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No. 34742-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mitchell Partee,

Appellant.

Lewis County Superior Court

Cause No. 03-1-00166-4

The Honorable Judge Stephen Warning

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

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ASSIGNMENTS OF ERROR

1. The trial court erred by revoking Mr. Partee's SSOSA.
2. The trial court erroneously believed it lacked discretion to impose confinement instead of revoking Mr. Partee's SSOSA.
3. The trial court erroneously believed it lacked discretion to impose consecutive 60-day sanctions for each of Mr. Partee's 10 violations.
4. The trial court erroneously believed it lacked discretion to order Mr. Partee confined to prison as a sanction for Mr. Partee's 10 violations.
5. The trial court erred by entering Finding of Fact No. 4, as follows:

The court lacks the authority to revoke only a portion of the remaining suspended sentence as suggest [sic] by counsel and the defendant's expert;
Supp. CP.
6. The trial court erred by entering Finding of Fact No. 5, as follows:

The court lacks the authority to 'stack' probation violation [sic] to give the defendant time in D.O.C. as recommended by defendant's counsel and the defendant's expert..."
Supp. CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mitchell Partee was sentenced under the Special Sex Offender Sentencing Alternative. At a hearing to revoke his suspended sentence, he asked the court not to revoke the SSOSA sentence, but to impose instead up to 600 days confinement (60 days for each of 10 violations). The trial court believed it did not have the authority to impose the sanction requested by Mr. Partee, and instead revoked the SSOSA and imposed the suspended sentence.

1. May a sentencing court impose 60 days confinement for each violation of a SSOSA sentence? Assignments of Error Nos. 1-6.

2. May a sentencing court impose consecutive 60-day sanctions for violations of a SSOSA sentence? Assignments of Error Nos. 1-6.

3. May a sentencing court order that a defendant be confined to the Department of Corrections to serve sanctions exceeding 12 months imprisonment? Assignments of Error Nos. 1-6.

4. Was the trial court incorrect in its belief that it lacked authority to order Mr. Partee to serve 10 consecutive 60-day sanctions at the Department of Corrections? Assignments of Error Nos. 1-6.

5. Did the trial court err by revoking Mr. Partee's SSOSA sentence? Assignments of Error Nos. 1-6.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mitchell Partee was charged with Rape of a Child in the Second Degree and Child Molestation in the Second degree in Lewis County Superior Court. CP 18-19. He pled guilty, and was sentenced under the Special Sex Offender Sentencing Alternative on July 9, 2003. CP 6-17.

The state filed a Petition for Termination alleging 10 violations of Mr. Partee's SSOSA sentence, including an allegation that he had been terminated from treatment. Supp. CP. Mr. Partee did not contest the violations. Instead, he presented testimony from a sex offender treatment provider, and asked the court to impose 60 days confinement per violation without revoking the SSOSA. RP (3/17/06) 3-37.

The court ruled that it lacked the authority to impose jail time without revoking the SSOSA, lacked the authority to impose consecutive jail time, and lacked the authority to impose confinement at the Department of Corrections. RP (3/17/06) 39. The court revoked the SSOSA and imposed Mr. Partee's suspended sentence. RP (3/17/06) 39; Supp. CP. Mr. Partee appealed. CP 4-5.

ARGUMENT

THE TRIAL COURT ERRONEOUSLY BELIEVED IT LACKED DISCRETION TO IMPOSE CONFINEMENT AS REQUESTED BY MR. PARTEE INSTEAD OF REVOKING HIS SSOSA SENTENCE.

The Special Sex Offender Sentencing Alternative under which Mr. Partee was sentenced is governed by RCW 9.94A.670. Under that statute, if the sentencing court determines that SSOSA is appropriate, the court may suspend execution of the sentence. RCW 9.94A.670(4). The conditions of suspension shall include confinement (up to 12 months), community custody, and other requirements. RCW 9.94A.670(4).

Under RCW 9.94A.670(10),

The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked. RCW 9.94A.670(10).

Probation violations are governed by RCW 9.94A.634. That statute is "Noncompliance with condition or requirement of sentence -- Procedure -- Penalty," and provides as follows:

If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section. RCW 9.94A.634(1).

RCW 9.94A.634 authorizes a variety of sanctions, including incarceration: “If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation...” RCW 9.94A.634(3)(c). Confinement for each violation may be aggregated up to the statutory maximum for the offense, and the offender can be ordered to serve the sanction in the custody of the Department of Corrections. *State v. McDougal*, 120 Wn.2d 334, 841 P.2d 1232 (1992).

The SSOSA provisions of RCW 9.94A.670 and the noncompliance provisions of RCW 9.94A.634 are “interrelated,” and “the court has discretion to sentence under either statute.” *State v. Badger*, 64 Wn. App. 904 at 910, 827 P.2d 318 (1992), *interpreting former* RCW 9.94A.120(7) *and former* RCW 9.94A.200.¹

In *Badger*, the defendant’s SSOSA was revoked following a hearing. The Court of Appeals remanded because the trial court erroneously believed it lacked the discretion to impose jail time in lieu of revoking the entire suspended sentence:

The sentencing judge, however, expressed doubt about whether he had the option to impose up to a 60-day jail sentence

¹ The two statutes at issue in *Badger* do not differ in any significant way from the current statutes. The statutes are reproduced in an appendix to this brief.

(RCW 9.94A.200) in lieu of executing the original sentence (RCW 9.94A.120(7)). We hold these two statutes are interrelated; thus, the court has discretion to sentence under either statute.

Because it apparently believed it had no such discretion, we remand to permit the court to exercise its discretion in deciding whether to continue with the original sentence or to impose the 60-day sanction for violation of the sentencing conditions, with credit for time served.

Badger, supra, at 910.

This case is controlled by *State v. Badger*. Mr. Partee asked the court to impose confinement of up to 600 days (60 days for each of the 10 violations) rather than revoking the SSOSA entirely. RP (3/17/06) 34-35. The trial court refused, believing it did not have the authority to impose the requested sanction:

4. The court lacks the authority to revoke only a portion of the remaining suspended sentence as suggest [sic] by counsel and the defendant's expert;

5. The court lacks the authority to 'stack' probation violation [sic] to give the defendant time in D.O.C. as recommended by defendant's counsel and the defendant's expert..."

Order, p. 2, Supp. CP.

See also RP (3/17/06) 39. Here, as in *Badger*, the case must be remanded to the trial court for the court to determine whether to exercise its discretion and impose 60 days of confinement for each violation or to revoke the SSOSA sentence and impose the entire suspended sentence.

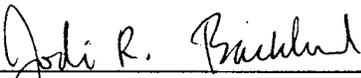
Badger, supra.

CONCLUSION

For the foregoing reasons, the case must be remanded to the trial court.

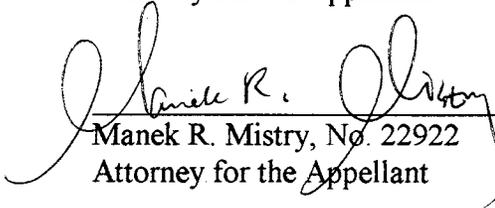
Respectfully submitted on November 14, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant





Manek R. Mistry, No. 22922
Attorney for the Appellant

APPENDIX

RCW 9.94A.120 Sentences

...(7)(a)(i) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense and has no prior convictions for a sex offense or any other felony sex offenses in this or any other state, the sentencing court, on its own motion or the motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

The report of the examination shall include at a minimum the following: The defendant's version of the facts and the official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors, the offender's social and employment situation, and other evaluation measures used. The report shall set forth the sources of the evaluator's information.

The examiner shall assess and report regarding the defendant's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

- (A) Frequency and type of contact between offender and therapist;
- (B) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (C) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;
- (D) Anticipated length of treatment; and
- (E) Recommended crime-related prohibitions.

The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The evaluator shall be selected by the party making the motion. The defendant shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(ii) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this special sexual offender sentencing alternative and consider the victim's opinion whether

the offender should receive a treatment disposition under this subsection. If the court determines that this special sex offender sentencing alternative is appropriate, the court shall then impose a sentence within the sentence range. If this sentence is less than eight years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(A) The court shall place the defendant on community supervision for the length of the suspended sentence or three years, whichever is greater; and

(B) The court shall order treatment for any period up to three years in duration. The court in its discretion shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court, and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. In addition, as conditions of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

(I) Devote time to a specific employment or occupation;

(II) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(III) Report as directed to the court and a community corrections officer;

(IV) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030, perform community service work, or any combination thereof;
or

(V) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime.

(iii) The sex offender therapist shall submit quarterly reports on the defendant's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, defendant's compliance with requirements, treatment activities, the defendant's relative progress in treatment, and any other material as specified by the court at sentencing.

(iv) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment. Prior to the treatment termination hearing, the treatment professional and community corrections officer shall submit written reports to the court and parties regarding the defendant's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community supervision conditions. Either party may request and the court may order another evaluation regarding the advisability of termination from treatment. The defendant shall pay the cost of any additional evaluation ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (A) Modify conditions of community supervision, and either (B) terminate treatment, or (C) extend treatment for up to the remaining period of community supervision.

(v) The court may revoke the suspended sentence at any time during the period of community supervision and order execution of the sentence if: (A) The defendant violates the conditions of the suspended sentence, or (B) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community supervision shall be credited to the offender if the suspended sentence is revoked.

(vi) After July 1, 1991, examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW.

For purposes of this subsection, "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.

(b) When an offender is convicted of any felony sex offense committed before July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, order the offender committed for up to thirty days to the custody of the secretary of social and health services for evaluation and report to the court on the offender's

amenability to treatment at these facilities. If the secretary of social and health services cannot begin the evaluation within thirty days of the court's order of commitment, the offender shall be transferred to the state for confinement pending an opportunity to be evaluated at the appropriate facility. The court shall review the reports and may order that the term of confinement imposed be served in the sexual offender treatment program at the location determined by the secretary of social and health services or the secretary's designee, only if the report indicates that the offender is amenable to the treatment program provided at these facilities. The offender shall be transferred to the state pending placement in the treatment program. Any offender who has escaped from the treatment program shall be referred back to the sentencing court.

If the offender does not comply with the conditions of the treatment program, the secretary of social and health services may refer the matter to the sentencing court. The sentencing court shall commit the offender to the department of corrections to serve the balance of the term of confinement.

If the offender successfully completes the treatment program before the expiration of the term of confinement, the court may convert the balance of confinement to community supervision and may place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sex offense on or after July 1,

1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sex offense committed prior to July 1, 1987. This subsection (c) does not apply to any crime committed after July 1, 1990.

(d) Offenders convicted and sentenced for a sex offense committed prior to July 1, 1987, may, subject to available funds, request an evaluation by the department of corrections to determine whether they are amenable to treatment. If the offender is determined to be amenable to treatment, the offender may request placement in a treatment program within a correctional facility operated by the department. Placement in such

treatment program is subject to available funds.

9.94A.200 Noncompliance with condition or requirement of sentence---Procedure---Penalty

(1) If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.

(2) If an offender fails to comply with any of the requirements or conditions of a sentence the following provisions apply:

(a) The court, upon the motion of the state, or upon its own motion, shall require the offender to show cause why the offender should not be punished for the noncompliance. The court may issue a summons or a warrant of arrest for the offender's appearance;

(b) The state has the burden of showing noncompliance by a preponderance of the evidence. If the court finds that the violation has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation, and may (i) convert a term of partial confinement to total confinement, (ii) convert community service obligation to total or partial confinement, or (iii) convert monetary obligations, except restitution and the crime victim penalty assessment, to community service hours at the rate of the state minimum wage as established in RCW 49.46.020 for each hour of community service. Any time served in confinement awaiting a hearing on noncompliance shall be credited against any confinement order by the court; and

(c) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations and regarding community service obligations.

(3) Nothing in this section prohibits the filing of escape charges if appropriate.

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Mitchell Partee
P.O. Box 1205
Chehalis, WA 98532

and to:

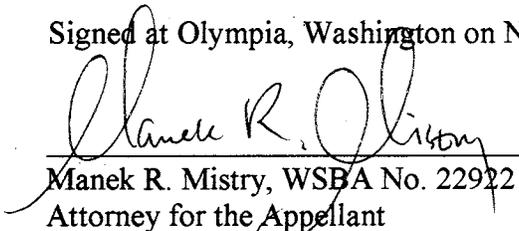
Lewis County Prosecuting Attorney
360 NE North Street
Ms: pro01
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 14, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 14, 2006.


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant