ritchie*, 126 Wn.2d at 396 (addressing appellant’s contention that “the length of an exceptional sentence must be proportionate to sentences in similar cases,” stating “We reject a proportionality review for compelling reasons”). This is because the trial court’s sentencing must be based solely upon the record before the court. RCW 9.94A.585(5) (“A review under this section shall be made solely upon the record that was before the sentencing court.”); *see also Ritchie*, 126 Wn.2d at 397 (“[A] proportionality review is inconsistent with [former] RCW 9.94A.210(5) which limits review solely of the record before the trial court.”).

“The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a

representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.” RCW 9.94A.500(1).

Here, there is no dispute that the exceptional sentence was authorized due to Johnson’s stipulation to aggravating factors. Thus the sentence should only be reviewed under the abuse of discretion standard as to whether the sentence was clearly excessive.

At sentencing, the trial court had before it a presentence investigation (PSI) conducted by DOC. Johnson had two prior convictions for Child Molestation in the Second and one prior for Child Molestation in the Third Degrees in 1996. Johnson indicated that his 11 year-old niece was the victim of those prior sex crimes. Twenty-three years later, having sexually abused children again, Johnson recognized that the victims of the instant case were also young, between the ages of 12 to 16, and they may not understand the full impact of his crimes upon them until they are older.

Furthermore, although Johnson knew he would be arrested at some point and was surprised it didn’t happen sooner, he admitted that he abused the children because he “liked to do it.” CP 147.

Additionally, Johnson admitted and the trial court found (CP 40, no. 4) that he committed the multiple special allegations under RCW

9.94A.535(3)(g), that the sex offenses were part of an ongoing pattern of sexual abuse of three different victims under eighteen as manifested by multiple incidents over prolonged periods of time. CP 39. Johnson also admitted to the aggravating factors under RCW 9.94A.535(3)(b) for Counts IV and V, that he knew or should have known that the two separate victims were particularly vulnerable or incapable of resistance. CP 39–40. Finally, Johnson admitted that for Counts I–III and VI–VIII, that he engaged the victims in sexual conduct in return for a fee.¹ CP 40.

The victim of Count III and IV (CP 79) Rape of a Child in the Second Degree, stated in the PSI that in addition to performing oral sex on her when she was 11 years of age and attempting to perform penile to vaginal penetration, Johnson had digitally penetrated her approximately 72 times while she was between the ages of 11 and 13 years old.

Furthermore, the trial court found that it was appropriate to impose an aggravated exceptional sentence to prevent Johnson from escaping punishment for “free crimes.” CP 40. The trial court pointed out that the defendant’s three prior sex offenses already gave Johnson a score of 9 and

¹ RCW 9.94A.585(9): “An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement.”

that if all the current offenses were actually scored, Johnson's offender score would be 33 for each of the current convictions. CP 40. This means that a standard range sentence would result in most of his offenses going unpunished. CP 40. The standard sentence range for counts III and IV was 210–280 months. RP 44. The maximum standard sentence range with all the sex offenses running concurrently would have been 280 months. RP 10–11. The trial court added an additional 80 months on top of the maximum standard sentence range for a total of 360 months. RP 76. Then the court added 12 months enhancement on each of counts I, II, VI, VII, and VIII for engaging the victims in sexual conduct in return for a fee and ran those enhancements consecutively for a total of 420 months. RP 76.

Based upon Johnson's prior sex offense convictions, the number and age of the child victims, the multitude of aggravating factors, Johnson's statements in the risk assessment, the statements of the victims, and the fact that Counts III and IV carry a maximum punishment of life imprisonment, it cannot be said that no reasonable judge would have imposed the 420 month exceptional sentence. *Oxborrow*, 106 Wn.2d at 531. A reasonable court could conclude that it is Johnson's conduct which shocks the conscious, not the court's sentencing decision.

Johnson argues that the sentence is not proportional to sentences in other similar cases and focuses argument on the crimes and sentences of

other sex offense cases in comparison to this case. Appellant’s Br. at 5. This argument is not relevant because the *Ritchie* Court expressly rejected proportionality review “for compelling reasons.” *Ritchie*, 126 Wn.2d at 396 (rejecting appellant’s contention that “the length of an exceptional sentence must be proportionate to sentences in similar cases.”).

This Court should find that the trial court did not abuse its discretion and should affirm the sentence.

B. THE COMMUNITY CUSTODY CONDITION NO. 20 SHOULD BE MODIFIED ON REMAND.

Condition no. 20 requires: “You shall not access internet unless previously authorized by CCO and/or SOTP therapist. You shall provide CCO with all computer passwords to monitor compliance.” CP 61.

The State concedes that the blanket restriction on the use of the internet without the approval of DOC is overbroad and leaves unchecked discretion to DOC. *See Matter of Sickels*, 2020 WL 4459314, at *9–10 (Wn. App. Div. 3, 2020) (citing *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005) (“Delegating authority to Mr. Sickels’s supervising CCO to approve internet access does not solve the problem; a sentencing court may not wholesaledly abdicate its judicial responsibility for setting the conditions of release.”); *see also State v. Johnson*, 184 Wn. App. 777, 781, 340 P.3d 230 (2014) (accepting State’s concession that blanket restriction from internet and computers without DOC approval was not

crime related); *State v. Forler*, 2019 WL 2423345, at *13 (Wn. App. Div. 1, 2019) (unreported decision and non-binding) (remanding to sentencing court to modify a blanket internet restriction to include limiting language prohibiting Forler from using the internet to solicit minors).

Although, the blanket restriction may need to be modified, it should be pointed out that as long as the condition is modified, random monitoring by DOC may still be appropriate. *Sickels*, at *9. The matter should be remanded to address this condition as it may be more narrowly tailored. *See id.* at 10.

IV. CONCLUSION

The record demonstrates that the court properly exercised its discretion in sentencing Johnson and the sentence was not clearly excessive. Therefore the Court should affirm the 420 month sentence and remand the case to modify community custody condition no. 20.

Respectfully submitted this 26th day of August, 2020.

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Jan Trasen on August 26, 2020.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

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