

No. 34933-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JONATHAN S. KINSMAN, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUE

1. DID THE COURT ABUSE ITS DISCRETION BY DECLINING TO IMPOSE AN ILLEGAL AND UNWARRANTED SENTENCE AS REQUESTED BY THE DEFENDANT?

II. SUMMARY OF ARGUMENTS

1. THE COURT PROPERLY REFUSED TO IMPOSE AN EXCEPTIONAL SENTENCE AND THEREFORE DID NOT ABUSE ITS DISCRETION.
 - A. The Court Properly Refused to Impose a SSOSA Sentence Where the Appellant Was Not Eligible for Such Alternative.
 - B. The Court Properly Declined to Impose the Exceptional Sentence Requested Where the Court Lacked the Authority to Fashion an Exceptional Sentence as Requested by the Appellant.
 - C. The Court Properly Declined to Impose an Exceptional Sentence Where the Facts of the Crime Do Not Support Such Departure.

III. STATEMENT OF THE CASE

On August 12, 2015, after receiving information concerning someone at 1301 Eleventh Street, Clarkston, Washington, accessing and distributing child pornography, police obtained and executed a search warrant at that residence. Clerks Papers (CP) 132-137. Upon knocking, officers were greeted by Samela Kinsman. CP 134-135. Officers explained why they were there and advised that they had a search warrant. CP 135. Also in the house was Samela's son, the Appellant, Jonathan Kinsman, and her daughter, Jessica Kinsman. CP 135. The warrant was read to all occupants, but the Appellant appeared especially nervous during this time. CP 135. During the initial walkthrough, it was observed that the Appellant had a large "gaming" type computer in his bedroom. CP 135.

Officers took the Appellant aside, and after advisement of his Miranda¹ rights and waiver of the same, he was questioned. CP 135. The Appellant denied knowing why the police would be there. CP 135. He was asked if he had any child pornography on his computer and the Appellant denied that he had downloaded any such materials. CP 135. The Appellant admitted that he was involved in "peer to peer" file sharing but denied involvement with child pornography. CP 135. After further questioning, he admitted to using search terms

¹Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

associated with child pornography. CP 135. The Appellant was confronted with the fact that twenty-six files of child pornography had been retrieved by investigators through his file sharing but he continued to deny involvement. CP 135. At that point in the questioning, the Appellant attempted to implicate his brother who had visited a couple weeks prior. CP 135. Officers pointed out that the file sharing had occurred six months prior. CP 135.

By that time, other officers had located his computer and had begun scanning it for child pornography. CP 136. They had located child pornography files on the hard drive. CP 136. The Appellant was confronted with these preliminary findings and he minimized his involvement. CP 136. Child pornography was also found on his cell phone. CP 136. The Appellant was placed under arrest. CP 136. In total, officers located twenty-six shared images of child pornography and over one -thousand one-hundred images of known child pornography. CP 136-137. Many of these images showed young children engaged in anal sex, ejaculation, vaginal sex, oral sex, masturbation, digital penetration, and other explicit and disturbing acts of sexual abuse. CP 137, 139-140.

The Appellant was charged with one count of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree, and twenty counts of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 1-21.

The Appellant subsequently pled guilty pursuant to a plea agreement to one count of Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree, and nine counts of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree. CP 22-23. The State agreed to dismiss the other eleven counts of Possession of Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree and agreed to recommend ninety-six months of incarceration. CP 22-23.

A sentencing hearing was held on May 2, 2016. CP 104, Report of Proceedings (RP) 20. With regard to sentence, the Appellant, recognizing that he was ineligible as sentence under Special Sex Offender Sentencing Alternative (SSOSA), argued for the court to fashion an exceptional sentence that, in all relevant aspects, mimics the SSOSA sentencing alternative. CP 51. In support of this request, the Appellant submitted evaluations and letters from Dr. John Colson,² Dr. Tim Rehnberg, and Dr. Dianne Phillips-Miller,³ recommending that the Appellant have his sentence suspended and be given community based treatment in lieu of incarceration. CP 50, 53-65, 66-73 74-86, 87-89. The court considered the arguments of

²Contrary to the Appellant's arguments below and here, Dr. Colson considered him to be a moderate to high risk for reoffense. CP 58.

³The report appears to have been by a graduate student and approved by Dr. Phillips-Miller.

counsel and the materials provided but declined to impose an exceptional sentence as suggested by the Appellant. RP 37. In so ruling, the court stated:

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 avenue⁴ for individuals who simply can't conform to what they need to be wrong.

RP 37. The court continued and in response to the Appellant's claim that he wasn't aroused by the child pornography found on his computer, stated:

And one of the difficult things in this case is that he kept going back and kept going back.

It's been explained here that he found it to be underwhelming or unsatisfactory, and so he went back and looked for more. I've had experience in restaurants where I've tried something off the menu, and it was unsatisfactory or underwhelming. I didn't go back and try to find more and more and more in that same venue. I moved on, and Mr. Kinsman simply did not. He kept at it. Apparently was very successful at it. He has some considerable knowledge about the use of computer and the Internet. He used that for this purpose time and again. And again, though there's been recitation that this was a new computer or wasn't actually used to search anything, it was used to store files. What a great opportunity to get rid of your unwanted materials if you're changing computers. Throw it in the round file, send it to the landfill. That's not what happened. These

⁴The court was referencing mental defenses under RCW 10.77.080 and noting that, while the Appellant may have social deficiencies, nothing supported the inference that the Appellant suffered from a mental disease or defect such that he could not form intent or appreciate the wrongfulness of his conduct.

were retained, which shows that they were neither underwhelming, nor so repugnant to Mr. Kinsman he would take advantage of that opportunity to get rid of them.

CRP 37-38. The Appellant was then sentenced to a low end standard range sentence of eighty-seven months incarceration. CP 108, RP39. Despite written advisement that any appeal must be filed within 30 days of entry, the Appellant waited six months to filed his appeal herein.⁵ CP 117, 125.

IV. DISCUSSION

In supporting his arguments on this dilatory appeal, the Appellant mischaracterizes the court's ruling and claims that the sentencing judge failed to recognize his discretion to impose an exceptional sentence. Because the court properly considered the facts of the case and applicable law. The Appellant's arguments are without merit. As such this appeal should be denied and the judgement of the sentencing court affirmed.

1. THE COURT PROPERLY REFUSED TO IMPOSE AN EXCEPTIONAL SENTENCE AND THEREFORE DID NOT ABUSE ITS DISCRETION.

As a starting point the law is well settled that generally no party, including the offender, may appeal a standard-range sentence.

⁵While a commissioner of this court previously ruled against the Court's motion to dismiss the appeal as untimely, the State does not concede that the appeal filed herein was timely. Rather the State would suggest, the clearly biased affidavit of his mother notwithstanding, that the Appellant was adequately advised of the limitations on his right to appeal and this matter should have been dismissed as untimely. CP 110.

See RCW 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). An offender "may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements." State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). Where an offender requested an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (Div. I, 1997). "A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." *Id.*

Here, the sentencing court did not refuse to consider an exceptional sentence in this case. The court considered the facts of the case and the arguments of defense counsel. Thereafter, the court determined that the facts of the case did not merit downward departure. The sentencing court did not violate SRA procedures nor did it categorically refuse to consider departure from the standard range. Therefore the standard range sentence imposed herein should be affirmed. Further, and as more definitively described

below, the sentence requested by the Appellant was beyond the court's authority to impose.

A. The Court Properly Refused to Impose a SSOSA Sentence Where the Appellant Was Not Eligible for Such Alternative.

As a starting point, it is important to understand what it was that the Appellant was actually requesting that the court impose as a sentence in this matter. It was not merely a departure below the standard range. The Appellant was requesting that the court fashion a SSOSA sentence as an exceptional sentence. CP 51. Under SSOSA, as set forth in and authorized by RCW 9.94A.670, a court can suspend a standard range period of incarceration and place the offender on community custody with sexual deviancy treatment as the primary focus. RCW 9.94A.670(4) & (5). However, to be eligible for the SSOSA, the offender must have had a pre-established relationship with the victim that was for purposes other than victimization. RCW 9.94A.670(2)(e). Child pornography crimes are not victimless crimes as suggested by trial counsel⁶ and the children therein ARE the victims of these crimes. State v. Velezmoro, 196 Wn. App. 552, 563, 384 P.3d 613, 616 (Div. I, 2016)(*holding that*

⁶His actual suggestion at hearing was that there isn't an identifiable victim, but certainly, the children who are being abused while being photographed would attest to the contrary. RP 29, 31-32.

restitution to the children depicted in the images was appropriate and lawfully ordered). Here, the Appellant conceded that he had no existing relationship and would therefore be legally ineligible for the SSOSA alternative sentence. CP 50, RP 28-29. See State v. Willhoite, 165 Wn.App. 911, 915, 268 P.3d 994, 997, *rev. denied* 174 Wn.2d 1006, 278 P.3d 1112 (2012) (Div. I, 2012). The Appellant was wholly ineligible to be sentenced under the SSOSA statute. Further, in the absence of a sentence under SSOSA, a court may not suspend imposition of sentence. See RCW 9.94A.575. The Appellant was not eligible to request a SSOSA sentence and his suggestion that the court could fashion a suspended sentence under RCW 9.94A.535 was likewise unlawful.

B. The Court Properly Declined to Impose the Exceptional Sentence Requested Where the Court Lacked the Authority to Fashion an Exceptional Sentence as Requested by the Appellant.

At sentencing, the Appellant recognized his ineligibility to be sentenced under RCW 9.94A.670. Despite his recognition of this fact, the Appellant asked the court to fashion a SSOSA-like sentence as an exceptional sentence. A SSOSA sentence is a sentencing alternative and not an exceptional sentence. See RCW 9.94A.670; see also State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (Div. I, 2003). This was a request to violate the SSOSA statute. Sentencing

courts may not utilize the exceptional sentence rules in order to grant a sentencing alternative to an offender where the legislature has established criterion that render the offender ineligible. See State v. Ha'mim, 132 Wn.2d 834, 845, 940 P.2d 633, 638 (1997). To do so would violate the intent of the SRA. *Id.*

Here, the Appellant's argument at sentencing was for the court to impose a SSOSA sentence or the equivalent thereof, as an exceptional sentence, effectively ignoring the legislative mandate that the offender have an established relationship to the victims. The requested sentence, whether dubbed a SSOSA or an exceptional sentence would therefore have been unlawful. The trial court did not abuse its discretion in declining to impose the Appellant's requested sentence.

C. The Court Properly Declined to Impose an Exceptional Sentence Where the Facts of the Crime Do Not Support Such Departure.

Pretermitted the legal barriers to the exceptional sentence requested by the Appellant, the sentencing court considered the Appellant's request and properly rejected it based upon the facts of the case itself. Generally, a trial court must impose a sentence within the standard range. State v. Ronquillo, 190 Wn.App. 765, 771, 361 P.3d 779 (Div. I, 2015). The sentencing court has discretion to depart from the standard range either upward or downward, but this

discretion may be exercised only if: 1) the asserted aggravating or mitigating factor is not one necessarily considered by the legislature in establishing the standard sentence range and, 2) it is sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *See id.* The SRA contains a list of aggravating and mitigating factors "which the court may consider in the exercise of its discretion to impose an exceptional sentence." RCW 9.94A.535. Although this list is not exclusive, any such reasons must relate to the crime and make it more, or less, egregious. State v. Akin, 77 Wn.App. 575, 584, 892 P.2d 774 (Div. I, 1995). Generally, "[a]n exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the same statutory category." State v. Murray, 128 Wn.App. 718, 722, 116 P.3d 1072 (Div. III, 2005)(quoting State v. Pennington, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989)). As stated in Murray:

Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, "was designed to promote several significant interests, including protection of the public, the need for rehabilitation, and the need to make frugal use of state resources." State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). To that end, "[t]he presumptive sentence ranges established for each crime represent the legislative judgment as to how these interests shall best be accommodated." *Id.* A trial court's subjective conclusion that the presumptive range does not adequately address rehabilitative concerns or the personal characteristics of the offender is not a substantial and compelling reason justifying a departure. State v. Allert, 117 Wn.2d 156, 169, 815

P.2d 752 (1991); Pascal, 108 Wn.2d at 137-38. Neither addictions nor other personal circumstances of defendants have been found to support exceptional sentences downward. See, e.g., RCW 9.94A.535(1)(e) (voluntary use of alcohol or drugs is excluded as a mitigating factor); State v. Freitag, 127 Wn.2d 141, 145, 896 P.2d 1254 (1995) (the defendant's desire to improve through community service); State v. Estrella, 115 Wn.2d 350, 353-54, 798 P.2d 289 (1990) (willingness to obtain treatment and attempts to gain employment); State v. Amo, 76 Wn. App. 129, 133, 882 P.2d 1188 (1994) (potential loss of parental rights); State v. Hodges, 70 Wn. App. 621, 623, 855 P.2d 291 (1993) ("extraordinary community support" and efforts at self-improvement).

Id. at 724-725. The party seeking a downward departure must prove the existence of mitigating factors by preponderance of the evidence. RCW 9.94A.535(1). Starting from that proposition, the Defendant's request for a downward departure, based upon the facts of these charges, was properly rejected.

The Appellant's request was based almost entirely upon his own peculiar characteristics or rehabilitative needs and not the specific facts of the crime. The Appellant glossed over the eleven hundred plus images found on his computer or the fact that he was sharing them over the internet. The images themselves weren't merely photos of nude children, but depicted very young children being sexually abused. The facts of the charges themselves were not so substantially different than other child pornography cases as to merit downward departure.

Instead the Appellant offered the opinions of several purported experts whose opinions were clearly tainted by sympathy for the Appellant. CP 60, 68, 87. These experts opined concerning the detrimental impact that incarceration would have on the Appellant. No consideration was given to deterrent impacts of punishment or the lack thereof. The request for an exceptional sentence was based entirely upon the Appellant's own personal characteristics and not on the underlying facts of the crimes. Dr. Colson even recognized that he understood the culpability of his conduct. CP 59. This is not a proper basis for a downward departure and the trial court properly rejected his request.

In support of his argument that his mental issues should have resulted in an exceptional sentence below the standard range, the Appellant cites to State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359, 367 (2015). In reliance thereon, he argues that if youth may be considered as a mitigating factor, then so should his claimed mental impairments. However, O'Dell, did not hold that youth alone is a sufficient basis to grant an exceptional sentence, but rather that case requires that the an offender must show that his youthfulness substantially impacted his "capacity to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law." *Id.* at 696. Here, the court considered the facts of this case and

rejected his claims. As the State argued below, the fact that the Appellant lied to police, denied involvement in child pornography, and tried to shift blame to his brother demonstrated his comprehension of the wrongfulness of his conduct. The court noted that those acts showed he was able to recognize his culpability, and that any claimed deficiency was wholly insufficient to constitute a mental defense.

The reports provided by defense show that, while he may have found social settings difficult at times, the Appellant was above average intelligence, matriculated through school without great difficulty, and even attended college. CP 56, 81. Dr. Rehnsburg noted that the Appellant's fluid reasoning, thinking ability and comprehension-knowledge scores placed him at the high end of the range and further noted that the Appellant excelled in his ability to grasp abstract concepts. CP 72. In that evaluation, Dr. Rehnsburg stated that the Appellant's "overall cognitive ability is probably in the high end of the average range, or above" and the only deficit noted was that he may not perform as well under time constraints. CP 72. The report from Dr. Dianne Phillips-Miller, indicates no cognitive impairment. CP 81.

While the conclusory opinions of the defense experts claim a lack of capacity to appreciate his culpability, his reaction to police and the records he provided demonstrate an ability to comprehend the

gravity and wrongfulness of his conduct. This comprehension further manifested itself in the reports where he claimed to his experts that he received no sexual stimulation through the viewing of the images and didn't need treatment, a clear attempt to minimize his culpability. In light of the overall evidence in the case, the sentencing court was well within its discretion to reject the conclusions of these reports.

The sentencing court considered his claims and rejected them as not credible, citing the sheer volume of child pornography found on his computer and phone. The court recognized that the Appellant knew what he as doing was wrong and that he kept going back, again and again, amassing an enormous collection of extremely deviant child pornography. RP 37-38. Contrary to the Appellant's claims, the sentencing judge did not fail to recognize his discretion to impose an exceptional sentence in this matter, but rather, declined to exercise it based upon the facts of this case. The Appellant's claims to the contrary are unsupported by the record in this matter. His appeal should therefore be denied.

V. CONCLUSION

The Appellant's arguments are without merit. The sentence requested by the Appellant was contrary to the law. Further, downward departure was not, in any event, appropriate under the facts of the case. The sentencing court did not abuse its discretion

by denying his requested sentence. The State respectfully requests that this Court affirm the sentence imposed herein.

Dated this 28th day of June, 2017.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,
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JONATHAN S. KINSMAN,
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Court of Appeals No: 34933-1-III

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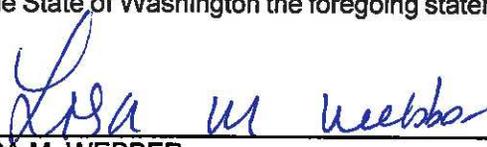
DECLARATION

On June 29, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

SUZANNE L. ELLIOTT
suzanne-elliott@msn.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 29, 2017.


LISA M. WEBBER
Office Manager

ASOTIN COUNTY PROSECUTOR'S OFFICE

June 29, 2017 - 8:39 AM

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