

NO. 65858-1-1

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

REC'D  
JAN 9 1 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW VOGT,

Appellant.

FILED  
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COURT OF APPEALS  
32

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

The Honorable Michael Heavey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion in denying the appellant the parenting sentencing alternative (PSA) based on an erroneous view of the law.

2. The sentencing court violated the appellant's rights under the state Equal Rights Amendment (ERA) and to equal protection by rejecting the sentencing alternative based on gender.

3. The sentencing court violated the appellant's substantive due process rights.

4. The court granted appellant's half-time motion to dismiss one of the charges but failed to indicate such dismissal on the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Did the sentencing court err in denying the sentencing alternative based in part on (a) the court's erroneous reading of the PSA statute and (b) the appellant's gender, in violation of the ERA and equal protection?

2. Did the sentencing court violate the appellant's right to substantive due process when it denied the sentencing alternative on arbitrary and unreasonable grounds?

3. Should this Court vacate the sentence and remand for resentencing before a different judge?

4. Should the judgment and sentence be corrected to reflect the dismissal of count 1 for insufficient evidence?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charges, dismissal of charge, and verdicts

The State charged Matthew Vogt with five counts of felony violation of a no-contact order occurring in February and March of 2009. Vogt's wife was the subject of the applicable July 2008 no-contact order. CP 1-8, 17-19. The State elevated the charges to felonies based on two previous no-contact order violations, to which Vogt stipulated. Ex. 5.

After the State rested, the parties agreed to dismiss count 1 based on insufficient evidence. 2RP 23. Of the remaining counts, the jury acquitted Vogt of all but count 5. CP 20-23; 3RP 57-58.

2. Sentencing hearing

Facing a standard range sentence of 41-54 months, Vogt sought a PSA under RCW 9.94A.655, which permits a court to grant 12 months of community custody in lieu of standard range incarceration for qualifying parents of minor children.<sup>2</sup> 4RP 5-8. The court denied the PSA and request for an exceptional sentence downward but imposed a prison-based drug

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 6/14/10; 2RP – 6/15/10; 3RP – 6/16 and 6/17/10; and 4RP – 8/5/10.

<sup>2</sup> The complete text of RCW 9.94A.655 is attached as an appendix.

offender sentence alternative (DOSA) that included incarceration of 23.75 months. 4RP 22; CP 56.

Vogt and his wife asked the court to impose the PSA so he would not be separated from his nine- and 10-year old sons<sup>3</sup> and could continue mental health treatment, which the court could closely monitor under the PSA's monitoring provisions. 4RP 4-7, 9-11, 14-16, 19-21. The State opposed the PSA, but did not dispute Vogt was eligible under the statute. 4RP 11-14.

In denying Vogt's request, the court stated, "[I] am not inclined to exercise my discretion and allow [Vogt] a parenting sentencing alternative."

4RP 8. The court reasoned the alternative was not for men:

It is my impression that the family sentencing alternative is for mothers, generally speaking and for the sole guardian of their children, so the motion for a [PSA] is denied.

[Defense counsel:] Your honor, if I could just clarify that there is nothing in the law that indicates that it is for a sole guardian, nor a mother.

[Court:] I understand that totally. If you wish to appeal my decision, you may well do that.

....

I believe it is discretionary. I have read the [Department of Corrections] risk assessment. I have heard from both sides on it and . . . I believe [the statute] does not [limit] it to a sex because of the equal protection and due process laws of the state and country, but I have a feeling it wasn't for this kind of case.

4RP 22. The court sentenced Vogt to a DOSA. 4RP 22. The court declined to enter a new no-contact order for Vogt's wife. 4RP 23.

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<sup>3</sup> At trial, Vogt did not dispute that even during the charging period he was living off and on at the home his wife was leasing and was caring for his children. 2RP 136, 145-46, 156-57, 161-62.

C. ARGUMENT

1. THE COURT ERRED AS A MATTER OF LAW AND VIOLATED VOGT'S E.R.A. AND EQUAL PROTECTION RIGHTS WHEN IT DENIED HIM THE PARENTING SENTENCING ALTERNATIVE BASED ON AN ERRONEOUS BELIEF THE STATUTE DID NOT APPLY TO PARENTS LACKING SOLE CUSTODY APPLY OR TO MALES IN GENERAL.

a. The denial of the sentencing alternative was based in part on an erroneous reading of the pertinent statute.

A defendant may challenge the procedure by which a standard range sentence is imposed. State v. Watkins, 86 Wn. App. 852, 854, 939 P.2d 1243 (1997) (citing State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). A trial court abuses its discretion when its ruling is based on an erroneous view of the law. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339-40, 344, 858 P.2d 1054 (1993).

In Fisons, the lower court denied discovery sanctions based in part on legal errors. Id. at 344-45. After setting out the correct legal standard, the Court reversed the denial of sanctions and remanded to determine the appropriate amount. Id. at 356.

This Court should reverse because the sentencing court's decision was similarly based, at least in part, on a misunderstanding of the law. When the plain language of a statute is clear, courts should assume the legislature meant exactly what it said. State v. Azpitarte, 140 Wn.2d 138,

141, 995 P.2d 31 (2000). Absent ambiguity, a statute's meaning is derived from its language alone. Id. at 142. Whatever the sentencing court believed the legislature *meant* to do by enacting the statute, Vogt qualified under the plain language, which imposes no sole custodianship or gender requirement.

While a court's decision to impose a PSA is discretionary, a court's discretion must be reasonable. Matheson v. Gregoire, 139 Wn. App. 624, 633, 161 P.3d 486 (2007) (a trial court abuses its discretion when it relies on unsupported facts or bases its ruling on an erroneous view of the law); Fisons, 122 Wn.2d at 339 (same). Moreover, the trial court's actions also violated Vogt's rights under the Washington ERA and to equal protection.

- b. The court violated Vogt's right to equal treatment under the state ERA as well as federal and state equal protection.

While no defendant is *entitled* to a sentence alternative, each is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The refusal to consider a sentencing alternative for a class of offenders is an abuse of discretion. Id.

Under article 1, section 12 and the Fourteenth Amendment, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. State v. Coria, 120 Wn.2d 156, 169, 839 P.2d

890 (1992) (citing State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). Washington courts generally construe federal and state equal protection clauses identically. State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); cf. Guard v. Jackson, 132 Wn.2d 660, 663, 940 P.2d 642 (1997) (before enactment of the ERA, Washington courts, unlike federal courts, subjected gender classifications to strict judicial scrutiny, in part based on the privileges and immunities clause of Const. art. I, § 12).<sup>4</sup>

Under Washington's ERA, however, "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex." Const. art. XXXI, § 1. The ERA governs Washington courts' review of gender-based classifications. Southwest Washington Chapter, Nat. Elec. Contractors Ass'n v. Pierce County, 100 Wn.2d 109, 128 n.3, 667 P.2d 1092 (1983) (citing State v. Adlington-Kelly, 95 Wn.2d 917, 923, 631 P.2d 954 (1981) (when directed toward the same concerns, specific laws prevail over the general)).

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<sup>4</sup> In analyzing an equal protection claim, Washington courts apply one of three tests. Schaaf, 109 Wn.2d at 17. Under the rational relationship test, the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. Id. The second test is strict scrutiny, under which the State's purpose must be compelling and the law must be necessary to accomplish that purpose. Id. The United States Supreme Court later recognized a third test that applies where the state action distinguishes on the basis of gender. E.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982) (applying intermediate scrutiny to state university's policy of admitting only women to nursing school). Under "intermediate scrutiny," the challenged law must further a substantial state interest. Schaaf, 109 Wn.2d at 17.

The ERA absolutely prohibits discrimination based on gender and is not subject to even the narrow exceptions permitted even under traditional “strict scrutiny.”<sup>5</sup> Elec. Contractors, 100 Wn.2d at 127 (citing Darrin v. Gould, 85 Wn.2d 859, 872, 540 P.2d 882 (1975)). Washington courts have found but two exceptions: (1) classifications based on actual physical differences between the sexes; and (2) affirmative action programs intended solely to ameliorate the effects of past discrimination. Guard, 132 Wn.2d at 664 (citing City of Seattle v. Buchanan, 90 Wn.2d 584, 591, 584 P.2d 918 (1978); Elec. Contractors, 100 Wn.2d at 127-28)). Neither applies here.

The trial court explicitly stated it was denying Vogt’s request for a PSA because of his gender. The court’s action meets neither of the Guard criteria and therefore violates the ERA. The same is true under the state privileges and immunities clause, because the court’s reliance on gender survives no level of scrutiny. Schaaf, 109 Wn.2d at 17.

Like the state constitution, the legislature has recognized that gender may not be used to distinguish between parents. See, e.g., In re Parentage of L.B., 155 Wn.2d 679, 701, 122 P.3d 161 (2005) (legislature is committed to “principle that sex and gender roles do not serve as a proper basis for distinction between parenting parties” in determining custody). The contributions of mothers and fathers to a child’s

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<sup>5</sup> To satisfy strict scrutiny, the state action must be necessary to further a compelling state interest. Schaaf, 109 Wn.2d at 17.

development may differ, but there is no reasonable basis to diminish the contributions of one or the other.

Because the court categorically refused to consider the PSA because Vogt was a man, it abused its discretion. Grayson, 154 Wn.2d at 342.

2. THE SENTENCING COURT LIKEWISE VIOLATED VOGT'S RIGHT TO SUBSTANTIVE DUE PROCESS.

Judicial conduct that is arbitrary and unreasonable violates the federal and state guaranties of substantive due process. U.S. Const. amend. 5, 14; Const. art. I, § 3; Arnold v. Department of Retirement Sys., 74 Wn. App. 654, 667, 875, 875 P.2d 665 (1994), rev'd on other grounds, 128 Wn.2d 765, 912 P.2d 463 (1996). A court's failure to comport with constitutional due process constitutes an abuse of discretion. State v. Herzog, 112 Wn.2d 419, 426, 771 P.2d 739 (1989).

To satisfy due process, the court's decision must have a rational basis and must treat alike those belonging to the same class. Arnold, 74 Wn. App. at 667. The court's decision satisfies neither criterion in Vogt's case. First, the decision to exclude Vogt from the sentencing alternative because he is a father was not rationally related to any proper state purpose. In fact, the legislature rejected such a distinction in enacting the statute. Second, the statute applies to a class of parents – not male or female parents – facing felony sentencing. The trial court abused its

discretion in denying the sentencing alternative to Vogt based on gender.

Herzog, 112 Wn.2d at 426.

3. THIS COURT SHOULD REMAND FOR SENTENCING BEFORE A DIFFERENT JUDGE BECAUSE THE JUDGE EXPRESSED HIS UNWILLINGNESS TO FOLLOW THE PLAIN LANGUAGE OF THE STATUTE.

At sentencing, Judge Heavey announced his unwillingness to grant Vogt the sentencing alternative based on his impression of the statute's purpose, which contravened the plain wording of the statute as well as the constitution.

Because the court has already demonstrated its unwillingness to follow the statute, the appropriate remedy is to vacate the sentence and remand for resentencing before a different judge. 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. 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"); State v. Lopez, 107 Wn. App. 270, 279-80, 27 P.3d 237 (2001) (remanded to different judge where judge granted persistent offender sentence over objection stating it was "unaware of any procedure" requiring the State to prove predicate priors); 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).

4. THE TRIAL COURT PROPERLY GRANTED VOGT'S MOTION TO DISMISS COUNT ONE BUT FAILED TO SET FORTH ITS RULING IN THE JUDGMENT AND SENTENCE.

At the close of the State's evidence, Vogt moved to dismiss the count 1 charge for insufficient evidence, and the State conceded dismissal was proper. The court agreed to dismiss the charge. 2RP 123. The judgment and sentence, which contains a blank space for the court to list dismissed charges, does not mention the charge. CP 54. The court did not enter a separate order dismissing the charge.

This Court should remand for amendment of the judgment and sentence to reflect the court's dismissal of count 1. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

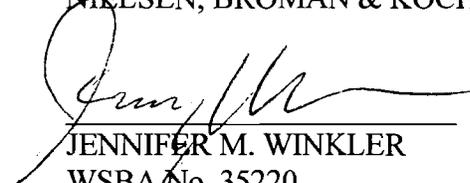
D. CONCLUSION

Because the trial court disregarded the plain language of the PSA statute and violated the constitutional guaranties of gender equality, equal protection, and substantive due process, this Court should remand for resentencing before a different judge. Remand is also required so the court may enter an order reflecting its dismissal of count 1 with prejudice.

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

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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# **APPENDIX**

RCW 9.94A.655  
Parenting sentencing alternative.

(1) An offender is eligible for the parenting sentencing alternative if:

- (a) The high end of the standard sentence range for the current offense is greater than one year;
- (b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;
- (c) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;
- (d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and
- (e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

(2) To assist the court in making its determination, the court may order the department to complete either a risk assessment report or a chemical dependency screening report as provided in RCW 9.94A.500, or both reports prior to sentencing.

(3) If the court is considering this alternative, the court shall request that the department contact the children's administration of the Washington state department of social and health services to determine if the agency has an open child welfare case or prior substantiated referral of abuse or neglect involving the offender or if the agency is aware of any substantiated case of abuse or neglect with a tribal child welfare agency involving the offender.

(a) If the offender has an open child welfare case, the department will provide the release of information waiver and request that the children's administration or the tribal child welfare agency provide a report to the court. The children's administration shall provide a report within seven business days of the request that includes, at the minimum, the following:

- (i) Legal status of the child welfare case;
- (ii) Length of time the children's administration has been involved with the offender;
- (iii) Legal status of the case and permanent plan;
- (iv) Any special needs of the child;
- (v) Whether or not the offender has been cooperative with services ordered by a juvenile court under a child welfare case; and
- (vi) If the offender has been convicted of a crime against a child.

(b) If a report is required from a tribal child welfare agency, the department shall attempt to obtain information that is similar to what is required for the report provided by the children's administration in a timely manner.

(c) If the offender does not have an open child welfare case with the children's administration or with a tribal child welfare agency but has prior involvement, the department will obtain information from the children's administration on the number and type of past substantiated referrals of abuse or neglect and report that information to the court. If the children's administration has never had any substantiated referrals or an open case with the offender, the department will inform the court.

(4) If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody. The court shall consider the offender's criminal history when determining if the alternative is appropriate.

(5) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate.

(b) The department may impose conditions as authorized in RCW 9.94A.704 that may include, but are not limited to:

- (i) Parenting classes;
- (ii) Chemical dependency treatment;

(iii) Mental health treatment;

(iv) Vocational training;

(v) Offender change programs;

(vi) Life skills classes.

(c) The department shall report to the court if the offender commits any violations of his or her sentence conditions.

(6) The department shall provide the court with quarterly progress reports regarding the offender's progress in required programming, treatment, and other supervision conditions. When an offender has an open child welfare case, the department will seek to coordinate services with the children's administration.

(7)(a) The court may bring any offender sentenced under this section back into court at any time during the period of community custody on its own initiative to evaluate the offender's progress in treatment, or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody, if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served in confinement under this section.

[2010 c 224 § 2.]

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65858-1-I
	)	
MATTHEW VOGT,	)	
	)	
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] MATTHEW VOGT  
DOC NO. 329830  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

2011 JAN 31 PM 4:36  
COURT OF APPEALS  
STATE OF WA

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

x Patrick Mayovsky