

FILED

JAN 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

NO. 29857-4-III

STATE OF WASHINGTON ,

Plaintiff/Respondent,

vs.

JERRY DANIEL SHEEHAN,

Defendant/Appellant.

RESPONDENT'S BRIEF

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FACTS

The State adopts the Defendants version of the facts in addition to the following:

On July 1, 2000, the victim's mother and the Defendant were married in Spokane, Washington. RP 1561. The victim, E. B, testified the first time she was molested was in 2004 and the last time was in 2008. RP 1562. The Defendant, during that period would drink eight to twelve (8 – 12) beers a day. RP 1564. He told her that he liked revenge and deception. RP 1576. He fought with her mother and talked about divorcing. He told her and her brother Coy that they would be white trash if they divorced. RP 1575. One of the biggest issues of the marriage was the Defendant's drinking. RP 1578.

Typically, the Defendant would massage her head as she began getting migraine headaches in the end of 2004. After the migraines began he would snap his fingers and tell her she had a headache and tell her to go to the couch so he could massage her head. RP 1581. Many of the massages turned into molestation of her private areas when they were alone. RP 1628, 1630. On many occasions he told her she could trust him. RP 1622. She felt she could not tell any adult because she was confused, embarrassed and scared. RP 1586, 1606. She was persuaded to tell police by her friend. RP 1606. Her friend's dad was a deputy sheriff,

the deputy then called her and set up a time where she would talk to police. RP 1606. She went to the sheriff's office that night and gave an initial recorded statement in November of 2009. RP 1606-7.

She later gave police a written statement and a recorded verbal interview regarding the statement in the spring of 2010. RP 1609. She described in the statement and interview, eight (8) specific incidents of sexual fondling that she could also link up with an approximated date. RP 1616-17. The Defendant was charged with five (5) counts of child molestation and one count of incest. CP 31-37. The victim testified generally about the molestation and the eight separate/specific incidents at trial. RP 1562, 1580-87, 1616-31. During the molestation the Defendant always drank Olympia beer while molesting her on the living room couch. RP 1586.

The victim was scared even after she told police since the Defendant had guns, she was also scared for her brother and her mom. RP 1537. This fear was bolstered by the fact that when she and the Defendant were alone he pointed a gun at her two (2) times. RP 1636. Apparently, he wanted her to see how the strobe light on it worked. RP 1636. She was also scared because of his constant yelling and screaming at her or her mom. RP 1570.

The Court also heard testimony from Nancy Ladwig, the Defendant's wife, at the time of the incidents. Ms. Ladwig testified that the Defendant drank excessively and was verbally abusive to her and to her children during the course of the marriage.¹ Additionally, the Court heard testimony from Coy Ladwig, the Defendant's stepson regarding Defendant's use of alcohol.² Mandy Coppage, a neighbor, also provided testimony regarding the Defendant's use of alcohol.³ Lastly, E. B., the victim in this case, testified that the Defendant drank alcohol excessively and would scream and yell at her.⁴ E. B. also testified that the Defendant would drink alcohol as he molested her.⁵ The record is replete with testimony regarding the drinking that the Defendant did and the angry behavior the exhibited toward family members in the home.⁶

¹ RP at pages 1097-1101; pages 1103-1113; pages 1116-1139; pg. 1206, lines 3-14; pages 1236-1237; pages 1305-1308; pg. 1318, lines 3-9; pg. 1321, lines 1-8; pg. 1329, lines 6-16; pg. 1333, lines 8-16; pg. 1335, lines 5-11 and lines 21-23; pg. 1336, lines 1-3.

² RP at pg. 1512, lines 8-25; pg. 1517, lines 14-25; pg. 1518, lines 1-9; pg. 1522, lines 1-4; pg. lines 2-5.

³ RP at pg. 1491, lines 19-25; pg. 1592, lines 1-3.

⁴ RP at pages, 1563-1566; pages 1571-1573; pg. 1581, lines 23-24; pg. 1586, lines 10-13; pg. 1628, lines 13-14; pg. 1637, lines 5-9; pages 1677-1678; pages 1700-1701; pg. 1706, lines 1-14; pages 1727-1728; pg. 1733, lines 11-22.

⁵ RP at pg. 1625, lines 3-4.

⁶ RP at pg. 1890, lines 17-18; pg. 1893-1894; pg. 1904, lines 10-11; pages 1939-1940; pages 2198-2199; pages 2205-2206; pg. 2219, lines 1-10.

The Defendant was convicted of Count I and Count II - Child Molestation in the Third Degree and Count III and Count IV – Child Molestation in the Third Degree and Count VI – Incest in the Second Degree. Count V was dismissed upon the State’s motion. RP 2380-81, CP 236 – 244. The jury also found beyond a reasonable doubt the Defendant abused his trust to facilitate his crime, on all five counts. CP 245 - 249

At sentencing the Honorable Judge Baker gave several reasons for imposing the exceptional sentence in addition to the jury finding of an aggravating factor. First she said the Defendant groomed her from an early age. RP 2657, CP 258. That based on the fact she was groomed at an early age the victim struggled as to whether the molestation was normal. RP 2657. The embarrassment and humiliation the victim went through since the molestation occurred in a small community. RP 2657. That the Defendant’s participation in community organization(s) was calculated in order to create an illusion that he was an upstanding citizen so if he were caught the accuser would be disbelieved. RP 2659. The judge also considered the victims(s) impact statement and how the crime affected their lives. RP 2660. The judge sentenced the Defendant to 22 years in prison and 13 years of community custody with various conditions. CP 290 - 321.

ARGUMENT

1. Was there a basis for exceptional sentence?

The appellant argues that the trial judge relied on ambiguous standards in imposing the exceptional sentence in this case since she did not rely on a substantial and compelling analysis other than an aggravating factor as found by the jury. The jury found that Defendant had abused his position of trust on all four counts to commit his felony sex offenses. CP 245-249. Abuse of trust is a substantial and compelling reason for imposing an exceptional sentence. *State v. Melhaff*, 158 Wn. 2d 363, 365, 143 P.3d 824 (2006).

An appellate court reviews an exceptional sentence under an abuse of discretion standard and will reverse only if it finds the length clearly excessive. *State v. Sao*, 156, Wn.App. 67, 80, 230 P.3d 277 (2010). An exceptional sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if in its action no reasonable judge would have taken such action. *Sao*, 156, Wn.App. at 80. In order to abuse discretion regarding an exceptional sentence the trial court must have relied on an impermissible reason or in light of the record, shock the conscience of the reviewing court. *State v. Ritchie*, 136 Wn.2d 388, 396, 894 P.2d 1308 (1995). Moreover, once a reviewing court has determined the facts support the reason(s) given for exceeding the range and that those

reasons(s) are substantial and compelling, there is often no more to say. *Ritchie*, 126, Wn.2d at 396, citing *State v. Ross*, 71 Wn.App. 556, 573, 861 P.2d 473 (1993). A trial court is under no obligation to articulate reasons for the length of an exceptional sentence. *State v. Sao*, 156, Wn.App. 67, 80, 230 P.3d 277 (2010), citing *Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995).

The purpose of the SRA is to structure not eliminate discretionary trial court decisions. *Ritchie*, 126 Wn.2d at 397. For instance, proportionality reviews (e.g. case by case comparisons), have been rejected for practical reasons. *Ritchie*, 126 Wn.2d at 396-7. In reality, the length of an exceptional sentence must have some basis in the record. *State v. Sanchez*, 69 Wn.App. 195, 208, 848 P.2d 735 rev.denied 121 Wn.2d 1031, 856 P.2d 382 (1983).

The Defendant argues that he is not urging the court to overrule *Ritchie*. But that is precisely the effect he asks for, sort of a waiver just for him. Defense for years had been asking for a jury determination of most aggravating factors and got what they wanted in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed 2d 403 (2004). Moreover, the Defendant uses pre-*Blakely* law to support his argument, but the law has substantially changed since *Blakely*. The basis for the

exceptional sentence in this case is a jury determination of abuse of trust established beyond a reasonable doubt.

However, even the pre-Blakely law still is favorable to the state in this case. The Defendant argues that the judge did not articulate any reasons for the sentence. The state contends that anything beyond the jury finding is not necessary, but the state also asserts the trial judge gave many reasons for the sentence she imposed including:

- (1) That he groomed her (victim) from an early age. RP 2657,
- (2) That based on the fact she was groomed at an early age the victim initially struggled with the fact the molestation was normal. RP 2657, 2658,
- (3) The embarrassment and humiliation the victim went through since the molestation occurred in a small community. RP 2657,
- (4) That the Defendants participation in community organizations was calculated in order to create an illusion that he was an upstanding citizen so that if he was ever

caught the accuser would be disbelieved. RP

2659,

(5) She considered the victim impact statements

and how the crime affected their lives. RP

2660.

Each and every one of the reasons articulated by the judge arguably all stem from or relate to abuse of trust. The fact of the matter is that the judge did verbally articulate substantial and compelling reasons for the imposition of the exceptional sentence in addition to the jury's determination of abuse of trust.

2. Can registration requirements exceed statutory maximums for punishment?

Persons whom have committed sex offenses must register as a sex offender. RCW 9A.44.130(1). Sex offender registration is regulatory not punishment. *State v. Ward*, 123 Wn.2d 488, 510-11, 869 P.2d 1062 (1994). A sex offender whose offense was a class B felony must register for at least 15 years after release from confinement. RCW 9A.44.130(1), RCW 9A.44.140(2).

The Defendant in this case was sentenced to a 22 year term of confinement out of a possible 35 years. The judge required the Defendant to register for 15 years. The Defendant argues that the registration

requirement is punitive, and that he cannot be required to register for 15 years, since the total of confinement of registration periods exceed 35 years. This assertion is incorrect, for example a person convicted of communication with a minor has a statutory maximum of one (1) year confinement (RCW 9.92.020). RCW 9A.44.140(1)(c) requires a person convicted of communication with a minor to register for ten (10) years, which far exceeds the statutory maximum. The same principles apply in this case since registration requirements are regulatory. Thus if the Defendant serves the full 22 years in prison he must register for 15 years even if the total confinement periods and registration periods exceed the statutory maximum of 35 years.

3. Can the Defendant possess pornography?

The State concedes that the restriction on pornography is unconstitutionally vague pursuant to the holding in *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). The State will recommend a limitation on child pornography and will research whether any software program can be implemented in order to constitutionally prohibit specific pornography on the internet. However, the State does recommend that the Department of Corrections should be allowed to search for prohibited porn either on the computer or for published material.

4. Was the length and the remaining conditions of the exceptional sentence proper?

The term of confinement and community custody cannot exceed the statutory maximum. RCW 9.94A.505(5), *State v. Hyder*, 150 Wn.App. 196, 203, 208 P.3d 32 (2009). However, a trial court can impose **exceptional** sentences of community custody. *Postsentence Review of Smith*, 139 Wn.App. 600, 601, 161 P.3d 483 (2007). For example, in *State v. Chanthabouly*, 164, Wn.App. 104, 262 P.3d 144 (2011), the defendant was convicted of Murder in the Second Degree with an aggravating factor. The standard range for community custody was 24-48 months. The trial judge imposed community custody for life. The sentence in *Chanthabouly* was upheld. When a statute authorizes community custody, a trial court may impose community custody terms longer or shorter than the amount set by statute as long as the overall sentence does not exceed the maximum term. *State v. Smith*, at 139 Wn.App. 600, 604, 161 P.3d 483(2007).

Once a trial court finds grounds for an exceptional sentence, it is not limited to imposing **conditions** that qualify as crime-related prohibitions under former RCW 9.94A.030(11). (now RCW 9.94A.030(10)), *State v. Schmeck*, 98 Wn.App. 647, 651, 990 P.2d 472 (1999) citing *State v. Guerin*, 63 Wn.App. 117, 816, P.2d 1249 (1991).

The Supreme Court held that a sentencing judge may employ an exceptional sentence to depart from the statutes ordinarily applicable to both duration and conditions of community supervision under a standard range sentence. *Guerin*, 63, Wn.App. at 120 citing *State v. Bernhard*, 108 Wn.2d 527, 741 P.2d 1 (1987) overruled on other grounds in *State v. Shove*, 113 Wn.2d 83, 776, P.2d 132 (1989). In reviewing the trial courts exceptional sentence of community supervision, the reviewing court will apply a clearly erroneous standard to determine whether the record supports the courts reasons. *Schmeck*, 98 Wn.App. at 650. The circumstance of the crime will define the natures of the conditions imposed. *Schmeck*, 98 Wn.App. at 651. Here, the trial judge imposed a term of incarceration and community custody of 35 years, total. CP 290 - 321

Here the Defendant challenges whether the court could impose a chemical dependency and mental health evaluation and follow-up with any recommended treatment. Moreover, he challenges whether the Department of Corrections can restrict the Defendant's access to the internet without software which would filter pornography. Lastly the Defendant challenges whether the Defendant can form a dating/sexual relationship without Department of Corrections approval.

For a prohibition to be crime related no causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas – Villa*, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). Whereas a defendant having been convicted of sexual assaults involving minors, the court upheld crime-related prohibitions requiring explicit consent and prior approval for sexual encounter with adults. *State v. Autry*, 136 Wn.App. 460, 468, 150 P.3d 580 (2006). The reason for such a condition is that the offender’s freedom of choosing even adult sexual partners is reasonably related to their crimes because potential romantic partners may be responsible for the safety of live-in or visiting minors. *Autry*, at 136 Wn.App. at 468. In *Autry* the Defendant was properly required to get approval of a sexual relationships/contact from Department of Corrections and a therapist. *Autry*, 136 Wn.App. at 468.

A court may impose alcohol and/or substance abuse treatment if they are crime related. *State v. Jones*, 118 Wn.App. 199, 76 P.3d 258, (2003). RCW 9.94A.505 (8) provides that “as a part of any sentence the court may impose and enforce crime related prohibitions and affirmative conditions.” Here the trial judge specifically held that the conditions set were crime related. RP 2667 However, she imposed a chemical dependency evaluation and follow-up with treatment. The courts however

must distinguish between drug and alcohol treatment. Jones, Wn.App. at 207-8. Drug usage was not established at trial thus the state will not seek a related condition. Alcohol usage was a major factor in this case in two regards: (1) in the treatment of his family, (2) he was always drinking when he molested the victim. Definitely, the use of alcohol was crime related.

As an additional condition the trial judge imposed a mental health evaluation and follow-up.

Former RCW 9.94A.505(9) (the statute in effect at the time(s) of Defendant Sheehan's offenses(s) now RCW 9.94B.080) provides: The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may

order additional evaluations at a later date if deemed appropriate.

The presentence report here specifically stated that the Defendant used fear and intimidation to control the victim (CP 267 – 279, 275) and the impact statement from his former spouse and mother of the victim stated that the Defendant was constantly drunk, controlling intimidating and very much verbally abusive (included in presentence report). CP 267 -279, 272 - 273. The trial judge specifically alluded to the conditions recommended by the presentence investigation. RP 2664-67. The specific condition was recommended by the presentence investigation. CP 267 - 279. However, the judge did not find that the Defendant was mentally ill under RCW 71.24.025.

Here the trial judge found that all the conditions she imposed were “crime related.” RP 2667. This is a step that was probably not required since the sentence was exceptional, based on the aggravating factor. (*See Schmeck*, 98 Wn.App. at 651). The record supports the following conditions at issue; (1) alcohol and evaluation and follow-up, (2) approval of dating relationships, (3) approval of dating sexual relationship(s). The imposition of a mental health evaluation and follow-up with treatment did not follow the procedure set out by RCW 9.94A.505(9), however arguably is crime related. However, the State will concede that there is no basis in

the record to restrict internet access and impose drug conditions. Alternatively the State will make the recommendation of mental health treatment and to restrict the Defendant from accessing child pornography since the sentence here is exceptional.

CONCLUSION

1. Substantial and compelling basis for exceptional sentence:

- (a) The judge was not required to justify the exceptional sentence further than the jury determination that the aggravating factor of abuse of trust existed, since the aggravating factor of abuse of trust is substantial and compelling.
- (b) Even though the trial judge was not required to establish further substantial and compelling reasons for the exceptional sentence she did so by laying out several factors which she determined were all crime related. The State concedes procedure pursuant to RCW 9.94A.505(9) was not followed, but can be imposed since the Defendant was sentenced

under exceptional circumstances as found by the jury.

2. Registration:

Registration requirements are regulatory and the 15 year requirement may exceed the statutory maximum for punishment i.e. prison and community custody.

3. Pornography:

The State concedes this issue, although will be asking for authorization to control possession, use, or access to child pornography in any form, including the internet.

4. Length of exceptional sentence:

Statutory maximum for all crimes committed is 35 years. The trial judge may impose an exceptional sentence of community custody as long as it does not exceed the maximum. The judge did not exceed her authority in imposing community custody, she imposed community custody for the duration of time the Defendant is released but did not exceed a total of 35 years.

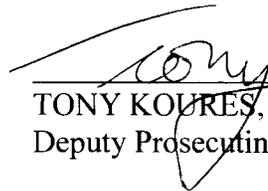
5. Additional conditions:

- (a) The record is replete with alcohol abuse by the Defendant, he was always drinking when he molested the victim and verbally abused his family, especially when he was drinking. The judge properly ordered a alcohol dependency evaluation and follow-up with recommended treatment.
- (b) The Defendant was verbally abusive and controlling to his family and thereby exhibited the possibility not only of alcohol abuse but mental health issues. Thus a mental health evaluation and follow-up with recommended treatment is crime related.
- (c) The State concedes that prohibiting internet access without software that restricts pornography was overreaching, since internet use was not an issue at this trial. However, the State seeks authorization to restrict the Defendant from accessing child pornography on the internet.

(d) Dating relationships can be restricted since they may be crime related because potential partner may be responsible for the safety of live-in or visiting minors. Thus approval of dating and/or sexual relationships is proper.

(e) Additionally, conditions need not be crime related in an exceptional sentence.

DATED this 24 day of Jan, 2012.



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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
)	No. 29857-4-III
Plaintiff,)	
)	CERTIFICATION OF SERVICE
vs.)	
)	
JERRY DANIEL SHEEHAN,)	
)	
Defendant.)	

I, Tony D. Koures, Deputy Prosecuting Attorney for Pend Oreille County, certify under penalty of perjury of the laws of the State of Washington, that I served the defense counsel on the 25th day of January, 2012, with a copy of Respondent's Brief, by depositing a true and correct copies of the same in the U.S. Mails, postage prepaid, and provided by e-mail a courtesy copy addressed to:

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