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**A. ASSIGNMENTS OF ERROR**

The Court erroneously believed that it did not have the discretion to extend the period of community service with the sanction of revoking the 90 month suspended sentence.

**B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

Did the Superior Court err in that he could not extend the period of community supervision with the sanction of revoking the 90 month suspended sentence for the remainder of the 10 year statutory maximum?

Was the Superior Court's decision to revoke the suspended sentence in this case based on a faulty presumption of the law?

**C. STATEMENT OF THE CASE**

On May 1, 1997, the defendant and appellant herein was arrested on one count of Attempted Second Degree Rape of a Child and two counts of Attempted First Degree Child Molestation. CP. 1. He was brought before the Superior Court of the State of Washington on May 2, 1997, and advised of the allegations and his rights and an attorney was appointed to represent him. CP 2-6. Bail was set at \$100,000.00. CP. 7. Formal charging was set

for May 7, 1997. CP 11. A plea of not guilty was entered on all three charges and the trial was set for May 20, 1997. On May 9, 1997, Clifford Morey entered a notice of appearance for the defendant as retained counsel. CP 18. An omnibus hearing was held on June 20, 1997, and bail was reduced to \$50,000.00 . CP 20 & 21.

On June 13, 1997, the defendant, pursuant to a plea agreement plead guilty to one count of Attempted Rape of a Child in the Second Degree in violation of RCW 9A.076 & 9A.28.020 and two counts of Attempted Child Molestation in the First Degree in violation of RCW 9A44.083 & 9A.28.020. CP 24-31. There never were any children who were at risk as the case was based on a police sting operation and the defendant was arrested in the course of the sting. Sentencing was continued to July 21, 1997. CP 31. The defendant appeared with counsel and was sentenced under the Special Sex Offender Sentencing Alternative (SSOSA) CP 56. He received a sentence of 90 months on each count all to run concurrent, ordered to undergo and successfully complete outpatient treatment with Robert Wheeler, Ph.D. for a period of 36 months and serve 4 months of total confinement along with a number of other restrictions. CP 56-59. A hearing was scheduled for the termination of treatment for May 19, 2000.

The defendant changed his treatment provider early in his suspended

sentence with the agreement of the Department of Corrections to Bellevue Community Services September 25, 1997. CP 71. During the course of the defendant's suspended sentence, two violations were reported by the Department of Corrections before the violations which caused the revocation of his suspended sentence and are the subject of this appeal. The first violation alleged contact with a child under 18, on September 1, 1999, during the course of his employment. No action was recommended or taken. The second violation was reported on May 10, 2000 to the court, alleging that during the course of employment as a cabulance driver, he transported a minor female. DOC recommended that his treatment be extended for an additional year and that he receive a sanction of 5 days in custody. Which was ordered by the court.

On May 14, 2001, the court terminated Mr. Schmidt's sexual deviancy treatment. He continued on under the terms of his suspended sentence. During the course of his final polygraph for the Department of Corrections he self reported 5 separate violations of the conditions of his suspended sentence.

1. Viewing pornographic material on or about 1/18/05 in Snohomish County, Washington.

2. Viewing sexually explicit material on the internet on about December, 2004 in Snohomish County.

3. Purchasing a sexually explicit material from an adult book store in Snohomish County Washington on or about December, 2004.

4. Contacting sex partners listed in the Stranger Magazine on or about December of 2004 in Snohomish County Court. (sic)

5. Having contact with a prostitute on or about in July of 2004 in King County, Washington.

CP 102-105.

The probation officer recommended a sanction of 10 days per violation for a total of 50 days and that he immediately resume treatment upon his release of confinement and that he submit to a polygraph every 60 days. CP 105. The Kitsap County Prosecutor filed a Motion to Show Cause for an Order Revoking Suspension of Sentence on February 3, 2005, alleging the same violations. CP 113-115.

The matter was set for hearing and eventually heard on May 2, 2005. The State called three witnesses. Community Corrections Officers, Tanaka and Butler and Dr. Lemmon, Mr. Schmidt's prior treatment provider. At the close of the testimony, the judge questioned whether the period of suspension had already run at the time of the violations, assuming that the period of supervision began on the day of sentence and he asked for briefing on the issue. The judge also heard from Mr. Schmidt, his wife and son and Pastor

Reitan in addition there were eight letters to the court asking for mercy for Mr. Schmidt. The matter was continued to May, 6, 2005. At that hearing the court found that the under RCW 9.94A.120.(8)(a)(2) controlled and made it clear that the confinement ordered in granting a SSOSA sentence "is in addition to and a condition of the suspended sentence itself, and that the community custody runs the whole length of the suspended sentence" which in this case was the 90 months and that did not commence till his release. The court found that the latest the period the suspended sentence would have run was February 14, 2005. VRP May 6, 2005, at p. 3. The court also asked for input on question as to whether the court had the option of extending the term of probation to the maximum sentence or 10 years. VRP. May 6, 2005, at p. 5-6 and whether Blakely applied to the revocation. The court also questioned whether the law at the time of the crime applied or the current iteration of the Sentencing Reform Act.

**D. STATEMENT OF FACTS**

At the time of his arrest in 1997, Richard Schmidt, was a 51 year old male who through correspondence with an undercover agent, expressed a desire to have sexual intercourse with 3 children. While Schmidt intended to have sex with the children the children in fact did not exist and were all part of the ruse. When he arrived at the motel to consummate the product of his

negotiations he was arrested. CP 12-15.

He pled guilty to one count of Attempted Rape of a Child in the First Degree and two counts of Attempted Child Molestation in the First Degree. The plea was entered on June 13, 2005. He received a SOSSA sentence of 90 months according to the Judgment and Sentence. CP 56. The court, however, orally had sentenced him to 90 months of confinement on each count and said that it was going to require Mr. Schmidt to serve 4 months of that. It went on to say "I'm going to suspend 86 months and allow you to convert that into the SOSSA program." It was the clear intent of the sentencing judge to impose only an 86 month sentence. Yet the judgment did not reflect the order of the court and sentenced the defendant to a 90 month suspended sentence which would have gone through November 11, 2004. Which would have put all the violations except having contact with a prostitute out of the period of supervised release.

The State called three witnesses, K.C. Butler, the community corrections officer who did the initial pre-sentence report. VRP May 2, 2005, at p. 11-12. He testified that the defendant had an obsession with sexual interests. Butler admitted that the mother was actually a law enforcement officer and that the three children were fictional. VRP May 2, 2005, at p. 22.

The State also called Pat Tanaka from the Department of Corrections

who was the supervising Community Corrections Officer, who filed the notice of violation. He had been Mr. Schmidt's supervising corrections officer for approximately 2 years. He testified that the defendant disclosed the violations which are the subject of his revocation, in the course of preparing for the polygraph. VRP May 2, 2005, at p. 30 . On cross examination he testified that other than the self revealed violations Schmidt had been very successful in his probation. at p. 35. He recommended that the SOSSA sentence not be terminated but that the defendant be sanctioned. VRP at 38.

The last witness was Dr. John Lennon. He was the treating doctor of the defendant. He believed Mr. Schmidt needed more treatment and would be willing to do it. VRP at p. 62. Basically the two professionals who had the closest link to Mr. Schmidt recommended that the defendant SOSSA not be revoked but that he be sanctioned instead.

#### **E. ARGUMENT**

Both imposition and revocation of a SSOSA sentence are within the trial court's discretion. State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997) (imposing SSOSA); State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) (revoking SSOSA). The court will not second-guess the sentencing court's exercise of discretion absent a showing that its decision is

manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

Evidentiary rulings will only be overturned where the trial court abused its discretion. An abuse exists when a trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 283, 840 P.2d 860 (1992) and Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984)).

In the case at bar, the court's decision to revoke Mr. Schmidt's SSOSA sentence was a close one. VRP May 13, 2005 , at p. 13. The court thought that it had two options, "sentence Mr. Schmidt to up to 300 days for the five violations, 60 days consecutive to be served in the county jail," or revoke his SOSSA sentence and send him to prison for 90 months." And that the court did not have the option of holding the 90 months, the suspended time, over Mr. Schmidt during a period of extended conditions of supervision. VRP May 13, 2005.

The prosecutor had conceded that at the time Mr. Schmidt was sentenced that a defendant whose period of community supervision had been extended to the statutory maximum and "if an individual violated, the SOSA could still be revoked." VRP May 13, 2005 at p. 4-5. But under the current

iteration of the sentencing reform act there would be no assigned officer to supervise Mr. Schmidt and that the prosecutor or the court would be the defacto probation officer or community corrections officer. A role they were uncomfortable with. The prosecutor argued that the court could extend the period of conditions of supervision but not the period of community custody. VRP May 13, 2005 at P. 6.

In the case of State v. Montgomery, 105 Wn. App. 442, 17 P.3d 1237 (Wash.App.Div.1 02/05/2001) Division I of the Court of Appeals ruled that the defendant in that case was not entitled to the benefits of the modification in the Sentencing Reform Act which would have made him eligible for a SOSSA sentence by increasing the range of the sentences available to take advantage of the option. Therefore he was limited to the sentencing options that were in place at the time of his crime and not the subsequent changes which would have benefited the defendant. Here at the time of the defendant's sentencing, the provisions of the Sentencing Reform Act and more particularly the conditions and utilization of the SOSSA option allowed the court to extend the conditions of supervision up to the entire maximum of the sentence that could be imposed and failure to comply with those conditions could result in the revocation of the entire suspended sentence.<sup>1</sup> It is

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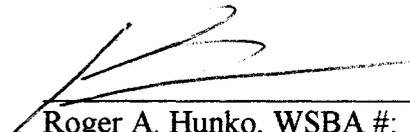
<sup>1</sup> RCW 9.94A.120 (10)(c) At any time prior to the completion of a sex offenders term of community custody, if the court finds that public safety would be enhanced, the court may

interesting that the court found that he was unconstitutionally denied the option of the SSOSA option based on his choice to go to trial but that it was moot since he was ineligible because of his sentence range.

F. **CONCLUSION**

Therefore the sentencing conditions and the options available to the court were the same as at the time of the sentencing of Mr. Schmidt and not limited to the current iteration of the Sentencing Reform Act and the court had the option of continuing Mr. Schmidt on community supervision with the option of revoking the 90 months suspended should he violate the terms of his supervision in the future. Since the Court erroneously concluded that it did not have this option this case should be remanded back to the Superior Court for a new sentencing hearing to determine if the option of revocation of the suspended sentence were available, would it still exercise its discretion in revoking Mr. Schmidt's SOSSA sentence.

Respectfully submitted this 23<sup>rd</sup> day of January, 2006.

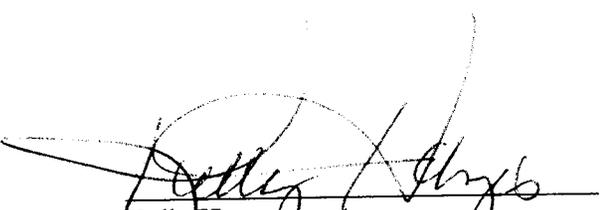
  
Roger A. Hunko, WSBA #: 9295  
Attorney for Appellant

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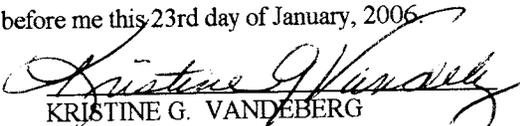
impose and enforce an order extending any and all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20. RCW, regardless of the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.195 and may be punishable as contempt of court as provided for in RCW 7.21.040.



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Kelly Hayes

SUBSCRIBED AND SWORN to before me this 23rd day of January, 2006

  
KRISTINE G. VANDEBERG  
NOTARY PUBLIC in and for the State  
of Washington  
My commission expires: 07/28/09

Affidavit of Service

**The Law Office**

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