

COURT OF APPEALS  
DIVISION II

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NO. 41081-8-II

STATE OF WASHINGTON  
BY JW

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

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STATE OF WASHINGTON,

Respondent,

v.

A.G.S. (DOB: 06/19/93),

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable James E. Warne

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BRIEF OF APPELLANT

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PM 3-14-11

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering the release of appellant's confidential Special Sex Offender Dispositional Alternative (SSODA) evaluation to the parents of the complaining witnesses.

2. The trial court erred in entering Findings of Fact 3, 5 and Conclusions of Law 1.

Issue Pertaining to Assignments of Error

Is reversal required where the trial court erred in ordering the release of appellant's confidential SSODA evaluation because the information contained in the evaluation is not relevant and necessary to protect the public and nondisclosure is essential to protecting appellant's right to privacy.

B. STATEMENT OF THE CASE<sup>1</sup>

On February 11, 2010, the State charged appellant, A.G.S. (DOB: 06/19/93), with four counts of rape of a child in the first degree. CP 1-3. The State amended the information on March 30, 2010, charging A.G.S. with two counts of rape of a child in the first degree and two counts of child molestation in the second degree, to which A.G.S. pleaded guilty. CP 4-6, 7-16; 3RP 11-12.

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<sup>1</sup> There are seven volumes of verbatim report of proceedings: 1RP - 02/23/10; 2RP - 03/23/10; 3RP - 03/30/10; 4RP - 06/22/10; 5RP - 06/29/10; 6RP - 07/20/10; 7RP - 08/10/10.

At A.G.S.'s disposition hearing on June 22, 2010, the court stated that it read SSODA evaluations submitted by the State and the defense and found that the evaluations similarly came to the same conclusion that A.G.S. was amenable to treatment. 4RP 30; Supp. CP \_\_\_\_ (SSODA evaluation by Pacific Psychological Associates, 03/22/10; Supp. CP \_\_\_\_ (SSODA evaluation by Vancouver Guidance Clinic, 06/14/10). The court noted that the evaluations do not discuss how damaging A.G.S.'s conduct was to the children. 4RP 30. Stating that a SSODA would give the children "the wrong message," the court denied a SSODA disposition. 4RP 31. The court imposed a maximum standard range of 53 to 76 weeks in confinement and 24 to 36 weeks of supervision. 4RP 30-32; CP 17-24.

On June 29, 2010, the State moved to release A.G.S.'s SSODA evaluation submitted by the defense to the parents of the complaining witnesses. 5RP 3. Defense counsel objected, arguing that the psychosexual evaluation contains "extraordinarily sensitive information that doesn't even relate to the offenses that are charged in this case." 5RP 3-4. The court responded that the victims "have a right to some information." 5RP 5. The State argued that the evaluation would assist in the treatment of the victims and that a redaction would be appropriate. 5RP 7. The court ordered defense counsel to prepare a redacted evaluation to present to the court. 5RP 7-8.

On July 20, 2010, the court granted the State's motion to release the redacted SSODA evaluation to the parents of the complaining witnesses. CP 28; 6RP 6-7. The court entered Findings of Fact and Conclusions of Law for releasing the SSODA evaluation and granted defense counsel's motion to stay the order granting release during the pendency of an appeal. 7RP 3; CP 25-26; Supp CP \_\_\_\_ (sub. no. 14, Order Staying Decision to Release Psychosexual Evaluation, 08/10/10). The trial court also ordered the clerk of the court to seal the SSODA evaluation. Supp CP \_\_\_\_ (sub. no. 5, Order Sealing Document, 08/10/10).

A.G.S. filed a timely notice of appeal. CP 27.

C. ARGUMENT

THE TRIAL COURT ERRED IN ORDERING THE RELEASE OF A.G.S.'s CONFIDENTIAL SSODA EVALUATION TO THE PARENTS OF THE COMPLAINING WITNESSES.

Reversal is required because the trial court erred in ordering the release of A.G.S.'s confidential SSODA evaluation to the parents of the complaining witnesses where the information contained in the evaluation is not relevant and necessary to protect the public and nondisclosure is essential to protecting A.G.S.'s right to privacy.

RCW 4.24.550 controls the release of information about sex offenders to the public:

[P]ublic agencies are authorized to release information to the public regarding sex offenders and kidnapping offenders when the agency determines that disclosure of the information is relevant and necessary to protect the public and counteract the danger created by the particular offender.

RCW 4.24.550(1) (in relevant part).

In State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994), the Washington Supreme Court observed that the Legislature placed significant limits on disclosure:

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies and *under limited circumstances*, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is *rationally related to the furtherance of those goals*.

Therefore, this state's policy as expressed in [RCW 4.24.550] is to require the exchange of relevant information about sexual predators among public agencies and officials and to authorize the release of *necessary and relevant* information about sexual predators to members of the general public.

Ward, 123 Wn.2d at 502 (citing Laws of 1990, ch. 3, section 116)(emphasis added by the court).

The Court determined that the "Legislature's pronouncement evidences a clear regulatory intent to limit the exchange of relevant information to the general public to those circumstances which present a threat to public safety." Id. The Court held that "a public agency must

have some evidence of an offender's future dangerousness, likelihood of reoffense, or threat to the community, to justify disclosure to the public in a given case. The statutory limit ensures that disclosure occurs to prevent future harm, not to punish past offenses." Id. at 503. Furthermore, the Court concluded that the geographic scope of dissemination must rationally relate to the threat posed by the sex offender. Id.

The Ninth Circuit Court of Appeals regarded the Supreme Court's construal of RCW 4.24.550 in Ward as authoritative. Russell v. Gregoire, 124 F.3d 1079, 1089-91 (9<sup>th</sup> Cir. 1997). The Court observed that the statute clearly "limit[s] the exchange of relevant information to the general public to those circumstances which present a threat to public safety." Id. at 1090. Citing Ward, the Court emphasized that only information "relevant to and necessary for countering the offender's dangerousness" is disclosed. Id. at 1091.

Contrary to Ward and Russell, a majority of this Court concluded in State v. Koenig, 155 Wn. App. 398, 299 P.3d 910 (2010), that RCW 4.24.550 authorizes complete disclosure of SSOSA evaluations because "public disclosure of SSOSA evaluations would enable parents to better prepare and educate their children regarding the release of an offender to their community." Koenig, 155 Wn. App. at 414-15. The dissent disagreed, concluding that RCW 4.24.550 does not authorize a broad

disclosure of information about a sex offender to the public, citing Ward. Id. at 425. The dissent reasoned that public disclosure would render defendants unwilling to engage in SSOSA evaluations and consequently be harmful to effective law enforcement which could pose greater harm to public safety than nondisclosure. Id. at 430.

The Koenig majority recognized that a SSOSA evaluation may also be exempt under the Public Records Act if nondisclosure is essential to protect any person's right to privacy. Id. at 416; RCW 42.56.240(1). Under the PRA, disclosing information violates a person's right to privacy if the disclosure 1) would be highly offensive to a reasonable person and 2) is not of legitimate concern to the public. RCW 42.56.050. The majority acknowledged that information revealed in a SSOSA evaluation would be highly offensive to a reasonable person but determined that the public has a legitimate interest in obtaining information about a sex offender "in order to understand the sentencing decision and to guard against a particular offender's risks to the community." Id. at 416-17. Thus, the majority concluded that other than the portions that disclose a victim's identity, a SSOSA evaluation is not exempt from disclosure. Id. at 417-18.

To the contrary, the dissent determined that it is "the final SSOSA recommendation, and what the State and the trial court do with that evaluation, that is of public interest, not the underlying details of the

evaluation.” Id. at 432. Pointing out the highly personal and sensitive nature of psychosexual evaluations, the dissent concluded that while “an evaluation’s ultimate conclusion may be a matter of public interest, the underlying details are not, and the evaluation should not be subject to disclosure even with redactions, particularly where sealed by court order.” Id. at 432-34.

This Court should reconsider Koenig, in light of Ward and Russell. In any event, here, the trial court’s findings of fact are not supported by substantial evidence and consequently do not support the court’s conclusion of law. An appellate court reviews conclusions of law to determine whether a trial court’s findings are supported by substantial evidence, and, if so, whether those findings support the conclusions of law. State v. Graffius, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). The trial court found that the victims’ families have “a right” to know the information considered by the court in making its disposition and that designated sections of the SSODA evaluation “were relevant” to the Court’s disposition. CP 25-26. (Findings of Fact 3 and 4).

A review of the record reflects that the court’s findings of fact are not supported by substantial evidence. The State claimed that information contained in the evaluation would assist in the treatment of the victims. 5RP 7. Defense counsel countered that the evaluation contained highly

sensitive information and that the victims' parents said they intend to disseminate the information to the public. 5RP 4-5. When defense counsel pointed out that the State had provided its SSODA evaluation to the victims' families, the court recalled that the evaluations were not substantially different. 5RP 6. The court could not find any authority for releasing the evaluation. 5RP 4-5. At the disposition hearing, the court stated that it read the evaluations:

Both of the evaluations come to the same conclusion. They're very similar in their methodology; they're very similar in their fact finding along the way; and they come to the same conclusion, that [A.G.S.] is amenable.

4RP 30.

Importantly, the court emphasized that its "overwhelming consideration" was the "[o]ne thing that [the evaluations] do not discuss, but that I've heard here today very eloquently, is how damaging his conduct was to these children." 4RP 30-31. The court denied a SSODA disposition and noted that A.G.S. "is a young person, he can straighten his life out, even if he doesn't get a SSODA disposition." 4RP 31.

The record substantiates that the court had no basis for finding that the victims' families had a right to the confidential information contained in the SSODA evaluation. Significantly, the evaluation was cumulative given the State's admission that it reviewed its SSODA evaluation with

the victims' families. 6RP 5-6. The record substantiates that the information was not relevant to the court's disposition because it did not follow the recommendations. As the court brought to light, it placed greater importance on the statements made by the victims' families at the disposition hearing. Furthermore, the court did not find that disclosure was necessary for public protection because A.G.S. posed a threat to the public, as required under Ward. Notably, the SSODA evaluation indicates that the report is "confidential" and "intended for professional use only." Supp. CP \_\_\_ (SSODA evaluation by Pacific Psychological Associates, 03/22/10). It is evident that A.G.S. relied on the confidentiality of the evaluation. His reasonable reliance creates an equitable right to the nondisclosure of the evaluation. See Q.L.M. v. DSHS, 105 Wn. App. 532, 538-40, 20 P.3d 465 (2001).

Reversal is required because the trial court's findings of fact are not supported by substantial evidence and consequently do not support its conclusion to release the redacted evaluation to the victims. As the well-reasoned dissent in Koenig concludes, "While an evaluation's ultimate conclusion may be a matter of public interest, the underlying details are not." 155 Wn. App. at 434. Most importantly, the trial court's release of the evaluation contravenes the Supreme Court's holding in Ward.

D. CONCLUSION

Confidentiality between patient and clinician has long been regarded as a cornerstone of effective mental health treatment. Psychology, Psychiatry, and the Law: A Clinical and Forensic Handbook, at 536 (Charles P. Ewing ed., 1985). For the reasons stated, this Court should reverse the trial court's order releasing the confidential SSODA evaluation to the complaining witnesses' families.

DATED this 14<sup>th</sup> day of March, 2011.

Respectfully submitted,

  
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**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626 and Anthony G. Siragusa, Naselle, 11 Youth Camp Lane, Naselle, Washington 98638-8600, MS: B25-2.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14<sup>th</sup> day of March 2011, in Kent, Washington.

*Valerie Marushige*

VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

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