

FILED  
Court of Appeals  
Division III  
State of Washington  
2/10/2020 11:29 AM

NO. 37034-8-III

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

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STATE OF WASHINGTON,  
Respondent,

v.

ROBERT LAMBERTON,  
Appellant.

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

The Honorable Brian C. Huber, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Lamberton's constitutional and statutory right to speedy sentencing by *sua sponte*, without good cause, postponing his sentencing more than three months.
2. The trial court abused its discretion at sentencing when it denied Mr. Lamberton a SOSA by applying the factors listed in RCW 9.94A.670(4) that were not supported by the evidence presented at sentencing.
3. The trial court violated the appearance of fairness doctrine by ordering multiple sexual deviancy evaluations to satisfy the judge's personal belief that Mr. Lamberton was not entitled to a SOSA despite the PSI evaluator, the prosecutor, the victim, and the defendant supporting a SOSA.

Issues Presented on Appeal

1. Did the trial court violate Mr. Lamberton's

constitutional and statutory right to speedy sentencing by *sua sponte*, without good cause, postponing his sentencing more than three months?

2. Did the trial court abuse its discretion when it denied Mr. Lamberton a SOSA by applying the factors listed in RCW 9.94A.670(4) by applying the factors listed in RCW 9.94A.670(4) that were not supported by the evidence presented at sentencing?
3. Did the trial court violate the appearance of fairness doctrine by ordering multiple sexual deviancy evaluations to satisfy the judge's personal belief that Mr. Lamberton was not entitled to a SOSA despite the PSI evaluator, the prosecutor, the victim, and the defendant supporting a SOSA?

**B. STATEMENT OF THE CASE**

The state charged Robert Lamberton with two counts of incest in the first degree and one count of incest in the second

degree based on him having sexual intercourse with his adopted daughter. CP 6-8. Mr. Lamberton negotiated a plea agreement with the state to plead guilty as charged in exchange for an agreed Sex Offender Sentencing Alternative recommendation. RP 33-34; CP 60-63. The trial court accepted Mr. Lamberton's guilty plea, remanded him into custody, and ordered a presentence investigation report on April 1, 2019. RP 23-29. The trial court set sentencing for May 8, 2019. RP 29.

The presentence sexual deviancy evaluator concluded that Mr. Lamberton is a good candidate for a SOSA and recommended that the trial court follow the agreed sentencing recommendation:

Based on the combination of Mr. Lamberton's interviews, psychological testing, risk assessment scores; answers on the risk indicator questionnaires; sexual history polygraph results; and his amenability to receiving treatment for his sexual behavioral issues, he can be viewed an appropriate candidate for community-based outpatient sex offense specific treatment.

CP 95. After receiving this evaluation, the trial court would not consider a SOSA, but *sua sponte*, ordered a second sexual deviancy evaluation under RCW 9.94A.670(3)(c) and. CP 98, 101-02. Mr. Lamberton objected to the trial court's continuance order on

the basis that the second evaluation was cumulative and the court's order violated the 40-day sentencing window in RCW 9.94A.500(1). CP 99-100. The trial court overruled Mr. Lamberton's objections. CP 104-05.

The second sexual deviancy evaluator did not conclude the evaluation until June 28, 2019 and did not provide the evaluation to the court until July 30, 2019. The evaluator made the same recommendation for a SOSA:

Based on the interviews with Mr. Lamberton and the outcomes of the testing procedures it is the opinion of this office that Mr. Lamberton does have a sexual disorder which renders him A LOW RISK to reoffend should he not receive sex offender treatment. Mr. Lamberton has stated that he does have some insight that he does have sexual issues and would like to participate in therapy services. This does indicate that he would be a good candidate for community based treatment should it be ordered by the courts.

CP 134. The trial court did not hold a sentencing hearing until August 12, 2019, which is 133 days after Mr. Lamberton pleaded guilty. RP 33.

During the August 12, 2019 sentencing hearing, the trial court expressed concern about the plea agreement based on a prior, unrelated case that it presided over:

[TRIAL COURT]: I will just be upfront and tell the -- anyone who wants to know that this has been a troubling case from

the beginning . . . I'm trying to understand with the facts of this case why in this -- I'm comparing it to prior cases. . . . Given the facts of this case, is there anything more the State would like to add with respect to why a six-month joint recommendation is appropriate. I suppose I can think of one case that at least to this Court seemed, you know they're -- all sex cases are egregious but on a scale of egregiousness, that case -- there was at least one other case where the State was recommending a significantly higher period of confinement and -- and urging the Court to reject SOSA. And when I compare the facts of the two cases, it just strikes me as something unusual that the State would be willing to recommend the six months. Is this -- my recollection was that I was told in the last case that it had a lot to do with what the victim's thoughts were.

RP 39-40.

The trial court challenged Mr. Lamberton's amenability to treatment despite reviewing two separate sexual deviancy evaluations where both evaluators concluded that Mr. Lamberton is amenable to treatment. RP 45-49. The state confirmed that the victim and her family expressed a desire for Mr. Lamberton to receive a SOSA and that this fact was influential in the state agreeing to the proposed resolution. RP 40.

Despite explanations from both parties, the trial court declined to follow the agreed sentencing recommendation and instead sentenced Mr. Lamberton to a standard range prison sentence. RP 50; CP 138. Mr. Lamberton objected to the trial

court's sentence, arguing that the court abused its discretion by denying the SOSA based on impermissible grounds and by misapplying the six factors identified in RCW 9.94A.670(4). RP 54-55.

The trial court provided an oral analysis of the six factors before overruling Mr. Lamberton's objection. RP 56-59. First, the court stated that it saw no benefit to this community of imposing a SOSA for incest involving an adopted child. RP 56-57. Second, the trial court agreed that the two evaluators indicated Mr. Lamberton is amenable to treatment, but the trial court asserted that it disagreed. RP 57. Third, the court determined that Mr. Lamberton's honesty about being attracted to the victim made him a risk to the community contrary to the purpose of a SOSA. RP 58. Finally, the court did not believe the victim and her family supported the SOSA despite the prosecutor explaining to the court that the victim wished for Mr. Lamberton to obtain a SOSA. RP 40, 42, 58.

The court explained that in another case, he rejected a SOSA where the victim was only 9 years old, but the prosecutor explained that in that case, the victim was 15 or 16 years old and the victim and her family expressly supported the SOSA, in part to

avoid a trial and in part for the SOSA to provide an incentive to agree to plead guilty. RP 41-43. Mr. Lamberton filed a timely notice of appeal. CP 158.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT *SUA SPONTE* AND WITHOUT GOOD CAUSE POSTPONED MR. LAMBERTON'S SENTENCING HEARING IN VIOLATION OF MR. LAMBERTON'S RIGHT TO SPEEDY SENTENCING AND RCW 9.94A.500(1)

Mr. Lamberton appeals the trial court's decision to postpone his original May 8, 2019 sentencing until August 12, 2019 for the sole purpose of ordering an unnecessary second sexual deviancy evaluation. The order for a continuance violates Mr. Lamberton's constitutional and statutory right to speedy sentencing. RCW 9.94A.500(1).

Criminal defendants have both a constitutional and statutory right to speedy sentencing. See RCW 9.94A.500(1); *State v. Bratton*, 193 Wn. App. 561, 563, 374 P.3d 178 (2016) (citing *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994)); CrR 7.1. The constitutional right to speedy sentencing is encompassed within the right to a speedy trial as guaranteed by the Sixth Amendment to the

United States Constitution and art. I, § 22 of the Washington State Constitution. *Bratton*, 193 Wn. App. at 563 (citing *Ellis*, 76 Wn. App. at 394).

The statutory right to speedy sentencing guarantees defendants a sentencing hearing within 40 court days of conviction unless there is good cause to postpone the proceedings. RCW 9.94A.500(1). The constitutional right to speedy sentencing is violated when a delay in sentencing is “purposeful or oppressive.” *State v. Rich*, 160 Wn. App. 647, 652-53, 248 P.3d 597 (2011) (citing *Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957)).

In determining whether a delay was purposeful or oppressive, appellate courts examine four factors: (1) the length of the delay, (2) the defendant’s assertion of his or her right, (3) the reason for the delay, and (4) the extent of prejudice to the defendant. *Rich*, 160 Wn. App. at 653 (citing *Ellis*, 76 Wn. App. at 394).

A two year delay is oppressive and prejudicial when the defendant did not contribute to the delay, and had moved on with his life during the delay. *Ellis*, 76 Wn. App. at 391. Subsequent

case law interpreting *Ellis* reflects that the decision does not create an automatic presumption of prejudice based on the length of the delay. In *State v. Barrows*, 122 Wn. App. 902, 910, 96 P.3d 438 (2004), *review denied*, 154 Wn.2d 1003 (2005), the Court recognized *Ellis* may not apply to those cases where the defendant was responsible for some of the delay in sentencing.

For example, Mr. Barrows received a judgment of acquittal by reason of insanity on July 11, 2002; but the court delayed the entry of specific, required findings of fact for over one year. *Barrows*, 122 Wn. App. at 905-06. The Court found while such an extended delay was troubling, it did not rise to the level found in *Ellis* because there was evidence Mr. Barrows was responsible for the delay.

Here, although the length of the delay is less than in *Ellis*, similar to that case, Mr. Lamberton did not contribute to the delay and the reason for the delay appears untenable-it is based on the judge's personal beliefs, rather than on any statutorily supported reasons. This supports a presumption of prejudice analogous to a more lengthy delay because it implicates not only speedy sentencing rights but also basic due process rights to a fair trial.

*Rich*, 160 Wn. App. at 653 (citing *Ellis*, 76 Wn. App. at 394).

Here the judge's personal dislike for Mr. Lamberton and his personal rejection of the SOSA is oppressive and egregious, and does not support a finding of good cause under RCW 9.94A.500(1). *Ellis*, 76 Wn. App. at 395. If a defendant successfully proves a violation of his or her right to speedy sentencing, the proper remedy is dismissal of the charge. *Ellis*, 76 Wn. App. at 395.

In Mr. Lamberton's case, most of the factors discussed in *Rich* and *Ellis* weigh in favor of finding that the trial court's continuance order violated Mr. Lamberton's right to speedy sentencing. First, Mr. Lamberton asserted his right to speedy sentencing immediately after the trial court continued his original sentencing date. CP 99-100. This factor-asserting the right to speedy sentencing-weighs in favor of finding a speedy sentencing violation. *Rich*, 160 Wn. App. at 653 (citing *Ellis*, 76 Wn. App. at 394).

The second factor that favors Mr. Lamberton's position is the reason for the delay. The trial court continued the original sentencing date pursuant to RCW 9.94A.670(3)(c) so it could order a second sexual deviancy evaluation, because the judge personally

disagreed with the evaluator's recommendation for a SOSA, and couched its concern by claiming the evaluation was "unclear" and "equivocal." RP 45-46. However, these claims are not supported in the record. This alone is both purposeful and oppressive under *Rich*, 160 Wn. App. at 653 (citing *Ellis*, 76 Wn. App. at 394).

The first sexual deviancy evaluation discussed all of the statutory considerations required by RCW 9.94A.670(3) to unequivocally conclude that Mr. Lamberton is amenable to treatment. CP 81-95. The trial court claim that the evaluation was unclear is not supported by the record and thus weighs in favor of finding a speedy sentencing violation.

The third factor that weighs in favor of finding a violation of Mr. Lamberton's right to speedy sentencing is the resulting prejudice to the defendant. The plea agreement between the parties stated that the state would recommend a six-month jail sentence for Mr. Lamberton but allowed for his counsel to argue for credit for time served at sentencing. RP 34-36; CP 61.

The trial court's continuance order resulted in Mr. Lamberton spending an additional three months in jail not knowing his future and unable to argue for commencement of his SOSA to obtain

needed treatment and resolution of his case. Weighing these factors establishes a purposeful and oppressive delay in violation of Mr. Lamberton's speedy trial rights. *Rich*, 160 Wn. App. at 653 (citing *Ellis*, 76 Wn. App. at 394).

The only factor that possibly weighs against Mr. Lamberton is the length of the delay. Most cases finding a violation of speedy sentencing involve delays longer than the one Mr. Lamberton faced in this case. See, e.g., *State v. Modest*, 106 Wn. App. 660, 664, 24 P.3d 1116 (2001) (two-year delay is excessive); *Ellis*, 76 Wn. App. at 395 (two-year delay in sentencing is presumptively prejudicial).

However, Washington courts have never announced a bright-line rule on how long a defendant must wait before a delay becomes prejudicial, and the only statute addressing the issue is RCW 9.94A.500 which requires that sentencing occur within 40 court days of conviction unless there is good cause to extend that timeframe. RCW 9.94A.500(1). The final factor, the length of the delay, is shorter than delays held to be unconstitutional in prior cases but longer than the time allowed for sentencing under RCW 9.94A.500.

In the criminal context, a finding of "good cause" generally

requires a showing that some external factor outside the control of the parties or court has caused a procedural default. *State v. Dearbone*, 125 Wn.2d 173, 179-81, 883 P.2d 303 (1994). The final factor, the length of the delay, is shorter than delays held to be unconstitutional in prior cases but longer than the time allowed for sentencing under RCW 9.94A.500(1). The shorter delay alone does not create “good cause” for a continuance under RCW 9.94A.500(1).

Three of the four factors that determine whether a sentencing delay violates the right to speedy sentencing favor Mr. Lamberton. The trial court’s decision to delay Mr. Lamberton’s sentencing was purposeful and oppressive, therefore it violated his right to speedy sentencing. Mr. Lamberton requests that this court vacate his convictions and dismiss the charges. *Ellis*, 76 Wn. App. at 395.

2. THE TRIAL COURT ABUSED ITS DISCRETION AT SENTENCING WHEN IT DENIED MR. LAMBERTON A SOSA AFTER MISAPPLYING THE FACTORS IDENTIFIED IN RCW 9.94A.670(4)

When a defendant requests a SOSA, the trial court must examine the following factors in determining whether to grant the

request: (1) whether the offender and the community will benefit from use of this alternative, (2) whether the alternative is too lenient in light of the extent and circumstances of the offense, (3) whether the offender has victims in addition to the victim of the offense, (4) whether the offender is amenable to treatment, (5) the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and (6) the victim's opinion whether the offender should receive a treatment disposition. RCW 9.94A.670(4). The trial court denied Mr. Lamberton a SOSA because it found that none of these factors weighed in his favor. RP 56-59.

The decision to grant a SOSA is within the trial court's discretion. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006) (citing *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992)). However, a trial court abuses its discretion when it categorically refuses to consider a SOSA, or it denies a request for one an impermissible basis. *Osman*, 157 Wn.2d at 482 (citing *State v. Khanteechit*, 101 Wn. App. 137, 139, 5 P.3d 727 (2000)). A discretionary decision is based on untenable grounds if the trial court relies on unsupported facts in coming to that conclusion.

*Hundtofte v. Encarnacion*, 181 Wn.2d 1, 20, 330 P.3d 168 (2014) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

The trial court analyzed the six factors listed in RCW 9.94A.670(4) and concluded that none of the six weighed in favor of granting the SOSA. RP 56-58. This conclusion constitutes an abuse of discretion because the trial court relied on unsupported facts in analyzing multiple factors.

First, the trial court concluded that Mr. Lamberton is not amenable to treatment despite two expert evaluators concluding the opposite. The first evaluator concluded that Mr. Lamberton is a good candidate for a SOSA based in part on his “amenability to receiving treatment for his sexual behavioral issues.” CP 95. The second evaluator agreed and classified Mr. Lamberton as “low-risk” to reoffend and a good candidate for a SOSA because he indicated he would like to participate in therapy to address his past behavior. CP 134.

The trial court postponed Mr. Lamberton’s sentencing to order a second sexual deviancy evaluation, apparently based on its own personal disagreement with the first evaluator’s conclusions

that a SOSA was appropriate. After the second evaluator also concluded that a SOSA was appropriate, the trial court simply disregarded the conclusions of both evaluations and independently concluded that Mr. Lamberton is not amenable to treatment. RP 45-49.

The trial court also misapplied the final factor by concluding, contrary to the evidence presented at sentencing, that the victim did not favor a SOSA disposition. The State informed the trial court at sentencing that the victim and her family favored a SOSA disposition. RP 40. The written plea agreement similarly states that the victim and her family supported the resolution. CP 62.

The trial court again disregarded this evidence entirely and substituted its own personal view of the case for the victim's wishes. RP 40, 42, 58. This is contrary to the plain language of RCW 9.94A.670(4), which requires the trial court to not only consider victim's opinion, but to give it "great weight." RCW 9.94A.670(4).

The trial court misapplied two of the six factors enumerated in RCW 9.94A.670(4) by disregarding evidence that directly contradicts its conclusion as to those factors. This constitutes an

abuse of discretion because the trial court relied on unsupported facts in coming to its conclusion. The trial court's assertions that Mr. Lamberton is not amenable to treatment and the victim's family do not endorse a SOSA are not supported in the record, yet they were influential in the trial court's decision not to follow the agreed sentencing recommendation. The trial court abused its discretion and Mr. Lamberton should be resentenced. *State v. McFarland*, 189 Wn.2d 47, 58-59, 399 P.3d 1106 (2017) (remedy is resentencing where trial court fails to properly exercise discretion at sentencing).

3. TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE BY ORDERING MR. LAMBERTON TO UNDERGO MULTIPLE SEXUAL DEVIANCY EVALAUTIONS FOR THE PURPOSE OF SATISFYING THE JUDGE'S PERSONAL BELIEF THAT MR. LAMBERTON SHOULD NOT RECEIVE A SOSA

Mr. Lamberton challenges the validity of his sentencing hearing under the appearance of fairness doctrine. The procedural history of Mr. Lamberton's case from the time he entered his plea until sentencing demonstrates that he did not receive an impartial hearing. The sentencing judge's rulings demonstrate an effort to

bolster its preconceived determination that Mr. Lamberton should not receive a SOSA.

Under the appearance of fairness doctrine, a judicial proceeding is only valid “if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). “The law requires more than an impartial judge; it requires that the judge also appear to be impartial.” *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017) (quoting *Gamble*, 168 Wn.2d at 187).

The party asserting a violation of the appearance of fairness doctrine must show the judge’s actual or potential bias. *Solis-Diaz*, 187 Wn.2d at 540 (citing *Gamble*, 168 Wn.2d at 187). The test for determining whether a judge’s impartiality is in question is an objective one that assumes the reasonable observer understands all of the relevant facts. *Solis-Diaz*, 187 Wn.2d at 540 (citing *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

In *Solis-Diaz*, the defendant successfully appealed his original sentence and was subsequently resentenced before the

same judge with instructions for the trial court to conduct an individualized inquiry into whether an exceptional sentence downward was appropriate in light of the defendant's youth. *Solis-Diaz*, 187 Wn.2d at 537.

At resentencing, the judge reimposed the original sentence and commented that he had already reviewed the materials related to the defendant's youth and did not believe an exceptional sentence downward was appropriate regardless of any new mitigation evidence presented at resentencing. *Solis-Diaz*, 187 Wn.2d at 538-39. The Court of Appeals reversed the defendant's sentence for a second time based on the sentencing judge's error in failing to consider the exceptional sentence, and the defendant asked the Washington Supreme Court to disqualify the sentencing judge on remand based on the appearance of fairness doctrine. *Solis-Diaz*, 187 Wn.2d at 539.

The Supreme Court agreed that the sentencing judge had violated the appearance of fairness doctrine and ordered resentencing before a different judge. *Solis-Diaz*, 187 Wn.2d at 541. The court held that the judge's remarks at resentencing demonstrated that he was committed to imposing the original

sentence regardless of any mitigation evidence presented on remand. *Solis-Diaz*, 187 Wn.2d at 541. Because the judge had shown an inability to examine mitigation evidence with an open mind, he had violated the appearance of fairness doctrine and was disqualified from sentencing the defendant a third time. *Solis-Diaz*, 187 Wn.2d at 541.

Similar to the judge in *Solis-Diaz*, the judge in Mr. Lamberton's case demonstrated potential bias by repeatedly refusing to acknowledge mitigation evidence that favors granting Mr. Lamberton a SOSA. The original sexual deviancy evaluation was sufficient to decide whether Mr. Lamberton is a good candidate for a SOSA and explicitly recommended a community-treatment based sentence. CP 95.

Nevertheless, the sentencing judge delayed sentencing on its own motion and sought a second evaluation. When the second evaluator agreed that Mr. Lamberton should receive a SOSA, the judge disregarded the evaluator's expert opinion and recommendation, and substituted his own conclusions to the contrary that he would not grant Mr. Lamberton a SOSA despite the unequivocal evidence in support of the SOSA. RP 57.

The judge's refusal to alter his position, even after reviewing multiple expert opinions, the prosecutor's recommendations and the victim's recommendations, demonstrates that the judge here, like the judge in *Solis-Diaz*, refused to consider the evidence with an open mind, and was set on rejecting the SOSA request regardless of any mitigation evidence favoring Mr. Lamberton. RP 58. This conduct violated the appearance of fairness doctrine. This court should reverse his sentence and remand for resentencing before a new judge. *Solis-Diaz*, 187 Wn.2d at 541.

#### D. CONCLUSION

Mr. Lamberton respectfully requests that this court reverse his vacate his sentence and order dismissal of the charges based on violation of Mr. Lamberton's right to speedy sentencing by postponing his sentencing more than three months without good cause. Alternatively, Mr. Lamberton requests the court vacate his judgment and sentence and remand for a new sentencing before a different judge because the sentencing judge abused his discretion and violated the appearance of fairness doctrine.

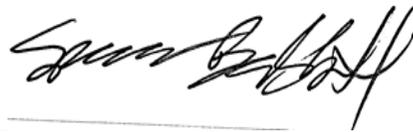
DATED this 10<sup>th</sup> day of February 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Douglas County Prosecutor's Office gedgar@co.douglas.wa.us and Robert Lamberton/DOC#416054, Coyote Ridge Corrections Center PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on February 10, 2020. Service was made by electronically to the prosecutor and Robert Lamberton by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**February 10, 2020 - 11:29 AM**

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**Appellate Court Case Title:** State of Washington v. Robert Thomas Lamberton  
**Superior Court Case Number:** 18-1-00210-2

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