

66614-2

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NO. 66614-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Appellant,

v.

ROBERT WILLHOITE,

Respondent.

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

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BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

RCW 9.94A.585 generally bars a party from appealing a nonexceptional sentence, except for legal errors by the sentencing court. Where the “error” which the State challenges is the trial court’s factual determination of whether Robert Willhoite’s crime had a “victim,” can the State appeal the sentencing court’s determination?

B. STATEMENT OF THE CASE

Robert Willhoite pleaded guilty to one count of possession of depictions of a minor engaged in sexually explicit conduct, and one count of dealing in depictions of a minor engaged in sexually explicit conduct. CP 65-82. At sentencing, Mr. Willhoite requested the court impose a Special Sex Offender Sentencing Alternative (SSOSA). RP 11-13. The Department of Corrections also encouraged the court to impose a SSOSA. CP 10-12.

The State opposed a SSOSA, however, contending Mr. Willhoite was ineligible for a SSOSA pursuant to RCW 9.94A.670(2)(e) which requires Mr. Willhoite have an established relationship with the victim(s) aside from the offenses. RP 4-6.

The trial court concluded the record did not establish that either of the offenses had a victim as that term is defined in RCW

9.94A.670(1)(c). RP 20. Thus, the court concluded Mr. Willhoite was eligible for a SSOSA. RP 37.

The State has now appealed.

C. ARGUMENT

THE TRIAL COURT PROPERLY FOUND THE STATE DID NOT PROVE THE OFFENSES HAD A "VICTIM" AS THAT TERM IS DEFINED IN RCW 9.94A.670(1)(c).

Because the State's argument on appeal concerns a factual determination by the trial court, the State may not appeal the trial court's ruling.

1. The State cannot appeal the sentence imposed. RCW 9.94A.585 bars a party from appealing the imposition of a standard range sentence. This limitation bars appeal except in the narrow class of cases in which the court applies an incorrect legal standard or abuses its discretion in determining which sentence applies. State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005) (citing State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1241 (2003)).

In apparent recognition of this limitation, the State, here, dresses its argument as concerning the trial court's legal conclusions. But it is clear that the State's dispute centers upon

the trial court's factual findings. Thus, that decision is not appealable.

2. The record supports the trial court factual finding that there was no victim in these case as that term is defined in RCW 9.94A.670(1)(c). The State's argument begins and ends with the assumption that there was a "victim" of these crimes. The State contends "the sole issue . . . is whether [Mr Willhoite] satisfied [RCW 9.94A.670](2)(e)." Brief of Respondent at 5. The State misrepresents the trial court's ruling. The trial court did not grant a SSOSA in this case because it found Mr. Willhoite had a relationship with the victims of the two offenses. Instead, the trial court granted the SSOSA because it concluded the record did not establish that the persons depicted met the definition of "victim" in RCW 9.94A.670(1)(c).

Thus, the issue on appeal is whether the State met its burden at sentencing to prove that the persons depicted met the statutory definition of "victim." found in RCW 9.94A.670(1)(c). The State's brief does not point to any fact in the record that would have permitted the court to make that finding.

RCW 9.94A.670(1)(c) provides:

"Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

The trial court specifically pointed to the absence of a record establishing that the persons depicted met the definition of "victim" found in RCW 9.94A.670(1)(c). RP 20. The court concluded "I don't know what has happened to any of these children. I can imagine, but I don't know. I'm not sure we have a victim here." Id. The trial court was correct in its factual finding. There is nothing in the record establishing any of the persons depicted suffered physical or other harm, or otherwise met the statutory definition.

The State has not shown that the trial court's factual ruling was erroneous. Indeed, the State cannot do so on appeal, as the court's factual findings at sentencing are not appealable. Instead, the State points to a single case which concluded the crimes of possession and distribution of depictions of minors engaged in sexually explicit conduct can have a victim(s). Brief of Respondent at 7-8 (discussing State v. Elhi, 115 Wn.App. 556, 62 P.3d 929 (2003)). But the fact that the crime may have victims does not begin to address the question of whether Mr. Willhoite's crime had

a victim within the specific definition of RCW 9.94A.670. Elhi offers a policy commentary that does not address the definition of victim provided in either RCW 9.94A.030(52) or RCW 9.94A.670(1)(c). Nowhere in its policy pronouncement did Elhi address whether the State had established the person(s) portrayed had suffered emotional, psychological, or physical harm. Absent that proof, there can be no “victim” of the crime as that term is used in either RCW 9.94A.030(52) or RCW 9.94A.670(1)(c). That is not to say the State could not prove minors depicted in child pornography are victims in a more general sense, or even that the State could not satisfy the specific definition of RCW 9.94A.670 by identifying a particular person depicted and establishing the harm s/he suffered. But it does mean the State did not do so here or in Elhi.

In any event, the conclusion in Elhi that two counts of possession of images of separate minors could not constitute the same criminal conduct, does not survive the Supreme Court’s recent decision in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). The Court there concluded that possession of multiple images constituted a single crime, and thus the Double Jeopardy clause did not permit multiple convictions. Id. 882-83. Because there could only be a single conviction, there could never be a

question of whether multiple convictions arose from the same criminal conduct.

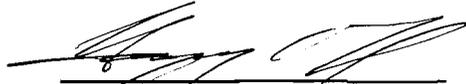
Nonetheless, the State claims Sutherby does not alter the analysis of Elhi. Brief of Respondent at 7, n.2. But had Elhi properly recognized the constitutional limitations, it would never have faced the question of whether the two convictions should be deemed the same criminal conduct. Thus, Elhi did little more than attempt to answer the question of how many fairies can dance on the head of a pin.

3. This Court must affirm the sentence imposed. The trial court properly concluded that the record does not establish that the persons depicted were victims as defined in RCW 9.94A.670(1)(c). Elhi does not require the court reach a different result. Because the error the State complains of is purely factual, the State cannot appeal. But further, because the trial court's factual conclusion is consistent with the record the State created, there is no error at all. Thus, this Court must affirm the trial court's sentence.

D. CONCLUSION

This Court should affirm Mr. Willhoite's sentence.

Respectfully submitted this <sup>25<sup>th</sup></sup> day of April 2011.



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

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|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) | NO. 66614-2-I |
|                      | ) |               |
| ROBERT WILLHOITE,    | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 26<sup>TH</sup> DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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|---|---|

**SIGNED** IN SEATTLE, WASHINGTON, THIS 26<sup>TH</sup> DAY OF APRIL, 2011.

X \_\_\_\_\_ *JA*

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