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MARCH 13, 2012
Court of Appeals
Division III
State of Washington

NO. 299091-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

STEVEN WAYNE WILKINS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00406-1

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The crimes, the charge, and the plea agreement:

J.C., the defendant's stepdaughter, reported the defendant penetrated her with his penis and with a finger on numerous occasions, both in Oregon and Washington. See "Official Version of Offense" in Pre-Sentence Investigation report. (CP 18-20). After failing a polygraph, the defendant admitted penetrating J.C.'s anus, once with his finger and twice with his penis. (CP 20).

The defendant was charged with two counts of Rape of a Child, with an aggravating factor based on RCW 9.94A.535(3)(n), that he used his position of trust or responsibility to facilitate the crime. (CP 1-2).

In exchange for his plea of guilty, the State agreed to dismiss Count II and not proceed regarding the aggravating factor. (CP 55). The sentence would be indeterminate under RCW

9.94A.712, with a minimum sentence of 93-123 months and a maximum sentence of life. (CP 8).

The State further agreed to recommend a Special Sex Offender Sentencing Alternative if the defendant received a favorable recommendation for such a sentence. As provided in the defendant's Statement on Plea of Guilty to Sex Offense, "(g) . . . Defendant may petition the court for SOSA and if receives favorable recommendation, defendant to serve 12 months in jail w/balance suspended consistent w/ SOSA sentence." (CP 10).

The written statement on plea of guilty informed the defendant he could be sentenced for the remainder of his life. The trial judge verbally advised the defendant he could receive a life sentence.

The written statement on plea of guilty:

The Statement on Plea of Guilty to Sex Offense specifically informs the defendant in Section 6 (f) that for the crime of "Rape of a

Child in the First Degree committed when [defendant] was at least 18 years old," Defendant shall receive a minimum term of confinement within the standard range (unless an exceptional sentence is ordered) and a maximum term of confinement of the statutory maximum. (CP 9). This section further informs the defendant the Indeterminate Sentence Review Board may increase the term of confinement. (CP 9).

Please note that an asterisk is handwritten next to the box, "Rape of a Child in the first degree committed when I was at least 18 years old" in section 6 (f) indicating that the defendant would receive a minimum term within the standard range and a maximum term of the statutory maximum, and that the Indeterminate Sentence Review Board could increase the minimum. (CP 9).

Further, the maximum term was correctly listed in section 6 (a) of the Statement on Plea of Guilty to Sex Offense. (CP 8). The defendant

told the trial court that he had read the Statement on Plea of Guilty to Sex Offense by himself and that he had gone over it with his attorney. (CP 33).

The plea colloquy:

During the plea colloquy, the trial court told the defendant, "You have an offender score of zero, **a maximum possible sentence of life in prison**, and a \$50,000 fine, a standard range sentence of 93 to 123 months in prison, followed by 36 months of community custody." [Emphasis added] (CP 32).

The trial court then discussed the State's recommendation, which included a 12 month sentence should the defendant receive a Special Sex Offender Sentencing Alternative (SSOSA). The trial court in discussing this 12-month possible sentence concluded by asking:

Q: Okay. And you understand that the sentencing judge does not have to follow that recommendation but could, in fact, put you in prison for up to ten years?

A: Yes, sir.

Q: Up to 123 months, so ten years plus three months. Do you understand that?

(CP 33).

The defendant did not receive a favorable recommendation for SSOSA from the treatment provider, Michael F. Henry.

Michael F. Henry submitted a report to the defendant's attorney dated September 21, 2010.

(CP 60-63). Some highlights:

- Although the defendant pled guilty to Rape of a Child, he denied ever penetrating or having oral-genital contact. (CP 61).
- The defendant minimized the number of times he sexually abused J.C., contradicting not only J.C., but his own statement to the police. (CP 61).
- Mr. Henry concluded that the defendant's actions "demonstrate a persistent pattern of manipulation and exploitation." (CP 62). "Steve verbalized feelings of remorse for

his actions, but my impression is that Steve's level of empathy was low and his feelings of remorse were superficial." (CP 62). "His sexual abuse of his stepdaughter is a further display of his self-centered attitude, and the deficits in the lack of awareness of his negative actions and effects on others. (CP 62). "[H]e has no marketable skills and will have difficulties obtaining stable employment in the future. ... He does not appear to be highly motivated to participate in treatment." (CP 63).

- Mr. Henry's recommendations: "It is my clinical opinion based on available data that Steve Wilkens appears to be a potentially moderate degree of risk to re-offend without follow up treatment. He appears to be a marginal candidate for referral to the SSOSA program based on his denial of personal or sexual problems, his low level of empathy, low motivation for

treatment, financial problems and a lack of marketable skills. In addition, it would be important for the victim's family to support outpatient treatment. I do have concerns about the conflicting reports of Steve and the victim regarding frequency of the sexual offenses, which Steve minimizes. His offense pattern appeared to have been escalating in regards to intrusiveness. Steve is interested in relocating to the Oregon area as he has no community support in the Tri-Cities including a stable residence but his plans are vague at this time." (CP 63).

- Finally, although I have found the SSOSA program to be helpful and beneficial to offenders in the past, unless the client can demonstrate a clear ability to commit to the long-term financial, residential and employment accountability imperative to the

treatment process, he becomes a liability to the community at large." (CP 63).

The defendant suppressed the Henry report, leading to two Pre-Sentence Investigation reports, one considering the case without the Henry report, the other with the Henry report.

The defendant did not release the *Henry* report to either the Department of Corrections for consideration in the Pre-Sentence Investigation or the prosecution. (03/30/11, RP 3). The Pre-Sentence Investigation (PSI), dated November 15, 2010, recommended "a sentence within the standard range with Community Custody under the authority of the ISRB for the statutory maximum." (CP 24).

The defendant then requested another PSI, this time after providing the Department of Corrections with the *Henry* report. (03/30/11, RP 4). Nevertheless, the outcome did not change: In an April 11, 2011, Department of Corrections report, the Pre-Sentence writer noted that the

Henry report was that the defendant was a marginal candidate for SSOSA, and repeated the standard range sentence recommendation. (CP 39).

The trial court finds that the State is not required to request a SSOSA, because the defendant has not received a favorable recommendation for that sentence.

In a hearing on March 18, 2011, before the Honorable Robert G. Swisher, the Court entered Findings that neither the Michael F. Henry report or the Pre-Sentence Investigation had favorable recommendations for a SSOSA. (CP 56-57). Therefore, the Court concluded that the prosecutor was not required to recommend a SSOSA. (CP 57).

The prosecutor recommended a sentence of a minimum of 93 months and a maximum of life, which the trial court accepted. (CP 7-8).

ARGUMENT

1. **RESPONSE TO DEFENDANT'S FIRST ARGUMENT:**
"The prosecutor breached the plea agreement and violated Wilkins' right to due process when it failed to recommend a SSOSA." (App. brief at 7).

A. The review herein is de novo.

Although the trial court heard a motion on this point, since a plea agreement is a contract, interpretation of the plea's terms is a question of law, reviewed de novo. *In re Hudgens*, 156 Wn. App. 411, 416, 233 P.3d 566 (2010).

B. Since the Michael F. Henry report was completed before the plea agreement, the "if (defendant) receives favorable recommendation" provision had to refer to a different report, namely the Pre-Sentence Investigation.

The following timeline is important:

September 21, 2010: Michael F. Henry's report is written and given to the defense attorney. (CP 60-63). The defendant did not provide the State with a copy of that report or otherwise inform the State of its contents.

October 20, 2010: Defendant pleads guilty with agreement that "if (defendant) receives favorable recommendation," the State will recommend a SSOSA. (CP 10).

First point: The plea agreement involves a classic condition precedent for the State's recommendation - the defendant having a favorable recommendation for SSOSA. Conditions precedent are those facts and events occurring subsequent to the making of a contract. *Ashburn v. Safeco Ins. Co. of America*, 42 Wn. App. 692, 713 P.2d 742 (1986). A condition precedent is based on what happens in the future, not what has already occurred.

Second point: If the parties intended to be bound by the Henry report, they would have said so. If that was the intent, the plea agreement would have simply said that the State would recommend SSOSA based on the favorable recommendation of Mr. Henry.

Third point: There is an implied duty of good faith and fair dealing in every contract. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). To allow the defendant to hide the *Henry* report, enter into a plea agreement, and then pull the *Henry* report from his back pocket and claim that any ambiguities in the report must be construed in his favor violates this duty.

C. Even ignoring the timing and the defendant's suppression of the *Henry* report, the "favorable recommendation" should refer to the Pre-Sentence Investigation, not a treatment provider's report.

There are several key differences between a PSI and a treatment provider's report. First, the PSI is mandatory on sex offenses. RCW 9.94A.500(1). In this case, there is no document filed and no comment made before or during the plea of guilty that the defendant would seek a report from a treatment provider. The only report the parties, or at least both parties knew was coming was the PSI. How could the "favorable

recommendation" refer to a treatment provider report which no one had officially requested?

Second, the PSI is required to provide a risk assessment. The primary purpose of a treatment provider report is "to determine whether the offender is amenable to treatment." RCW 9.94A.670(3). Although a treatment provider's report should "assess and report the offender's amenability to treatment and relative risk to the community," the report is focused on the offender. RCW 9.94A.670(3)(b). Only the PSI involves an assessment of the risk.

Consider a man who volunteers to coach a softball team of 13-year-old girls. Eventually, he grooms each girl and each girl's parents to believe he is a safe, trustworthy man. He has the opportunity to be alone with each girl on the team and molests each one. A treatment provider may report that the man will go to counseling sessions and appears willing to follow treatment

suggestions. However, the court should consider, under RCW 9.94A.670(4) whether:

- The offender and the community will benefit from the use of a SSOSA;
- The SSOSA is too lenient in light of the extent and circumstances of the offense;
- The offender has victims in addition to the victim of the offense;
- The offender is amenable to treatment.

The court should also consider:

- The risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim; and
- The victim's opinion whether the offender should receive a treatment disposition.

Only the PSI refers to all of these considerations. The treatment provider report is designed to only consider the defendant's amenability to treatment. This Court should hold that the "favorable recommendation" referred to

in the plea agreement is the recommendation of the Pre-Sentence Investigation after considering the risk-benefit analysis, not a treatment provider's assessment of the defendant's amenability to treatment.

D. The Henry report is not favorable for the defendant to be sentenced to SSOSA.

1. The Henry report is not favorable.

Probably the best evidence that the Henry report is unfavorable is that the defendant wanted it suppressed. If the defendant thought the Henry report was favorable, he would have provided it to the prosecution and the Department of Corrections. The defendant probably suppressed the Henry report because it was so obviously unfavorable that it would have eliminated any possibility of a positive recommendation from the PSI. In fact, it is hard to find any "favorable" comments for the defendant in the Henry report.

2. "Favorable" does not equal
"amendable."

Further, the defendant's argument on appeal is incorrect: "Favorable" is not equivalent to "amenable." First, if the parties had meant that the State would recommend a SSOSA if the defendant was "amenable" to treatment, they would have so stated it in the plea agreement.

Second, the dictionary definition of "favorable" and "amenable" are not close. Amenable is defined as "1. Willing to follow advice or suggestion; tractable; submissive. 2. Responsible to authority; accountable. 3. Open or liable to testing; criticism or judgment." *The American Heritage Dictionary of the English Language*, New College Edition (5th printing 1975). Thus, a defendant may be completely willing to submit to all counseling sessions and suggestions in treatment, but be a terrible candidate for a SSOSA.

"Favorable," on the other hand, is defined as "1. Advantageous; helpful. 2. Propitious;

encouraging. 3. Manifesting approval; commendatory. 4. Embodying or conceding that which was desired or requested: a favorable reply. 5. Indulgent or partial." *The American Heritage Dictionary of the English Language*. There is nothing in the Henry report that could be construed as "manifesting approval" of a SSOSA, "encouraging" the court to award a SSOSA, or stating that a SSOSA would be "advantageous or helpful."

Again, imagine the volunteer softball coach who grooms and molests each of the nine 13 year-old-girls on the team. The coach is convicted of nine counts of Child Molestation in the Second Degree, resulting in a standard range of 87-116 months. RCW 9.94A.510 and 9.94A.515. The coach is eligible for SSOSA under RCW 9.94A.670(2) in that he has no prior sex offenses, no prior violent offense convictions, there was no bodily harm to the victims, he had an established

relationship with the victims and he could be sentenced for less than eleven years.

A treatment provider may report that he is willing to follow advice, and therefore, amenable to treatment. However, that does not mean that the treatment provider made a "favorable" recommendation for a SSOSA. The treatment provider has not considered or commented on the defendant's predatory nature, his abuse of a position of trust, his repeated offenses, his danger to the community, or the opinions of the victims.

In this case, the best Mr. Henry could say is the defendant was a marginal candidate. Mr. Henry noted the defendant's minimization of his acts, his lack of empathy, lack of motivation, and lack of family resources. Mr. Henry concluded by stating the defendant may be a threat to the community. A treatment provider should not be required to accept a patient under these conditions.

2. RESPONSE TO DEFENDANT'S SECOND ARGUMENT: "The Guilty Plea Was Invalid Because The Court Misinformed Wilkins About His Maximum Sentence." (App. brief at 15).

The defendant has the burden of proving the statement of plea of guilty is manifestly unjust, sufficient to warrant withdrawal of the plea. *State v. Codiga*, 162 Wn.2d 912, 929, 175 P.3d 1082 (2008). There is a strong preference for the enforcement of plea agreements. *Id.*

A. While the defendant is allowed to raise this issue for the first time on appeal, the defendant has never claimed, and does not now claim that he was confused about the maximum possible sentence.

The defendant moved to withdraw his guilty plea with the trial court based on his failure to obtain a favorable recommendation for SSOSA and the State's subsequent request that he be sentenced to the standard range as the minimum sentence and life as the maximum, and for lack of contact with his attorney. (CP 41; 05/11/11, RP 5). The defendant has never claimed, then or now, that he was actually confused by the trial

court's colloquy or the written statement on plea of guilty.

The defendant is allowed to raise this issue for the first time on appeal. However, when considering whether the trial court misinformed the defendant, this Court should keep in mind that the defendant did not have any questions during the plea colloquy, and has not had any questions since regarding the maximum possible sentence.

B. The written plea agreement and the trial court's colloquy properly informed the defendant that the maximum sentence is life.

The defendant states, "The superior court incorrectly told Wilkins he could not be imprisoned for more than 123 months." (App. brief at 15). This is not accurate. The Court told the defendant, "You have an offender score of zero, **a maximum possible sentence of life in prison**, and a \$50,000 fine, a standard range sentence of 93 to 123 months in prison, followed

by 36 months of community custody.” [Emphasis added] (CP 32).

The defendant cites the court’s statement to the defendant that he could be sentenced to 123 months pursuant to the standard range. (CP 33). The defendant then argues that this somehow contradicted the court’s statement that the maximum sentence was life. This is not correct. Nowhere did the trial court state, modify, amend, withdraw, change, or otherwise contradict the statement that the defendant was facing life in prison.

The trial court has an obligation to inform the defendant of the standard range and the maximum sentence. As stated in *State v. Kennar*, 135 Wn. App. 68, 75, 143 P.3d 326 (2006), CrR 4.2 and caselaw requires the trial court to advise a defendant of both. The trial court did exactly that and did so directly and without confusion.

Further, the trial court specifically asked the defendant if he had read the plea statement,

if he went over it with his attorney, and if his attorney explained to him the consequences of entering the plea. (CP 33). As stated in *State v. Codiga*, 162 Wn.2d at 923, the trial court is not required to orally ascertain that the defendant understands the consequences of his plea, if the defendant stated that he read the plea agreement. Knowledge of the direct consequences of the plea can be satisfied by the plea documents.

The defendant's argument is even more tortured regarding the written plea. The written plea statement is directly from the form authorized in CrR 4.2, "Statement of Defendant on Plea of Guilty to Sex Offense." The defendant stated he read that form and consulted with his attorney about it. An asterisk is beside section (6)(f) which states that the defendant would be sentenced to a minimum term and a maximum term consisting of the statutory maximum for the crime. (CP 9). The written plea states the

Indeterminate Sentence Review Board could increase the minimum sentence.

Although the defendant on appeal argues that section (6)(f) "does not make clear" the role of the Indeterminate Sentence Review Board, the State requests that this Court review the Statement of Defendant on Plea of Guilty. (CP 7-17).

The trial court properly advised the defendant of the maximum sentence, the minimum sentence pursuant to the standard range, and the defendant stated that he had read the plea agreement and understood it, including the provision regarding the indeterminate sentence.

3. **RESPONSE TO DEFENDANT'S THIRD ARGUMENT:**
"The Court Exceeded Its Authority In Imposing Conditions Of Community Custody." (App. brief at 20).
 - A. **"The Law Does Not Authorize The Court To Prohibit Mere Possession Of Alcohol When Alcohol Did Not Contribute To The Offense." (App. brief at 20).**

The State concedes that the provision, "should not use or possess alcohol," should be stricken. (CP 52).

B. "The Law Does Not Authorize The Court To Ban Wilkins From Assuming Any Position Of Authority Whatsoever." (App. brief at 22).

The defendant committed the crime against his step-daughter, a person with whom he had a position of trust. This provision is directly related to the defendant's crime. To respond to the defendant's argument, that Defendant could be precluded from leading a prayer group or a 12-step meeting (although since he denies alcohol abuse, it is not clear why he wants to go to a 12-step meeting): The defendant abused his position of leadership, trust or authority in this case. The trial court was correct to prohibit his participation in activities where he is in a position of authority.

C. "The Community Custody Condition Prohibiting Possession of Pornography is Unconstitutionally Vague." (App. brief at 23).

The Court should order modification of the Judgment and Sentence from, "Shall not use or possess any pornographic materials, to include magazines, internet sites and videos" to "Shall not use or possess any depictions of sexually explicit conduct as defined in RCW 9.68A.011(4)." (CP 52).

CONCLUSION

The Court should hold:

There was no breach of the plea agreement.

The defendant needed to receive a "favorable recommendation" as a condition for the State to recommend a SSOSA. That "favorable recommendation" had to come from the pre-sentence investigation, and not a treatment provider. The PSI considers all factors including the treatment provider's report, the victim's concerns, and a cost-benefit analysis of the advantages and disadvantages of SSOSA for the defendant and the community. Nevertheless, neither the *Henry* report or the PSI were favorable to the

defendant. If there was any doubt about the *Henry* report being unfavorable, the defendant had the *Henry* report when he entered into the plea agreement, which indicates that he believed the report was negative and that he hoped the pre-sentence investigation would be positive.

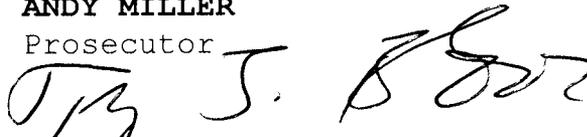
The trial court, both in writing and orally, correctly told the defendant he was facing life in prison. The written plea is explicit about the minimum and maximum sentences and the role of the Indeterminate Sentencing Review Board. The trial court in the plea colloquy asked the defendant if he had read the plea statement, had reviewed it with his attorney, and resolved any questions with his attorney. The trial court verbally told the defendant, explicitly, that the maximum sentence was life.

Strike the provision in the Judgment and Sentence regarding the use of alcohol. Affirm the provision in the Judgment and Sentence regarding the defendant not participating in

activities where he is in a position of trust.
Modify the Judgment and Sentence from "Shall not
use or possess any pornographic materials" to
"Shall not use or possess any depictions of
sexually explicit conduct as defined in RCW
9.68A.011(4)."

RESPECTFULLY SUBMITTED this 13th day of
March 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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