

NO. 64350-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS L. MILLER,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

1. Where the court made it clear that it was vacating the defendant's SOSA because of his admitted serious, serial violations of the SSOSA conditions, not on the remaining length of the suspended sentence, did the court abuse its discretion?

2. Where a SOSA was revoked, is defendant entitled to credit for the community custody he served as part of the SOSA against the post-incarceration community custody?

3. Where the court, on revoking the SOSA imposed 10 years of community custody, and the length of community custody for defendant's crime set out in the Sentencing Reform Act was three years, is remand required to correct the sentence?

II. STATEMENT OF THE CASE

Between July 1 and August 31, 1998, defendant raped his six year old cousin by performing fallatio on him. 1 CP 216. The State charged defendant with first degree rape of a child. 1 CP 218, 214.

On March 2, 2000, defendant was convicted as charged on stipulated facts at a bench trial. Defendant was sentenced to a special sexual offender sentencing alternative (SSOSA) of 123 months confinement. Confinement beyond four months was

suspended for 123 months on condition defendant undergo a 36 month outpatient sex offender treatment program and comply with other conditions of community custody, including that he not “associate with minors more than three years younger than he is without the supervision of an adult chaperone[.]” 1 CP 140-41, 144.

On April 6, 2001, the court held a sentencing conditions violation hearing. The allegations included having repeated unauthorized contacts with a minor child. 1 CP 118. The court found defendant had committed all 8 of the alleged violations of the conditions of his SSOSA. It imposed 45 days confinement as a sanction.¹ On the Order Modifying SSOSA Sentence, there was a handwritten notation, “Defendant shall NOT have contact with minor children, no exceptions.” 1 CP 99, 100 (emphasis in original). The court, in a later hearing, said:

I recall talking to Mr. Miller and telling him in no uncertain terms that he was in grave danger of being

¹ It appears that DOC did not toll defendant’s community custody while he was serving this sanction. Defendant was not incarcerated before his trial. 2 CP _____. Defendant’s community custody term of 123 months started after he served the four months of his sentence. 1 CP 140. He was released on July 23, 2000. 2 CP _____. 123 months from July 23, 2000, would have been October 23, 2010. Defendant’s term of community custody was to end on October 10, 2010. 1 CP 7. The State has designated the Order on Personal Recognizance and Return of Commitment as part of the Clerk’s Papers. They have not yet been paginated.

revoked and that if there were any further violations, he would be revoked. He indicated to me that he understood that.

10/13 RP 98.

In September, 2008, defendant asked the court to modify his sentence by reducing the period of suspension from 123 months to 93 months. That motion was transferred to this Court for consideration as a personal restraint petition in Cause No. 62410-5-I. This Court dismissed the petition since there is no authority in the Sentencing Reform Act to change a sentence once it has been imposed. 1 CP 64-65.

On March 5, 2009, defendant moved for a modification of the conditions of his suspended sentence. 1 CP 62. Defendant asked that he be allowed to consume as much alcohol as he wanted, be allowed to have a relationship with a woman who had a minor child, and be allowed to “be in the residence or to allow me to be in the presence of a child with the supervision of an adult.” 1 CP 59, 8, 10/13 RP 20. Defendant denied that he was in a relationship with a woman at that time. 10/13 RP 21. DOC opposed modifying the conditions of defendant’s suspended sentence. 1 CP 55-56.

On March 26, 2009, defendant told his CCO he was withdrawing his motion to modify the conditions of his sentence.

On that same day, defendant re-scheduled the hearing on the motion, but did not notify his CCO of the new hearing date. When confronted, defendant initially denied re-scheduling the hearing. He then admitted he had changed the hearing date. Defendant's CCO concluded defendant was trying to have the motion heard without DOC input. 1 CP 8. It does not appear that the motion was heard by the court.

On July 7, 2009, defendant had a polygraph examination. Deception was indicated in defendant's response of "No" to the question, "Have you stayed the night anywhere besides your registered address or Las Vegas, since your last polygraph?" Defendant's responses to questions about being alone with anyone under the age of 18 and having sexual contact were inconclusive. 1 CP 9-10. Defendant explained his deceptive response as him having stayed at "Dillon's" one night. 1 CP 10.

Defendant met with his community corrections officer (CCO) after the polygraph examination. When the CCO asked defendant for Dillon's phone number to confirm defendant's explanation of his deceptive answer, defendant admitted that he was in a relationship with a woman who had a blind 9 year old child. Defendant claimed he had never been alone with the child. Defendant's CCO asked

him to make a written statement about his relationship with the woman and her child. The CCO told defendant to not have contact with the woman or her child. 1 CP 10.

Defendant provided more details about his relationship with the woman whom he claimed he loved. He still denied any contact with her son. When defendant was told that his next polygraph would be specifically about his contacts with minors, he informed his CCO that he had had run into the woman and her son at the mall. Defendant said he spoke to the boy but had no physical contact with him. Defendant reported three other contacts with the boy. The boy's mother or father were present at all times. 1 CP 11-12.

Defendant met with his therapist. The therapist e-mailed defendant's CCO that defendant had told him he had contact "with the boy on about 5 or 6 occasions, for about an hour each time. He said the mother was always present[.]" Defendant's therapist also reported defendant told him that his physical contact with the boy was limited to occasional high-fives. 1 CP 12.

Before defendant's next polygraph, he told the examiner he had been dating the woman for eight months and had contact with her son "three or four" times per week. Defendant also said he

exchanged high-fives with the boy and “maybe one or two hugs.” In addition, the boy had looked at defendant’s tattoos. Defendant then admitted that he had been alone with the boy for about 45 minutes on one occasion when the boy’s mother was sick and in bed. Defendant denied sexual contact or arousal involving the boy. 1 CP 12-13.

Defendant then took the polygraph. His answers to questions about sexual contact with the boy, being alone with the boy, and spending the night at the woman’s house when the boy was present showed deception. Defendant then admitted he had been alone with the boy on four or five occasions “while [the babysitter] used the bathroom.” 1 CP 13.

After the polygraph, defendant described to his CCO three instances when he was alone with the boy. Two were when the woman defendant was dating asked him to pick the boy up from the school bus because she could not. The third was when the woman was sick. Defendant did not mention a babysitter. 1 CP 13-14.

On September 1, 2009, the court filed a Department of Corrections (DOC) Court-Notice of Violation. It indicated that termination of the suspended sentence was October 10, 2010. 2

CP ____.² On October 1, 2009, the State filed a Petition for Order Modifying SSOSA Sentence/Revoking SSOSA Sentence/Confining Defendant. The State alleged defendant had committed seven violations of the conditions of his suspended sentence. The State recommended revoking defendant's SSOSA. 1 CP 50-51.

On October 13, 2009, the court held a violation hearing. Defendant's CCO informed the court that defendant was well aware that dating the mother of a nine-year-old boy was a serious violation of the conditions of his suspended sentence. The CCO told the court "So [defendant] was given an opportunity to do things out in the open where everyone could see what it was he was doing, and he chose to keep it secret." 10/13 RP 9. The CCO recommended revoking defendant's SSOSA. 1 CP 16, 10/13 RP 9.

Defendant testified that when he re-scheduled the hearing on his motion to modify the conditions of his sentence, "So the idea of deception wasn't completely there. It was more of confusion[.]" 10/13 RP 22. Defendant also testified that he loved the woman he was having a relationship with. 10/13 RP 25, 26, 29. Defendant

² The notice was filed again on October 16, 2009, after the violation hearing. The State has designated the original notification as part of the Clerk's Papers. It had not been paginated when the State filed this brief.

denied that he was in the relationship so that he could have physical contact with the woman's son. 10/13 RP 27-28.

Defendant admitted he had committed all of the seven alleged violations of the conditions of his suspended sentence. 10/13 RP 29, 31-32, 34. He asked the court to be allowed to complete his SSOSA without having his suspended sentence revoked. 10/13 RP 36.

The State argued that the court should revoke defendant's SSOSA. Defendant argued that his violations "occurred specifically in the context of this love relationship." 10/13 RP 96. He then argued:

But with one year to go, Your Honor, not only would it be inappropriate to put [defendant] in nine years of incarceration, but I submit that it would not be basically, I guess, positive or do any good to place him in incarceration for nine years under these circumstances.

10/13 RP 97.

The court entered an oral ruling. It found that defendant had entered into a relationship with a woman who had a child who was about the same age as the child defendant raped. The court also found:

And then Mr. Miller engaged in a series of what can only be termed deceptive acts where he lied to

his former treatment provider, where he lied to his CCO, where he was caught with the polygraph.

And I just don't have any illusions that Mr. Miller didn't understand what he needed to do in order to pursue this relationship, because it was pretty clearly explained to him. . . . I mean, there's a whole set of circumstances by which Mr. Miller could have fairly easily complied with the terms of his probation and pursued the relationship with this young woman.

But apparently at this stage, I can only think that Mr. Miller had just got to the point where he was really kind of done with probation. He was trying very hard to talk the Court into terminating the probation. He was trying very hard to talk both the Court and his community corrections officer into significantly changing the terms of his probation and he made a very significant series of decisions whereby he decided to not abide by the terms of his probation and then lie about it[.]

10/13 RP 98-99.

The court articulated the decision it had to make:

And I'm just really struggling in trying to figure out why the Court should essentially show Mr. Miller an incredible amount of leniency, because he pretty flagrantly disregarded some of the most serious conditions, other than committing a new offense[.]

* * *

So the question for the Court is do we want to take a chance on somebody who shows they don't have a lot of interest in following the rules, that they're more interested in trying to change the rules of the game as opposed to following them?

10/13 RP 100-01.

The court observed in passing “There’s only about a year, less than a year, if he would be incarcerated for some, perhaps, significant portion of that period of time to learn these new behaviors and demonstrate that he’s changed,” The court then entered its ruling:

But on balance, I think Mr. Miller has just not given the Court a lot of options, given his behavior. And the fact that this behavior has occurred so late in the game is extremely unfortunate for Mr. Miller, and in a lot of ways it’s probably unfortunate for the community, because the Court is being put in a position where Mr. Miller is probably going to be incarcerated maybe beyond what’s actually necessary, given his level of risk. But based on the extremely serious nature of these violations and the reasons that would be considered not to revoke the SSOSA, I just cannot find it within me to not revoke the SSOSA. So I’m going to grant the State’s motion, and the SSOSA will be revoked.

10/13 RP 101-02.

The State asked the court to impose ten years of community custody. Defendant did not object. The court agreed. It imposed 123 months of confinement, followed by ten years of community custody. 10/13 RP 102, 1 CP 44-45. The order entered by the court awarded defendant “credit for time served.” 1 CP 45.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

When the court revoked defendant's SSOSA, it properly exercised its discretion based on defendant's flagrant, repeated violations of the conditions of his SSOSA. While the court observed that sanctioning defendant for his violations with incarceration might decrease the length of community custody available for defendant to demonstrate that he had changed his behavior, that was not the reason the court revoked the SSOSA.

Since defendant was not tried twice for his rape of a child, there was no double jeopardy violation in sentencing defendant to post-revocation community custody. Imposition of a standard range sentence, including post-incarceration community custody is the punishment that the legislature intended for a violation of the conditions of a SSOSA.

The term of community custody was limited to three years by the version of the Sentencing Reform Act in effect when defendant raped his cousin. The case must be remanded for correction of the sentence.

B. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT REVOKED DEFENDANT'S SSOSA.

Defendant argues that since the court observed that he had less than a year of community custody remaining, and that period might be reduced if a sanction of incarceration was imposed, the court based its decision in part "on an erroneous view of the law." Brief of Appellant 3. Defendant fails to show that the court's decision to revoke his SSOSA was reached by applying an erroneous view of the law.

1. Standard Of Review.

A defendant seeking to overturn a court's decision because it had an erroneous view of the law has the burden of showing that the decision was "predicated" on that view. T.S. v. Boy Scouts of America, 157 Wn.2d 416, 431-32, 138 P.3d 1053 (2006), State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). Accordingly, unless defendant has established that the court would not have revoked his SSOSA had it realized that the community custody would be tolled for any time spent in confinement, he has not shown that the decision was based on an erroneous view of the law.

2. The Decision To Revoke Defendant's SSOSA Was Based On Defendant's Violations, Not On How Much Community Custody Was Left In The SSOSA.

The court made it clear that it revoked defendant's SSOSA "based on the extremely serious nature of these violations and the reasons that would be considered not to revoke the SSOSA[.]" 10/13 RP 102. Defendant admitted that he committed the violations. 10/13 RP 34. "These admissions constitute evidence of serious noncompliance which, standing alone, would support revocation[.]" State v. Badger, 64 Wn. App. 904, 909, 827 P.2d 318 (1992).

The court recognized that there was less than one year left of defendant's suspended sentence. The hearing was held on October 13, 2009. The SSOSA was set to end on October 10, 2010. 1 CP 7. Even if the court had recognized that community custody would be tolled if defendant was serving a sanction for his violation, defendant would still have had less than one year of the SSOSA remaining after his release. The court did not indicate that the relatively short amount of time remaining on the SSOSA was a significant factor in its decision to revoke the SSOSA. Defendant has not shown that the court "predicated" its decision on an erroneous view of the law.

C. SENTENCING DEFENDANT TO POST-INCARCERATION COMMUNITY CUSTODY WITHOUT GRANTING CREDIT FOR THE SSOSA COMMUNITY CUSTODY DID NOT VIOLATE DOUBLE JEOPARDY.

1. Standard Of Review.

An appellate court reviews constitutional challenges de novo. State v. Jones, 159 Wn.2d 231, 237, 149 P.3d 636 (2006), cert. denied, 549 U.S. 1354 (2007).

Because defendant's double jeopardy claim does not involve the consequences of a prior trial, this Court examines whether the legislature intended to require that a defendant serve a mandatory term of community custody after serving his prison sentence when his SSOSA is revoked. See State v. Nguyen, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006) ("unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent."), review denied, 163 Wn.2d 1053, cert. denied, 129 S.Ct. 644 (2008).

2. There Was No Double Jeopardy Violation In Not Giving Defendant Credit For Community Custody Served As Part Of A SSOSA.

Defendant was sentenced to a SSOSA. After serving some nine years of community custody, his SSOSA was revoked and his standard range sentence was ordered to be executed, including a

term of community custody. RCW 9.94A.120(8)(a)(ii)³ required the sentencing court to impose a standard range sentence, then suspended execution and place the defendant on community custody for the length of the sentence. RCW 9.94A.120(10)(a) required the court to sentence a sex offender, such as defendant, to three years of community custody, “in addition to other terms of the sentence[.]”⁴ RCW 9.94A.120(8)(a)(vi) required the court to “order the execution of the sentence” if the SSOSA was revoked. That same subsection requires, “All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.” There is no similar provision regarding credit for community custody served while the sentence was suspended.

Taking these provisions together, it is clear that the legislature intended that the offender serve community custody while the SSOSA was in effect, then serve additional community custody after confinement if the SSOSA was revoked. See State v. Gartrell, 138 Wn. App. 787, 791, 158 P.3d 636 (2007) (community

³ RCW 9.94A.120 pertaining to a SSOSA has been re-codified as RCW 9.94A.670.

⁴ RCW 9.94A.120 pertaining to community custody for sex offenders has been re-codified as RCW 9.94A.

custody is not confinement, and is not credited when a SSOSA is revoked).

Community custody served during a SSOSA has a different purpose from community custody served after incarceration. Community custody served during a SSOSA is primarily to ensure the defendant participates in his treatment plan. RCW 9.94A.120(8)(a)(ii)(B)-(viii). Post-incarceration community custody serves to supervise a defendant for the protection of the community after he completes his prison term. RCW 9.94A.120(10)(c).

Since the community custody served during a SSOSA and the community custody served after incarceration have different purposes, the legislature clearly intended that a defendant whose SSOSA is revoked serve both periods of community custody.

Relying on North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed in part on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), defendant argues that his nine years of community custody is punishment 'already exacted,' and failing to credit him for the time he served on community custody while his sentence was suspended "violated [his] rights to be free from multiple

punishments for the same offense.” Brief of Appellant 8. Defendant asks this Court to apply the wrong legal standard.

The issues in Pearce were:

“the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon retrial. The other is the more limited question whether, in computing the new sentence, the Constitution requires that credit must be given for that part of the original sentence already served.

Pearce, 395 U.S. at 715-16.

Since defendant was not being re-sentenced for the same offense, Pearce is not helpful in analyzing whether defendant right to be free from double punishment was violated.

The purpose [of the Double Jeopardy Clause] is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government[.]

Jones v. Thomas, 491 U.S. 376, 381, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989).

The sentencing court did not impose a sentence beyond that proscribed by the legislature for first degree rape of a child where a SSOSA is imposed, then revoked. See State v. Daniels, 73 Wn. App. 734, 738, 871 P.2d 634 (1994). There was no violation of defendant’s double jeopardy rights.

D. THE COURT ERRED BY SENTENCING DEFENDANT TO TEN YEARS COMMUNITY CUSTODY.

When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

RCW 9.94A.120(10).

The court here sentenced defendant to ten years community custody. 1 CP 45. This exceeded the period provided for by the legislature. “[A] sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced.” In re Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). “The error [in imposing an unauthorized sentence] is grounds for reversing only the erroneous portion of the sentence imposed.” State v. Elts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980).

This Court should affirm defendant’s judgment and sentence, except for the term of community custody.

IV. CONCLUSION

The judgment and sentence should be affirmed, except for

the term of community custody, and the case remanded for reduction of the term of community custody to three years.

Respectfully submitted on July 29, 2010.

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