Supreme Court No. 101562-3
(COA No. 83277-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TRAVIS DARBY,
Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Travis Darby petitions for review of the Court of Appeals' November 21, 2022, opinion (attached). RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. RCW 9.94A.670 governs eligibility and consideration of Special Sex Offender Sentencing Alternative (SSOSA) sentences and establishes procedural and substantive criteria courts must apply in assessing a request for such a sentence, including a person's amenability to treatment and risk level. Here, the court erroneously concluded Mr. Darby was not amenable to treatment and was a risk for reoffense because it mistakenly believed Mr. Darby was convicted of crimes involving force and criticized him for denying he used force. The court relied on its mistaken belief to refuse a SSOSA despite the joint recommendations of the evaluator, the defense, the prosecution, and the victim's family. The opinion affirming Mr. Darby's SSOSA denial based on misinformation conflicts with the substantial public interest favoring SSOSA sentences

and Mr. Darby's due process right to have the court meaningfully consider the sentencing alternative based on facts supported by the record and without mistakes of law. RAP 13.4(b)(3)-(4).

2. Misinformation about the direct consequences of a guilty plea renders the plea involuntary. This Court's cases addressing involuntary pleas hold a person "need not establish a causal link" between the misinformation and the plea to be entitled to withdraw their involuntary plea and have repeatedly rejected a requirement that a person must prove the misinformation was material. The Court of Appeals acknowledged Mr. Darby's plea agreement misadvised him of a direct consequence of his guilty plea. However, it wrongly rejected his argument he is entitled to withdraw his plea by ignoring this Court's cases in favor of a Court of Appeals' case holding a person may withdraw an involuntary plea only when they also prove the misinformation affected the actual punishment imposed. This Court should accept review because

the Court of Appeals' opinion conflicts with this Court's precedent and the Due Process Clause. RAP 13.4(b)(1), (3).

C. STATEMENT OF THE CASE

Travis Darby pleaded guilty to first and second degree child molestation and third degree rape of a child for the abuse of his daughter over several years. CP 43-65. None of the three crimes to which Mr. Darby pleaded guilty involved an element of force or violence. The prosecution did not accuse Mr. Darby of engaging in acts of force or violence, nor did Mr. Darby admit to such acts. 08/12/21RP 8-10; CP 43-44, 52, 73-74. Instead, each crime consisted of committing specified sexual acts, the ages of the victim and defendant, and the absence of marriage.[1] Former RCW 9A.44.083; Former RCW 9A.44.086; Former RCW 9A.44.079.[2]

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[1] Mr. Darby was convicted based on acts occurring from 2014 through 2020.

[2] The legislature amended each of these offenses in 2021 to eliminate the element that victim and defendant were not married. Laws of 2021, ch. 142, §§ 4-6.

The prosecution recognized Mr. Darby had no criminal history and was eligible for a SSOSA. As part of the plea agreement, the prosecution agreed to consider Mr. Darby's evaluation and recommend him for a SSOSA if appropriate. CP 58; 08/12/21RP 10.

Jason Bailey, a licensed, nationally certified forensic mental health evaluator and counselor who specializes in sex offender treatment, evaluated Mr. Darby. CP 96-125. Specialist Bailey reviewed the case materials, conducted a number of interviews, and administered tests to assess Mr. Darby's treatment needs, his amenability to treatment, and his safety to live in the community.

As part of the evaluation, Specialist Bailey assessed the validity of the tests he gave Mr. Darby to determine their accuracy. The validity indices controlling the tests demonstrated Mr. Darby "did not attempt to present an unrealistic or inaccurate impression." CP 107, 120. A polygraph also concluded, "no deception was indicated." CP

116, 121. In short, Mr. Bailey found Mr. Darby answered the evaluation and test questions truthfully.

The tests assessing Mr. Darby's risk factors determined he presented "below average risk" for reoffense. CP 116-19, 122, 124. They indicated he was motivated for treatment. CP 109, 122. The evaluator concluded Mr. Darby's "demonstrated amenability to specialized sex offender treatment" and "'Below Average Risk' for sexual recidivism" suggested "he would make progress in treatment, and treatment has the potential to reduce his risk for sexual recidivism." CP 122. Indeed, Mr. Darby scored a "-1" on the Static-99R Risk Assessment, placing him in the "below average risk" category. CP 116-17. And Mr. Darby's composite risk assessment, achieved by combining the Static-99R results and the results of a second test, STABLE-2007, also assessed him as "below average risk" and determined Level II supervision and intervention would be appropriate for Mr. Darby. CP 118-19.

Mr. Darby expressed remorse and understood his actions were wrong and harmed his daughter. CP 90, 100; 09/29/21RP 11. He struggled to understand how he could have committed the offenses and believed his excessive drinking may have contributed. CP 107, 112. The evaluation confirmed Mr. Darby would benefit from treatment to address his alcohol use, in addition to his sexual offender treatment needs. CP 121-24.

The specialist's evaluation, Mr. Darby, the prosecution, and the victim's family all recommended a SSOSA.[3] CP 75-82, 96-128; 09/29/21RP 3-12. The victim's mother called it the "best opportunity" for her family to move forward. CP 128. The prosecution explained to the court the family was "in support of a SSOSA" and that the prosecution supported the sentence after reviewing the evaluation and "in conjunction with the family's wishes." 09/29/21RP 4. The prosecution

[3] The victim relied on her mother to convey her and her family's position. CP 126-28.

recommended it because it agreed the SSOSA was "the best option" for the victim's family. 09/29/21RP 5.

The family and the prosecution expressed a particular concern about the family's lack of income following Mr. Darby's incarceration because he was the primary financial support for the family. CP 126-28; 09/29/21RP 4-5. Mr. Darby presented the court with a plan for his housing and employment under the proposed SSOSA. Mr. Darby would live with his parents and work at the family's business, a motorcycle repair shop. CP 12; 09/29/21RP 10-12.

Contrary to the recommendation of the evaluation, the prosecution, Mr. Darby, and the victim's family, the Department of Correction's presentence investigation report recommended a standard range sentence. CP 94. It concluded that Mr. Darby "committed forcible rape," and seized on his denial of having committed a forcible rape as proof he would be "unlikely to make appropriate progress in treatment," contrary to Specialist Bailey's expert opinion. CP 93.

The court, too, focused on Mr. Darby not reporting "having used force in a sexual encounter." 09/29/21RP 13; CP 12-15. The court used this to conclude Mr. Darby was not amenable to treatment and that he could reoffend, thereby creating a risk to the community, the victim, and other potential victims. 09/29/21RP 12-14.

The court rejected the recommendation of the evaluator, the prosecution, and Mr. Darby, rebuffed the wishes of the victim's family, and refused to impose a SSOSA. CP 09/29/21RP 12-16; CP 8-15. Instead, the court imposed an indeterminate term of life on count one with the possibility for release after 120 months, and determinate terms of 75 months and 60 months on counts two and three. CP 20-21, 83-84; 04/20/22RP 24-25. The court also imposed lifetime community custody on count one. CP 22.

D. ARGUMENT

1. The court's unreasonable rejection of the jointly recommended SSOSA based on its misunderstanding of the relevant law and unsupported factual findings contravenes public policy and due process, warranting review.

The victim, the prosecution, the evaluator, and the defense all recommended the trial court impose a SSOSA. CP 76-82, 119-24, 128; 09/29/21RP 3-14. The court rejected that universal recommendation based on its misunderstanding of the elements of the offenses to which Mr. Darby pleaded guilty and its mistaken belief he denied facts critical to the elements of his offenses. The court also relied on its erroneous understanding of the facts and the law to discredit the evaluator's assessment that Mr. Darby was amenable to treatment. The court rejected the recommended SSOSA for untenable reasons, constituting a failure to consider meaningfully Mr. Darby's alternative sentence. The right to have the court meaningfully consider a sentencing alternative based on findings supported by the record and a correct understanding of the law presents a

significant constitutional issue of substantial public interest that merits this Court's review.

A person eligible for a sentencing alternative has the right to request a sentencing alternative and have the court actually consider that request. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Courts must meaningfully consider discretionary sentencing decisions. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). The failure to "meaningfully consider" such a sentence is an error requiring a new hearing. *State v. O'Dell*, 183 Wn.2d 680, 696-67, 358 P.3d 359 (2015); *Grayson*, 154 Wn.2d at 342.

Here, the trial court incorrectly believed Mr. Darby was convicted of crimes requiring the element of force and penalized him for denying he used force. 09/29/21RP 13-14; CP 13-15. The court then interpreted his failure to admit to a "forcible rape" as proof Mr. Darby was not amenable to treatment and a reason to reject the nearly universally recommended SSOSA. 09/29/21RP 13; CP 13. The court

penalized Mr. Darby for not admitting to an element of an offense with which he was not charged and to which he did not plead guilty, rendering its decision to deny the SSOSA because of its misunderstanding untenable.

The court's mistaken belief also led it to dismiss the evaluator's conclusion that Mr. Darby was amenable to treatment and to reject the expert's recommendation for treatment. The victim's family, the prosecutor, the defense, and the evaluator all recommended a SSOSA sentence. CP 76-82, 119-24, 128; 09/29/21RP 3-14. A court retains its discretion to impose any authorized sentence, and nothing in the statute requires a trial court to follow the recommendation of an evaluator. RCW 9.94A.670. But the court's decision must be based on sound reasons.

Here the trial court ruled Mr. Darby was not amenable to treatment and refused to impose the recommended SSOSA because it erroneously found that during the evaluation, Mr. Darby "did not disclose his referral offense of having

committed a forcible rape." CP 13; 09/29/21RP 13. The court decided this perceived failure to admit his use of force created concern about "his true amenability to treatment" and "the risk the defendant poses to the community." CP 13-14; 09/29/21RP 13-14. The court relied on this mistaken belief again in assessing the leniency of the sentence, finding he "forcibly raped" his daughter repeatedly. CP 15.

But none of the three crimes to which Mr. Darby pleaded guilty contain an element of force. CP 43-44, 51-52, 73-74; 08/12/21RP 8-10; *see State v. Smith*, 177 Wn.2d 533, 547-48, 303 P.3d 1047 (2013). Instead, the sexual act itself, along with the child's age and lack of marital status, establish the offense. Former RCW 9A.44.083 (Laws of 1994, ch. 271, § 303); Former RCW 9A.44.086 (Laws of 1994, ch. 271, § 304); Former RCW 9A.44.079 (Laws of 1988, ch. 145, § 4).

The trial court nonetheless discredited the evaluation's conclusions that Mr. Darby was amenable to treatment and a "below average risk" for recidivism based on a

misunderstanding of the elements of the offenses. The offenses did not include a forcible rape, a forcible sex offense, or a forcible act of any sort.

The Court of Appeals affirmed the convictions because of its fundamental misunderstanding of Mr. Darby's argument. The opinion concludes, "Darby cites no authority that a sentencing court must look to conduct in only charged offenses when considering whether an offender is amenable to treatment." Slip op. at 7. Mr. Darby cites no authority for that proposition because that is not his argument. RCW 9.94A.670 does not expressly limit a court to considering only the charged offense. However, a court must limit itself to considering accurate information supported by the record. A court bases its decision on untenable grounds for untenable reasons if it relies on facts the record does not support. *State v. Greenfield*, 21 Wn. App. 2d 878, 887, 508 P.3d 1029 (2022) (reversing and remanding where court based refusal to impose sentencing alternative on unsupported facts).

And a court abuses its discretion "if it applies the wrong legal standard, bases its ruling on an erroneous view of the law, or acts without consideration of and in disregard of the facts." *State v. Hawkins*, __ Wn.2d __, 519 P.3d 182, 194 (2022). Similarly, a court's "singular focus" on one fact to the exclusion of other facts the statute directs the court to consider also constitutes an abuse of discretion. *Id.* at 186, 195 n.15 (holding trial court erred in "disregarding" some evidence "in favor of a singular focus" on other evidence).

The court here maintained a singular focus on Mr. Darby denying an element of a crime with which he was not charged, to the exclusion of other factors. Moreover, contrary to the court's concern that permitting Mr. Darby to participate in a SSOSA could endanger the community because he could reoffend, CP 13-14, empirical evidence suggests participants in SSOSA recidivate at a lower rate than people who are eligible for but denied SSOSA. "The recidivism rates of those statutorily eligible for a SSOSA but sentenced to prison are

higher than the rates of those receiving SSOSA." Wash. State Inst. for Pub. Pol'y, *Sex Offender Sentencing in Washington State: Special Sex Offender Sentencing Alternative Trends* 1 (2006);[4] *accord* Kate Stith, *Principles, Pragmatism, & Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 L. & Contemp. Probs. 105, 116 & n.101 (2013) (citing Wash. State Inst. Pub. Pol'y reports).

The substantial public interest in treating people charged with sex offenses and lowering recidivism rates increases the importance of courts properly evaluating SSOSA requests, particularly when such a sentence is jointly recommended by nearly everyone involved, as occurred here. The trial court unreasonably denied Mr. Darby a SSOSA for manifestly untenable reasons based on a misunderstanding of the law and the critical facts. The court used its misinterpretation to conclude erroneously that Mr. Darby was not amenable to

[4] https://www.wsipp.wa.gov/ReportFile/928/Wsipp_Special-Sex-Offender-Sentencing-Alternative-Trends_Report.pdf

treatment, contrary to the evaluation's conclusions, and that he presented a higher risk of recidivism than the evaluation demonstrated. This Court should accept review.

2. The Court of Appeals erroneously imposed a materiality requirement that people misadvised of the direct consequences of their guilty plea must also prove the misinformation actually affected their punishment, in conflict with this Court's precedent and due process.

Mr. Darby's plea agreement erroneously informed him he faced terms of lifetime community custody on two counts instead of only one. CP 45, 59. The prosecution conceded and the Court of Appeals acknowledged the plea agreement misadvised Mr. Darby of the term of community custody on count two. Slip op. at 10-11; Br. of Resp. at 2, 31-32. However, the Court of Appeals held this incorrect sentencing information "did not misadvise [Mr. Darby] about a direct consequence of his plea" because he did not also prove the error affected the punishment the court actually imposed. Slip op. at 10-11.

This Court has repeatedly rejected such a materiality requirement. Instead, a person must show the plea agreement misinformed them of a direct consequence of their plea. Direct consequences include the lengths of confinement and community custody. The Court of Appeals' erroneous opinion conflicts with opinions of this Court and the protections of due process, meriting this Court's review.

a. A person involuntarily pleads guilty when the plea agreement misinforms them of the direct consequences of their guilty plea.

The Due Process Clause requires that a waiver of constitutional rights must be knowing, intelligent, and voluntary. U.S. Const. amend. XIV; Const. art. I, § 3; *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. 2d. 7 (1970) (waiver of right to trial); *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (waiver of rights against self-incrimination, to trial by jury, and to confrontation); *Johnson v. Zerbst*, 304 U.S. 458, 465-69, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (waiver of right to counsel).

This includes a waiver of rights by guilty plea. "Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charges and enters into the plea intelligently and voluntarily." *State v. A.N.J.*, 168 Wn.2d 91, 117, 225 P.3d 956 (2010).

A guilty plea may not stand without proof the defendant voluntarily, intelligently, and understandingly waived the constitutional rights encompassed by the plea. *Boykin*, 395 U.S. at 243. This requires a person be informed of all direct consequences of pleading guilty. *Brady*, 397 U.S. at 748; *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). If a person does not have "sufficient awareness of the relevant circumstances and likely consequences" of a guilty plea, the plea is involuntary. *Brady*, 397 U.S. at 748.

A direct consequence of a guilty plea includes terms affecting the range of the person's punishment. *Ross*, 129 Wn.2d at 284. Our courts have long held the statutory

maximum term and length of a sentence are direct consequences of a plea. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008); *State v. Mendoza*, 157 Wn.2d 582, 590, 141 P.3d 49 (2006); *see also State v. Morley*, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). Thus, misinformation about the length of a sentence renders the plea involuntary. *Mendoza*, 157 Wn.2d at 590. This is true even if the actual, correct sentence is shorter than the mistaken sentence of which the defendant was advised. *Id.* at 590-91.

A waiver of core constitutional rights is involuntary and a guilty plea is invalid where a defendant is not accurately informed of the sentencing consequences. *Weyrich*, 163 Wn.2d at 557. This applies not only to terms of confinement but also to terms of community custody. *State v. Barber*, 170 Wn.2d 854, 858, 248 P.3d 494 (2001); *State v. Turley*, 149 Wn.2d 395, 399, 69 P.3d 338 (2003); *Ross*, 129 Wn.2d at 287-88. Where a plea agreement misinforms a person of a mandatory term of community custody, "there is no dispute" that the person "was

misinformed as to a direct consequence" of the plea agreement. *Barber*, 170 Wn.2d at 858.

b. <u>The prosecution conceded and the Court of Appeals agreed Mr. Darby's plea agreement and guilty plea statement misinformed him of the term of community custody on count two.</u>

Mr. Darby pleaded guilty to all three counts at the same time pursuant to a single plea agreement. 08/12/21RP 1-12; CP 43-65. The plea agreement and guilty plea statement by which Mr. Darby waived his constitutional rights misadvised Mr. Darby about the term of community custody he faced on count two. The guilty plea statement told Mr. Darby he faced lifetime community custody on count two. CP 45.

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancement)	PLUS Enhancements*	TOTAL ACTUAL CONFINEMENT (standard range + enhancement)	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
2	6	57-75 MONTHS		57-75 MONTHS	LIFETIME	CLASS B FELONY – The maximum penalty is 10 years imprisonment and/or a $20,000.00 fine.

CP 44-45. Likewise, the plea agreement told Mr. Darby he faced lifetime community custody on count two. CP 59.

B. COMMUNITY CUSTODY: State recommends that the defendant serve the following term of Community Custody:

Count I	LIFE	months	Count IV		months
Count II	LIFE	months	Count V		months
Count III	36	months	Count VI		months

CP 59.

The advisement that Mr. Darby faced a lifetime of community custody on count two was incorrect. On a plea to second-degree molestation, Mr. Darby faced three years of community custody, not a lifetime. *Compare* RCW 9.94A.701(a)(1) (requiring three years community custody for sex offenses not included in RCW 9.94A.507), *with* RCW 9.94A.507 (requiring community custody until the maximum expiration of indeterminate sentence for listed offenses, which do not include second-degree child molestation).

The prosecution concedes the plea agreement misadvised Mr. Darby that he faced a lifetime of community custody on count two when he actually faced only three years. Br. of Resp. at 2, 31-32. The Court of Appeals also acknowledged the plea

agreement and statement misadvised Mr. Darby of the length of community custody he faced on count two. Slip op. at 10-11.

Mr. Darby did not face a lifetime of community custody as a consequence of his plea of guilty on count two; he faced only three years of community custody. The plea agreement and statement advising him he faced a lifetime of community custody was incorrect, and this misinformation about a direct consequence of his plea rendered the plea involuntary. *Weyrich*, 163 Wn.2d at 557.

c. The Court of Appeals wrongly refused Mr. Darby the opportunity to withdraw his plea because it abandoned this Court's precedent and required Mr. Darby also show the admitted misinformation in his plea materially affected the punishment imposed.

Mr. Darby involuntarily waived his core constitutional rights when the guilty plea agreement and statement misinformed him of the direct consequences of his plea. The remedy for an involuntary waiver of rights based on misinformation is a withdrawal of the waiver. *State v. Walsh*, 143 Wn.2d 1, 8-9, 17 P.3d 591 (2001); *Barber*, 170 Wn.2d at

855. Because Mr. Darby pleaded guilty in a single plea agreement, he must be permitted to withdraw his pleas to all counts. *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 812, 383 P.3d 454 (2016); *Turley*, 149 Wn.2d at 401.

Reviewing courts must presume misinformation about the direct consequences of a plea prejudices a person. *Weyrich*, 163 Wn.2d at 557; *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 596, 316 P.3d 1007 (2014). A person "need not establish a causal link between the misinformation and his decision to plead guilty." *Weyrich*, 163 Wn.2d at 557.

The Court of Appeals acknowledged the plea agreement and statement misadvised Mr. Darby of a direct consequence of his plea when it misinformed him of the length of community custody he faced on count two. Slip op. at 10-11. However, the Court of Appeals excused the conceded misinformation in Mr. Darby's plea agreement by abandoning this Court's precedent and instead relying on a Court of Appeals case, *State*

v. Smith, 137 Wn. App. 431, 438, 153 P.3d 898 (2007). Slip op. at 9-11.

In *Smith*, the Court of Appeals held misinformation about the sentence range of a guilty plea did not render it involuntary because it did not change the actual sentence the court imposed. Because the defendant "received the same punishment under the correct sentencing range that he would have received under the erroneous range," the court held the "unexpected sentence provision" was not a direct consequence of his plea. *Smith*, 137 Wn. App. at 438.

Here, the Court of Appeals followed *Smith* and rejected Mr. Darby's challenge to conceded misinformation in his plea agreement by reasoning the misinformation did not alter the ultimate sentence and, therefore, it could not have rendered his plea involuntary. Slip op. at 10-11. This contradicts this Court's holdings.

This Court has repeatedly rejected a materiality standard that would require a person to show the misinformation affected

their guilty plea. *Mendoza*, 157 Wn.2d at 590-91; *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). "[W]e adhere to our precedent establishing that a guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated." *Mendoza*, 157 Wn.2d at 591.

A person does not need to show the misinformation materially affected their decision to plead guilty or sentence. *Weyrich*, 163 Wn.2d at 557. A person must show only that he was misinformed of "a direct consequence" of the plea. *Mendoza*, 157 Wn.2d at 588. Mr. Darby satisfied that here. The plea agreement and statement informed him he faced terms of lifetime community custody on two counts. CP 44-45, 59. That information was incorrect; Mr. Darby only faced one term of lifetime community custody.

There is no materiality requirement. *Isadore*, 151 Wn.2d at 302. If a plea agreement misinforms a person of a direct

consequence of a guilty plea, their plea is not knowing, intelligent, or voluntary, and the agreement is invalid. *Id.* "The defendant does not need to establish a causal link between the misinformation and his decision to plead guilty." *Weyrich*, 163 Wn.2d at 557. To the extent the Court of Appeals case on which the opinion relies holds otherwise, it does not displace this Court's precedent. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Mr. Darby's plea inaccurately informed him he faced lifetime community custody on count two. This inaccurate advisement misinformed him on a direct consequences of his plea because it misadvised him about the length of community custody he faced and his ability to secure and maintain his release and the terms of his supervision on that count.

Mr. Darby should be permitted the opportunity to withdraw his involuntary plea. *Swagerty*, 186 Wn.2d at 812; *Weyrich*, 163 Wn.2d at 557. The Court of Appeals disregarded this Court's precedent and followed an outlier Court of Appeals

case that conflicts with this Court's clear holdings. This Court should accept review to resolve the conflict and reaffirm its longstanding precedent protecting due process.

E. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

In compliance with RAP 18.17(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,189 words.

DATED this 20th day of December, 2022.

Respectfully submitted,

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APPENDIX A

November 21, 2022, Opinion affirming conviction and sentence

FILED
11/21/2022
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. DARBY, TRAVIS WILLIAM, DOB: 02/11/1980, Appellant.	No. 83277-8-1 UNPUBLISHED OPINION

BOWMAN, J. — Travis William Darby pleaded guilty to first and second degree child molestation and third degree rape of a child, all with domestic violence (DV) designations. The trial court denied Darby's request for a special sex-offender sentencing alternative (SSOSA) and imposed a concurrent indeterminate sentence of 120 months to life and lifetime community custody. Darby appeals, arguing that the trial court erred by denying his SSOSA, that his plea agreement misinformed him of the consequences of his guilty plea, and that the court erred when it imposed discretionary supervision fees. We affirm his convictions but remand to strike the discretionary supervision fees.

FACTS

In September 2020, 15-year-old L.D. disclosed that Darby, her father, sexually assaulted her. She said he began abusing her when she was 10 years

old. She described an escalating pattern of sexual abuse that occurred over several years. And she explained how eventually, "she stopped fighting back because it was 'going to happen anyway.' " The abuse continued until police arrested Darby shortly after her disclosure.

Darby pleaded guilty to one count of first degree child molestation DV, one count of second degree child molestation DV, and one count of third degree rape of a child DV, committed against L.D. between 2014 and 2020. Darby's plea agreement advised him of the maximum and standard-range sentences for each crime. Under the "COMMUNITY CUSTODY" section, the agreement said that Darby faced a lifetime of community custody for the first and second degree child molestation convictions[1] and 36 months of community custody for the third degree child rape conviction. Darby sought a SSOSA.[2]

A certified sex-offender treatment provider evaluated Darby. The evaluation assessed Darby's "treatment needs, his amenability to treatment, and his safety to be in the community." The provider recommended imposing a SSOSA. But he noted that in Darby's interview, Darby said he did not begin abusing L.D. until 2020. Darby stated that L.B. initiated the relationship, and that " '[he] didn't force her, but [he] allowed it.' " So the evaluator found that Darby "does not report committing rape or having used force in a sexual encounter." And he explained that Darby's rationalizations for his conduct "keep him from

[1] RCW 9.94A.701(1)(a) provides for no more than 36 months of community custody for a defendant charged with second degree child molestation. The parties agree the term of community custody for that count is an error.

[2] A SSOSA suspends confinement and allows the offender to remain in the community (with conditions) while they receive treatment. See RCW 9.94A.670.

accepting full responsibility for his actions." While the evaluation notes that Darby is generally amenable to treatment, "the nature of some of his problems suggest that treatment could be fairly challenging." The evaluation concludes that Darby "demonstrated amenability to specialized sex offender treatment" and posed a " 'Below Average Risk' for sexual recidivism."

The Department of Corrections (DOC) issued a presentence investigation report that recommended a sentence within the standard range instead of a SSOSA. The report explained:

> Darby's conduct was by all accounts, frightening and abhorrent to the victim, and should be punished accordingly. He not only committed a serious abuse of a position of trust, he committed forcible rape, and used his young daughter's natural curiosity to justify his actions. His behavior has caused a degree of emotional and mental harm that is most likely immeasurable, and has caused his daughter to be terrified of encountering him. Also of concern, [is] the defendant's inability to take full responsibility for his actions, making him not only a danger to reoffend, but also unlikely to make appropriate progress in treatment.

As part of DOC's report, L.D.'s mother expressed concerns that L.D. was " 'terrified' " and " 'worried about [Darby] getting out of jail and running into him.' " But she recognized that L.D. did not understand " 'the level of supervision [Darby] will be under when he gets out, the fact that it will be for life.' " She ultimately agreed to a SSOSA, stating that she " 'made [her] peace with [it], only because of the high level of supervision for [Darby], and the lifetime protection order for [her] daughter.' " And she repeated this sentiment in her "Victim Impact Statement" provided to the sentencing court.[3]

[3] Under RCW 9.94A.670(1)(c), " '[v]ictim' also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense," so we consider L.D.'s mother a victim as well.

At sentencing, the parties addressed Darby's request for a SSOSA. The prosecutor told the court that he "has concerns," "largely echoed in the presentence investigation report regarding [Darby] taking full responsibility." Defense counsel argued that Darby gave "a complete and very thorough confession and admission of what he did." He insisted that the "responsibility issues" related "purely to recollection of when the [abuse] actually occurred or when [it] started occurring. So it's not a denial . . . . It just was a confusion as to what dates and when this actually began." The State "struggled with" Darby's request, but ultimately supported granting the SSOSA because Darby's family relied on his financial contributions, and assuming there was a plan for housing and employment, "the SSOSA . . . is the best option in order to . . . provide for the family."

The sentencing court denied Darby's request for a SSOSA. It stated that it "read these reports several times . . . . The fact that this child was repeatedly raped for a number of years and molested and gave up fighting because she knew she couldn't stop it is just heart-wrenching." The court noted that L.D.'s mother seemed to "reluctantly" agree to the SSOSA because of the lifetime supervision requirement, "which is going to occur regardless of whether the Court grants a SSOSA." The court agreed with the concerns in the DOC report about Darby's amenability to treatment and cited the evaluation's finding that Darby did "not report committing rape or having used force in a sexual encounter."

Ultimately, the court determined that a SSOSA would be "too lenient" given the facts of the case and that Darby would not be amenable to treatment.

The trial court entered extensive written findings of fact and conclusions of law and imposed a concurrent standard-range, indeterminate sentence of 120 months' confinement to life. It also imposed lifetime community custody and several conditions, including no contact with L.D. Finally, the court found Darby indigent and waived all nonmandatory fees. But the court did not strike the discretionary DOC supervision fees language from the "conditions applicable to all community custody terms" section of the judgment and sentence.

Darby appeals.

ANALYSIS

Denial of SSOSA

Darby argues that the trial court erred in denying his request for a SSOSA. We disagree.

We review a sentencing court's denial of a SSOSA sentence for abuse of discretion. State v. Osman, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). A sentencing court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id. A sentencing court also abuses its discretion "if it categorically refuses to impose a particular sentence or

if it denies a sentencing request on an impermissible basis."[4] Osman, 157 Wn.2d at 482.

Sentencing courts must generally impose a sentence within the standard range. Osman, 157 Wn.2d at 480. A SSOSA is an alternative to a standard-range sentence and is available to certain offenders convicted of sex crimes. See RCW 9.94A.670(2). Whether to grant a SSOSA is entirely at the sentencing court's discretion. State v. Sims, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). If an offender is eligible for and requests a SSOSA, the court must decide whether that alternative is "appropriate." Osman, 157 Wn.2d at 480-81.

In determining whether a SSOSA is appropriate, the trial court must consider several factors, including, (1) "whether the offender and the community will benefit from use of [a SSOSA]," (2) "whether [a SSOSA] 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 [SSOSA]." RCW 9.94A.670(4). The sentencing court must give "great weight" to the victim's opinion. Id.

Darby argues that the trial court abused its discretion by denying his request for a SSOSA because it "misapprehended the relevant charges," which

[4] "Washington courts have only specified the defendant's race, sex, or religion as impermissible bases for a court's denial of a nonstandard sentence." Osman, 157 Wn.2d at 482 n.8.

caused it to misinterpret his amenability to treatment and minimize the victims' "support" for a SSOSA. According to Darby, the trial court mistakenly believed that Darby was convicted of forcible rape and penalized him for not admitting to "doing something he was not charged with doing, and was not convicted of doing."[5]

To support his argument, Darby points to the court's comment that "[h]e does not report committing rape or having used force in a sexual encounter which is in opposition to the statement of the victim which is she gave up fighting." But that comment does not suggest that the court mistakenly believed the State charged and Darby pleaded guilty to forcible rape. Rather, it refers to L.D.'s statement that Darby repeatedly raped her for several years and that eventually, she quit fighting him. Darby cites no authority that a sentencing court must look to conduct in only charged offenses when considering whether an offender is amenable to treatment. " 'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.' " City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)), review denied, 195 Wn.2d 1031, 468 P.3d 621 (2020).

[5] Citing State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005), the State argues that Darby's argument "is not reviewable on appeal because he challenges the sentence imposed, not the procedure by which it was imposed." Darby argues that "[t]he court's rejection of the recommended SSOSA for these untenable reasons constitutes a failure to consider meaningfully Mr. Darby's alternative sentence and requires remand for a new hearing." As much as Darby's assignments of error may relate to facts unsupported by the record or mistakes of law, we choose to address his claims on their merits.

And the treatment provider shared the court's concern. The evaluation states that "[a] person's behavior is governed by their belief system and learning to control deviant sexual behavior is seriously affected by what one believes about how the offense behavior occurred." In Darby's case, his behavior shows "numerous sexual 'thinking errors' which he uses to help him explain the sexual behavior that occurred, i.e., he did not plan it, it just happened, the person wanted it, etc." The evaluator concludes that Darby's "explanations keep him from accepting full responsibility for his actions."

Nor did the court minimize the victims' support for the SSOSA. In her DOC interview, L.D.'s mother said that L.D. was " 'terrified' " of running into Darby in the community, and that she " 'only agreed to the SSOSA because of . . . the high level of supervision for [Darby], and the lifetime protection order for my daughter.' " And in the Victim Impact Statement, she stated that "while there is disappointment with the SOSA program, I am in agreement with it due to the restrictions that he will be required to follow for the rest of his life." The trial court accurately characterized L.D.'s mother's support as "tepid" and "reluctant[ ]" in its oral ruling.[6] And the record supports the court's comment that it gave "great weight" to her recommendation.

We conclude that the court did not abuse its discretion by denying Darby's request for a SSOSA.

[6] The court also accurately described the State's support of the SSOSA as "tepid" and "[p]erhaps even begrudging."

Voluntary Plea

Darby argues that his plea was not voluntary because the plea agreement "misadvised him of the direct consequences of the plea" to second degree child molestation. We disagree.

Due process requires that a guilty plea be knowing, intelligent, and voluntary. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006); see also CrR 4.2(d). To make a knowing and intelligent plea, a defendant must have a correct understanding of the charges and consequences of pleading guilty. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835, 226 P.3d 208 (2010); see also State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). The imposition of mandatory community placement or community custody is a direct consequence of a guilty plea. State v. Turley, 149 Wn.2d 395, 399, 69 P.3d 338 (2003); Quinn, 154 Wn. App. at 836. A guilty plea is involuntary " 'when based on misinformation regarding a direct consequence on the plea, regardless of whether the actual sentencing range is lower or higher than anticipated.' " Quinn, 154 Wn. App. at 838 (quoting Mendoza, 157 Wn.2d at 591). So a defendant need not show that misinformation affected his decision to plead guilty. State v. Smith, 137 Wn. App. 431, 437-38, 153 P.3d 898 (2007). Still, the defendant must establish that the erroneous sentencing provision represents " 'a definite, immediate and largely automatic effect on . . . the defendant's punishment.' " Id. at 438[7] (quoting Mendoza, 157 Wn.2d at 588).

[7] Alteration in original.

In Smith, the defendant pleaded guilty to forgery and unlawful possession of payment instruments (UPPI). 137 Wn. App. at 435. The defendant's plea agreement advised him correctly that the standard sentence range for the forgery was 14 to 18 months. Id. But it incorrectly advised him that the range for the UPPI was 0 to 12 months. Id. The correct standard range was 14 to 18 months. Id. The defendant moved to withdraw his guilty plea, arguing it was involuntary because the State misadvised him of the direct consequences. Id. The trial court denied his motion to withdraw the plea. Id.

Division of Two of our court affirmed. Smith, 137 Wn. App. at 438. It reasoned the "defendant must establish that the unexpected sentence provision was a direct consequence of his guilty plea; one that represents 'a definite, immediate and largely automatic effect on . . . the defendant's punishment.' " Id.[8] (quoting Mendoza, 157 Wn.2d at 588). The court found that the defendant could not show the misinformation about his standard range on the UPPI affected his punishment because the standard range for the forgery conviction was also 14 to 18 months, and the sentences ran concurrently. Id. Because the direct consequence of the defendant's plea was a 14- to 18-month term of confinement despite the error on the plea form, the State did not misadvise the defendant about a direct consequence of his plea. Id.

Darby's plea form advised him that he faced a lifetime of community custody for the second degree child molestation conviction. But RCW 9.94A.701(1)(a) provides for a maximum of 36 months of community custody for

[8] Alteration in original.

that sex offense. Still, his plea form correctly advised Darby that he faced a lifetime term of community custody as result of the first degree child molestation conviction. And the terms of community custody ran concurrently. So, like the defendant in Smith, Darby's plea form did not misadvise him about a direct consequence off his plea because he still must serve lifetime community custody, despite the error.[9]

Supervision Fees

Darby challenges the trial court's imposition of discretionary DOC supervision fees despite the trial court's finding that he is indigent and its order to waive all nonmandatory legal financial obligations (LFOs). The State concedes and agrees that the court should strike the fees.

The trial court determined that Darby was indigent and waived all nonmandatory LFOs. But the judgment and sentence contained preprinted language requiring Darby to "pay supervision fees as determined by DOC." "[B]ecause 'supervision fees are waivable by the trial court, they are discretionary LFOs.' " State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (quoting State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020)). We remand to strike the fees from the judgment and sentence. Bowman, 198 Wn.2d at 629.

[9] Darby argues that Smith is distinguishable because "[l]ifetime community custody on two cases would make it harder for a person to gain parole." But he offers no authority to support his argument. We assume that a party who fails to provide relevant authorities has conducted a diligent search and found none. Levesque, 12 Wn. App. 2d at 697.

We affirm Darby's convictions but remand to strike the discretionary supervision fees.

WE CONCUR:

Díaz, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 83277-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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