

NO. 37773-0-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JACK IRVIN SIMS,

Appellant.

STATE OF WASHINGTON
BY  DEPUTY

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FILED
COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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I. STATE'S REPOSE TO ASSIGNMENT OF ERROR

- 1. The State concedes the trial court's order banishing the defendant from Cowlitz County is not narrowly tailored to serve the compelling governmental interest of protecting the victim and the Appellate court should vacate the order and remand the matter back to the trial court to narrowly tailor the order.**
- 2. If the Appellate court vacates the order and/or remands the matter to narrowly tailor the order, the matter should also be remanded for re-sentencing as the trial court granted a Special Sex Offender Sentencing Alternative under RCW 9.94A.670 with the understanding the Defendant would not live in Cowlitz County.**

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

- 1. When a trial court uses their discretion to grant a SSOSA sentence under RCW 9.94A.670 upon a condition of banishment that is later vacated, should the matter be remanded to the trial court for reconsideration of the SSOSA sentence?**

III. STATEMENT OF THE CASE

The State agrees with the Statement of the Case given in the opening brief of the appellant Jack Irvin Sims with the following exceptions and additions:

On May 22, 2007, the Defendant went uninvited into the victim's home. CP 23. The victim (age 11) and her brother (age 10) were the only ones home and were getting ready for school. CP 23. The victim was in the shower and the Defendant went into the bathroom and asked her if she

had anything to wash her back with. CP 23. When the victim showed the Defendant a sponge over the top of the shower door, Sims opened the shower door, grabbed the sponge from the victim, and proceeded to wash the victim's back from her shoulders to midway down her back. CP 23. After Sims was finished, he left the residence and the victim immediately called her mother. CP 23.

In the Pre-Sentence Investigation Report (PSI) the Department of Corrections (DOC) spoke to the victim's father. CP 24. He told DOC the victim was "ok," but was still having issues and would shut her curtains if she saw the Defendant outside. CP 24. He also told DOC that the summer of 2007 was very difficult for the victim because after the defendant was charged, he went around "campaigning the community...saying [the victim] was lying." CP 24. The offense was difficult enough, but the insult made things worse for the victim. CP 24.

The PSI raised the concern that the victim lived within sight of the Defendant's residence and just across the street. CP 27. While the Defendant complied with the no contact order while the case was pending, he said he could see the kids playing across the street and avoided going

outside in front of his house or the street outside his front door. CP 27. He had to do this to stay away from the victim and her family. CP 27.

The PSI concluded that if the two families continued to live across the street, there would be times they would see each other. The PSI stated the Defendant could be forced to move from his long-term residence, but it would seriously impact the Defendant's family. CP 28. It might be possible for the Defendant to continue to live in the residence without further impacting the victim if he had no contact of any sort with the victim or her family and if he stopped maligning the victim's character in the Castle Rock community. CP 28. The PSI asked the Court to address the Defendant's living situation at the time of sentencing. CP 28.

DOC spoke to the Defendant for the PSI. After speaking with the Defendant, it was DOC's opinion the Defendant did not have an understanding of how his behavior affected the victim or her family. CP 29. In fact, the Defendant maintained that touching the victim's back didn't hurt her or anybody else. CP 25. He only pled guilty because he failed a lie detector test. CP 25.

The Defendant requested a SSOSA sentence. RP 21.¹ DOC attached a copy of the Defendant's psychosexual evaluation by Dr. Migneault to the PSI. When asked if his action caused the victim harm and what harm, the Defendant told Dr. Migneault that his actions had hurt the victim, but the Defendant was unable to formulate any possible harm. CP 37.

In Dr. Migneault's evaluation he expressly did not give a recommendation as to any appropriateness of punishment. CP 35. Dr. Migneault found the Defendant reticent to share his feelings and remarked that this reticence could be problematic to treatment as it could lead to the Defendant omitting important facts and circumstances. CP 40. Dr. Migneault expressed concern over the Defendant's ability to embrace treatment and likely avoidance of participation, his need to hide the truth from himself, and possibility Sims would attempt to fake understanding in treatment. CP 41-42, 45-46. In the end, Migneault found the Defendant posed a very low risk for re-offending and recommended treatment. CP 45.

¹ The record on appeal includes one volume of continuously numbered verbatim reports of the proceedings in this case held on 2/21/08, 3/27/08, 4/3/08, 4/10/08, 4/24/08, and 5/1/08, referred to herein as "RP [page #]".

On March 28, 2007, the parties appeared before Judge James Stonier for sentencing. RP 11. The State and the victim's family opposed a SSOSA sentence. RP 11-43. The victim's family asked the court to prohibit the Defendant from living across the street for the well being of the victim. RP 16. The victim's father stated the victim should be allowed to recover from the sexual assault without knowing the Defendant was right across the street, potentially watching her and knowing her every move. RP 16. He stressed the need for her to feel safe in their house, yard, and neighborhood. RP 16-17. He also reiterated his comments to DOC that the Defendant campaigned against the victim and called her a liar. RP 15-16. Defense counsel denied the Defendant ever called the victim a liar. RP 24. Counsel remarked the Defendant lived and was active in the small town of Castle Rock and he knew practically everyone in the city limits. RP 24. He opined and suspected the Defendant's supporters doubted the accusations. RP 24.

In deciding sentence, the court said there were two issues it considered troubling. RP 36. The first issue was the nature of the offense. RP 36. The court considered that in the realm of behavior the court has seen for convictions of Child Molestation in the first degree, the actions

were not as serious as other offenses. RP 36.² On the other hand, the psychosexual evaluation by Dr. Mineault was one of the weaker reports the court had seen. RP 36. The court pointed out that Dr. Mineault was not recommending SSOSA, but rather treatment. RP 36. The court was troubled that according to Dr. Mineault, the Defendant would avoid participation in treatment to avoid embarrassment, and upon the threat of exposure for his lack of understanding or comprehension, the Defendant would act as though he comprehended. RP 36.

The court stated, “the only way I would grant SSOSA, because what I have heard, is --- I don’t think this young girl should ever have to see him again in her life.” RP 37. “I will not allow him to remain in that community and grant SSOSA.” RP 37. “I don’t think she should have to see him drive by. I don’t think that she should be walking down the street and just happen to see him.” RP 37. “I am not going to leave him in the community and allow him to have SSOSA.” RP 37. “[G]iven the nature of this offense...I would grant SSOSA...[but] not if he remains in the community where she has to see him.” RP 37.

² The court made clear it did not intend to make light of the offense in saying it was not serious and pointed out the victim’s confidence in men and potential for sexuality in the future could be impacted. RP 36.

The court specifically stated the victim needed to recover from the crime. RP 37. It found the Defendant robbed the victim of something and given her a life sentence. RP 37. Given proper counseling the victim could recover, but the court didn't think this could happen if he was in the community and a neighbor. RP 37.

Defense counsel asked the court, if the court would impose a geographic condition that he not enter the city limits of Castle Rock. RP 38. The victim's family indicated this would not be sufficient and the court said it would grant a restriction that the Defendant not live in Cowlitz County. RP 38. The court said it did not want the victim living in fear she would run into the Defendant anywhere in the county. RP 38. It concluded that it would grant SSOSA only if there were arrangements that the Defendant would not live in the county. RP 40. The court said if there came a time when the victim no longer lived here, it would consider modifying the restriction. RP 40. The Court also said it would allow the Defendant to drive through the county and would allow him to respond to a summons for SSOSA related issues. RP 40, CP 55, CP 58.

III. ARGUMENT

1. THE STATE CONCEDES THE ORDER BANISHING THE DEFENDANT FROM COWLITZ COUNTY IS NOT NARROWLY TAILORED AND THE ORDER SHOULD BE VACATED AND THEN REMANDED TO THE TRIAL COURT TO TAILOR THE ORDER.

The Defendant correctly cites the case law concerning banishment orders as conditions on a judgment and sentence. The cases of *State v. Schimelpfenig*, 128 Wa.App. 224, 115 P.3d 338 (2005) and *State v. Alphonse*, 142 Wa.App. 417, 174 P.3d 684 (2008) appear to be controlling. The State concedes that based upon the limited factual record the order is not narrowly tailored and should be vacated.

Additionally like the courts in *Schimelpfenig* and *Alphonse*, the State asks that the matter be remanded so the trial court may have the opportunity to more narrowly tailor the residence restriction to satisfactorily protect the victim and prevent further reminder of the assault. *See Schimelpfenig*, 128 Wa.App. at 230.

2. THE DEFENDANT SHOULD BE RESENTENCED BECAUSE THE TRIAL COURT WAS MISTAKEN AS TO ITS SENTENCING OPTIONS AND ITS DECISION TO GRANT SSOSA RESTED UPON AN INVALID RESTRICTION.

At the time of sentencing, the trial court made abundantly clear it only granted the Defendant a SSOSA sentence on the condition he not live in Cowlitz County. RP 36-40. Because the trial court was mistaken as to its sentencing options, the matter should be remanded for re-sentencing.

A court is given broad discretion when deciding whether to grant a SSOSA sentence under RCW 9.94A.670. *See* RCW 9.94A.670 (2008), *State v. Osman*, 157 Wa.2d 474, 139 P.3d 334 (2006). A court must consider

whether the offender and the community will benefit from the use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give greater weight to the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4) (2008). "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.” *Osman*, 157 Wa.2d 474, 482. Additionally, “it may be an abuse of discretion where, in selecting one particular sentencing option, the court erroneously believes that its alternatives are limited such that it fails to consider other legally available options.” *State v. Partee*, 141 Wa.App. 355, 361-62, 170 P.3d 60 (Div 2, 2007). The State is not arguing the trial court abused its discretion. However, *Osman* and *Partee* are instructive in that when a court denies a sentencing request on an impermissible basis or misunderstands all the sentencing options, the matter is referred back for re-sentencing.

In *State v. Badger*, 64 Wa.App. 904, 907, 827 P.2d 318 (Div 3, 1992), the trial court found the defendant violated the condition of his SSOSA sentence, revoked the SSOSA and imposed the original sentence. At the time of sentencing, the trial court “expressed doubt about whether it had the option to impose up to a 60-day jail sentence (RCW 9.94A.200) in lieu of executing the original sentence (RCW 9.94A.120(7)). *Id.* at 910. However, the trial court believed it did not have this discretion and imposed the original sentence. *See id.*

The Court of Appeals held the trial court did have the option of imposing up to 60 days and not just the original sentence. *See id.* Because

the trial court believed it did not have the option, the Court of Appeals remanded the matter back to the trial court, so the trial court could exercise its discretion with all the sentencing options before it. *See id.*, *State v. Partee*, 141 Wa.App. 355, 361-65, 170 P.3d 60 (Div 2, 2007).

Additionally, in *State v. DeBello*, 92 Wa.App. 723, 728, 964 P.2d 1192 (Div 2, 1998), Division Two remanded a case for re-sentencing when a judge was unaware of a sentencing option. In *DeBello*, the trial court found the defendant violated the conditions of his sentence, and imposed a partially suspended sentence. *See DeBello*, 92 Wa.App. at 724. The State appealed and the Appellate court found the trial court did not have the discretion to impose a suspended sentence. *See id.* at 729. The defendant contended a remand would be useless because the trial court could just impose the same unsuspended time. *See id.* The Court of Appeals disagreed and remanded the matter for re-sentencing on the basis “the trial court might have ordered a different sanction had it known that it lacked the authority to suspend a portion of the confinement term.” *Id.*

In the present case, the trial court believed it could banish the Defendant from the county. RP 36-40. This order is not supported by the record nor narrowly tailored. *See supra*. The trial court agonized over

whether to grant a SSOSA sentence, only deciding to do so, if the Defendant did not remain in the county. RP 36-40. Because the court relied on an unavailable and incorrect condition for the basis of granting a SOSSA, the court may decide to impose either a different condition or different sentence.

Revised Code of Washington section 9.94A.670(4) tells the court it must give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. *See* RCW 9.94A.670(4) (2008). Additionally, a court must consider the risk the defendant would pose to the victim and community. *See id.* Lastly, a court may consider "subjective factors as problems related to a particular offender, the offender's social situation, and the impact on the community when imposing sentence." *State v. Osman*, 157 Wa.2d 474, 482, 139 P.3d 334 (2006).

At the time of sentencing, the victim's family told the court it was very difficult for the victim to see the defendant and asked that he not be allowed to live across the street. RP 16. Additionally, the question of where the defendant would live was raised in the PSI. CP 28. The court knew of the Defendant's strong ties to the community through the PSI and

his defense counsel's representation, but still chose to order the Defendant away from the community. RP 21-27, 36-40, CP 24-28. The court was very concerned with the weak psychosexual evaluation, the Defendant's potential to avoid treatment and the effect the crime had upon the victim and the community. RP 36-40. Arguably, without the ability to banish the Defendant from the county, the court may have decided not to grant a SSOSA.

V. CONCLUSION

The trial court's order banishing the Defendant from the county was done in error. The State requests this Court vacate the order and remand for re-sentencing based upon the arguments above.

Respectfully submitted this January 22, 2009.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
Respondent,)
v.) NO. 37773-0-II
) 07-1-00829-0
JACK IRVIN SIMS,) AFFIDAVIT OF MAILING
)
Appellant.)

MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on January 22, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

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2. MOTION TO SUPPLEMENT RECORD ON REVIEW
3. Affidavit of Mailing.

Michelle Sasser
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SUBSCRIBED AND SWORN to before me this 22 day of January, 2009.

Julie J. Sasser
Notary Public in and for the State
of Washington residing in Cowlitz
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