

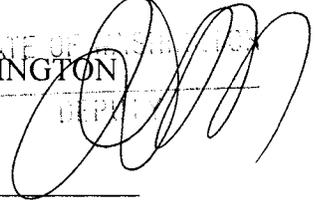
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COURT OF APPEALS
DIVISION II

NO. 36999-1-II

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

STATE OF WASHINGTON
BY _____
DEPUTY



STATE OF WASHINGTON, Respondent

v.

DON WESLEY WINTON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02237-8

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACT

For the most part, the State accepts the statement of facts as set forth by the appellant in his brief. Because of the nature of the issues, additional information will be supplied in the argument section of this brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant in this appeal deal with his sentencing for two counts of Child Molestation in the First Degree and one count of Child Molestation in the Third Degree as charged in an Amended Information. The claim is that the trial court considered non charged “victims” in violation of a real facts doctrine and that the trial court abused its discretion in not imposing a SSOSA sentence on the defendant.

In the Designation of Clerks Papers presented by the appellant, he does not include a copy of the Amended Information, the Statement of Defendant on Plea of Guilty, or any other underlying documentation concerning the plea itself. The information that can be garnered is being

taken from the Felony Judgment and Sentence, (Prison- Community Placement/ Community Custody) (CP 35). That Judgment indicates that the Felony Judgment and Sentence was entered on October 23, 2007. The defendant had pled guilty on July 5, 2007 with a presentence investigation being ordered and evaluations being done to determine whether or not he was an appropriate SSOSA candidate.

The defendant pled guilty to Child Molestation in the First Degree under count 1 which involved dates from January 1, 1999 to August 31, 2001. He pled guilty to count 2 which was another Child Molestation in the First Degree with dates occurring from September 1, 2001 to August 7, 2004. Finally, he pled guilty in count 3 to Child Molestation in the Third Degree when we dealt with a time period from July 2, 2000 to July 1, 2002.

At the time of sentencing, the deputy prosecutor set forth some of the nature of allegations that had come to light dealing with the three counts (involving two separate victims) and the extended history with these particular children.

Mr. Farr (Deputy Prosecutor): When asked what happened, he said nothing happened to him, but his father did worry him a few times, and when asked why, he said he and his cousin, that's G.L.D., would go out on the

family boat and on at least one of these occasions his father was naked.

On another occasion he says his father sunbathed naked on the boat while he and G.L.D. were on shore, and that these events made him feel very uncomfortable.

G.L.D. had to come to this family after a terrible family situation, as noted in the presentence investigation, and they, that is, Ms. Winton and Mr. Winton, fought – to fight custody to obtain her and provide her a better life.

She was vulnerable, seeking out a family and a father figure, and the defendant was aware of that.

He would come into her bedroom when normally a father would come in to say goodnight, go into her bedrooms when the father would normally come in to say good morning, when the trust issue is the greatest, and he would abuse that trust, utilizing his position as the guardian to use the opportunity to molest her.

He would offer her money and gifts. He would bribe her. He would bribe her with not only the opportunity to do something special, like going out of town and the excitement of staying at motels, traveling, antique shows, only to lure her into the bed, to obtain pornographic videos and to abuse her.

He did the same thing to his stepdaughter, A.L.D., utilizing his position when she was small, coming into her bedroom when he had the opportunity to say goodnight to abuse her.

The defendant admits to doing most of this. He admits at least fifty times, in Dr. Johnson's report, to abusing these children. He admits that it happened in the home, at the boat, the motel. He admits taking them to nude beaches.

When talking about what he did, although he would admit these, some of these acts, and slight digital penetration and oral sex, and mutual touching, and taking her to the nude beach, he seemed to justify it by saying, "Well, I asked her first," making the child feel responsible for having to accept because he obtained permission.

Those multiple acts of abuse of family trust, of abuse of his position of authority, those multiple acts over years, G.L.D. occurring from January of '99 to August of

'04, abuse of his stepdaughter, A.L.D., for at least two years in the charged period of 7/2/02 – 0 – 2000 to 7/1/2002, were serious and they have changed these children's lives forever.

As indicated in the presentence investigation, he would offer them money and favors, exploited them, and much of this activity was prior to puberty. This is not a situation where this is normative behavior for adolescent girls, these are children.

In their statements in the presentence investigation, both of these young girls are asking Your Honor to send Mr. Winton to prison. They bear the scars of these – of this abuse and of this – these violations against them. They will bear the scars the rest of their life.

The defendant exploited them for his own personal use. He did so repeatedly. And he went from one to the other as a more vulnerable victim moved into his house.

-(RP 20, L. 20 – 23, L. 17).

The State at the time of sentencing did not recommend the use of a SOSSA resolution. (RP 25 – 26).

The Court also heard from Shelly Feld, the writer of the presentence investigation report. (RP 32). The recommendation that she was making on behalf of the Department of Corrections was for a sentence of 98 months and that the SOSSA not be used.

(Shelly Feld—PSI writer): The offense – basically Mr. Winton was – has used his position of trust as a guardian and stepfather for both victims. This is an offense that was part of an ongoing pattern of sexual abuse

for over a long period of time, multiple incidents per victim, multiple victims.

Although no force was involved, the victims reported intimidation and fear of Mr. Winton during the time of the offenses, and after.

The official reports indicate that Mr. Winton was sexually abusing victim A.L.D. while presenting himself with his wife to the court during a custody battle for G.L.D., who later became Winton's second victim.

Also, the Department of Corrections feels that the SSOSA sentence is too lenient in light of the circumstances of the offense.

-(RP 34, L. 3 – 19).

Early on in the sentencing the Court made it quite clear to the Prosecution and to the defense that it intended to make its ruling on what the defendant had pled guilty to and not necessarily any of the other matters that may have come before it:

The Court: I'm ruling on the purpose of the sentencing to a sentencing based on the crimes charged, the criminal history that he has, the impact that he has on the victims that are charged and whether or not his – the – medical – let's say not medical, but the psychological consequences that can be dealt with by treating him.

-(RP 31, L. 21 – 32, L. 2).

The Court then at the time that it pronounced sentence based its sentence on the long pattern of abuse against the named victims that the

defendant had plead guilty to abusing and the circumstances surrounding the matters that he had plead guilty to.

The Court: Mr. Winton basically destroyed his relationship with his family at the first opportunity when he first abused one of the children. It was his act that destroyed his relationship with the family and not anyone else's.

And it seemingly was conducted on for a period of time shifting from one child to the other. Difficult and almost unexplainable of what a person see in sexually molesting a six – or seven- year-old child. It bears no semblance to anything of reality and has to represent a mental condition or a desire to do something other than mere sexual exploitation.

The testing indicates that Mr. Winton has a – at the present time has little arousal in that type of a child, and at the same time, the course of conduct continued over several period of time prior to finally, let's say, stopping when it did in the summer of '06.

And whether it would have been reoccurring or not, I think the age of the child and their independence became a protection and in part so that they would not be used as against him and disclosure would somehow put his life's activities that he has been conducting over many years suddenly before the general public and his family.

Obviously the girl in writing the information down in her school book actually discovered by a teacher, which led to the issues becoming before the court through the prosecutor's office under this mandatory self-reporting, and it put in motion a lot of things, including the desire to obtain a protection and that he would be able to (indiscernible) in the community and not pose a risk, obviously seeking out a treatment situation.

In reviewing the reports, it's clear that Mr. Winton does represent a person who is amenable to treatment. Two, he does represent a type of person that has a minimal

likelihood of reoccurrence if he successfully follows the treatment requirements as suggested by his physicians who would be dealing with him in setting forth an extensive treatment program.

The question basically really comes down to the last part of this equation as to whether or not the activities are such that it would be an excessive rebuke to the children and to our community to permit a SSOSA based upon this long pattern of sexual activity.

I've tried to review in my mind similar cases, and historically where I've had a pattern of sexual abuse of more than one child over a long period of time. I've elected not to use SSOSA. I have sentenced to the Department of Institutions.

Looking at this particular case, it appears it does fit that same pattern. There is treatment available in Twin Rivers. There is programs available at Twin Rivers.

The question is because of the impact on the children, the long duration that we have experienced, I don't feel that it is justified to use that as a treatment option and not require a more severe type of sentence that the Legislature has prescribed.

-(RP 130, L. 8 – 132, L. 21).

A defendant may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the SRA or constitutional requirements. State v. Osman, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). 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 court abuses its 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).

In matters in which the trial court is vested with discretion, error is never presumed, but to be available must appear on the face of the record. State v. Van Waters, 36 Wash. 358, 361, 78 P. 897 (1904). An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990).

Finally, in determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. However, the statute does not limit the source of the information provided at sentencing. State v. Handley, 115 Wn.2d 275, 280 – 282, 796 P.2d 1266 (1990). Instead, the court may consider information from multiple sources to understand the circumstances surrounding the crimes. If the defendant believes the information is unreliable or inaccurate, he may object, at which point the trial court must either hold an evidentiary hearing or refuse to consider the information. State v. Handley, 115 Wn.2d at 282. The defendant's failure to object information presented to the court results in acknowledgment of the information for sentencing purposes. State v. Handley, 115 Wn.2d at 282.

In our situation, there is absolutely no information that the trial court considered anything other than the activities between the defendant and the two victims of his crimes. Even at the start of the sentencing hearing, the court made it clear that it was not going to consider information other than related to the defendant's activity with the victims. Likewise, the information provided by the Prosecutor and the information provided by the PSI writer provided a sufficient basis for the trial court to conclude that the SSOSA alternative was not appropriate under the circumstances. In other words, the court was not considering disputed facts and thus no evidentiary hearing was necessary. He was relying on no more information than is normally provided at the time of a sentencing as it relates specifically to the criminal activity of the defendant. He allowed the defendant to put on a number of expert witnesses to talk about his amenability to SSOSA. However, the Judge did not conclude that that would be appropriate under all of the circumstances and thus rendered his opinion contrary to the wishes of the defendant. The criminal activity that the defendant had pled guilty to with one child ran from basically January of 1999 through to August 2004. As for the other child, the activity ran from July 2000 to July 2002. It was pointed out a number of times that he was in a position of authority over these children at the time that he was committing these activities and that multiple occasions of sexual

misconduct took place between himself and these two children. The State submits that the trial court was well within its discretion to give a standard sentence range and not consider a SSOSA alternative as appropriate.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 15 day of Sept, 2008.

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