

NO. 64058-5-I

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

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REC'D  
JAN 31 2011  
King County Superior Court  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LANDSIEDEL,

Appellant.

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

The Honorable Regina S. Cahan, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding it lacked authority to sentence appellant under the "Special Sex Offender Sentencing Alternative" (SSOSA).

2. The trial court erred in failing to enter Findings of Fact and Conclusions of Law pursuant to CrR 3.5(c).

Issues Pertaining to Assignments of Error

1. Where appellant was eligible for a SSOSA, did the trial court abuse its discretion by refusing to consider such a sentence because it believed it lacked authority?

2. Where a trial court fails to enter written findings of fact and conclusions of law as required by CrR 3.5, is remand for entry of findings and conclusions required?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Nicholas Landsiedel with attempted second-degree child rape and communicating with a minor for immoral purposes. CP 4-5; RCW 9A.28.020; RCW 9A.44.076; RCW 9.68A.090. The prosecutor alleged that 24-year old Landsiedel arranged through an internet chat room to meet a person he thought was a 13-year-old female (but who was actually a Seattle Police detective posing as a 13-year-

old female) in order to engage in sexual intercourse/"pretend" rape, and that thereafter he took a substantial step towards accomplishing that goal by appearing at the location where they agreed to meet. CP 2-3.

A CrR 3.5 hearing was held to determine the admissibility of Landsiedel's pre- and post-arrest statements to police. 1RP<sup>1</sup> 8-33. In its oral ruling, the court concluded all of Landsiedel's statements were admissible. 1RP 29-33. A jury trial followed, after which the jury convicted Landsiedel as charged. CP 30-31.

The court imposed a minimum term sentence of 76.5 months for the attempted rape conviction, and a concurrent 12-month sentence for the communicating with a minor conviction. CP 57-66; 5RP 10. The court later amended the judgment and sentence, adding a provision that the maximum sentence term was "life". Supp CP \_\_ (sub. no. 76, Order Amending the Judgment and Sentence, 7/31/09).

## 2. Substantive Sentencing Facts

Before sentencing, Landsiedel's counsel filed a "Presentence Statement" urging the court to consider imposing a SSOSA. CP 54-55. At sentencing, the prosecutor recommended a 90-month sentence, and Landsiedel's counsel initially recommended a standard range minimum

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<sup>1</sup> There are five volumes of verbatim reports of proceedings referenced as follows; 1RP - 4/14/09; 2RP - 5/11/09; 3RP - 5/12/09; 4RP - 5/13/09; and 5RP - 7/2/09.

sentence of 76.5 months, but later noted the earlier request for a SSOSA. 5RP 2-4.

When the court asked whether Landsiedel was eligible for a SSOSA, the prosecutor admitted she had not prepared a response because she believed the request had come from Landsiedel's wife rather than from his attorney. 5RP 4. When the court persisted, the prosecutor explained a SSOSA may be imposed only when there is a "pre-existing relationship between the victim in the case and the defendant. And because of the charge, and the facts in this case, there's obviously no relationship between the officer [who pretended to be a 13-year-old female], who I suppose would be the purported victim and the defendant." 5RP 5. Defense counsel countered that the term "victim" in the context of the SSOSA statute should be interpreted more broadly to include Landsiedel's immediate family members, who had suffered from his actions. 5RP 6-7.

The court concluded it did not have discretion to impose a SSOSA because Landsiedel was not eligible, and was therefore limited to imposing a sentence within the standard range. 5RP 10.

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN CONCLUDING IT HAD NO AUTHORITY TO IMPOSE A SSOSA.

Landsiedel was eligible for a SSOSA. The trial court's conclusion to the contrary constitutes an error of law that requires reversal and remand for resentencing.

The SSOSA statute provides:

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

...

(c) “Victim” means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. . . .

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. . . .;

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;

(c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;

(d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

...

RCW 9.94A.670 (emphasis added).

Landsiedel meets the eligibility requirements under subsections (2)(a), (b), (c), (d), and (f): he was convicted of a "sex offense" that is neither a violation of RCW 9A.44.050 (second degree rape) nor a "serious violent offense"; he has no prior convictions at all, (CP 57-66); his crimes of conviction caused no physical harm to anyone; and his standard range sentence provides for the possibility of less than 11 years of confinement.

Id. Despite the prosecutor's claims and the trial court's contrary conclusion, Landsiedel also meets the requirement under subsection (2)(e) because there was a "victim" of his crimes with whom he had a previously established relationship; his wife, Dziedra Landsiedel.

Although not yet married at the time he committed his offenses, Landsiedel and Dziedra were married by the time of trial. She testified she was initially unaware of Landsiedel arrested and was "terrified" when

he failed to meet her as scheduled later that day. 4RP 32. As a result, she "panicked" when she could not locate him at area hospitals or with any of their mutual friends. 4RP 33. Once she did learn he was in jail, she bailed him out by purchasing a bail bond. 4RP 34; Supp CP \_\_ (sub. No. 4., Bond, 1/9/08). At sentencing, Dziedra reflected on the anguish she had experienced since Landsiedel's arrest, and the strain on her friendship with others resulting from her continuing support of her husband despite the charges and resulting convictions. 5RP 9.

Landsiedel had an established relationship with Dziedra when he committed the offenses, as they were in the process of moving into a home together. 4RP 27. That Dziedra "sustained emotional, psychological, physical, or financial injury . . . as a result of" Landsiedel's crimes cannot reasonably be disputed in light of the nature of their relationship at the time of the offenses, her testimony at trial, and her comments at sentencing.

In addition, the "context" in which the term "victim" is used in subsection (2)(e) does not "clearly" preclude applying it to someone like Dziedra for purposes of determining SSOSA eligibility. Because Dziedra meets the definition of a "victim" under RCW 9.94A.670, the trial court erred in concluding Landsiedel was legally ineligible for a SSOSA.

The State may claim the term "victim" in subsection (2)(e) applies only to the complainant named in the information. This Court should reject such a claim. First, there is no independent direct authority in support. Second, when correctly interpreted under the rules of statutory interpretation, it is apparent victims like Dziedra fall within its meaning.

Statutory interpretation is a question of law this Court reviews de novo. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). Where a statute is plain on its face, the Legislature is presumed to mean exactly what it says. Criminal statutes are given a literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). To the extent a statute is ambiguous, the rule of lenity requires resolution in the defendant's favor. State v. Carter, 138 Wn. App. 350, 356-57, 157 P.3d 420 (2008).

RCW 9.94A.670 is clear and unambiguous with regard to the meaning of the term "victim." Subsection (1) states that "[u]nless the context clearly requires otherwise," it should be given the broad definition set for in subsection (1)(c), which includes "any person who has sustained emotional, psychological, physical, or financial injury . . . as a result of the crime charged." RCW 9.94A.670(1)(emphasis added). Nothing about the context of the use of the term "victim" in subsection (2)(b) "clearly

requires" applying a different definition than the one provided in subsection (1)(c).

Every defendant has the right to have the trial court exercise its discretion to consider available sentence alternatives. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005). In failing to recognize its discretion, or to exercise its discretion, the trial court abused its discretion.<sup>2</sup> It also violated Landsiedel's right to equal protection because it failed to consider all available sentencing options. See State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (equal protection is not violated when court considers all sentencing options), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

The appropriate remedy is to remand for resentencing because it is apparent the trial court would have pursued at least an evaluation for a SSOSA if it correctly understood Landsiedel was eligible. State v.

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<sup>2</sup> The failure to exercise discretion is itself an abuse of discretion. State v. Elliott, 121 Wn. App. 404, 408, 88 P.3d 435 (2004) (refusal to hear expert testimony was a failure to exercise discretion); State v. Fleiger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (failure to determine whether defendant was a security risk before ordering "shock box" was abuse of discretion), rev. denied, 137 Wn.2d 1003 (1999); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) (refusal to exercise discretion in imposing an exceptional sentence below the range is reviewable error), rev. denied, 136 Wn.2d 1002 (1998); State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214 (1995) (failure to exercise discretion in determining whether offenses constitute the same criminal conduct); State v. Tharp, 96 Wn.2d 591, 598, 637 P.2d 961 (1981) (failure to exercise discretion in admitting 404(b) evidence); Tacoma Recycling v. Capitol Material, 34 Wn. App. 392, 396, 661 P.2d 609 (1983) (failure to exercise discretion in denying a motion for a new trial); see also, State v. Barnes, 58 Wn. App. 465, 477, 794 P.2d 52 (1990) (failure to exercise any discretion at all in establishing length of exceptional sentence) aff'd on other grounds, 117 Wn.2d 701, 712, 818 P.2d 1068 (1991).

McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (court's failure to exercise discretion out of belief it lacked authority requires remand if reviewing court cannot say same sentence would have been imposed if sentencing court were aware of its options); see RCW 9.94A.670(3) ("If the court finds the offender is eligible for [a SSOSA], the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.").

2. THE TRIAL COURT'S FAILURE TO FOLLOW CrR 3.5(c) WARRANTS A REMAND FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of facts and conclusions of law. CrR 3.5(c). Written findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1 (d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing to determine whether to admit Landsiedel's statements to police. 1RP. The court concluded they were admissible, but failed to enter written findings of fact and conclusions of law. 1RP 29-33.

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, such findings are not a suitable substitute; a court's oral opinion is not a finding of fact. State v. Hescocock, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id., citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

A trial court's failure to enter written findings and conclusions requires remand for entry of the required findings. Head, 136 Wn.2d at

624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

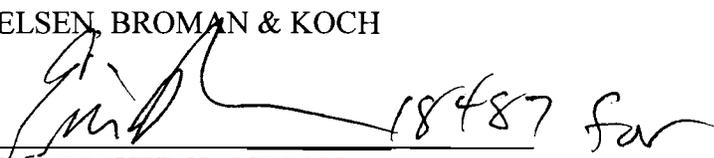
D. CONCLUSION

This Court should reverse Landsiedel's judgment and sentence and remand for resentencing so the trial court can consider whether to impose a SSOSA. Also, because the trial court failed to follow CrR 3.5(c), this Court should remand for entry of written findings of fact and conclusions of law.

DATED this 31<sup>st</sup> day of January, 2011.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64058-5-I
	)	
NICHOLAS LANDSIEDEL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NICHOLAS LANDSIEDEL  
DOC NO. 330872  
WASHINGTON STATE CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

2011 JAN 31 PM 4:32  
SUPERIOR COURT  
CLERK

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

x Patrick Mayovsky