

X

83779-1

NO. 83779-1
Cowlitz Co. Cause NO. 07-1-00829-0

**SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JACK IRVIN SIMS,

Appellant.

RECEIVED
CLERK OF SUPERIOR COURT
2009 DEC 11 AM 8:07
CLERK

RESPONSE TO PETITION FOR REVIEW

SUSAN I. BAUR
Prosecuting Attorney
AMIE HUNT/WSBA 31375
Chief Criminal Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

	Page
I. ANSWER TO ISSUES PRESENTED FOR REVIEW BY THE PETITIONER	1
II. ISSUE PRESENTED FOR REVIEW BY THE RESPONDENT	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT REGARDING ISSUES PRESENTED FOR REVIEW BY THE PETITIONER.....	7
A. REVIEW OF THE COURT OF APPEALS DECISION VACATING THE DEFENDANT'S SSOSA SENTENCE AND REMANDING FOR RE-SENTENCING SHOULD NOT BE GRANTED.	7
V. CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County</i> , 96 Wash.2d 201, 634 P.2d 853 (1981).....	10
<i>City of Seattle v. Brenden</i> , 8 Wn.App. 472, 506 P.2d 1314 (1973)	8
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wash.2d 791, 83 P.3d 419 (2004).....	10
<i>Griffin v. California</i> , 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).....	8
<i>State v. Eide</i> , 83 Wn.2d 676, 521 P.2d 706 (1974).....	8
<i>State v. Ross</i> , 155 Wa.2d 574, 122 P.3d 903 (2005).....	11
<i>State v. Rousseau</i> , 78 Wash.App. 774, 898 P.2d 870 (1995, review denied, 128 Wash.2d 1011, 910 P.2d 482 (1996).....	8
<i>United States v. Jackson</i> , 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)	8
OTHER AUTHORITIES	
Washington State Constitution, Article I, Section 22	8
RULES	
Rule of Appellate Procedures 2.4	11

I. ANSWER TO ISSUES PRESENTED FOR REVIEW BY THE PETITIONER

1. No significant question of law under the Constitution of the State of Washington or of the United States is involved regarding any decision pointed to in the petition.
2. The petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

II. ISSUE PRESENTED FOR REVIEW BY THE RESPONDENT

Does the limited and fact-specific decision of the Court of Appeals to vacate and remand the Defendant for re-sentencing after he appealed a condition of his sentence present a significant question of law or an issue of substantial public interest?

III. STATEMENT OF THE CASE

The State agrees with the Statement of the Case given in the Petition for Review with the following exceptions and additions:

On May 22, 2007, the Defendant went uninvited into the victim's home. CP 23. The victim (age 11) and her brother (age 10) were the only ones home and were getting ready for school. CP 23. The victim was in the shower and the Defendant went into the bathroom and asked her if she had anything to wash her back. CP 23. When the victim showed the Defendant a sponge over the top of the shower door, Sims opened the shower door, grabbed the sponge from the victim, and proceeded to wash

the victim's back from her shoulders to midway down her back. CP 23. After Sims was finished, he left the residence and the victim immediately called her mother. CP 23.

In the Pre-Sentence Investigation Report (PSI) the Department of Corrections (DOC) spoke to the victim's father. CP 24. He told DOC the victim was "ok," but was still having issues and would shut her curtains if she saw the Defendant outside. CP 24. He also told DOC that the summer of 2007 was very difficult for the victim because after the defendant was charged, he went around "campaigning the community...saying [the victim] was lying." CP 24. The offense was difficult enough, but the insult made things worse for the victim. CP 24.

The PSI raised the concern that the victim lived within sight of the Defendant's residence and just across the street. CP 27. While the Defendant complied with the no contact order while the case was pending, he said he could see the kids playing across the street and avoided going outside in front of his house or the street outside his front door. CP 27. He had to do this to stay away from the victim and her family. CP 27.

The PSI concluded that if the two families continued to live across the street, there would be times they would see each other. The PSI stated

the Defendant could be forced to move from his long term residence, but it would seriously impact the Defendant's family. CP 28. It might be possible for the Defendant to continue to live in the residence without further impacting the victim if he had no contact of any sort with the victim or her family and if he stopped maligning the victim's character in the Castle Rock community. CP 28. The PSI asked the Court to address the Defendant's living situation at the time of sentencing. CP 28.

DOC spoke to the Defendant for the PSI. After speaking with the Defendant, it was DOC's opinion the Defendant did not have an understanding of how his behavior affected the victim or her family. CP 29. In fact, the Defendant maintained that touching the victim's back didn't hurt her or anybody else. CP 25. He only pled guilty because he failed a lie detector test. CP 25.

The Defendant requested a SSOSA sentence. RP 21.¹ DOC attached a copy of the Defendant's psychosexual evaluation by Dr. Migneault to the PSI. When asked if his action caused the victim harm and what harm, the Defendant told Dr. Migneault that his actions had hurt

¹ The record on appeal includes one volume of continuously numbered verbatim reports of the proceedings in this case held on 2/21/08, 3/27/08, 4/3/08, 4/10/08, 4/24/08, and 5/1/08, referred to herein as "RP [page #]".

the victim, but the Defendant was unable to formulate any possible harm. CP 37.

In Dr. Migneault's evaluation he expressly did not give a recommendation as to any appropriateness of punishment. CP 35. Dr. Migneault found the Defendant reticent to share his feelings and remarked that this reticence could be problematic to treatment as it could lead to the Defendant omitting important facts and circumstances. CP 40. Dr. Migneault expressed concern over the Defendant's ability to embrace treatment and likely avoidance of participation, his need to hide the truth from himself, and possibility Sims would attempt to fake understanding in treatment. CP 41-42, 45-46. In the end, Migneault found the Defendant posed a very low risk for reoffending and recommended treatment. CP 45.

On March 28, 2007, the parties appeared before Judge James Stonier for sentencing. RP 11. The State and the victim's family opposed a SSOSA sentence. RP 11-43. The victim's family asked the court to prohibit the Defendant from living across the street for the well-being of the victim. RP 16. The victim's father stated the victim should be allowed recover from the sexual assault without knowing the Defendant was right across the street, potentially watching her and knowing her every

move. RP 16. He stressed the need for her to feel safe in their house, yard, and neighborhood. RP 16-17. He also reiterated his comments to DOC that the Defendant campaigned against the victim and called her a liar. RP 15-16. Defense counsel denied the Defendant ever called the victim a liar. RP 24. Counsel remarked the Defendant lived and was active in the small town of Castle Rock and he knew practically everyone in the city limits. RP 24. He opined and suspected the Defendant's supporters doubted the accusations. RP 24.

In deciding sentence, the court said there were two issues it considered troubling. RP 36. The first issue was the nature of the offense. RP 36. The court considered that in the realm of behavior the court has seen for convictions of Child Molestation in the first degree, the actions were not as serious as other offenses. RP 36.² On the other hand, the Psychosexual evaluation by Dr. Mineault was one of the weaker reports the court had seen. RP 36. The court pointed out that Dr. Mineault was not recommending SSOSA, but rather treatment. RP 36. The court was troubled that according to Dr. Mineault, the Defendant would avoid

² The court made clear it did not intend to make light of the offense in saying it was not serious and pointed out the victim's confidence in men and potential for sexuality in the future could be impacted. RP 36.

participation in treatment to avoid embarrassment, and upon the threat of exposure for his lack of understanding or comprehension, the Defendant would act as though he comprehended. RP 36.

The court stated, "the only way I would grant SSOSA, because what I have heard, is --- I don't think this young girl should ever have to see him again in her life." RP 37. "I will not allow him to remain in that community and grant SSOSA." RP 37. "I don't think she should have to see him drive by. I don't think that she should be walking down the street and just happen to see him." RP 37. "I am not going to leave him in the community and allow him to have SSOSA." RP 37. "...[G]iven the nature of this offense...I would grant SSOSA...[but] not if he remains in the community where she has to see him." RP 37.

The court specifically stated the victim needed to recover from the crime. RP 37. It found the Defendant robbed the victim of something and given her a life sentence. RP 37. Given proper counseling the victim could recover, but the court didn't think this could happen if he was in the community and a neighbor. RP 37.

Defense counsel asked the court, if the court would impose a geographic condition that he not enter the city limits of Castle Rock. RP

38. The victim's family indicated this would not be sufficient and the court said it would grant a restriction the Defendant not live in Cowlitz County. RP 38. The court said it did not want the victim living in fear she would run into the Defendant anywhere in the county. RP 38. It concluded that it would grant SSOSA only if there were arrangements the Defendant would not live in the county. RP 40. The court said if there came a time when the victim no longer lived here, it would consider modifying the restriction. RP 40. The Court also said it would allow the Defendant to drive through the county and would allow him to respond to a summons for SSOSA related issues. RP 40, CP 55, CP 58.

IV. ARGUMENT REGARDING ISSUES PRESENTED FOR REVIEW BY THE PETITIONER

A. Review of the Court of Appeals decision vacating the Defendant's SSOSA sentence and remanding for re-sentencing should not be granted.

Sims argues the Court of Appeals decision involves a significant question of law under the Washington Constitution and an issue of substantial public interest because it impermissibly chills the defendant's right to appeal. *See* Pet. for Rev. at 8.

Under the Washington State Constitution, criminal defendants 'shall have the right ... to appeal in all cases.' Wash. Const. art. I, sec. 22. The right to appeal is absolute, and no penalty can be imposed for its exercise. *City of Seattle v. Brenden*, 8 Wa.App. 472, 474, 506 P.2d 1314 (1973). It is 'patently unconstitutional' to chill the exercise of constitutional rights by penalizing those who choose to exercise them. *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). 'A person cannot be influenced to surrender a constitutional right by imposing a penalty on its use.' *State v. Eide*, 83 Wa.2d 676, 679, 521 P.2d 706 (1974) (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Jackson*, 390 U.S. 570).

The question before the court is whether the Court of Appeals decision remanding for resentencing penalizes the defendant. It is clear from the Report of Proceedings that the trial court only granted a SSOSA sentence because it thought it could banish the defendant. RP 36-40. The Defendant's appeal rightly questioned the court's banishment order, but he failed to see that the court's sentence was based upon an unconstitutional ground. A defendant is not entitled to a sentence granted upon an unconstitutional basis. See *State v. Rousseau*, 78 Wash.App. 774, 777,

898 P.2d 870 (1995, *review denied*, 128 Wa.2d 1011, 910 P.2d 482 (1996). Additionally, offenders do not have a “right to a particular result that lies within the court’s discretion.” *Id.*

The Defendant is in no worse position today than he was at the time of sentencing. The trial court still has the ability to grant SSOSA. Moreover, the Court of Appeals specifically told the trial court it had the discretion to re-impose SOSSA with constitutionally tailored conditions. The Defendant has not shown how the Court of Appeals decision has chilled his right to appeal as there is no penalty.

The Defendant argues the Appellate Court’s decision gives sentencing judges *carte blanche* to impose any unconstitutional conditions and rely on the defendant’s decision not to appeal because they wish to take advantage of the SOSSA suspended sentence. This is rather a dim view of judges, their ethical duties, and the criminal justice system. The Appellate process is designed to uphold the laws of Washington and the United States and protect the rights of all. Judges and attorneys are bound by codes of ethics and must answer for any unconstitutional act. In the same vein, a Defendant should not be allowed to take advantage of an

unconstitutional sentence by trying to limit his risk by saying only the condition is unconstitutional.

The Defendant has also not shown how there is a substantial public interest at stake. A substantial public interest involves an issue that “is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture.” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 803, 83 P.3d 419 (2004). Courts will also accept a case if it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officials. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wash.2d 201, 208, 634 P.2d 853 (1981).

A prime example of a matter of substantial public interest is in *State v. Ross*, 155 Wa.2d 574, 122 P.3d 903 (2005). In *Ross*, the Pierce County Prosecuting Attorney’s Office sent a memorandum to all local judges, department of corrections and defense counsel informing them as a general policy, the Attorney’s office would no longer recommend the drug offender sentencing alternative (DOSA). *See id.* at 575-76. The Court of Appeals held this memo was an *ex parte* communication although

harmless to the particular offender. *See id.* at 576. The Supreme Court found this was an issue of substantial interest because it had the potential to affect every sentencing proceeding in Pierce County involving DOSA sentences, it invited unnecessary litigation and created confusion. *See id.* at 577. It added that the ruling had the potential to chill policy actions taken by attorneys and judges. *See id.*

The present case is unlike *Ross* because it stems from a narrow and specialized set of facts for this particular Defendant. It is unlikely this issue will arise in the future. The Defendant's rendition of possible outrageous conditions is unlikely given that a judge is bound by judicial ethics not to impose unconstitutional sentences. Moreover, one would expect defense counsel would alert the court to any such improper conditions and the court, unlike this trial court, would have the opportunity to correct any unconstitutional sentence.

The Defendant argues the State's lack of cross-appeal involves a significant question of law or matter of substantial public interests citing to Rule of Appellate Procedures 2.4. *See Pet. for Review* at 13. However, Defendant does not state how the Court of Appeals decision to allow vacation because the necessities of the case demanded such a resolution is

a significant question of law. In reality, the Appellate decision is firmly rooted in law that allows them to grant such a resolution. The Defendant's argument that such a decision chills the right to appeal is countered by the very fact a defendant is given notice by RAP 2.4(a) that a court can grant relief, even without cross-appeal, based upon the necessities of the case.

V. CONCLUSION

For the reasons stated above, Sim's petition for discretionary review should be denied.

Respectfully submitted this 15th day of December, 2009.

SUSAN I. BAUR
Prosecuting Attorney

By:



AMIE L. HUNT/WSBA # 31375
Chief Criminal Deputy Prosecuting Attorney
Representing Respondent