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JUL 30 2010

King County Prosecutor
Appellate Unit

NO. 64918-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JON LALUM,

Appellant.

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court failed to follow statutory directives in denying appellant's request for a suspended sentence under the special sex offender sentencing alternative (SSOSA).

Issue Pertaining to Assignments of Error

Where the trial court failed to consider all enumerated factors listed under RCW 9.94A.670(4), and failed to give "great weight" to the victim's wishes for a SSOSA, did the trial court err in denying the request?

B. STATEMENT OF THE CASE

Jon D. Lalum is appealing from the court's denial of his request for a SSOSA, following his guilty pleas to two counts of first degree child molestation, committed against his daughter, G.L. CP 7-30, 31-34. When the accusations arose, Lalum turned himself into the police and admitted the truth of G.L.'s accusations. CP 2-3.

The prosecutor, the mother of G.L., and Lalum asked the court to impose a SSOSA as an evaluator had found Lalum highly amenable to treatment. CP 32. According to the evaluator, "Lalum is one of the best SSOSA candidates he has seen in a very long time." CP 32.

Lalum had no prior criminal history. However, during the polygraph for the SSOSA, he admitted additional instances of abuse committed against G.L., peeping on his step-mother when he was an adolescent, inappropriately touching a ten-year-old girl when he was fifteen, viewing child pornography on the internet, and one act of bestiality. 2RP 25-26.

The standard range for Lalum's offenses was 67-89 months (minimum). CP 31. The state and defense agreed that it would be appropriate for the court to impose 78 months confinement, with 72 months suspended on the condition that Lalum actively and successfully participate in a sexual deviancy program and comply with standard SSOSA conditions. CP 32; 1RP (12/18/09) 2-3.

Sentencing was initially scheduled for December 18, 2009. 1RP. At the hearing, the state made the agreed-upon recommendation for a six-month suspended SSOSA. 1RP 2-3. G.L.'s mother supported a SSOSA, but wanted the court to impose the maximum time available, before Lalum would be released into the program. RP (12/18/09) 8.

The court first inquired whether six months was the most it could impose. 1RP 9. The prosecutor responded the court could impose 12 months. 1RP 9.

Next, the court inquired whether, considering the seriousness of the offense, there was a reason other than Lalum's amenability to treatment to support the joint request for the six-month suspended sentence. 1RP 9. The prosecutor offered two reasons. First, the family's wished for Lalum to receive treatment. Although G.L.'s mother intended to divorce Lalum, she hoped that if Lalum received treatment, it might "leave open the option, at some day, of her daughter knowing her father a little bit." 1RP 10. Second, the prosecutor did not believe the sentencing review board would keep Lalum indefinitely. On the contrary, the prosecutor anticipated "he is going to be released in his 30's and back in the community and able to commit similar crimes if left untreated." 1RP 11.

The court noted that even without a SSOSA, it could impose treatment conditions as part of the sentence. 1RP 11. But the prosecutor countered that it would be best to strike while the iron was hot. 1RP 11. In other words, Lalum was amenable now. It was in the community's best interest therefore to provide that treatment now. 1RP 11-12. Plus, the court could always revoke the suspended sentence if Lalum did not toe the line or progress satisfactorily in treatment. 1RP 12. In the prosecutor's opinion, the

SSOSA provided the community “the best chance at preventing things like this from happening ever again.” 1RP 12.

The court resolved it would like to see the research supporting the prosecutor’s argument that treatment now would be more effective than treatment following a prison sentence. 1RP 13-14. Defense counsel offered to provide information that would alleviate the court’s concerns. 1RP 14.

By the time of the next hearing on January 22, 2010, defense counsel had provided the court with materials by Dr. Rawlings in answer to the court’s question as to whether it would be more effective to provide treatment now. 2RP (1/22/10) 3. Rawlings knew of no studies on the issue, but confirmed the widely held professional opinion that treatment now is always more preferable to treatment later:

He even commented it is unlikely that such a study exists because, as a general rule, treatment is preferable sooner than later. And we discussed whether that’s regarding medical treatment, psychological treatment, or sexual deviancy treatment. In his opinion, it is the consensus among medical community and the psychological community that treatment is much better if it is closer in time to the actual act. His concern was that if there is a delay in treatment, especially after a period of prison confinement, that the deviancy might further – could be further enforced in his actions, and the appropriate mechanisms of self control may be not really learned,

and according to Dr. Rawlings, he said it is preferable able to initiate treatment sooner rather than later.

2RP 5-6.

G.L.'s mother's reiterated her support for a SSOSA and asked the court to impose one "for the good of her family." 2RP 17. She explained to the court that her daughter was aware of the proceedings and doing much better in all aspects:

I do want to address a couple things that were said, as far as how it affects my daughter, Grace, the victim. Just to state matter of factly, since June, her grades have improved, her behavior in school has improved, she stopped getting written up for behavioral problems, she has been able to obtain friends, which she has never been able to do in the past. She does know what's going on, she expressed fears to me about being taken and things like that. I do believe that Jon is an excellent candidate for the SOSA [sic] program and I guess, for me, I just want to make it clear to the Court that my main concern is that my daughters and I have the opportunity for the clean break that they deserve, and to be separated, and to have that opportunity, to give my daughters the life that they deserve without having to deal with the ghosts of the past. Grace has managed leaps and bounds in her counseling. I – um, the defense was correct, I don't have a plan on having their biological father involved in their lives in any way, but – um, I guess I want to be clear that I do support SOSA [sic].

2RP 16.

Regardless, the court fixated on Lalum's disclosures of additional offenses during the polygraph. 2RP 25-26. Despite the

victim's wishes, the court stated "I just don't think it's right. I've given people who drive while suspended a lot more time than that, and this conduct deserves more." 2RP 27. The court therefore imposed 67 months. 2RP 27.

C. ARGUMENT

THE TRIAL COURT FAILED TO FOLLOW STATUTORY DIRECTIVES IN DENYING THE SSOSA.

The trial court failed to consider all enumerated factors listed under RCW 9.94A.670(4) and failed to give "great weight" to the victim's wishes, as statutorily required. At the outset, the court's failure to follow statutory directives in denying the SSOSA is reviewable. Under RCW 9.94A.585(1), "A sentence within the standard sentence length . . . for an offense shall not be appealed." However, as the Supreme Court has recognized, this statute is not an absolute prohibition on the right of appeal. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Rather, it precludes only appellate review of "challenges to the amount of time imposed when the time is within the standard range." Herzog, 112 Wn.2d at 423 (quoting State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796, cert. denied, U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986)). "An appellant, of course, is not precluded from

challenging on appeal the procedure by which a sentence within the standard range was imposed.” Herzog, 112 Wn.2d at 423 (adding italics, quoting Ammons, 105 Wn.2d 182-83).

In that same vein, the court’s incorrect application of the SSOSA statute is appealable. See e.g. State v. Adamy, 151 Wn. App. 583, 586, 213 P.3d 627 (2009) (a criminal defendant may challenge a standard range sentence where he challenges, not the length of the sentence, but rather the trial court’s interpretation of the SSOSA statute); State v. Onefrey, 119 Wash.2d 572, 574 n. 1, 835 P.2d 213 (1992) (whether trial court erred in interpreting SSOSA statute to preclude Onefrey from eligibility properly appealable).

RCW 9.94A.670 provides in pertinent part:

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim’s opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim’s opinion whether the offender should receive a treatment disposition under this section. If the

sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.

Emphasis added.

The Legislature's use of the word "shall" imposes a mandatory duty. State v. Krall, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994). In this case, the court fixated on Lalum's disclosure of other offenses during the polygraph and length of the requested sentence, which the statute allows. However, the court failed to consider an equally important factor: Lalum's low risk to the community and G.L. And perhaps more significantly, the court utterly discounted G.L. and her mother's wishes.

As noted by defense counsel, Lalum presented as a very low risk SSOSA candidate:

This was not an incident where Mr. Lalum is a risk to the community at large, this is a particularized victim of, essentially, a crime of opportunity where it was a household member, his daughter. So the risk to the community is not there, the risk to the victim is one that is going to be considered by the Court. We are talking about the risk to this particular victim. Mr. Lalum has not had any contact with his daughter, we anticipate that whether he is in custody or out of custody, he is not going to be authorized to have any contact with his daughter whatsoever, with his wife, who is not interested in him having any contact at all for, I would have to say, indefinitely.

. . . I expect, whether the SOSA [sic] is granted or not, that the Court will prevent him from having any contact with minor children. So when we look at whether there is victims of similar age and circumstances, he certainly doesn't have any other children that he can – or any other family members or biological children that he would be able to engage in this conduct with. So I don't think that is a concern.

2RP 10-11.

In pronouncing sentence, however, the court addressed only Lalum's disclosure of other offenses. 2RP 25-26. The court failed to consider the nature of the offense and the relatively low risk that such behavior presents to the community at large. This was error.

Although the court recognized it was supposed to give "great weight to what the victim wants," the court failed to do so, noting simply: "I just don't think it is right." 2RP 27. In reasoning that the court had given people who drive while license suspended more time, the court gave greater weight to its own opinion, rather than that of the victim.

Significantly, as reported by her mother, G.L. knew about the proceedings and was making leaps and bounds, not only in counseling, but in school and her social contacts. The court erred in failing to properly weigh this factor.

While the sentencing court has discretion to deny a SSOSA request, it must consider the criteria set forth in the statute. Because the court failed to do so here, its decision was unauthorized, and resentencing before a different judge is therefore appropriate. Several cases provide examples of this remedy under similar circumstances. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanded to different judge "in light of the trial court's already-expressed views on the disposition"); accord, State v. Harrison, 148 Wn.2d 550, 559-60, 61 P.3d 1104 (2003) (resentencing before different judge should be the remedy where state breaches a plea agreement and the defense seeks specific performance); State v. Talley, 134 Wn.2d 176, 182, 188, 949 P.2d 358 (1998) (remanded to different judge where it appeared that initial judge may have "prejudged the matter"); State v. M.L., 134 Wn.2d 657, 661, 952 P.2d 187 (1998) (remand to different judge required where disposition was found clearly excessive); State v. Ameline, 118 Wn. App. 128, 134, 75 P.3d 589 (2003) (remand to different judge following improper exceptional sentence); State v. Romano, 34 Wn. App. 567, 570, 662 P.2d 406 (1983) (remanded to different judge where initial sentencing suffered from appearance of unfairness).

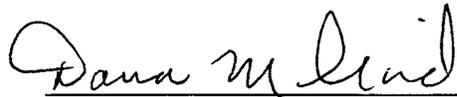
D. CONCLUSION

For the reasons stated above, this Court should reverse and remand for resentencing before a different judge.

Dated this 30th day of July, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script that reads "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

DANA M. LIND, WSBA 28239

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

STATE OF WASHINGTON,)

Respondent,)

v.)

JON LALUM,)

Appellant.)

COA NO. 64918-3-I

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 30TH DAY OF JULY, 2010, 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] JON LALUM
DOC NO. 335739
STAFFORD CREEK CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2010.

x *Patrick Mayovsky*

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