

NO. 62756-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL BROWN,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 30 PM 4:43

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. RCW 9.94A.585 bars a defendant from appealing the imposition of a standard range sentence unless the court applied an incorrect legal standard. Although his request for a suspended sentence under the Special Sex Offender Sentencing Alternative (SSOSA) was denied, the defendant was given a sentence within the standard range and he has made no showing that the court applied an incorrect legal standard. Is the court's denial of the defendant's request for a SSOSA appealable?

2. Although RCW 9.95A.670 sets out factors that the court must consider in deciding whether or not to grant a defendant's request for a SSOSA, those factors are not exhaustive and the statute does not require that the court give specific reasons for its decision to either grant or deny a SSOSA sentence. Did the court abuse its discretion in denying the defendant a SSOSA sentence when his request was opposed by both the State and the victim, he had sexually abused the victim for years, he threatened the victim in order to prevent her from disclosing the abuse, he denied the abuse and continued to abuse the victim even after she reported the abuse to her doctor, he fled the State when he realized that the police were going to be informed, he blamed the victim and

minimized the abuse even to his sexual deviancy evaluator, he had sexually abused another child in the past, he had not been honest about the abuse with his wife and family, and he had been turned down for treatment by his first evaluator while his second evaluator found him to be only a "marginal" SSOSA candidate?

B. STATEMENT OF THE CASE

Over a five year period the defendant repeatedly raped his five to ten year old stepdaughter, K.B., using both his fingers and his penis. CP 54. Although he had been confronted about the abuse years before it ended after doctors at Mary Bridge Hospital noticed that K.B. had vaginal trauma consistent with sexual abuse, the defendant denied being responsible and continued to regularly rape K.B. CP 54. When K.B. threatened to report the abuse, the defendant threatened her by telling her that if she told anyone she would get in trouble. CP 54. Finally, K.B. summoned the courage to disclose the abuse to her mother in August 2005. CP 3. The following day she called the defendant to confront him about the abuse. CP 4. During the conversation, the defendant repeatedly told her that they had already discussed the issue and accused her of trying to "entrap" him. CP 4. The following day he gave his

house keys to a friend, asked him to give all of his belongings to charity, and fled the state. CP 4. The State filed charges of Rape of a Child in the First Degree against the defendant in April of 2006. CP 1.

When the defendant was eventually arrested and returned to Washington to face charges, he elected to undergo a sexual deviancy evaluation. He was first evaluated by Dr. Paul Spizman who did not recommend him for a SSOSA. CP 59. When that failed, the defendant obtained another evaluation, this time from William Satoran. CP 53-62. Mr. Satoran wrote,

Mr. Brown than admits the sexual assaults though he minimizes the seriousness saying, 'I'd hardly call it molestation' although he reports digital penetration of his victim and rubbing his penis on her vagina.

...

On the negative side, he has not been honest with his fiancée or his parents. They are his major support group and he intends to live in California while his parents reside in Washington. He has been turned down by a highly respected and highly qualified evaluator Paul Spizman, Ph.D. The discrepancy in age molested is of concern since this discrepancy may denote dishonesty on the part of Mr. Brown. He has a past history of Domestic Violence. His fiancée's work often involves children and families. When caught he fled to California. . . .

In summation, he presents as a *marginal* case for SSOSA and community treatment.

CP 59 (emphasis added).

Sadly, K.B. is not the only child that the defendant has sexually abused. During his evaluation, the defendant reported sexually abusing another child when she was only nine years old and he was 42. CP 54.

On November 5, 2008, the defendant pleaded guilty to two counts of Rape of a Child in the First Degree. CP 7-32. At the sentencing hearing on December 5, 2008, the defendant requested that he be granted a suspended sentence under the Special Sex Offender Sentencing Alternative. The State and the victim voiced their opposition to the defendant's request for a SSOSA. RP 18-27. After hearing from all parties, the judge rejected the defendant's request for a SSOSA and sentenced him within the standard range on each count. RP 34-35.

C. ARGUMENT

1. BECAUSE THE DEFENDANT WAS SENTENCED WITHIN THE STANDARD RANGE AND HE HAS NOT SHOWN THAT THE COURT USED AN INCORRECT LEGAL STANDARD, HIS SENTENCE IS NOT APPEALABLE.

"A sentence within the standard sentence range ... for an offense shall not be appealed." RCW 9.94A.585(1). As long as a

sentence falls within the proper presumptive standard range set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length. *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214, (2003). A criminal defendant is permitted to appeal a standard range sentence only if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Simply arguing that the court abused its discretion in imposing a standard range sentence does not raise an appealable issue. *State v. J.W.*, 84 Wn. App. 808, 811, 929 P.2d 1197 (1997); *citing State v. Onefrey*, 119 Wn.2d 572, 574, 835 P.2d 213 (1992).

In *J.W.*, the defendant was attempting to appeal the trial court's imposition of a standard range sentence instead of granting his request for a sentence under the Special Sex Offender Disposition Alternative (SSODA) (the juvenile version of SSOSA). *J.W.*, 84 Wn. App. 808. Like Mr. Brown, the defendant in *J.W.* argued that the court abused its discretion in denying his SSODA request, arguing that "there was no basis for the court's reasons." *Id.* at 811. In ruling that the issue was not appealable, the Court of Appeals pointed out that the defendant did not assert that the trial judge committed any procedural error; instead arguing only that the

.. ..

trial court abused its discretion. *Id.* at 812. The appellate court pointed out that the trial court considered legitimate factors in denying the defendant's SSODA request such as the defendant's escalating offenses and the evaluator's opinion that the defendant was a "marginal candidate" for a SSODA. *Id.* at 811.

Although Mr. Brown cites several cases that stand for the proposition that a standard range sentence can be appealed if there is a procedural error by the trial court, a close look at his argument reveals that he is not alleging any procedural error. For example, Mr. Brown does not argue, like the defendant in *Onefrey*, that the court improperly found that he is not eligible for a SSOSA sentence. Nor does he argue, like the defendant in *Williams*, that the SSOSA statute is unconstitutional. Rather, Mr. Brown's argument is that the trial court considered factors in denying the defendant's request for a SSOSA (e.g., abuse of trust and longevity of abuse) that the SSOSA statute does not specifically state bars a defendant from SSOSA eligibility. Brief of Appellant, p. 5-6. However, the trial judge did not rule that Mr. Brown was not eligible for a SSOSA. To the contrary, she specifically considered the defendant's evaluation and the arguments by all sides before making her decision. RP 18-37. She then ruled, in accordance

with the requirements of the statute, that granting the defendant a SSOSA was "not appropriate" based on her assessment of the information that was provided to her at sentencing. RP 34-36.

In sum, because the trial court sentenced the defendant within the standard range and the defendant has presented no indication that the judge committed a procedural or legal error, his sentence is not appealable.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR A SSOSA.

"An abuse of discretion occurs only when the decision or order of the court is 'manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.'" *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981); *State v. Hays*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). Discretion is only abused where it can be said that "no reasonable man would take the view adopted by the trial court." *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

In *Hays*, the Division One Court of Appeals addressed the trial court's denial of a SSOSA sentence under circumstances similar to those presented in this case. In ruling that the trial court

had not abused its discretion in denying the defendant a SSOSA despite uncontradicted testimony from a social worker that the defendant would benefit from the treatment, the court pointed out that the victim was not in favor of a SSOSA, the defendant had sexually abused children other than the victim, the sexual abuse occurred over a two year period, and the defendant had threatened to spank the victim if she did not comply with his demands. *Hays*, 55 Wn. App. at 17.

Similarly, in *State v. Frazier*, 84 Wn. App. 752, 754, 930 P.2d 345 (1997), the court of appeals ruled that the trial court did not abuse its discretion in denying a defendant's request for a SSOSA due to the fact that the defendant had initially lied about the abuse and the victim's mother was not in favor of a SSOSA.

Applying the *Hays* and *Frazier* court's rulings to this case, it cannot credibly be argued that the trial court abused its discretion in denying the defendant's SSOSA request. In her ruling, the trial court specifically referenced the defendant's initial denials of abuse, his attempt to flee once it became apparent the crime had been or was about to be reported, the longevity of the abuse, the severe abuse of trust, and the equivocal recommendation by the defendant's evaluator, Mr. Satoran. Furthermore, the record is

replete with additional reasons to deny the defendant's request for a SSOSA including the fact that he threatened the victim in order to prevent her from disclosing the abuse, he minimized the abuse even to his sexual deviancy evaluator, he had sexually abused another child in the past, he had not been honest about the abuse with his wife and family despite listing them as his major support group, he had been turned down for treatment by the first evaluator he went to (Dr. Spizman), he has a history of Domestic Violence, he blamed the victim for much of the abuse, and the victim was not in favor of a SSOSA sentence. CP 59. Considering all of these factors weighing against the imposition of a SSOSA sentence, the trial court was well-justified in denying the defendant's request for a SSOSA sentence and did not abuse its discretion.

D. CONCLUSION

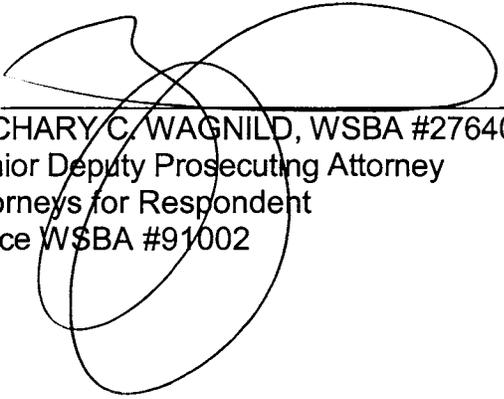
For the foregoing reasons, the State requests that this court find that the defendant's standard range sentence is not appealable

and that the trial judge did not abuse her discretion in denying his request for a SSOSA.

DATED this 30 day of July, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Charles Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DAVID MICHAEL BROWN, Cause No. 62756-2-I, in the Court of Appeals, Division I, for the State of Washington.

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

Sandra Atkinson
Name

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Date

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