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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 37773-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JACK IRVIN SIMS,

Petitioner.

PETITION FOR REVIEW

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FILED

OCT 22 2009

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

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A. *IDENTITY OF PETITIONER*

JACK IRVIN SIMS asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of that part of the published decision of the Court of Appeals, Division II, in which it vacated the defendant's Sex Offender Special Sentencing Alternative (SOSSA) sentence under RCW 9.94A.670 instead of vacating the unconstitutional community custody conditions the trial court imposed and the defendant appealed.

C. *ISSUES PRESENTED FOR REVIEW*

I. IN A CASE IN WHICH THE DEFENDANT APPEALED SOLELY FROM THE IMPOSITION OF AN UNCONSTITUTIONAL COMMUNITY CUSTODY CONDITION IMPOSED AS PART OF A SOSSA SENTENCE, AND IN WHICH THE STATE DID NOT CROSS-APPEAL, DOES THE COURT OF APPEALS IMPERMISSIBLY CHILL THE DEFENDANT'S RIGHT TO APPELLATE REVIEW AND DUE PROCESS BY VACATING THE SOSSA SENTENCE IN ITS ENTIRETY?

II. UNDER RAP 2.4(a), DOES THE COURT OF APPEALS HAVE THE AUTHORITY TO VACATE A SOSSA SENTENCE WHEN THE DEFENDANT APPEALED SOLELY FROM THE IMPOSITION OF AN UNCONSTITUTIONAL COMMUNITY CUSTODY CONDITION AND THE STATE DID NOT CROSS-APPEAL?

D. *STATEMENT OF THE CASE*

In the case at bar, the trial court sentenced the defendant on a charge of first degree child molestation to life in prison with a minimum mandatory

time of 60 months to serve before first being considered for release, with that sentence suspended under the SOSSA option. CP 65-78. As part of the conditions of the judgment and sentence, the court banished the defendant from Cowlitz County and the City of Castle Rock. CP 55. That order within the judgment and sentence stated:

Other Conditions: Do not reside in Cowlitz County, do not enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation. Do not enter the city limits of Castle Rock.

CP 55.

Under paragraph 4.5(d), the court set the term of the suspended sentence, ordering as follows.

- (d) **Suspension of Sentence.** The court suspends execution of this sentence; and places the defendant in community custody under the charge of DOC for the length of the suspended sentence, the length of the maximum term sentence under RCW 9.94A.712, or three years, whichever is greater.

CP 54.

Since, in this case, the court sentenced the defendant under RCW 9.94A.712 on a Class A felony with a maximum term of life, the conditions of the suspended sentence, including the banishment order, will run for the defendant's entire lifetime. CP 54.

The trial court later reiterated the banishment order by entering a separate "Order on Additional Conditions," which state as follows:

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The defendant shall not reside in Cowlitz County, not to enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation, and shall not enter the city limits of Castle Rock, per the order of the court on APRIL, 24, 2008.

CP 79.

Following imposition of this sentence, the defendant filed timely notice of appeal, arguing that the trial court violated the defendant's right to due process and equal protection under United States Constitution, Fifth and Fourteenth Amendments when it entered this banishment order. *See* Opening Brief of Appellant. Appellant did not assign error to the trial court's imposition of the SOSSA sentence, and the state did not cross-appeal the trial court's imposition of the SOSSA sentence. CP 80.

The state responded in the Court of Appeals by conceding the error, and inviting this court to either (1) remand the case so the trial court can modify the banishment order, or (2) vacate the SOSSA sentence and remand for a new sentencing hearing. *See* Brief of Respondent. Following oral argument, the Court of Appeals entered the following order for supplemental briefing.

IT IS ORDERED that the appellant Sims shall file a supplemental brief specifically addressing whether, if we vacate the Order On Additional Conditions prohibiting Sims from entering Cowlitz County, we should remand this matter to the trial court for broader resentencing, including reconsideration of the Special Sex Offender Sentencing Alternative under RCW 9.94A.670.

Order for Supplemental Briefing.

Appellant responded to the order and filed a supplemental brief arguing that (1) under RAP 2.4(a), the state's failure to cross-appeal the trial court's discretionary decision to grant a SOSSA sentence precluded review of that decision, and (2) that the revocation of a SOSSA sentence upon a defendant's successful constitutional challenge to one of the conditions of the SOSSA sentence would impermissibly chill the defendant's right to appeal under Washington Constitution, Article 1, § 22, and would impermissibly chill the right to seek enforcement of the constitutional guarantees the improper condition violated. *See* Supplemental Brief of Appellant.

On September 22, 2009, the Court of Appeals, Division II, filed its published opinion in this case, ordering the defendant's SOSSA sentence vacated, and remanding the case to the trial court for a new sentencing hearing in which the trial court was free to refuse the new imposition of a SOSSA sentence.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case at bar presents a significant question of constitutional magnitude that should be reviewed by this court under RAP 13.4(b)(3), because the Court of Appeals' decision vacating the SOSSA sentence based upon the defendant's successful appeal from the imposition of an unconstitutional banishment order impermissibly chills the defendant's right to appeal under Washington Constitution, Article 1, § 22, and impermissibly

chills the defendant's right to seek enforcement of the constitutional guarantees the improper condition violated. In addition, Under RAP 13.4(b)(4), the case at bar involves an issue of substantial public interest that should be determined by this court. The following sets out these arguments.

A criminal defendant does not have a federal constitutional right to make post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, each state is free to create a right to appeal either in its constitution or by statute, and once a state acts to create such a right, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington, a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1,

§ 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

The remedy the Court of Appeals imposed in this case upon its finding that the trial court's banishment order violated the defendant's right under United States Constitution, Fifth and Fourteenth Amendments, has the direct effect of impinging upon the defendant's constitutional right to appeal his sentence and his constitutional right to judicial review of sentencing conditions that violate other constitutional guarantees (in this case the right to freedom of movement as found in United States Constitution, Fifth and Fourteenth Amendments). The reason is that a trial court's decision to grant

a defendant a SOSSA sentence under RCW 9.94A.670 constitutes a significant benefit to a criminal defendant, particularly a defendant subject to the extremely harsh sentencing provisions found in RCW 9.94A.712, as was the defendant in the case at bar.

The granting of a SOSSA sentence is such a significant benefit to a defendant that counsel for appellant is unaware of any reported or unreported appellate cases in which a defendant contested the trial court's decision to grant a SOSSA sentence. This is not unusual as counsel is unaware of any case in which the trial court granted a SOSSA sentence without the defendant having first requested its imposition after having obtained a psycho-sexual evaluation. This is what happened in the case at bar, and under no circumstances did the defendant herein seek a new sentencing hearing to reconsider the imposition of the SOSSA sentence. As the defendant stated to the Court of Appeals, he would rather abandon his appeal rather than go to a new sentencing hearing to reconsider the original decision to impose a SOSSA sentence in spite of the fact that the trial court imposed an obviously unconstitutional banishment order.

The Court of Appeals' published holding that the defendant's act of contesting the validity of a particular condition now permits the Court of Appeals to revoke the SOSSA sentence has the effect of eliminating all appeals from the conditions imposed in the SOSSA sentence because with

this written decision in place, no rational defendant will ever take the chance of having his or her SOSSA sentence revoked through the successful appeal of an obviously unconstitutional SOSSA condition. This published decision of the Court of Appeals gives sentencing judges *carte blanche* to impose any condition the court desires regardless of its constitutional infirmity, knowing that the defendant would never appeal the unconstitutional condition as long as the trial court states that but for the authority to impose that unconstitutional condition the court would not have authorized the SOSSA sentence.

For example, a judge contemplating a defendant's SOSSA sentence request might well agree to that option if and only if the defendant submits to surgical sterilization and agrees to not appeal from the imposition of that condition. Similarly, a court might grant a SOSSA request if and only if a defendant agrees to have the words "sex offender" tattooed prominently upon his forehead, and agrees to not appeal from that condition. Each of these conditions (and the agreement to not appeal from them) would violate both the state and federal constitutions. However, few if any defendants, particularly those faced with a sentence under RCW 9.94A.712 on a Class A felony, would refuse to submit to the condition and would then appeal if success in that appeal would have the effect of revoking the SOSSA sentence. Thus, the Court of Appeals published decision vacating the SOSSA sentence

based solely upon the defendant's successful appeal from the imposition of an unconstitutional sentencing condition significantly chills a defendant's exercise of the constitutional right to appeal and the right to contest other unconstitutional violations by the trial court.

The validity of this argument is illustrated by the fact that in the case at bar, the defendant asked the Court of Appeals for permission to withdraw his appeal, if the result of the appeal was going to be the vacation of the SOSSA sentence and a remand to the trial court for a new sentencing hearing in which the trial court was free to deny the request for the SOSSA. Although the defendant's contingent request to withdraw his appeal was unusual, it was prompted by the fact that under the Rules for Appellate Procedure, there was no way for the defendant to even anticipate that such a remedy would be available to the court. The following sets out this argument.

Under the RAP 2.4(a), a respondent in an appeal may only seek affirmative relief from those portions of a trial court's final decision that the respondent designates in a timely notice of appeal. Subsection (a) of this rule states as follows:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. *The appellate court*

will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

RAP 2.4(a) (emphasis added).

For example, in *State v. Aumick*, 73 Wn.App. 379, 869 P.2d 421 (1994), a defendant convicted of first degree burglary and attempted first degree rape appealed those convictions arguing that the trial court had erred when it (1) refused to instruct the jury that fourth degree assault was a lesser included offense to attempted first degree rape, and (2) failed to inform the jury that an attempt is not proven unless the state proves both a criminal intent as well as the existence of a substantial step toward the completion of a criminal act. In its Brief of Respondent, the state countered both of these arguments. The state also claimed that the trial court had erred when it instructed the jury on voluntary intoxication, even though the state did not file a notice of cross-appeal on this latter issue.

Ultimately, the trial court agreed with the appellant's argument and remanded the case for a new trial. However, under RAP 2.4(a), the court refused to consider the state's argument that the trial court had erred when it gave an instruction on voluntary intoxication because this argument requested affirmative relief for the state without the state first filing a notice of cross-appeal. The court held: "Because the State has failed to file a notice of cross

appeal, we need not address whether the court erred in instructing the jury on voluntary intoxication. RAP 2.4(a).” *State v. Aumick*, 73 Wn.App at 385.

Under RCW 9.94A.670, the decision whether or not to grant a SSOSA sentence lies within the sound discretion of the trial court. *State v. Onefrey*, 119 Wn.2d 572, 835 P.2d 213 (1992). In the case at bar, the state did not appeal the trial court’s imposition of the SOSSA sentence. Rather, appellant in this case merely appealed one of the conditions the trial court imposed as part of community custody and as part of the conditions of the SOSSA sentence. Indeed, a close look at the opening brief of appellant reveals that the defense did not even contest the court’s right to impose reasonable conditions concerning his movement. Rather, appellant merely contested the trial court’s right under the constitution to enter a general banishment order.

Thus, the only issue properly before the Court of Appeals was the validity of a single condition of the SOSSA sentence and community custody, not the validity of the trial court’s decision to grant the SOSSA sentence. The state’s argument that the court of appeals had the authority to remand the case to the trial court to more narrowly tailor the banishment order so as to bring it within the limitations that the Fifth and Fourteenth Amendments place on such governmental action was well taken, particularly in the light of the case cited by both appellant and the state. However, the state’s further request that the Court of Appeals reverse the trial court’s decision to grant

a SOSSA sentence was unmistakably a request for affirmative relief. Thus, under RAP 2.4(a), the Court of Appeals should not have considered this request because the state did not file a notice of cross-appeal to put this issue before the court. In addition, since the state did not cross-appeal, there was no way for the appellant to anticipate that the Court of Appeals would consider reversing a SOSSA sentence.

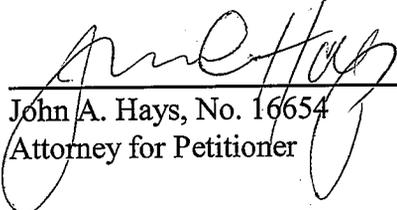
In effect, the Court of Appeals has decided to punish the defendant for seeking to enforce those rights guaranteed under both the United States Constitution and the Washington Constitution, and for his action in taking an appeal in the first place. Allowing the opinion of the Court of Appeals to stand in this case is, on the one hand, an open invitation to trial courts to ignore the limitations of the constitution when imposing SOSSA sentences, provided they simply state on the record that but for the imposition of the unconstitutional decision the court would not have granted the SOSSA sentence. On the other hand, allowing the opinion of the Court of Appeals to stand will impermissibly chill the right to appeal under Washington Constitution, Article 1, § 22, for any defendant given a SOSSA sentence at the trial level. Defendant respectfully argues that these are significant constitutional issues, and significant issues of public interest for which this court should review.

F. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeals.

Dated this 16th day of October, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

. . .

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RAP 2.4(a)

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

APR 23 9:23 AM
STATE OF WASHINGTON
BY _____

DIVISION II

No. 37773-0-II

STATE OF WASHINGTON,

Respondent,

v.

JACK IRVIN SIMS,

Appellant.

PUBLISHED OPINION

HUNT, J. — Jack Sims appeals the trial court’s sentencing order prohibiting him from entering or residing in Cowlitz County. He argues that his banishment from Cowlitz County violates his right to due process and equal protection under the United States Constitution Fifth and Fourteenth Amendments.¹ The State concedes this error but argues that we should remand this matter to the trial court for broader resentencing and reconsideration of the trial court’s suspension of the confinement portion of Sims’ sentence under the Special Sex Offender Sentencing Alternative (SSOSA).² We accept the State’s concession, vacate Sims’ sentence, and remand to the trial court for resentencing.

FACTS

I. MOLESTATION

On May 22, 2007, 11-year-old EM and her 10-year-old brother, SM, were home alone getting ready for school. While EM was taking a shower, Jack Sims, a neighbor and family

¹ U.S. CONST. amend. V; U.S. CONST. amend. XIV

² RCW 9.94A.670.

friend, entered their house and went into EM's bathroom. Sims asked EM if she needed help. Although EM declined assistance, Sims opened the shower door, took her sponge, washed her back, and then left.

EM immediately told her parents about the incident, and her father contacted the police. SM told the police that he had noticed Sims in the house that morning and had seen him enter EM's bathroom. The police interviewed Sims on May 29. Sims denied both having entered EM's home and having touched EM while she showered.

II. GUILTY PLEA AND SENTENCING

The State charged Sims with one count of first degree child molestation and, in the alternative, one count of fourth degree assault with sexual motivation. On February 21, 2008, Sims pleaded guilty to first degree child molestation.³ The trial court accepted Sims' plea, placed Sims in the custody of the Cowlitz County Corrections Department, and ordered the Department of Corrections (DOC) to arrange a mandatory pre-sentence information report.

Sims underwent a psychosexual evaluation with a state-certified sex offender treatment provider. The treatment provider determined that Sims would be amenable to treatment and a "very low risk" for recidivism if the trial court allowed him to remain within the community, under DOC supervision, while participating in a sex offender treatment program. Based on Sims' psychosexual evaluation, in its pre-sentence investigation report, the DOC recommended (1) imposing a life sentence with 51 months of mandatory minimum confinement before

³ The trial court dismissed the fourth degree assault charge.

consideration for release; and (2) suspending the confinement portion of the sentence under the SSOSA option, with the condition that Sims serve nine months in jail.

At sentencing, the State recommended incarceration for 60 months to life, community custody for life, a sex offender evaluation, a requirement that Sims follow all treatment, a no-contact order, costs, and restitution. The State argued against a SSOSA.⁴ Sims contended that he presented a minimal risk of reoffending and requested a SSOSA.

The trial court expressed concerns about giving Sims a SSOSA, noting that it did not “think this young girl should ever have to see him again in her life. And [the trial court would] not allow him to remain in that community and grant SSOSA.” Report of proceedings (RP) at

37. The following relevant dialogue occurred at sentencing:

DEFENSE COUNSEL: I take it the Court would impose a geographic condition that he not enter the city limits of Castle Rock while she is residing there.

THE STATE: Your honor, I’m not sure that will take care of the issue. The family is indicating no and I am not familiar . . . with Castle Rock to be able to say one way or another. I do agree that the issue where he will live will create the biggest problem. And I think it can even go so far as Cowlitz County.

TRIAL COURT: I’ll grant that. Can’t live in Cowlitz County. I know it is a problem but you know, it’s a problem of his making. She shouldn’t have to—she should be free to go anywhere in this county, go to the mall, go anywhere in this County and not see him. And not worry about seeing him. Otherwise, I can’t grant SSOSA in this case because the treatment is fine in terms of addressing some very deep, serious issues for him. I will give 180 days in jail but if he resides in Cowlitz County she’s got a sentence.

RP at 38.

⁴ EM’s family asked the trial court not to impose a SSOSA, while Sims’ family requested a SSOSA.

The trial court sentenced Sims to life in prison, with 60 months of minimum mandatory confinement before consideration for release, but it suspended this sentence in imposing a SSOSA. The trial court also entered an Order on Additional Conditions that provided:

IT IS HEREBY ORDERED:

The Defendant shall not to [sic] reside in Cowlitz County, not to [sic] enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation, and shall not enter the city limits of Castle Rock, per the order of the court on April 24, 2008.^[5]

Clerk's Papers (CP) at 55. Sims did not object to these additional conditions.

Under the suspended SSOSA sentence's terms, Sims must remain under community custody for the greatest of (1) the length of the suspended sentence, (2) the length of the maximum term sentence under RCW 9.94A.712, or (3) three years. Because the trial court sentenced Sims under RCW 9.94A.712 for a Class A felony with a maximum term of life, Sims will remain under community custody for his entire life.

Sims appeals his sentence, challenging in particular the above SSOSA conditions, which he contends constitutes banishment from Cowlitz County for life.

ANALYSIS

I. BANISHMENT

Sims argues that that trial court's order banishing him from Cowlitz County and the City of Castle Rock for life violates his rights to due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution. Conceding that the trial court did not

⁵ A bench order further clarified the conditions of Sims' banishment, allowing "the defendant to enter Cowlitz County for the purposes of responding to court summons for SSOSA related probation violations." Supplemental Clerk's Papers (Supp. CP at 1).

narrowly tailor the banishment order, the State asks us to vacate Sims' sentence and to remand to the trial court for resentencing. We agree.

Banishment orders encroach on an individual's constitutional right to travel, which includes the right to travel within a state. *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005) (citing *Shapiro v. Thompson*, 394 U.S. 618, 630-31, 634, 89 S. Ct. 1332, 22 L. Ed. 2d 600 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct 1347, 39 L. Ed. 2d 662 (1974)). Because of these constitutional implications, courts apply strict scrutiny in reviewing a banishment order. *Thompson*, 394 U.S. at 634. To survive such review, the trial court must narrowly tailor the order to serve a compelling governmental interest.⁶ *Schimelpfenig*, 128 Wn. App. at 226; *see also State v. Alphonse*, 147 Wn. App. 891, 197 P.3d 1211 (2008) (Division One holding that a banishment order prohibiting a defendant from entering a city, except for legal or judicial reasons, impermissibly impinged upon his right to travel within the state), *review denied*, 166 Wn.2d 1011 (2009).

In *Schimelpfenig*, we held that a lifetime banishment order prohibiting the defendant from residing in Grays Harbor County, to protect the mental well-being of a murdered victim's family, unconstitutionally impinged upon the defendant's right to travel. 128 Wn. App. at 224. Because *Schimelpfenig's* banishment order failed the strict scrutiny test, we vacated it. *Id.* at 230.

⁶ *Schimelpfenig* and *Alphonse* do not hold that a banishment order created to prevent a victim or her family from being reminded of the defendant constitutes a compelling government interest. *Schimelpfenig* notes that a compelling state interest is "one aimed at preventing an individual from becoming the victim of threatened crime." *Schimelpfenig*, 128 Wn. App. at 229. But because the order here is not narrowly tailored and the State concedes the error, we do not address whether the order fulfilled a compelling government interest.

Nevertheless, we noted that a more narrowly-tailored geographical restriction could adequately protect the victim's family. *Id.*

In *Alphonse*, Division One of our court vacated a banishment order prohibiting the defendant from entering the city of Everett after he made repeated harassing phone calls to Everett police officers. 147 Wn. App. at 911. The court held that although the order served a compelling government interest, "less restrictive means were available to serve the State's interest, and the restriction was unrelated to rehabilitation." *Id.* at 910. The court vacated the banishment order and remanded to the trial court with instructions about how to tailor the order more narrowly.⁷ *Id.* at 911.

Similarly, Sims' banishment order is not narrowly tailored. The trial court prohibited Sims from entering Cowlitz County to protect the mental well-being of EM and her family. As in *Schimelpfenig*, a more narrowly-tailored geographical restriction might adequately protect EM. On remand, the trial court could follow the suggestions listed in *Alphonse* to modify the no-contact order, such as entering an order restricting Sims' contact with EM and her family. Because a more narrowly tailored geographical restriction could potentially protect EM and her family, we accept the State's concession and remand this matter to the trial court for resentencing. If the trial court decides to reimpose a SSOSA, it may include more narrowly-tailored geographical restrictions.

⁷ Division One noted that the trial court could (1) restrict the defendant's contact with the victim and his family; (2) require the defendant to stay a specified distance from the victim; and (3) restrict any uninitiated contact with any member of the city's police force, absent emergency circumstances. *Alphonse*, 147 Wn. App. at 911.

II. RESENTENCING

The State asks us to remand to the trial court for complete resentencing, including reconsideration of Sims' SSOSA. Sims argues that we should not remand for broad resentencing because (1) the SSOSA portion of his sentence is not properly before us,⁸ and (2) allowing the trial court to reconsider whether to grant a SSOSA will impermissibly chill criminal appeals. Although Sims' "chilling appeals" argument is compelling, we agree with the State that, under these narrow circumstances, the trial court should be allowed to reconsider the SSOSA on remand.

A. SSOSA Inextricably Linked to Banishment Order

The trial court has discretion to impose a SSOSA. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). Here, the trial court's decision to grant Sims a SSOSA was inextricably linked to the banishment order. The trial court explicitly stated that it would not "leave [Sims] in the community and allow him to have SSOSA." RP at 37. Thus, the trial court chose to exercise its discretion and to grant Sims a SSOSA with the understanding that it could validly exclude Sims from the community.

Had Sims objected to the scope of the banishment order at trial, the trial court could have decided then whether it could have narrowly tailored the order to protect the victim and her family, who were Sims' neighbors, such that the trial court would still have found the SSOSA acceptable. But Sims' failure to object to the scope of the banishment order precluded the trial court's considering a more narrow tailoring; therefore, we hold that on remand the trial court

⁸ Sims asserts that he is appealing only the banishment order, not his entire sentence.

retains the discretion either to reimpose a SSOSA with constitutionally tailored conditions acceptable to the trial court or to deny a SSOSA altogether.

B. Sims Appealed Entire Sentence

Sims argues that we may not vacate the SSOSA because only the banishment condition of his sentence is before us on review. More specifically, he contends that (1) in asking for broad resentencing, the State seeks affirmative relief; and (2) under the Rule of Appellate Procedure (RAP) 2.4(a), we may not grant affirmative relief to the State because it did not file a timely notice of cross-appeal. We disagree.

RAP 2.4(a) provides:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(Emphasis added.)

In his notice of appeal, Sims designated “the judgment and sentence, and every part thereof.” Spindle. Thus, his entire judgment and sentence, including the SSOSA, are properly before us on review, despite his wishes to the contrary. Furthermore, because the trial court exercised its discretion to grant the SSOSA in reliance on its mistaken understanding (which Sims made no attempt to correct at trial) that it could banish Sims from Cowlitz County, “the

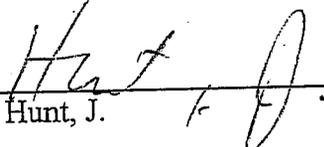
necessities of the case" demand that we vacate Sims' entire sentence and remand for resentencing. RAP 2.4(a).

III. SIMS' REQUEST TO DISMISS APPEAL RATHER THAN TO ALLOW RESENTENCING

Finally, Sims requests that we allow him to withdraw his appeal if we determine that we must remand to the trial court to reconsider his SSOSA. We deny this request.

We may, in our discretion and on motion made before oral argument, dismiss review of a case on stipulation of all parties. RAP 18.2. In a criminal case, RAP 18.2 also requires the defendant's written consent. Sims' request, which he embedded in his supplemental brief and made contingent on our ruling in a particular manner, does not meet RAP 18.2's requirements. Further, Sims cites no legal authority for contingently withdrawing an appeal. RAP 10.3(a)(6) (requiring argument with citation to legal authority). We hold that Sims may not contingently withdraw his appeal.

We vacate Sims' sentence, including the banishment order, and remand to the trial court for resentencing.



Hunt, J.

We concur:



Bridgewater, P.J.



Quinn-Brintnall, J.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,

Respondent,

vs.

SIMS, Jack.

Appellant,

Cowlitz Co. No. 07-1-00829-0
APPEAL NO: 37773-0-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON)
County of Cowlitz) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On October 16, 2009 , I personally placed in the mail the following documents:

- 1. PETITION FOR REVIEW
- 2. AFFIRMATION OF SERVICE

to the following:

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Dated this 16th day of October, 2009 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS