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Court of Appeals
Division III
State of Washington

NO. 31678-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DANIEL LYLE SCHRECENGOST,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Daniel Lyle Schrecengost's request for a SSOSA disposition.

2. The Judgment and Sentence prohibits Mr. Schrecengost from contact with all minor females. The trial court failed to take into consideration Mr. Schrecengost's minor daughter. (CP 66)

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the trial court fail to conduct an appropriate analysis concerning Mr. Schrecengost's request for a SSOSA disposition, and, if so, was it an abuse of discretion?

2. Is Mr. Schrecengost entitled to have the prohibition against contact with minor females reconsidered based upon his fundamental right to parent?

STATEMENT OF CASE

An Information was filed on October 17, 2011 charging Mr. Schrecengost with four (4) counts of second degree child rape. Count I encompassed the time period August 15, 2009 to July 31, 2010. Count II

encompassed the same time period. Count III referenced a time frame of October 10, 2009 to July 31, 2010 and Count IV involved a period from February 1, 2010 to July 31, 2010. (CP 6)

At Mr. Schrecengost's arraignment defense counsel challenged the charging language contained in the Information based upon the overlapping time frames. (10/26/11 RP 4, l. 21 to RP 5, l. 25)

Multiple scheduling orders were entered and Mr. Schrecengost eventually pled guilty to Counts I and III of the Information on March 14, 2013. (CP 12; CP 19; CP 20; CP 21; CP 22; CP 25; CP 28; CP 29; CP 30; CP 31; CP 32; CP 34; CP 35)

The trial court conducted a colloquy at the time Mr. Schrecengost entered his guilty plea. The Court also ordered a pre-sentence investigation (PSI). The PSI was filed on May 7, 2013. It recommended a standard range sentence. (CP 53; 3/12/13 RP 4, l. 4 to RP 11, l. 12)

Dr. Paul Wert conducted an evaluation to determine whether or not Mr. Schrecengost was eligible for a SSOSA sentence. The evaluation was filed on May 15, 2013. (CP 80)

In addition to the evaluation conducted by Dr. Wert, a polygraph examination was performed on August 17, 2012. The results of the examination were submitted to the Court and filed on May 15, 2013. (CP 103)

Treatment reports from Pricilla Hannon, a sex offender treatment provider, and Deanette L. Palmer, PhD, a licensed psychologist, were also provided to the Court for consideration of the SSOSA sentence. (CP 107-115)

Ms. Hannon testified at the sentencing hearing. She indicated that Mr. Schrecengost voluntarily entered into both sex offender treatment and mental health treatment in February 2012. He fully participated in weekly group meetings with the exception of two (2) excused absences. He remained current with his payments and his mental health counseling. She is willing to continue treating him as a SSOSA candidate. (5/7/13 RP 44, ll. 304; ll. 11-15; RP 46, ll. 3-11; RP 47, ll. 1-11; ll. 15-20; RP 49, ll. 11-25)

Judgment and Sentence was entered on May 7, 2013. The trial court denied a SSOSA sentence. The trial court's reasoning was that there was a long-term improper relationship between Mr. Schrecengost and J.G. (5/7/13 RP 95, l. 8 to RP 96, l. 6)

Mr. Schrecengost filed his Notice of Appeal on May 21, 2013. (CP 116)

SUMMARY OF ARGUMENT

The trial court's reason for denying Mr. Schrecengost's request for a SSOSA disposition failed to take into consideration all of the criteria under RCW 9.94A.670(4).

By denying Mr. Schrecengost a SSOSA disposition the trial court contravened the primary intent behind the SSOSA legislation.

The prohibition against contact with any minor females contravenes Mr. Schrecengost's fundamental constitutional right to parent his daughter. The condition needs to be amended and/or clarified.

ARGUMENT

I. SSOSA

RCW 9.94A.670(2) states:

An offender is eligible for the special sex offender sentencing alternative if:

- (a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the

crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970) and *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976);

- (b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;
- (c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;
- (d) The offense did not result in substantial bodily harm to the victim;
- (e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and
- (f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

Mr. Schrecengost meets each and every one of the criteria for a SSOSA sentence. He had no felony criminal history prior to the current offenses.

There was an established relationship between Mr. Schrecengost and J.G. No evidence of substantial bodily harm was presented to the trial court.

Mr. Schrecengost's standard range sentence was an agreed-upon one hundred and thirty-one (131) months. Mr. Schrecengost reserved the right to ask for the SSOSA disposition.

Mr. Schrecengost pled guilty to two (2) counts of second degree child rape. The elements of the offense are set out in RCW 9A.44.076(1):

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

Mr. Schrecengost's guilty plea complies with RCW 9.94A.670(2)(a) and includes all of the elements of the offense of second degree child rape.

Mr. Schrecengost was evaluated by Dr. Wert. He was found eligible for a SSOSA disposition.

Mr. Schrecengost voluntarily entered into sex offender treatment in February 2012. He fully complied with all treatment recommendations for a period in excess of one (1) year. In addition, he voluntarily entered into mental health counseling.

Mr. Schrecengost was fully cooperative with law enforcement. During his initial interview he disclosed facts corroborating J.G.'s statements. (CP 1)

RCW 9.94A.010 provides:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve him or herself;
- (6) Make frugal use of the state's and local government's resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Mr. Schrecengost contends that denial of a SSOSA disposition contravenes several of the designated purposes set forth in RCW 9.94A.010.

Initially, Mr. Schrecengost's incarceration will not reduce his risk of re-offending. Dr. Wert used the STATIC-99 and Ms. Hannon used the STATIC-99R to assess Mr. Schrecengost's risk of re-offense. He scored low risk on both tests. (CP 86; 05/07/13 RP 50, ll. 17-21)

The testimony and documentation presented at the sentencing hearing establishes that Mr. Schrecengost had already taken the opportunity to improve himself. Thus, the denial of SSOSA contravenes subsection (5) of RCW 9.94A.010.

One (1) of the purposes behind sex offender treatment is to make every effort to protect the public from further unlawful sexual activity by an offender. Mr. Schrecengost concedes that incarceration serves the same purpose; but it denies him continued treatment modalities until the last two (2) years of his sentence.

Mr. Schrecengost was paying for his treatment. Thus, by incarcerating him the trial court is now using State and/or local resources.

Mr. Schrecengost recognizes that a sentencing court has discretion with regard to a SSOSA disposition. However, it is apparent that the Court, in this case, abused its discretion.

The Legislature has seen fit to provide sex offenders with an alternative sentencing disposition. In ascertaining whether or not to give a particular offender a SSOSA disposition, the trial court must recognize that the elements of the particular offense under consideration have already been considered by the Legislature.

The special sex offender sentencing alternative was enacted by LAWS OF 2000, Ch. 28, Sec. 20. It is codified as RCW 9.94A.670.

RCW 9.94A.670(4) provides, in part:

After receipt of the reports, the court shall consider whether the offender and the community will benefit from the use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, 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 consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. ...

J.G. opposed Mr. Schrecengost's request for a SSOSA disposition.

(05/07/13 RP 26, l. 23 to RP 28, l. 24)

The trial court had to consider her opinion in light of the other factors which the Legislature has directed the Court to consider.

Eligibility for a SSOSA disposition is a question of statutory interpretation and is reviewed *de novo*. See: *State v. Landsiedel*, 165 Wn. App. 886, 889, 269 P.3d 347 (2012).

“The grant of a SSOSA sentence is entirely at a trial court’s discretion, so long as the court does not abuse its discretion by denying a SSOSA on an impermissible basis.” *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011).

Mr. Schrecengost maintains that it is impermissible for a trial court to ignore the factors set forth in RCW 9.94A.670. Most of the factors weigh in favor of Mr. Schrecengost’s request for a SSOSA disposition.

Both Mr. Schrecengost and the community benefit from the use of a SSOSA disposition. His voluntary entry into a sex offender treatment program and mental health counseling are indicative of the benefits accruing to both himself and the community.

Mr. Schrecengost has no prior felony criminal history. There are no other sex offense victims attributable to him.

It is obvious that Mr. Schrecengost is amenable to treatment. Dr. Wert found him amenable to treatment. Ms. Hannon testified that he was fully participating in his sex offender treatment program.

As previously noted, Mr. Schrecengost's risk of re-offense is minimal. Thus, he does not present a current danger to the community. He does not present a current danger to J.G. He does not present a current danger to persons of similar age and circumstances as J.G.

It appears that the trial court relied upon the factor that a SSOSA disposition would be too lenient in light of the extent and circumstances of the offense(s). Reliance upon a single factor is indicative of an abuse of discretion. The language of RCW 9.94A.670(4) is in the conjunctive. Mr. Schrecengost contends that this means that each and every factor must be taken into consideration by the sentencing court, and that a single factor is not dispositive.

Appellate courts may review a trial court's imposition of sentence for abuse of discretion. Discretion is abused only when it can be said no reasonable person would adopt the view which was adopted by the trial court.

State v. Smith, 93 Wn.2d 329, 353, 610 P.2d 869 (1980).

When consideration is given to the purposes of SSOSA, as set out in RCW 9.94A.010, Mr. Schrecengost argues that no reasonable person would adopt the view that continued sex offender treatment and mental health counseling, which is working to the benefit of Mr. Schrecengost

and the community, should be discontinued in favor of long term incarceration with little or no treatment.

Finally, it should be remembered that “[s]ociety has a stake in whatever may be the chance of restoring [the offender] to normal and useful life within the law.” *Personal Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005), quoting *Morrissey v. United States*, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed.2d 484 (1972).

II. FUNDAMENTAL RIGHT TO PARENT

Paragraph 4.2(B) of the Judgment and Sentence incorporates Appendix “H.” Condition number eleven (11) of Appendix “H” states that Mr. Schrecengost shall have no contact with minor females. (CP 64; CP 72)

During the pendency of the proceedings an order was entered allowing Mr. Schrecengost to have contact with his minor daughter. (CP 15)

The all-inclusive nature of the prohibition against contacting minor females adversely impacts Mr. Schrecengost’s right to parent.

We generally review sentencing conditions for abuse of discretion. ... But we more carefully review conditions that interfere with a fundamental constitutional right ..., such as the fundamental right to the care, custody, and companionship of one’s children. Such conditions must be “sensitively

imposed” so that they are “reasonably necessary to accomplish the essential needs of the State and public order.” ... The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny.

Personal Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (citing *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) and *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed.2d 599 (1982)).

The record is devoid of any consideration of Mr. Schrecengost’s fundamental right to parent his daughter. The fact that an order was entered prior to entry of the guilty plea, or the judgment and sentence, indicates that the State had little fear that Mr. Schrecengost’s continued contact with his daughter would be detrimental to her.

Whether or not Mr. Schrecengost is granted a SSOSA disposition, the original judgment and sentence would still need to be clarified insofar as his fundamental right to parent his daughter.

CONCLUSION

The trial court’s failure to take into consideration the legislative purpose behind a SSOSA disposition, along with the specific factors outlined in RCW 9.94A.670(4), is indicative of an abuse of discretion. The

trial court's denial of the SSOSA sentence should be reversed and the case remanded to grant a SSOSA to Mr. Schrecengost.

Alternatively, if no abuse of discretion is found with regard to the denial of the SSOSA disposition, the case still needs to be remanded for clarification on the prohibition against contact with minor females. Mr. Schrecengost has the fundamental right to continue to parent his daughter. His daughter is not a victim. He should not be precluded from contact with her.

DATED this 25th day of January, 2014.

Respectfully submitted,

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COURT OF APPEALS
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STATE OF WASHINGTON,)
) SPOKANE COUNTY
Plaintiff,) NO. 11 1 03210 9
Respondent,)
) CERTIFICATE OF SERVICE
v.)
)
DANIEL LYLE SCHRECENGOST,)
)
Defendant,)
Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of January, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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