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SUPREME COURT NO. 99825-6

NO. 80920-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SYR RUMSEY,

Petitioner.

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

The Honorable Elizabeth Berns, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Syr Rumsey seeks review of the Court of Appeals' unpublished decision in State v. Rumsey, No. 80920-2-I, filed April 19, 2021 ("Slip op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. When the trial court revokes a defendant's Special Sex Offender Sentencing Alternative (SSOSA) based on several violations of community custody or treatment conditions, and some of those violations are found on appeal to be legally or factually unsupported, what standard of review must the Court of Appeals apply when determining whether to grant a new revocation hearing?

2. When the Court of Appeals determines whether the trial court would certainly have revoked the defendant's SSOSA, even if it had not relied on violations that were factually or legally unsupported, may the Court of Appeals conduct its own fact-finding, relying on testimony that the trial court did not credit in the original revocation decision?

C. STATEMENT OF THE CASE

The trial court revoked Mr. Rumsey's SSOSA because it found he had violated several conditions of his community custody and sex offender treatment. In its written revocation ruling, the trial court explained that Mr. Rumsey's failure in treatment stemmed from his violation of a condition

that required his "complete honesty regarding life and behaviors with the treatment provider and [community corrections officer (CCO)]." CP 137, 147.

Mr. Rumsey appealed, and the Court of Appeals held that the "honesty" condition was unenforceable for vagueness, and that the evidence was insufficient to support the trial court's finding that Mr. Rumsey had violated another condition related to "sexually explicit" materials. Slip op. at 6, 8. Nevertheless, the Court of Appeals affirmed the revocation because it concluded that "substantial evidence supported finding [Mr. Rumsey] was not amenable to treatment." Slip op. at 11.[1]

The Court of Appeals' analysis conflicts with this Court's decision in State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993), which held that a new sentencing hearing is required unless it is clear the trial court would have imposed the same sentence based solely on valid factors.

1. Underlying Offense

Syr Rumsey had an unstable childhood, characterized by abuse, abandonment, and drug use. CP 194-97, 208. He started using marijuana when he was eight years old, and Percocet and Oxycontin when he was 13. CP 197. He attempted suicide at eight years old. CP 199. Mr. Rumsey

[1] This portion of the Court of Appeals' decision inexplicably refers to Mr. Rumsey as "Moore." Slip op. at 11.

attributed these behaviors to his depression over being chronically overweight and "an incest baby," *i.e.*, the product of his mother's rape by her half-brother. CP 195, 199.

When Mr. Rumsey was 20, he moved in with his girlfriend, a close friend he had known for many years. CP 195. This girlfriend had two young children, and Mr. Rumsey provided childcare while his girlfriend was at work. CP 195. Around this time, Mr. Rumsey became addicted to methamphetamine. CP 195.

When his girlfriend's daughter was three years old, Mr. Rumsey put his penis in her mouth for a few seconds on two occasions during the same week. CP 202-04. Mr. Rumsey was 21 years old at the time. CP 203. About two years later, the child disclosed this incident to her mother, who then confronted Mr. Rumsey. CP 202-03. Mr. Rumsey told his girlfriend that the child was telling the truth, and he immediately turned himself into the police. CP 202-03.

On April 14, 2017, Mr. Rumsey pleaded guilty to first degree rape of a child. CP 55-69. Consistent with the State's recommendation, the trial court imposed a Special Sex Offender Sentencing Alternative (SSOSA): a term of 93 months to life, suspended on the conditions that Mr. Rumsey serve two months of confinement in the King County jail, participate in

treatment for up to five years, and comply with numerous terms of community custody. CP 45-46, 58-60.

In his initial screening for treatment, Mr. Rumsey described his offense as "'[v]ery wrong because I am a grown man and I ain't supposed to do that to a little girl.'" CP 203. He said he cried when he remembered the look on his girlfriend's face when she found out. CP 204.

Mr. Rumsey also told his evaluator that he was using methamphetamine daily when he committed the offenses, and that the drug caused him to act uncharacteristically and to have constant erections. CP 205. He described the phenomenon as painful. CP 205. He said that the second time he abused his girlfriend's daughter she bit him and he "'woke up and thought what am I doing to my little girl[?]'" CP 203.

Mr. Rumsey attributed the offenses to "his methamphetamine use and his loneliness and desperation." CP 203. His evaluator concluded that they were isolated incidents—*i.e.*, that Mr. Rumsey had no other history of perpetrating abuse—and determined he posed a moderate-low risk of re-offense. CP 206-07.

2. Prior Notices of Violation

During Mr. Rumsey's first two years of treatment, DOC filed four separate Notices of Violation seeking to revoke his SSOSA or otherwise sanction him. CP 73-74, 81-82, 93-94, 119-20.

The first notice alleged an unapproved living arrangement (because Mr. Rumsey was homeless at the time and could find nowhere else to go). CP 73-74. Mr. Rumsey admitted the violation and, consistent with DOC's recommendation, the court imposed a mild sanction of credit for time served and GPS monitoring for 60 days. CP 74, 78.

The other three notices all alleged normal adult sexual behavior. CP 81-82, 93-94, 119-20.

The first notice, filed in July of 2017, stated that Mr. Rumsey told a polygraph examiner he had been masturbating to depictions of pornography, and that he had not discussed this behavior with his treatment provider, Daniel DeWaelsche. CP 81-82. DOC alleged that this behavior violated a condition regarding pornography, which the Department summarized as: "do not possess, use, access or view any sexually explicit material, erotic materials or any material depicting a person engaging in sexually explicit conduct unless given permission by [his] treatment provider." CP 82. The Notice of Violation also expressed concern that Mr. Rumsey had reported himself homeless and unemployed since the beginning of his community custody term, and that he had been unable to attend therapy sessions since June 23, due to lack of funds. CP 82.

Mr. Rumsey again admitted to the allegations. CP 83. The court imposed credit for time served, granted DOC's motion for various sanctions

involving unapproved internet access and random searches of Mr. Rumsey's internet-enabled devices, and ordered Mr. Rumsey to report to the court on his efforts to obtain a job, housing, and his GED. CP 85.

Following that court order, Mr. Rumsey made substantial positive progress. He was found in compliance at his September and October, 2017, review hearings, and the court noted he had obtained full time work and would soon begin GED classes. CP 86, 156. In October, Mr. DeWaelsche submitted a review letter to the court praising Mr. Rumsey's honesty, enrollment in college and efforts to maintain employment, and compliance with treatment rules. CP 90.

The following month, DOC submitted a Notice of Violation after Mr. Rumsey admitted, during a polygraph session, that he had been involved in a romantic relationship with a 24-year-old woman for three weeks without disclosing this to Mr. DeWaelsche. CP 93-94. In response to this disclosure, Mr. DeWaelsche terminated Mr. Rumsey the treatment program. CP 97.

DOC moved for revocation of the SSOSA, but also notified the court that it would not oppose lesser sanctions if a new treatment provider agreed to work with Mr. Rumsey. CP 162-63.

The court denied the request for termination and approved reentry into treatment with a new provider, Dan Knoepfler. CP 109. The court's

order also imposed 15 new "conditions of treatment and supervision." CP 109-110. Following this order, Mr. Rumsey remained in compliance for several months. CP 116; CP 284-87.

In July, 2018, Mr. Knoepfler submitted a review letter to the court stating that Mr. Rumsey "is doing well, and is a pleasure to have in my program . . . [and] has followed through with every commitment he has made with me." CP 288-89.

That same month, DOC submitted a Notice of Violation after Mr. Rumsey admitted, during a polygraph session, to viewing pornography. CP 119-20. He told his CCO, Tim Janson, that this occurred on a single occasion two days after his latest release from jail, when he viewed a Playboy magazine belonging to his cousin. CP 120. The State and DOC moved jointly for the revocation of Mr. Rumsey's SSOSA. CP 289-99.

The court denied the motion for revocation, but imposed sanctions and 17 conditions for reentry into treatment. CP 136-37.

3. Current Notice of Violation

On March 29, 2019, DOC completed another Notice of Violation, alleging six violations of his community custody conditions and requesting that Mr. Rumsey's SSOSA be revoked. CP 314-21. Mr. Rumsey was once again arrested. RP 41, 73-74. The six alleged violations were as follows:

(1) Mr. Rumsey consumed Suboxone while incarcerated pending his February, 2019, SSOSA revocation hearing; (2) Mr. Rumsey consumed Seroquel, a sleep aid, while incarcerated pending his February, 2019, SSOSA revocation hearing; (3) Mr. Rumsey exchanged messages of a sexual nature with women on Facebook since March, 2019; received a nude photo from one woman; and masturbated to it before deleting it from his phone; (4) Mr. Rumsey failed to disclose these behaviors to his treatment provider in group sessions, and claimed he was waiting to do so in an individual session; (5) Mr. Rumsey briefly kissed a woman on a bus in March, 2019, and then stopped when he smelled alcohol on her breath; and (6) Mr. Rumsey's treatment provider terminated him from the program upon learning about these behaviors, so Mr. Rumsey was no longer participating in treatment. CP 306-07, 14-21; RP 4-5.

According to the State, these behaviors violated conditions (1) prohibiting unauthorized use of controlled substances; (2) prohibiting possession of "sexually explicit" or "erotic" material; (3) prohibiting any "attempt to enter, remain, or participate in any sexual, dating, and/or romantic relationship; and (4) requiring Mr. Rumsey to "[m]aintain complete honesty regarding life and behaviors with the treatment provider and CCO." RP 5, 54-57, 69; CP 137.

A hearing was held on November 27, 2019. RP 1-90. The court heard testimony from Mr. Rumsey's CCO, Mr. Janson, and from his latest treatment provider, Steve Silver. RP 9-54. It also viewed some Facebook message exchanges cited in the March 29 Notice of Violation; a note that Mr. Rumsey wrote to Mr. Janson, disclosing his cell phone password and some incidents involving contact with women; and a "Termination of Service" letter from Mr. Silver, dated April 1, 2019. CP 314-68.

At the hearing, CCO Janson testified that he learned of Mr. Rumsey's "violations" on March 27, 2019, the very first time he met with Mr. Rumsey after his latest release. RP 11, 20-21. At this meeting, Mr. Rumsey disclosed that he had used Suboxone and Seroquel while he was incarcerated, and that he had kissed a woman on a bus. RP 12. He made these disclosures as soon as CCO Janson asked him "if anything was going on." RP 11. At that point, Mr. Rumsey was not scheduled to take a polygraph for several months. RP 11, 26-27.

CCO Janson testified that he did not believe Mr. Rumsey just "started randomly making out" with a stranger, so he demanded that Mr. Rumsey go home, get his cell phone, and bring it back without deleting anything. RP 12. The following day, Mr. Rumsey returned with his cell phone and a note disclosing that he had sent sexual messages to two or three women on Facebook, received one nude image over Facebook and

masturbated to it before deleting it, made out with a woman, and masturbated to "twerk videos on YouTube four times." RP 11-12; CP 314-68.

Mr. Silver testified that Mr. Rumsey had been his patient for only one month, March of 2019, during which time Mr. Rumsey attended three group therapy sessions. RP 37. Mr. Silver never met with Mr. Rumsey in an individual session. RP 50.

Mr. Silver had difficulty recalling Mr. Rumsey's contributions to group therapy, but he did remember that Mr. Rumsey had truthfully disclosed his underlying offense in the very first session. RP 37, 53-54. He also noted that Mr. Rumsey had consistently paid the $25 weekly treatment fee, and that this must have been very difficult as Mr. Rumsey was homeless and unemployed at the time. RP 39.

Nevertheless, Mr. Silver was critical of Mr. Rumsey's disclosures regarding "his sexual deviancy and his prior treatment experience." RP 37. He said that Mr. Rumsey was "pretty tangential about that." RP 37.

When Mr. Rumsey was arrested on the current allegations in late March, 2019, Mr. Silver reviewed Mr. Knoepfler's file on Mr. Rumsey and immediately terminated him from treatment. RP 37-38. Mr. Silver said he did this because he believed Mr. Rumsey was "sexually preoccupied" and "doing what he wanted in contempt for people who were trying to rein him

in." RP 38-39. He testified that he reached that conclusion because Mr. Rumsey had a pattern of watching "approximations to pornography" such as "twerking videos," and because Mr. Rumsey had expressed a desire to see minors in his extended family. RP 41. Mr. Silver explained that his treatment service was "a fairly conservative agency" and that, after learning about Mr. Rumsey's violations, "we did not want him back." RP 41.

Mr. Silver also testified that he assumed Mr. Rumsey knew he was supposed to be disclosing all his current violations in group therapy sessions. RP 42. He based that assumption on speculation that the prior treatment provider, Mr. Knoepfler, had "probably acquainted [Mr. Rumsey] with what was expected," and on the fact that the other participants in Mr. Silver's group session provide "a lot of good modeling." RP 42. Mr. Silver also acknowledged that Mr. Rumsey was still new to the group when he was arrested and terminated, and that most participants take time to "drop their guard" in group sessions. RP 47.

The court found that all six alleged violations occurred, and it revoked Mr. Rumsey's SSOSA. RP 75, 87. In its written order, the trial court found that Mr. Rumsey's "non-compliance has been rooted in his unwillingness to be honest with his treatment providers and CCO." CP 147.

4. Court of Appeals Decision

On appeal, Mr. Rumsey argued that the conditions relating to "sexual, dating, and / or romantic relationships" and "complete honesty" were vague and unenforceable, and that the evidence was insufficient to sustain a finding that he possessed "sexually explicit materials." Br. of App. at 20-30. The State conceded the arguments regarding "honesty" and "sexually explicit materials." Br. of Resp. at 1, 5.

Mr. Rumsey also argued that, particularly because the "complete honesty" provision had played such a prominent role in the trial court's revocation decision, it was not clear the court would have revoked the SSOSA had it not relied on that provision and the unsupported finding relating to "sexually explicit" materials. Br. of App. at 30-31; Reply Br. of App. at 3-6.

The Court of Appeals accepted both concessions, holding that the evidence was insufficient to show Mr. Rumsey possessed prohibited materials and that the "complete honesty" condition was unenforceable for vagueness. Br. of Resp. at 1, 5; Slip. op. at 6, 8. It also agreed with Mr. Rumsey that the condition involving "dating" contained a vague term. Slip op. at 8-11.

Consistent with those holdings, the Court of Appeals ordered that the case be remanded for the trial court to correct and clarify the community

custody conditions. Slip op. at 13. This means that the trial court will strike the vague term, "romantic," from the condition relating to "relationships," and it will also craft new, constitutional language to describe the "honesty" required of Mr. Rumsey. Slip op. at 8, 10-11, 13.[2]

The Court of Appeals offered no guidelines for crafting the new "honesty" condition. See slip op. at 8 (noting State's argument that "a differently worded condition requiring honesty in more specific terms would pass constitutional muster" and remanding for the trial court to impose such a condition). Instead, it remanded for what will presumably be a fact-intensive hearing on the concrete ways in which a person undergoing sex offender treatment can demonstrate "honesty." Slip op. at 13.

But the Court of Appeals also held that, at this hearing, the trial court will have no discretion to reconsider its decision to revoke the SSOSA. Slip op. at 11-13. Thus, the trial court must re-write the honesty condition—the condition whose violation the court said was at the root of Mr. Rumsey's failure in treatment—so that it is specific enough to "pass constitutional

[2] It is not clear whether the State will request a new condition that would prohibit watching twerking videos. It is clear—contrary to the latest treatment provider's apparent understanding—that the longstanding conditions prohibiting possession of "sexually explicit" or "erotic" materials do not cover such items. See Br. of App. at 20-23; Br. of Resp. at 12-15.

muster," and then send Mr. Rumsey back to prison where he will receive no treatment. Slip op. at 8; CP 147.

On May 3, 2021, the Court of Appeals denied Mr. Rumsey's motion for reconsideration.

D. REASONS REVIEW SHOULD BE ACCEPTED

1. Review is Appropriate under RAP 13.4(b)(1).

Review is appropriate, under RAP 13.4(b)(1), where the Court of Appeals decision conflicts with a decision of the Supreme Court. That standard is met here because the Court of Appeals' decision conflicts with this court's decision in Gaines, 122 Wn.2d 502.

2. Under this Court's Decision in Gaines, Remand is Required Unless it is Clear the Trial Court would have Revoked the SSOSA on the Basis of Valid Considerations Alone.

No published case addresses the standard of review applicable where a SSOSA-revocation is based partly on violations found to be legally or factually unsupported. See slip op. at 11. But the Court of Appeals agreed it was proper to analogize to the context of exceptional sentencing, where "remand for resentencing is necessary [unless it is] . . . clear . . . the trial court would have imposed [the same] . . . sentence" solely on the basis of valid considerations. Gaines, 122 Wn.2d at 512.

The facts of Gaines illustrate the proper application of this standard. Mr. Gaines was arrested when he helped an undercover officer buy $20 worth of cocaine. Id. at 505. He was 19 years old at the time, and his standard range sentence was 31-41 months. Id. Defense counsel requested an exceptional sentence of 12 months, followed by inpatient treatment, and submitted a diagnostic substance abuse evaluation concluding that inpatient treatment was the only measure likely to prevent re-offense. Id. at 505-06.

The trial court granted the defense request, issuing several written findings and conclusions to the effect that, where drug addiction plays a causal role in an offense, society's interest in public safety is better served by treatment than by incarceration. Id. at 506-09. In addition to these findings and conclusions, the trial court also cited Mr. Gaines's minor role in the crime (which involved a third-party seller), a mitigating factor explicitly enumerated in the Sentencing Reform Act (SRA). Id. at 506.

The State appealed, arguing that drug addiction was insufficient as a matter of law to support the imposition of an exceptional mitigated sentence. Id. at 509. The Court of Appeals affirmed, and this Court granted review and remanded for a new sentencing hearing. Id. at 512, 518.

This Court reasoned that, because voluntary drug use was specifically excluded as a basis for one enumerated mitigating factor in the SRA—that "'[t]he defendant's capacity to appreciate the wrongfulness of

his conduct or to conform his conduct to the requirements of the law, was significantly impaired'"—drug addiction was legally insufficient to sustain an exceptional mitigated sentence under *any* rationale. Id. at 509-12 (quoting former 9.94A.390(1)(e)).

Of relevance here, this Court also held that it could not be sure the trial court would have imposed the exceptional sentence on the basis of the other mitigating factor, minor role in the offense, specifically identified in its ruling. Id. at 512. It explained that, absent the trial court's explicit statement to the contrary, remand is required whenever "the sentencing court placed considerable weight on invalid factors, even if other factors were valid." Id. (citing State v. Henshaw, 62 Wn. App. 135, 140, 813 P.2d 146 (1991).

Crucially, this Court in Gaines did not conduct any independent evaluation of the evidence presented to the sentencing court. See id. Instead, it searched the record only for evidence of the trial court's intent. Then, finding no "clear" indication that the trial court viewed the valid mitigator as sufficient, by itself, to justify the exceptional sentence, this Court remanded so the trial court could consider that question. Id.

3. The Court of Appeals Affirmed the Revocation because it Concluded, Based on Factors the Trial Court Never Addressed, that "Substantial Evidence" Supported the Conclusion that Mr. Rumsey was not Amenable to Treatment.

In Mr. Rumsey's case, the Court of Appeals purported to apply the Gaines standard, concluding that it must reverse the SSOSA-revocation "unless the trial court gave indication that it would have imposed the same sentence based solely on . . . valid [considerations]." Slip op. at 11. But the court then affirmed the revocation, without citing any such "indication" in the trial court's written or oral rulings. Indeed, the Court of Appeals' ostensible Gaines analysis is notable for its near-total omission of any reference to the trial court's reasoning whatsoever. See slip op. at 11-13.[3] Instead of analyzing that reasoning, the Court of Appeals affirmed the revocation because it found that "*substantial evidence* supported the finding that [Mr. Rumsey] was not amenable to treatment." Slip op. at 11 (emphasis added).

To support that conclusion, the Court of Appeals relied on the opinions of Mr. Rumsey's latest treatment provider and arguments the State made on appeal. Slip op. at 11-12. For example, the Court of Appeals

[3] In this part of its analysis, the Court of Appeals references the trial court's reasoning only once, when it cites that court's order, at a prior revocation hearing, that "'100% strict compliance of all conditions' was required." Slip op. at 12.

credited the State's argument that Mr. Rumsey's unauthorized use of prescription depressants in jail was "especially notable" because his original violation was linked to methamphetamine use. Compare slip op. at 11-12 with Br. of Resp. at 11 (arguing that the violations involving Seroquel and Suboxone were "especially concerning because Rumsey blamed his rape of S.B. in part on the effects of his methamphetamine use"). But the trial court did not draw that parallel. See CP 142-47. Thus, by analogizing a prescription sleep aid to methamphetamine, and concluding both were linked to a cycle of re-offense, the Court of Appeals conducted its own fact-finding and substituted its own judgment for the trial court's.

Similarly, the Court of Appeals reasoned that, since his treatment provider terminated Mr. Rumsey for the drug use and for "possibly attempting to meet parents of underage children," that termination must have signified far more to the trial court than simply a failure to maintain "honesty." Slip op. at 12 (quoting CP 329). But, as Mr. Rumsey argued in his briefing to the Court of Appeals, the treatment provider reached several unsupported conclusions that the trial court rightly declined to credit. See Reply Br. of App. at 4 (citing CP 109-110, 136-37, 147, 329-68; RP 65-66, 74). Chief among these was the utterly baseless speculation that Mr. Rumsey's consensual online communications with adult women suggested a desire to meet underage children. Id. The appellate court cannot simply

assume that the trial court agreed with all the treatment provider's conclusions. That assumption conflicts with Gaines.

As noted above, the "honesty" condition was particularly important to the trial court, and it plainly loomed large in the trial court's decision to revoke. See RP 74; CP 147. The trial court concluded that "the defendant's overall progress on supervision has been poor given his lack of compliance as well as *dishonesty* throughout his time on supervision." CP 147 (emphasis added). It also stated: "[h]is non-compliance has been rooted in his unwillingness to be *honest* with his treatment providers and CCO." CP 147 (emphasis added). No other violation received this kind of special attention in the trial court's findings and conclusions. CP 142-47.

In light of the "considerable weight" the trial court placed on the "complete honesty" condition, remand is required. Gaines, 122 Wn.2d at 512 (citing Henshaw, 62 Wn. App. at 140). It is not clear the court would have revoked the SSOSA without finding a violation of the "complete honesty" condition (to say nothing of the now-invalidated "sexually explicit materials" violation). Indeed, the Court of Appeals *acknowledges* this uncertainty in its opinion, characterizing revocation solely on the basis of the valid violations as "all but certain." Slip op. at 12.

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(1). It should hold that (1) the Gaines standard applies where a trial court's SSOSA-revocation decision is based partly on factors found to be factually or legally insufficient; (2) this standard is not satisfied simply because "substantial evidence" supported the trial court's conclusion that the defendant was not amenable to treatment; and (3) a Gaines analysis is limited to the trial court's reasoning, and it does not entail the appellate court's independent fact-finding and exercise of judgment.

DATED this 27th day of May, 2021.

Respectfully submitted,

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. SYR ADRIAN RUMSEY, Appellant.	No. 80920-2-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — Rumsey appeals the revocation of his SSOSA on the basis of six violations of his conditions of community custody. He asserts there was insufficient evidence to support the alleged violations for use of controlled substances and possession of sexually explicit materials. He also challenges the constitutionality of two of the violated conditions of custody. He asserts that because the trial court relied on improper grounds, he is entitled to a new revocation hearing. We affirm the revocation of his SSOSA and remand for resentencing to correct and clarify the community custody conditions.

FACTS

On March 15, 2017, Syr Rumsey pleaded guilty to one count of rape of a child in the first degree. The victim was his girlfriend's minor child. He attributed his behavior to "his methamphetamine use and his loneliness and desperation." The trial court imposed a special sex offender sentencing alternative (SSOSA).[1]

[1] RCW 9.94A.670.

His sentence was suspended on the conditions that he spend two months in custody, five years undergoing sex offender treatment, and comply with numerous conditions of community custody.

Rumsey was released from confinement in April 2017. At his initial review hearing, Rumsey was found to be in compliance with his SSOSA. In June 2017, federal agents found Rumsey living in a drug house in King County in violation of his SSOSA conditions. The court imposed a sanction of credit for time served and global positioning system (GPS) monitoring for 60 days.

In July 2017, Rumsey admitted during a routine polygraph exam to masturbating to pornography since his release from custody. Rumsey's community corrections officer (CCO), described Rumsey's adjustment to supervision as "poor." The CCO recommended Rumsey's SSOSA be revoked. The court did not revoke his SSOSA, but imposed credit for time served and a new condition requiring Rumsey to obtain approval from his CCO before using the internet and permitted the CCO to make random searches of his devices to monitor compliance with his condition.

In October 2017, Rumsey's GPS monitor showed him spending the night at a house in Tacoma. After a polygraph exam, he admitted to having a sexual relationship with the woman who lived at the house. This violated a condition of his SSOSA requiring Rumsey to notify his CCO and treatment provider of any new dating relationships. As this was his third violation in seven months, Rumsey's CCO recommended revocation of his SSOSA. His treatment provider terminated

Rumsey from his treatment program for violating his treatment rules. The court allowed Rumsey to reenroll in treatment with a new provider and imposed several supplemental conditions. One of the new conditions required Rumsey to maintain "complete honesty" with his treatment provider and CCO.

In July 2018, following another routine polygraph examination, Rumsey admitted to viewing pornography. His CCO again recommended revocation of his SSOSA. The trial court again declined to revoke his SSOSA. Instead, it sanctioned him to credit for time served and imposed additional conditions of community custody. The court noted Rumsey had "been given clear and explicit notice from the Court that 100% strict compliance of all conditions" was required.

In March 2019, Rumsey admitted to several additional violations of his SSOSA conditions. These conditions included the use of nonprescribed drugs while in custody, exchanging text messages of nude photographs, masturbating to videos, and "making out" with an intoxicated woman on a bus. Rumsey had also been soliciting nude photographs from several women on the social networking service Facebook. In response, his CCO, treatment provider, and the prosecutor all recommended revocation of his SSOSA.

The trial court revoked Rumsey's SSOSA. It found all six violations contained in the March 2019 notice of violation were committed. It found two violations for controlled substances, Suboxone and Seroquel, had been used by Rumsey without a prescription. Third, it found Rumsey had possessed sexually explicit materials intended for sexual gratification. Fourth, it found he failed to

maintain complete honesty regarding his life and behaviors with his treatment provider and CCO. Fifth, it found he had attempted to enter, remain, or participate in a sexual, dating, and/or romantic relationship. And, finally, it found he had failed to complete the sex offender treatment program by being terminated from his program.

Rumsey appeals.

DISCUSSION

Rumsey asserts there was insufficient evidence to support the alleged violations for use of controlled substances and possession of sexually explicit materials. Further, he asserts two of the violated conditions of custody were unconstitutionally vague. First, he challenges the condition requiring him to maintain complete honesty regarding his life and behaviors with the treatment provider and CCO is unconstitutionally vague. Next, he challenges the condition prohibiting him from attempting to enter, remain, or participate in any sexual, dating, and/or romantic relationship until further order of the court. Finally, he asserts that because the trial court relied on improper grounds, he is entitled to a new revocation hearing.

A SSOSA may be available for some people convicted of sex crimes who meet statutory criteria. State v. Osman, 157 Wn.2d 474, 477 n.3, 139 P.3d 334 (2006); RCW 9.94A.670(2). If the court determines a SSOSA is appropriate, it will impose a sentence or a minimum term of sentence within the standard range. RCW 9.94A.670(4). If the sentence imposed is less than 11 years of confinement,

the court may suspend the sentence. Id. Required conditions of the suspended sentence include placing the defendant on community custody. RCW 9.94A.670(5)(b). The court may also impose crime-related prohibitions as conditions of the suspended sentence. RCW 9.94A.670(6)(a).

A SSOSA sentence may be revoked at any time if there is sufficient proof to reasonably satisfy the court that the offender has violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. State v. Miller, 180 Wn. App. 413, 416, 325 P.3d 230 (2014); see also RCW 9.94A.670(11). Revocation of a suspended sentence due to violations rests within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Miller, 180 Wn. App. at 416-17. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. State v. Sassen Van Elsloo, 191 Wn.2d 798, 806, 425 P.3d 807 (2018).

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. In re Custody of A.T., 11 Wn. App. 2d 156, 162, 451 P.3d 1132 (2019).

The revocation of a suspended sentence is not a criminal proceeding, but rather an extension of the original criminal conviction. State v. McCormick, 166 Wn. 2d 689, 699-700, 213 P.3d 32 (2009). Accordingly, an offender facing a revocation of a suspended sentence has only minimal due process rights. Id. at 700.

I. Community Custody Conditions

A. Sufficiency of the Evidence Challenge

1. Possession of Sexually Explicit Material

Rumsey contends there was insufficient evidence to support the trial court's conclusion that he committed the third violation, possession of sexually explicit materials intended for sexual gratification. The State concedes there was not substantial evidence to support this violation. Its concession is well taken.

2. Use of Controlled Substances

Rumsey further asserts the alleged violations involving the use of controlled substances were legally insufficient to constitute violations of his community custody conditions.

Rumsey's conditions of community custody required that he "[n]ot possess or consume controlled substances except pursuant to lawfully issued prescriptions." The trial court found Rumsey had two violations of his community custody agreement for use of controlled substances, Suboxone and Seroquel, without a prescription. It is undisputed that Rumsey took the drugs and did so while confined in King County Jail.

In his opening brief, Rumsey relied on the argument that conduct occurring in jail cannot constitute a violation of community custody conditions because a person in total confinement is not in community custody. The State countered that in Washington, community custody conditions remain enforceable even while the offender is incarcerated. In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 819 177

P.3d 675 (2008) (holding the department of corrections retains supervisory power and responsibility while offenders on community supervision are confined). In his reply, Rumsey concedes the "technical violation," as Dalluge precludes his argument.

We hold there was sufficient evidence to support the trial court's finding of two violations of the community custody agreement for use of a controlled substance.

B. Constitutional Challenges

Additionally, Rumsey challenges two conditions of community custody as unconstitutionally vague.

We review a trial court's imposition of crime-related conditions of community custody for abuse of discretion. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Sassen Van Elsloo, 191 Wn.2d at 806. Imposition of an unconstitutional condition would, of course, be manifestly unreasonable. State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

The sentencing court may impose conditions that restrict a defendant's constitutional rights provided those conditions are imposed sensitively. Id. at 757. Limitations on constitutionally-protected conduct must be "narrowly tailored and directly related to the goals of protecting the public and promoting the defendant's rehabilitation." Id.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. Id. at 752. A community custody condition is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). But, "impossible standards of specificity are not required." City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

1. Honesty with Treatment Provider

The trial court found that Rumsey violated a condition of community custody requiring him to "[m]aintain complete honesty regarding life and behaviors with the treatment provider and CCO." Rumsey argues this condition is unconstitutionally vague. The State maintains that a differently worded condition requiring honesty in more specific terms would pass constitutional muster. But, the State concedes that the condition in this case was impermissibly vague.

We accept the State's concession.

2. Prohibition on Dating

After the third time his CCO moved to revoke Rumsey's SSOSA, the court imposed additional conditions, including that he "not attempt to enter, enter, [sic] remain, or participate in any sexual, dating, and/or romantic relationship until

further order of this Court." Rumsey challenges the constitutionality of this condition.

Rumsey exchanged messages of a sexual nature with several women on the Facebook Messenger[2] application. Rumsey had also admitted to "making out" with a woman on a bus who it was later determined he had met on Facebook. The court stated,

> He had the contact. He admitted to the contact. It's the type of contact that the Court is concerned about within the context of a SSOSA. And for all those reasons, and based on the evidence that I've heard, . . . I am reasonably satisfied that there is a breach of [the] condition.

Rumsey argues the supplemental condition contains at least one vague term.

In Nguyen, our Supreme Court held the phrase "dating relationship" is not an unconstitutionally vague term. State v. Nguyen, 191 Wn.2d 671, 683, 425 P.3d 847 (2018). It distinguished the phrase from the language "significant romantic relationship" which had been found unconstitutionally vague by the Second Circuit. Id. at 682-83 (discussing United States v. Reeves, 591 F.3d 77, 79 (2d Cir. 2010)). Though it made no ruling on the term "significant romantic relationship," it noted the "terms 'significant' and 'romantic' are highly subjective qualifiers, while 'dating' is an objective standard that is easily understood by persons of ordinary intelligence. Id. at 683.

[2] "Facebook Messenger" is a mobile app that enables text, voice, and video communications between Facebook web-based messaging and smartphones.

In Casimiro, the court considered the constitutionality of a condition requiring Casimiro to notify his CCO and treatment provider "'of any romantic or sexual relationship.'" State v. Casimiro, 8 Wn. App. 2d 245, 251, 438 P.3d 137, 140, review denied, 193 Wn.2d 1029, 445 P.3d 561 (2019). In light of Nguyen, it retained the language "sexual relationship," but remanded to strike the word "romantic," suggesting the trial court consider substituting "dating relationship" in its place. Id.

Rumsey argues the term "sexual relationship" may be constitutional, but his communications with women on Facebook could not constitute a "relationship." He provides no authority for the assertion that contact must be in-person. But, the condition forbids Rumsey from even attempting to enter any sexual, dating, and/or romantic relationship. Rumsey communicated with "at least 20" women on social media. In these conversations, he described sex acts, asked questions about sexual preferences, and requested sexually explicit photographs. He attempted to make plans to meet up with several women in person. He lied about knowing a woman with whom he had a physical sexual encounter on the bus. It would be clear to an ordinary person that this conduct violated the condition.

Striking the term "romantic" so that only "any sexual and/or dating" would qualify the word "relationship" would provide additional certainty to this condition. But, a convicted person is not entitled to complete certainty as to the exact point at which his actions would be classified as prohibited conduct. Nguyen, 191 Wn.2d at 681. Instead, the proscribed conduct is required to be sufficiently definite only

in the eyes of an ordinary person. Id. Taken together, this language is not vague. An ordinary person would understand this condition and understand Rumsey's conduct to violate it.

We hold this condition was not unconstitutionally vague, but clarification in light of Nguyen is desirable.

II. New Revocation Hearing

Rumsey argues because the trial court relied on several improper grounds to revoke his SSOSA, Rumsey is entitled to a new revocation hearing. The State contends notwithstanding its concessions, "any reasonable review of the record shows the trial court would have revoked Rumsey's SSOSA."

Washington has not established a standard of review for instances where some, but not all, of the violations supporting revocation are found to be invalid. Analogy may be drawn to the imposition of an exceptional sentence on multiple grounds, some of which are subsequently invalidated on appeal. In that circumstance, the rule is that resentencing is required unless the trial court gave indication that it would have imposed the same sentence based solely on a valid factor. See, e.g., State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

Here, substantial evidence supported finding Moore was not amenable to treatment. Four of the six bases for the revocation remain. He concedes he twice violated a condition related to use of controlled substances. His treatment provider stated at the revocation hearing that Rumsey avoided talking about his sexual deviancy. Instead, he was focused on seeking approval to consume alcohol and

marijuana. This is especially notable given Rumsey's contention that his predatory behavior was caused by his drug use. He attempted to engage or engaged in sexual relationships on Facebook.

The trial court found he had failed to complete his sex offender treatment program when he was terminated from his program. Rumsey argues he was removed from treatment due only to his lack of complete honesty, which is tied to an improperly found violation. Rumsey's treatment provider discussed Rumsey's dishonesty, but it was not confined to the context of his condition violation:

> "The new allegations include; prescription medication without a prescription, for the buzz. Sexting with and possibly attempting to meet parents of underage children, kissing a woman on a bus who may have been under the influence of alcohol, and sexual pic[ture]s. He did not disclose any of this to us although he had three or four group sessions to do so. We require honesty and compliance. He appears to have established a pattern of rapid recidivism, relapse and delayed disclosure or in this case discovery by his corrections officer during an investigation."

This was the second time Rumsey had been removed from his treatment program by his provider. Rumsey repeatedly and consistently violated his SSOSA, resulting in his CCO and others moving to have it revoked on three previous occasions. The trial court warned Rumsey after imposing additional conditions in lieu of revocation that "100% strict compliance of all conditions" was required. Given Rumsey's multiple validly-found violations, it is all but certain the court would have revoked his SSOSA absent the two invalid violations.

We affirm the revocation of the SSOSA and remand for resentencing to correct and clarify the community custody conditions.

Appelwick, J.

WE CONCUR:

Chun, J.

NIELSEN KOCH P.L.L.C.

May 27, 2021 - 11:02 AM

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