Original

NO. 35158-7-II

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

STATE OF WASHINGTON, Respondent

v.

MARQUIS ANTEZ RAMIREZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 02-1-02076-3

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The defendant in this matter was originally charged with 4 counts of Rape of a Child in the First Degree by Information filed on October 17, 2002 (CP 2). All indications are that the defendant's date of birth was September 19, 1986. After negotiations, the defendant entered into a plea of guilty and was requesting a Special Sex Offender Sentencing Alternative (SSOSA). The Statement of Defendant on Plea of Guilty to Sex Offense is dated December 4, 2002 (CP 13).

A pre-sentence investigation was performed (CP 33) and a psychological evaluation was completed as well (CP 49). As a result of that, the court sentenced the defendant under the Special Sex Offender Sentencing Alternative. The Judgment and Sentence (SSOSA) was filed on March 11, 2003 (CP 61).

In August, 2005, the defendant was brought before the court concerning violations of his SSOSA sentence. An Order Modifying Sentence was entered on August 5, 2005 (CP 90). The judge determined at that time to continue him on the SSOSA alternative but to punish him with 120 days of custody.

Apparently, the defendant did not learn anything from this experience because he was again before the court in 2006 for additional violations of his SSOSA since the time that he had been released. As a

result of this second set of violations, the court revoked his SSOSA making findings that he had been in violation of his SSOSA conditions. The Order Modifying Judgment and Sentence (CP 207) is dated July 13, 2006. That particular order was entered after extensive testimony and review of exhibits. At the end of the hearing, the court made the following observations:

> THE COURT: Okay. All right. The Court makes the following findings. One, that the defendant, Mr. Ramirez, failed to follow an opportunity to enter into and complete a drug treatment program. He failed to maintain current attendance with his sexual deviancy treatment program.
>
> That he had use of a controlled substance, to-wit, codeine, as well as marijuana, as proven by his testing.
>
> That he had been released from the county jail late October, if he got the third -- which had put him somewhere just in around the 20th (indiscernible) to the 25th of October for a release date.
>
> That he immediately proceeded to do activities in the month of November, and subsequent the month of December which continued the same risk factors that he had -- had been penalized for in July.
>
> That apparently the incarceration had no lasting or meaningful effect and did not in any way deter the continued deterioration of his method and approach to the responsibilities of one placed under a SSOSA type of sentencing.
>
> That he further had in his possession nude photographs of individuals, both male -- excuse me, not male, female. He himself is portrayed in that same folder. So he was part

> and parcel of that particular portrait, the series of photographs that were within the folder in the cell phone.
>
> When you add together all of these risk factors, it's an intolerable risk to be placed back into the community. The community is entitled under the laws of protection.
>
> The Court has been given the opportunity to permit some be placed in the sex offender program under probation. That it is to be used jealously in administering that program to ensure that the rights and protection of the community is being served as well as an opportunity for the privilege of maintaining treatment and may continue in a treatment situation within the community.
>
> He violated that in July. It had no meaningful effect upon him in November. Therefore, he forfeited all opportunity to remain within the community. That's how the program is set forth, that's how the sentencing is set forth.
>
> This is no deviation type program. He actually got an opportunity that probably should not have been given. His extreme youth probably is the reason it was given, and the effort on all to try to continue to work with him at the -- at this particular level.
>
> He has available to him at Twin Rivers a very good and thorough program if he wishes to take opportunity to be able to make a major correction. He has that opportunity, and but apparently in this last year his total conduct has deteriorated to a point that we're no longer able to supervise in a manner by which the Court expects or the Department of Corrections anticipates.
>
> (RP283, L.10 – 285, L.20)

On July 13, 2006, the court entered the Felony Judgment and Sentence (Prison – Community Placement/Community Custody). The defendant was sentenced to a term of 123 months. (CP 192).

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is that the trial court abused its discretion when it failed to take into consideration the opinion of the victim concerning the defendant's sentence.

It is undisputed that the decision to impose a SSOSA is entirely within the trial court's discretion. State v. Onefrey, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). A trial court abuses this discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. State v. Khanteechit, 101 Wn. App. 137, 139, 5 P.3d 727 (2000). However, in our situation there is nothing manifestly unreasonable or untenable about what the trial court did. It initially gave him the opportunity for a SSOSA and he failed to comply with the conditions of the program. Not only that , but the trial court had reached a middle ground at a previous occasion and not revoked the SSOSA, hoping that the defendant would change his behavior and decide to cooperate with the program. It was only after he had again failed to comply that the court felt it had no other alternative but to impose the revocation of SSOSA and send him to the Department of Corrections. The court may consider such subjective factors as problems related to a particular offender, the offender's social situation, and the impact on the community when

imposing a sentence under the SRA. State v. Osman, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). As indicated in the previous comments by the trial court, it felt that the defendant posed a risk to the community and felt obligated to revoke the SSOSA.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that the trial court violated the constitution when it denied the defendant's motion to withdraw his guilty plea arguing that the Superior Court did not have subject matter jurisdiction. The argument appears to be that the court lacked subject matter jurisdiction to take the plea in 2002 because the defendant had committed his crimes before he reached sixteen years of age.

As indicated previously in this brief, the defendant was originally charged by Information on October 17, 2002. The charges at that time were four counts of Rape of a Child in the First Degree. The charges were filed directly into the Superior Court. The defendant was sixteen years old upon date of the filing of the Information. (Defendant's dob is September 19, 1986). RCW 13.04.030(1)(e)(v) indicates that exclusive jurisdiction is in Superior Court when the juvenile is 16 or 17 years old and the alleged offense is one that is enumerated in the statute. Under that statute under

(C) is included Rape of a Child in the First Degree committed on or after July 1, 1997.

The State submits that this matter has been resolved and clarified by the Washington State Supreme Court in State v. Salavea, 151 Wn.2d 133, 86 P.3d 125 (2004). The defendant in Salavea was between 13 to 15 years of age when he raped and molested his cousins. He was charged with four counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. As the investigation took some time, the defendant was not charged until he had turned 16 years old. The defendant challenged both the timing and the jurisdiction of the filing, claiming that the matter should have been originally filed in the juvenile court. The trial court denied the defendant's motion and the Court of Appeals affirmed the trial court. The defendant appeals to the State Supreme Court which addressed the question raised in our situation: Does the age prerequisite in RCW 13.04.030(1)(e)(v) refer to the defendant's age at the time of the proceedings or the defendant's age during the commission of the crime? The Supreme Court responded to that issue as follows:

> Statutory interpretation is a question of law and we review the interpretation of RCW 13.04.030(1)(e)(v) de novo. See State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). RCW 13.04.030 allows the juvenile court exclusive jurisdiction over juvenile offenses unless certain

circumstances arise. Here, we are concerned only with RCW 13.04.030(1)(e)(v). This section automatically transfers jurisdiction to the adult court if "the juvenile is sixteen or seventeen years old and the alleged offense is" an enumerated crime. RCW 13.04.030(1)(e)(v)(A)-(E). The statutory automatic transfer is an exception to the normal decline procedures and does not require or permit a decline hearing. See RCW 13.40.110 (explaining normal decline hearing process); Boot, 130 Wn.2d at 557 (interpreting what is now RCW 13.04.030(1)(e)(v)(A) and (B)). Therefore, if the statute applies to a defendant, the juvenile court does not have discretion to assign juvenile court jurisdiction and the defendant cannot be prejudiced based on loss of juvenile court jurisdiction.

The two elements in RCW 13.04.030(1)(e)(v) that trigger automatic decline are (1) the age of the offender and (2) the nature of the offense. Here, the nature of the offense clearly falls within the statute because Salavea was charged with first degree rape of a child. RCW 13.04.030(1)(e)(v)(C). However, Salavea and amicus argue that the age element was not met because the age at the time of commission of the crime, rather than the age at the time of proceedings, is controlling. Based on this interpretation, Salavea concludes that the statute does not apply to him because he was only 13-15 years of age when he committed the crimes.

In light of previous case law, the clear wording of the statute, and legislative intent we disagree with Salavea and find the age of the individual at the time of the proceedings is the controlling age. Although the offenses occurred when Salavea was ages 13-15, the earliest the State could charge and try Salavea was after he was 16. Therefore, the age prerequisite is satisfied, the court did not have discretion to assign juvenile court jurisdiction, and Salavea fails to prove prejudice.

- State v. Salavea, 151 Wn.2d at 140-141.

The facts of our case are almost identical to those set out in Salavea. The State submits that this is controlling case law and should resolve this matter.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of March, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
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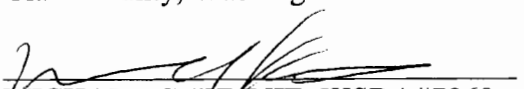
By: 
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STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On March 5, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	John Hays Attorney At Law 1402 Broadway Suite 103 Longview, WA 98632-3714
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DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: March 5, 2007.
Place: Vancouver, Washington.