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Division III
State of Washington
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COA No. 37034-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent

v.

ROBERT T. LAMBERTON,

Appellant.

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

RESPONDENT'S BRIEF

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A. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by Defendant.

B. STATEMENT OF THE CASE

After having plead guilty to two counts of Incest First Degree and one count of Incest Second Degree, in this timely appeal Mr. Lamberton alleges a violation of his right to speedy sentencing and that the court abused its discretion in denying his petition for a Special Sex Offender Sentencing Alternative (SSOSA).

I. Summary of Issues.

Speedy sentencing. There is no speedy sentencing violation because Mr. Lamberton withdrew his speedy sentencing objection and expressly waived speedy sentencing at the May 28, 2019 hearing. Supp. RP 19.

Denial of SSOSA. The court's denial of SSOSA was not an abuse of discretion despite the positive recommendation for SSOSA from both parties, two SSOSA evaluators, the victim, and the DOC pre-sentence investigation (PSI), because the judge

thoroughly articulated his concerns about granting a SSOSA. RP 43-60.

II. Facts.

On April 1, 2019, pursuant to a plea bargain, Mr. Lamberton plead guilty to the charges noted above with the parties jointly recommending a SSOSA sentence. CP 60-63, 65-77, 79. The court then revoked defendant's release and remanded him to the custody of the Okanogan County Jail pending sentencing. CP 64. The court entered an order directing the Department of Corrections (DOC) to perform a PSI, with sentencing set for May 6, 2019. CP 78, 79.

On April 3, 2019, defense counsel filed the Evaluation of Sexual Behavior and Risk previously prepared by Ken Schafer on February 26, 2019. CP 80.

Because the PSI was not completed in time for the original sentencing hearing, the court, with agreement of the defendant, continued sentencing to May 20, 2019. CP 175.

On May 20, 2019, the sentencing hearing was continued to May 28th because the court and the parties had only received the PSI the day before and the court had not had a chance to read it. Supp. RP 5. In that hearing the court also mentioned an e-mail it

had sent to the parties on May 17th ordering a second SSOSA evaluation. Supp. RP 5; CP 98. Defense counsel objected to any further continuances on speedy sentencing grounds. Supp. RP 6. Defense counsel requested to continue the matter to be able to address the ordering of a second SSOSA evaluation. Supp. RP 7. The court also noted that sentencing was not going to occur at this time because the court had not had an opportunity to review the PSI it received just the day before. RP 8. The court then continued the matter to May 28, 2019. RP 9.

On May 23, 2019, defense counsel filed a written objection to a second evaluation based on a violation of speedy sentencing and on abuse of discretion by the judge. CP 99-100.

On May 28, 2019, after much discussion where, in part, the court indicated it was prepared to go forward with sentencing in the absence of a second evaluation, the defendant withdrew his two-pronged objection. Supp. RP 20-21. Upon the waiver, the court then ordered a second SSOSA evaluation and set a status hearing for June 10, 2019, to which defense counsel agreed. CP 101; Supp. RP 30.

At the status hearing on June 10th, defense counsel informed the court the second SSOSA evaluation was scheduled

for June 19, 2019, so the sentencing was set for July 8, 2019. CP 176.

While awaiting completion of the evaluation, sentencing was continued to July 15th, then again to July 29th, and then again to August 12th. CP 177 - 179. At no time during any of these continuances did the defendant raise a speedy sentencing objection. One of the continuances was instigated by defense counsel via email. CP 105.

The second SSOSA evaluation was eventually filed with the court on July 30, 2019. CP 106.

Sentencing occurred on August 12, 2019. CP 137, 154. Defense counsel indicated he had no objection to incorporation of the probable cause affidavit in the sentencing hearing. RP 36. Prior to pronouncing sentence, the court engaged in extensive conversations with both the prosecutor and defense counsel about the basis for the plea agreement, whether the victims agreed to the SSOSA, whether the defendant acknowledged to the evaluators the full extent of his activity – including the issue of photographs and the number of times of incest, grooming behavior and attempts to cover it up, shifting of blame onto the victim, amenability to

treatment, and many other facets contained in or not addressed in the SSOSA evaluations. RP 33-50.

The court, after articulating the six factors or RCW 9.94A.670(4), denied the petition for SSOSA and imposed a standard range sentence. RP 55-64.

C. AUTHORITY AND DISCUSSION

I. Speedy Sentencing.

The constitutional right to a speedy trial encompasses the right to speedy sentencing. *State v. Ellis*, 76 Wn. App. 391, 394, 884 P.2d 1360 (1994). A delay violates speedy sentencing rights if it is "purposeful or oppressive." Id. "This determination turns on a balancing of four factors: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his or her right; and (4) the extent of prejudice to the defendant." *State v. Johnson*, 100 Wn.2d 607, 629, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985).

Constitutional rights notwithstanding, speedy sentencing is also required by court rule and statute. CrR 7.1(a)(1) requires the court to set a date, time, and place for sentencing in compliance with RCW 9.94A.500. RCW 9.94A.500(1) requires a sentencing

hearing within 40 court days following conviction, subject only to an extension for good cause on a motion by either party or the court. "The trial court has broad discretion to determine whether there is good cause to postpone sentencing." *State v. Roberts*, 77 Wn. App. 678, 685, 894 P.2d 1340 (1995). The same four *Johnson* factors also provide guidance in determining whether a delay is unreasonable under CrR 7.1. *Johnson*, 100 Wn.2d at 629-30. When the parties and the court do not have time to adequately review the pre-sentence investigation (PSI), it is proper for a trial court to continue sentencing in order to give the parties more time to review the PSI and to assure that the court is fully advised at the time it imposes sentence. *See State v. Halgren*, 87 Wn. App. 525, 538, 942 P.2d 1027 (1997), *rev'd on other grounds*, 137 Wn.2d 340, 971 P.2d 512 (1999).

Here, after balancing the four *Johnson* factors, the reviewing court should conclude that the trial court did not violate Mr. Lambertons's right to speedy sentencing. First, the length of the delay between Mr. Lamberton's guilty plea and the sentencing hearing was 133 days. While this amount of time exceeds the 40 days required by RCW 9.94A.500(1), it is significantly less than the amounts of time at issue in cases that held the defendant's rights

were violated. Compare *Ellis*, 76 Wn. App. at 394 (two years violated defendant's speedy sentencing rights), and *State v. Edwards*, 93 Wn.2d 162, 167, 606 P.2d 1224 (1980) (over two years violated defendant's speedy sentencing rights), with *Johnson*, 100 Wn.2d at 630 (13 months did not necessarily violate defendant's sentencing rights).

The second factor weighs against Mr. Lamberton because the delays were necessary to complete the PSI, and then again to obtain the second SSOSA evaluation.

The third factor weighs against Mr. Lamberton because although he initially asserted his speedy sentencing rights, he later withdrew that objection. The court indicated it was ready to proceed to sentencing in the absence of a second SSOSA evaluation on May 28th, but defendant withdrew the objection.

And the fourth factor weighs against Mr. Lamberton because he cannot point to any prejudice where he was given a sentence within a standard range, and he will receive credit for time served against a range that is not yet completed. Mr. Lamberton was remanded to custody at the time of his plea without objection. The length of time Mr. Lamberton was incarcerated prior to sentencing, 133 days, was only 13 days longer than he would have

served had the court followed the joint recommendation of 180 days, which would have netted him 120 days assuming accrual of one-third earned early release time.

The prejudice must be inherent in the delay of the sentencing, not in the sentence imposed. In an unpublished opinion, this court "reject[ed] the argument that prejudice can be established by a trial court rejecting an agreed sentence ..." See *State v. Gleim*, No. 33209-8-III, 2016 Wash.App. Lexis 939, 2016 WL 2343168 (COA Div. III 2016).[1] That the trial court in this instance did not follow the agreed sentence recommendation should not be considered the prejudice envisioned by the *Johnson* factors where Mr. Lamberton acknowledged, in both the written plea agreement (CP 63) and again in the statement on plea of guilty (CP 70), that he understood the court was not bound to follow the parties' agreement.

Here, the delay in sentencing was not purposeful and oppressive and the judge did not abuse his discretion in setting

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[1] GR 14.1(a). Citation to Unpublished Opinions. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any courts. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

over sentencing where the defendant agreed to the delay in order to accommodate the second SSOSA evaluation.

II. Denial of SSOSA

The grant of a SSOSA 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, such as the defendant's race, sex, or religion. *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). The sentencing court does not abuse its discretion simply by rejecting an evaluator's SSOSA recommendation. See *State v. Frazier*, 84 Wn. App. 752, 754, 930 P.3d 345 (1989); *State v. Hays*, 55 Wn. App. 13, 17, 776 P.2d 718 (1989). Although the State may agree to recommend a particular sentence, a trial court is free to ignore its recommendation." *State v. Talley*, 83 Wn. App. 750, 759, 923 P.2d 721 (1996), *aff'd*, 134 Wn.2d 176, 949 P.2d 358 (1998); *accord* RCW 9.94A.431(2).

Generally, defendants cannot appeal standard range sentences. RCW 9.94A.585(1). A defendant may appeal if the trial court fails to comply with the procedural requirements of the SRA, however, or if the sentence is alleged to be unconstitutional. *State v. Osman*, 126 Wn. App. 575, 579, 108 P.3d 1287 (2005). In order for a "procedural appeal to be allowed ... it must be shown that the

sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." Id. (*citing State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)).

SSOSA is a sentencing alternative available for first-time sex offenders who meet certain criteria. RCW 9.94A.670(2). If the court finds an offender eligible for SSOSA, it may order that the offender be examined to determine whether the offender is amenable to treatment. RCW 9.94A.670(3)(a). In deciding whether to grant a SSOSA, the court considers: (1) whether the offender and the community will benefit from the offender's participation in the program; (2) whether the alternative is too lenient in light of the extent and circumstances of the offense; (3) whether there are additional victims; (4) whether the offender is amenable to treatment; (5) the risk to the community, to the victim or to person of similar age and circumstances as the victim; and (6) the victim's opinion as to whether the offender should receive SSOSA. RCW 9.94A.670(4).

Under the SRA, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine any sentence. This includes whether to grant a SSOSA sentence. *See State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005).

"'Acknowledged facts' include all those facts presented or considered during sentencing that are not objected to by the parties." *Grayson*, 154 Wn.2d at 339 (*citing State v. Handley*, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990)). This includes information stated in the presentence reports. RCW 9.94A.500(1).

In this matter, the trial court denied the SSOSA after considering the evaluators' SSOSA reports, listening to the defendant, engaging in much conversation with both the prosecutor and the defense attorney, considering the PSI prepared by DOC, taking into consideration the victims' opinion, comparing and contrasting the information in the probable cause affidavit and the defendant's version of events given to the evaluators, and articulating the reasons for denial.

When deciding to disregard the evaluators' opinions, the trial court explained why, pointing out the specific passages in the reports that caused the court concern. RP 46-9.

The court also articulated its concerns that Mr. Lamberton was either not being forthright with the evaluators or not showing appropriate remorse and recognition of his offenses. RP 48. The court expressed its concerns with Mr. Lamberton's grooming behaviors and blame shifting to the victim. RP 57.

The trial court went through each of the six statutory factors and explained its reasons why the SSOSA was not appropriate. RP 56-60.

The entire record at sentencing is full and enough to support the court's decision not to grant a SSOSA. In denying the SSOSA the court did not do so for no reason at all or for an unjust reason such as race, religion, etc. The court followed the statutory process and articulated its concerns.

D. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to dismiss this appeal.

Respectfully submitted this
2nd day of April, 2020

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IN THE COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	) Court of Appeals no. 37034-8-III) Douglas County No. 1810021009
v.	)
ROBERT T. LAMBERTON, Appellant.	) PROOF OF SERVICE (RAP 18.5(b))

I, W. Gordon Edgar, do hereby certify under penalty of perjury that on April 3, 2020, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief to:

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Signed in Waterville, Washington this 3rd day of April, 2020

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