

No. 34933-1-III
Asotin County Superior Court No. 15-1-00131-2

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

JONATHAN KINSMAN,
Defendant-Appellant.

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

The Honorable Scott D. Gallina, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

The sentencing judge abused his discretion when he failed to grant Kinsman a mitigated sentence.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the sentencing judge abuse his discretion when he failed to appreciate that he could impose a mitigated sentence based upon Kinsman's mental health diagnosis of autism and pervasive developmental disorder without reference to RCW 9.94A.535(1)(e)?
2. Did the sentencing judge abuse his discretion when he failed to apply the two-part test set forth in *State v. Ha'mim*¹ when determining whether a mitigated sentence was appropriate?
3. Do the purposes of the SRA support a mitigated sentence in this case?

III.
STATEMENT OF THE CASE

Jonathan Kinsman was charged with 21 counts of criminal conduct relating to child pornography. CP 1-24. He entered a plea of guilty to nine counts of possession of child pornography in violation of RCW 9.68A.070(1) and one count of disseminating child pornography in violation of RCW

¹ *State v. Ha'mim*, 132 Wn.2d 834, 843, 940 P.2d 633 (1997).

9.68A.050(1). CP 24-35. The parties agreed that Kinsman's standard range was 87-116 months in prison. CP 26.

Prior to sentencing, Kinsman obtained a psychosexual evaluation by John Colson who opined that Kinsman had "a developmental disorder which plays a significant role" in his criminal conduct. He also proffered medical records from Tim Rehnberg, Ph.D., a 2014 psychological evaluation by Maria Arellano, M.A., M.S., and a letter from his treating psychiatrist, Robert L. Johnson.

Dr. Johnson said that Kinsman suffered from chronic depression. CP 88. He said that Kinsman rarely left home, was "detached, fearful, and suffers greatly with interpersonal relationship issues."

Ms. Arellano said that Kinsman suffered from a major depressive disorder, an anxiety disorder, panic disorder, pervasive developmental disorder, and epilepsy. Kinsman was referred to her by DSHS to evaluate his eligibility for state benefits. At that time, Kinsman had lost his job as a dishwasher apparently because he had difficulty completing multiple tasks at the same time. *Id.* He was not permitted to drive because at a "fourway stop he is unable to trust his judgment and know when it is a good time to cross." He had previously tried to commit suicide. He said that growing up, he was also considered "the weird one." CP 79.

Dr. Rehnberg stated that Kinsman suffered from autism. CP 67. He discussed Kinsman as “a little eccentric” and as having a difficult time “making and maintaining eye contact.” CP 69.

John Colson described Kinsman’s medical history as follows:

Mr. Kinsman’s medical/mental health history is significant. Mr. Kinsman and his mother report that in “2011 or 2012” Mr. Kinsman was diagnosed with “Autism (ASD) and seizure disorder”. This was the first time that these issues were clinically diagnosed although Mr. Kinsman showed significant indicators all his life. He was language deficit (not speaking) at three years old. He demonstrated social anxiety and no peer relationships throughout his schooling and isolation which appeared to increase in intensity. While attending WSU Mr. Kinsman reports that his grades were falling and his financial aide “didn’t come through”. He didn’t talk “With anyone and he was socially isolated. Mr. Kinsman stated he attended only two semesters before he states, “I had a breakdown”. This precipitated his seeking mental health treatment and his diagnosis. He is currently being seen at St. Joseph’s Mental Health in Lewiston, Idaho by a Dr. Johnson and a neurologist, Dr. Thompson at the same center. Mr. Kinsman had been put on medications. He is currently taking Lamictal for his seizures, Paxil for his depression, Clasipan for his anxiety and Omeprazol for his stomach issues. Mr. Kinsman is currently supported by his SSI/disability assistance. Apparently Mr. Kinsman’s Paxil has been increased due to the current stress. Releases were sent for collateral information however none has been received to date.

CP 55.

He also said:

Mr. Kinsman’s primary social outlet is the Internet and the computer as he is socially isolated and anxious. He was exposed to pornography use at an early age by his older siblings and this activity has continued finding it a way in which to interact and to

soothe. Although he states that he knew the behavior was wrong the drive to connect and “interact” over rides his choice.

CP 59.

Colson concluded that:

It is my opinion that Mr. Kinsman has a developmental disorder which plays a significant role in his access and use of child pornography as well as adult pornography. To incarcerate Mr. Kinsman would be counterproductive to eradicating this problem. It is seen as a mental health issue and due to the low risk of hands on offending Mr. Kinsman, I believe can be managed in the community.

CP 60.

Based upon this information, Kinsman sought a sentence below the standard range. He noted that he did not need to establish a statutory mitigator. However, he pointed out that two items on the non-exclusive list of mitigating factors in RCW 9.94A.535 provided guidance to the Court: 1) Kinsman’s capacity to appreciate the wrongfulness of his acts was impaired, RCW 9.94A.535(1)(e), and 2) the multiple offense policy would result in a clearly excessive sentence “in light of the SRA policies expressed in RCW 9.94A.010.” RCW 9.94A.535(1)(g). Kinsman asked the sentencing judge to impose a mitigated sentence “resembling a SSOSA, as outlined in the psychosexual evaluation, including three years’ probation to include sexual deviance treatment.” CP 51.

The State opposed a mitigated sentence.

The sentencing judge rejected Kinsman’s request. He said:

Mr. Laws, you make a compelling argument, but I'm afraid that it's one that I can't go along with for the reasons that the reports, while they have the language that's been recited by both parties indicating that there may be some mental health issues on the part of Mr. Kinsman, don't go far enough, and the legislature provided that avenue for individuals who simply can't conform to what they need to be wrong. This case doesn't quite rise to that level.

5/2/16 RP 37.

The judge imposed a standard range sentence. CP 104-116.

IV. ARGUMENT

A. THE SENTENCING JUDGE ABUSED HIS DISCRETION IN CONCLUDING THAT KINSMAN'S MENTAL HEALTH ISSUES DID NOT PROVIDE A BASIS FOR A MITIGATED SENTENCE

In order to determine if a non-statutory factor legally supports departure from the standard sentence range, the trial court should engage in a two-part test. First, the trial court should determine if the legislature necessarily considered that factor when it established the standard sentence range. If it did so, the factor is an inappropriate basis for an exceptional sentence. A factor must be "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *Ha'mim* at 840. This Court reviews the trial court's decision on an exceptional sentence request under the abuse of discretion standard and a failure to exercise discretion is itself an abuse of discretion. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The sentencing judge abused his discretion in two ways. First, he failed to exercise his discretion because he appeared to believe that the only basis for departing below the standard range for mental health issues was the strict confines of RCW 9.94A.535(1)(e). He said that “there may be some mental health issues on the part of Mr. Kinsman, don’t go far enough, and the legislature provided that avenue for individuals who simply can’t conform to what they need to be wrong.” As Kinsman pointed out, mental health issues alone can be a mitigating factor. Statutory mitigating factors are only illustrative and the Supreme Court has clearly stated that other factors can be used in mitigation. *State v. Ha’mim*, 132 Wn.2d at 843. For example, the Supreme Court has held that youthfulness can amount to a substantial and compelling factor justifying a sentence below the standard range in some cases. *State v. O’Dell*, 183 Wn.2d 680, 696, 358 P.3d 359, 366 (2015). And, in that case, the Court went further and said that a defendant need not present expert testimony to establish that youth diminished his capacities for purposes of sentencing. *Id.* at 697.

Second, he did not apply the required two-part test from *Ha’mim*. These two errors alone are sufficient for reversal.

Moreover, had the trial judge correctly applied the law, he would have reached a different conclusion. First, he would have recognized that Kinsman’s mental illness standing alone could justify a mitigated sentence. Clearly, the

Legislature did not consider the effects of autism when setting the standard ranges for Kinsman's crimes.

Second, Kinsman's mental health history was sufficiently substantial and compelling to distinguish the crime in question from others in the same category. Here, Kinsman did present expert opinion. He was diagnosed with autism. CP 70. He exhibited a pervasive developmental disorder including delayed language development. CP 71. He had difficulty reading and writing "when required to perform cognitive and academic tasks quickly." CP 72. He suffered from seizures. CP 56. He never held a job, dropped out of college and qualified for SSI disability. CP 56

Two of those experts explained how Kinsman's diagnosis affected his criminal culpability and, thus, was a substantial and compelling reason to impose a mitigated sentence. Tim S. Rehnberg, Ph.D., said one of the characteristics of person with a pervasive developmental disorder is a "difficulty and/or inability to understand." CP 67

Because of this, they often display behaviors that they do not realize could be "socially inappropriate" because they are "clueless" when it comes to understanding social norms.

Id.

Mr. Jon Colson, a state certified sex offender treatment provider, evaluated Kinsman and his medical records. He stated:

Research has described pornography use by those who have ASD [Autism Spectrum Disorder] as not unusual and often the only non-threatening manner in which to feel “connected” to other or to express their sexual behaviors despite knowing it is wrong but having little concept as to the as to the future consequences.

CP 57. He went on to say that, because ASD patients have social anxiety, they are unlikely to “escalate to actual physical hands on contacts” with others. CP 57. He opined that the viewing of child pornography was “due to the users level of developmental immaturity.” *Id.* He concluded:

Research also supports this problem to be treated as a mental health issue and developmental issue rather than to imprison which appears to exasperate the issues.

CP 57.

This connection between Kinsman’s autism and his crimes of conviction are similar to the connection between youthfulness and criminality. Thus, like youth, it provides a substantial and compelling basis for a mitigated sentence and the trial judge erred in concluding otherwise.

B. THE PURPOSES OF THE SENTENCING REFORM ACT SUPPORT A MITIGATED SENTENCE FOR KINSMAN

As directed by the plain language of RCW 9.94A.535(1)(g), a trial court must look to the purposes of the Sentencing Reform Act as expressed in RCW 9.94A.010 to determine whether mitigation of a consecutive sentence is appropriate in a particular case. *State v. Graham*, 181 Wn.2d 878, 886-87, 337 P.3d 319 (2014). Those purposes are as follows: (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 himself or herself; (6) Make frugal use of the state's and local governments' resources; and (7) Reduce the risk of reoffending by offenders in the community.

Kinsman proposed a sentence that included some confinement but was primarily directed at treatment. Treating Kinsman rather than imprisoning him would promote respect for the law. Respect for the law is diminished when the mentally ill are imprisoned rather than treated. It appears unjust to jail someone because they are mentally ill. It suggests that mental health disorders are a personal weakness or evidence of a criminality.

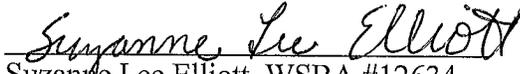
Mental health disorders are exacerbated with incarceration. The experts agreed that Kinsman needed treatment far more than he needed to be incarcerated. The public would be better protected if Kinsman spent the next eight to ten years in treatment and on supervision rather than being warehoused at the DOC. His prospects for a productive life after completing his sentence would be vastly improved. His risk to reoffend would be significantly reduced. Clearly, treatment is a far more frugal use of the public's resources than years of imprisonment.

V.
CONCLUSION

For the reasons stated above, this Court should reverse the standard range sentence and remand to the sentencing court for proper consideration of Kinsman's request for a mitigated sentence.

DATED this 26th day of May, 2017.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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