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JUN 15, 2015

Court of Appeals
Division III
State of Washington

NO. 32563-6-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PERRY ANTHONY ZUVELA, Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. Second St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Was the trial court's decision to revoke Zuvela's suspended SSOSA sentence manifestly unreasonable or based on untenable grounds?

B. ANSWER TO THE ISSUE PRESENTED BY THE ASSIGNMENTS OF ERROR

1. The trial court's decision to revoke Zuvela's suspended SSOSA sentence was not manifestly unreasonable or based on untenable grounds.

II. STATEMENT OF THE CASE

The appellant, Perry Anthony Zuvela, was convicted of eight counts: one count attempted first degree child molestation, and seven counts of third degree child molestation. CP 25. The charges were based on the following facts:

When Zuvela's son, J.Z., was 15 years old, Zuvela would go into his son's bedroom and touch and stroke his penis. This happened 10 to 15 times. CP 2. When his daughter, M.Z., was 14, he would rub her vagina. He did this about 5 times and told her he was "going to make her happy" or "make her feel good." CP 2. When his other son, D.Z., was 10 years old, Zuvela went into D.Z.'s bedroom after he had gone to sleep. CP 2. D.Z. awoke and tried to sit up but his father pushed him back onto the bed.

CP 2. D.Z. reported that his father then kissed him down the front of his body, including kissing D.Z.'s penis. CP 2.

Zuvela pled guilty on February 20, 2009. CP 25. Sentencing took place May 13, 2009. CP 25. Zuvela sought a Special Sex Offender Sentencing Alternative (SSOSA) under RCW 9.94A.670. RP 24. A SSOSA evaluation was conducted by Dr. Mark Cross.[1] In the sexual history polygraph examination, Zuvela admitted that he repeatedly performed fellatio on both of his sons and that he began sexually abusing his older son by touching his penis when his son was two years old.[2] The SSOSA evaluator did a risk assessment, finding Zuvela to be at a "moderate-low risk for sexual recidivism," but noted that "...[Zuvela's] history suggested that substance use would increase his risk level."[3]

The mother of the three children spoke at the sentencing hearing. She strongly objected to a SSOSA. RP 30-31. She also indicated that the children told her they didn't agree with it either. RP 31. She said that Zuvela blamed her for him being in jail, and said he was only admitting to the offenses in order to get out of jail. RP 30-1. She also stated, "[h]e will

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[1] Dr. Cross was also Zuvela's treatment provider.
[2] SSOSA Report page 13 of 19. The State has filed a Supplemental Designation of Clerk's Papers to include the SSOSA Report.
[3] Id.

not make it, he will violate with drugs."[4] The Community Corrections Officer who wrote the pre-sentence investigation report, CCO Munguia, declined to make a SSOSA recommendation because he did not have all the information needed to do so.[5]

The trial judge, the Honorable Judge Reukauf, had reservations about giving Zuvela a SSOSA sentence, stating "I don't know that you're a great candidate for SSOSA." RP 55. She had concerns because Zuvela minimized his crimes and disclosed certain facts only when it came time for the polygraph. RP 54-5. But she gave Zuvela the opportunity, saying "...I think it will prove itself out very quickly..." RP 56. She warned Zuvela, "...if you mess this up, Mr. Zuvela, then you will have this SSOSA program revoked." RP 67.

Based on 17 prior felonies, Zuvela's offender score was more than 9 points for each crime. CP 26. Zuvela was sentenced to life with a minimum term of 120 months on the attempted first degree child molestation count and 60 months on each of the other counts. CP 27. As

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[4] Pre-Sentence Investigation page 13. The State has filed a Supplemental Designation of Clerk's Papers to include the Pre-Sentence Investigation.
[5] Pre-Sentence Investigation pages 6, 13.

part of the SSOSA, the sentence was suspended based on numerous conditions.[6] CP 27-8.

On January 21, 2010, the State filed a Petition for Order Revoking SSOSA and Motion to Impose Standard Range Sentence, hereinafter "Revocation Petition." CP 39. It was alleged that Zuvela failed to maintain law-abiding behavior on January 13, 2010 by shoplifting and carrying an illegal switchblade knife. CP 41. A revocation hearing was held and Zuvela stipulated to the violations. RP 77. The State and CCO Munguia were particularly concerned about the illegal switchblade because of Zuvela's prior First Degree Robbery conviction involving a knife. CP 91, 95. At the hearing, CCO Munguia noted that Zuvela shoplifted in November as well. RP 95.

Zuvela's treatment provider, Dr. Cross, noted that "[w]ith Mr. Zuvela's extensive criminal history and substance abuse history, he was advised when he began treatment that any violations would result in termination."[7] CP 43, 94. Dr. Cross sent a letter to CCO Munguia stating the following:

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[6] The numerous sentence conditions included that he "maintain law-abiding behavior and commit no new crimes," and "not unlawfully possess or consume any controlled substances except pursuant to a lawfully issued prescription." CP 28.
[7] Dr. Cross also conducted the SSOSA evaluation of Zuvela.

> Mr. Zuvela has a lengthy history of antisocial, criminal behavior and he appears unwilling to change the behavior pattern. Mr. Zuvela is presenting increased risk to the community. He is not considered to be safe in the community, is not amenable to sexual offender treatment. Mr. Zuvela's SSOSA treatment is terminated and…a revocation of the SSOSA is recommended.

RP 90. Despite the State's motion to revoke his SSOSA, the court gave Zuvela a second chance. RP 106, 109. The Honorable Judge Reukauf explained that there would be no more chances after that. RP 106-7. The court noted the objections of the State and the Department of Corrections. RP 109.

A second Revocation Petition was filed on August 23, 2013. CP 60. The allegation included Zuvela's use of methamphetamine on August 22. CP 61. The petition was amended on September 4 to include two more violations regarding using methamphetamine on August 29 and from September 6 to September 10. CP 63-5. Zuvela stipulated to the violations, RP 123, and was allowed to remain on the SSOSA. CP 70. He was ordered to complete inpatient treatment. CP 70.

A third Revocation Petition was filed on December 5, 2014. CP 71. The allegations were failing to report a change of address, failure to attend treatment, and failure to maintain law-abiding behavior. CP 72. A

hearing was set for December 17, 2013. RP 139. An initial hearing was scheduled for January 8, 2014, but was continued a few times until March 7, 2014. RP 141.

At the hearing, CCO Munguia recommended revocation of Zuvela's SSOSA. RP 142. Numerous violations were testified to at the hearing, including the fact that Munguia was missing sex offender treatment due to his use of methamphetamine. RP 143, 169. The State also noted that Zuvela had failed to register as a sex offender as required by the sheriff's department. RP 171. CCO Munguia also testified that Zuvela made comments about wanting to kill his father. RP 155. CCO Munguia testified that based on Zuvela's history and violations, there was no other choice short of revocation. CP 145. Zuvela's treatment provider, Dr. Cross, also testified that Zuvela's continued drug use and avoiding participation would make him no longer amenable to treatment. RP 164.

The trial judge, the Honorable Judge McCarthy, found the violations committed but released Zuvela from custody with a court date of May 9. RP 181. Zuvela was told by the court, "...if you screw up in any regard, okay, regardless of how minor or—I'm going to revoke your

SSOSA." RP 181. In the order setting the May 9 date, the court wrote, "Final decision on sanction is reserved until then."[8]

The fourth and last Revocation Petition was filed on April 11, 2014. CP 74. The allegation involved Zuvela using methamphetamine on April 7. CP 75. A hearing was heard on this petition on May 16, 2014. CCO Munguia testified that Zuvela had a positive urinalysis test and had admitted to using methamphetamine. RP 191-2. CCO Munguia also discussed the facts surrounding Zuvela getting a prescription for narcotics:

> When [Zuvela] was prescribed the narcotic medication by his doctor, and he reported to my office, that was in March of this year, he – somehow half of the medication was gone within two to three days. I asked him what happened to them, and he said, Well, I was sleeping with some – I was staying at someone's house, and they went through my bag and took my pills. Then he said that he put all the narcotic medication into a jar of water and diluted them. Nobody observed this at all whatsoever. So I don't even know what happened to those medications at all.

RP 193. CCO Munguia again recommended revocation of the SSOSA and the trial court agreed this time. RP 194, 199. The court pointed to Zuvela's chronic abuse of controlled substances that was driving his entire

[8] March 7, 2014 Order for Release from Custody and Scheduling Hearing. The State has filed a Supplemental Designation of Clerk's Papers to include this order.

life. RP 198. An order revoking the SSOSA sentence was filed on May 30, 2014. CP 77.

This appeal followed.

III. ARGUMENT

A. STANDARD OF REVIEW

A trial court's decision to revoke a SSOSA sentence is reviewed for abuse of discretion. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); see also State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court).

B. THE TRIAL COURT'S DECISION TO REVOKE ZUVELA'S SUSPENDED SENTENCE WAS NOT MANIFESTLY UNREASONABLE OR BASED ON UNTENABLE GROUNDS.

A court may revoke an offender's SSOSA at any time if it is reasonably satisfied the offender violated a condition of the suspended sentence. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); RCW 9.94A.670(11). Here, it is undisputed that Zuvela violated numerous

conditions of his suspended sentence. Therefore, the trial court had the discretion to revoke the sentence.

The fact that there was discretion in making this decision was amply demonstrated by all of the "second chances" Zuvela received while on the program. At nearly every stage, Zuvela was told that there would no more chances and that he would go to prison. However, the trial court continued to allow him on the SSOSA program to his benefit. Finally, after the State's fourth Revocation Petition, Zuvela was revoked, and only after he was given another month to prove himself.

The trial court could have revoked him after the first petition for revocation was filed. Or after the second or third petition. However, the court worked with Zuvela time after time. As pointed out by the trial judge, Zuvela is a chronic abuser of controlled substances. This resulted in him missing sex offender treatment sessions. In addition, as Dr. Cross testified, methamphetamine use "stimulates like cocaine the sexual areas of the brain, causes people to become more hypersexual, more sexually preoccupied, more likely to involve in compulsive behaviors, doing things repeatedly despite whatever else is going on." RP 160. Without a handle on his chronic drug abuse, Zuvela became unamenable to sex offender treatment and a safety risk to the community.

Given the number and type of violations, it can hardly be said that the trial court, after the fourth Revocation Petition, acted manifestly unreasonable or based its decision on untenable grounds. Any one violation could have been a sufficient basis for revocation. See RCW 9.94A.670 (11).[9] The trial judge clearly understood that he had the discretion to keep Zuvela on the program or to revoke him. He did not abuse his discretion in revoking Zuvela only after all attempts to get him on the right track had failed.

Zuvela argues on appeal that the trial judge failed to exercise discretion because he told Zuvela, "if you screw up....I'm going to revoke your SSOSA." (Appellant's Brief at 12). However on May 16, the trial judge still heard arguments from both the State and from the defense. RP 189-98. The trial judge also heard from CCO Munguia. RP 191-4. CCO Munguia's discussed his recommendation:

> ...this being his third, fourth time using drugs and being in jail because of this, it's a – looks like it's a continuing – a [continuous] pattern. And I'm asking the Court to revoke his SSOSA...

[9] 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. RCW 9.94A.670.

RP 194. The judge also heard from Zuvela himself. RP 197-8. The judge also indicated that he appreciated Zuvela's request for one more chance at the program. RP 199.

Nothing in the record indicates that the trial judge felt he had no discretion to order anything other than a revocation. If the judge truly felt that he had no discretion, he would not have taken arguments and testimony on the issue of whether to revoke. The court's ability to exercise discretion was also demonstrated at the prior hearing on April 7 when he went against numerous recommendations to revoke and released Zuvela from custody.

Appellant also argues that the violations did not involve any potential victims and were not sexual in nature. The court's ability to revoke a SSOSA, however, is not limited to violations of a sexual nature or those involving potential victims. Appellant also compares the facts in other published cases to Zuvela's case in support of his argument that the revocation here was unreasonable because "the public safety concerns…are incomparable." (Appellant's brief at 15). However, this isn't the standard for assessing whether a decision is "manifestly unreasonable." It is not surprising that Appellant has found two cases with more extensive or egregious violation history. However, based on

two cases, one cannot say that the revocation here, based on an entirely different set of facts, was manifestly unreasonable.

In sum, this is not a case where the trial judge categorically refused to consider a sentence or refused to exercise discretion at all. It is a case where a chronic drug abuser was given numerous chances at a SSOSA sentence, despite his 17 prior felonies and despite the objection of his victims. Zuvela was extremely fortunate to have had the chance to participate in the SSOSA program, but he repeatedly violated the conditions of his sentence. Even so, the trial court went above and beyond to give Zuvela the benefit of the doubt. The ultimate decision to revoke him from the program can hardly be described as an abuse of discretion.

IV. CONCLUSION

In sum, the court did not abuse its discretion when it revoked Zuvela's SSOSA and reinstated his suspended sentence. The trial court's decision should be affirmed.

Respectfully submitted this 15th day of June, 2015,

TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on June 15, 2015, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. Mick Woynarowski at wapofficemail@washapp.org.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of June, 2015 at Yakima, Washington.

TAMARA A. HANLON,
WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us