

66614-2

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NO. 66614-2-I

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

STATE OF WASHINGTON,

Appellant,

v.

ROBERT S. WILLHOITE,

Respondent.

2011 JUN 13 AM 10:40

COURT OF APPEALS
STATE OF WASHINGTON


REPLY BRIEF OF APPELLANT

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I. ADDITIONAL ISSUES

(1) Under RCW 9.94A.670(2)(e), a defendant is eligible for SSOSA only if he had an established relationship with the victim of the crime. The record shows that the defendant lacked any such relationship. Can the State appeal the SSOSA sentence?

(2) Under RCW 9.94A.670(3), a sentencing court can consider a SSOSA sentence only if it finds that the defendant is eligible. Does this statute impose the burden of proof on the party seeking SSOSA?

(3) The State introduced evidence that the distribution of child pornography creates continuing harm to the children depicted. The defendant agreed and submitted no contrary evidence. If the trial court's decision is interpreted as a factual finding that the children were not "victims," is that finding clearly erroneous?

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Appellant. That brief does, however, contain one factual error. In the first full paragraph on page 2, the brief describes two images that the defendant uploaded to a child pornography web site. The brief states that the defendant uploaded these on "December 9, 2009." The correct date is December 16, 2009. CP 84.

III. ARGUMENT

A. THE STATE IS ENTITLED TO APPEAL A SENTENCE THAT IS ILLEGAL BECAUSE A MANDATORY FACTUAL REQUIREMENT WAS NOT SATISFIED.

The defendant claims that the trial court made a factual finding that the children depicted in the defendant's child pornography were not "victims." He claims that this "finding" is unreviewable. This is not correct. RAP 2.2(b)(6) allows the State to appeal the following:

A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

In this case, the State contends that the defendant was ineligible for SSOSA under RCW 9.94A.670(2)(e). This contention brings this case within subdivisions (A), (C), and (D) of RAP 2.2(b)(6). If the defendant is ineligible for SSOSA, the trial court's sentence of 9 months' confinement is outside the standard ranges of 26-34 months for possession of child pornography and 31-41 months for dealing in child pornography. Similarly, if the defendant is ineligible, the inclusion in the sentence of SSOSA provisions is unauthorized by law, and the sentence fails to include a provision requiring confinement for the period required by law.

Although the State may not challenge a standard range sentence, it may “challenge the underlying *facts* and legal conclusions by which a court applies a particular sentencing provision.” State v. Wood, 117 Wn. App. 207, 210, 70 P.3d 151 (2003) (emphasis added). The defendant cites no authority to the contrary. A trial court cannot shield an illegal sentence from review by making factual findings that are unsupported by the record. Any findings made by the trial court are subject to review.

B. SINCE A SSOSA SENTENCE REQUIRES A FINDING THAT THE DEFENDANT IS ELIGIBLE, THE BURDEN OF PROVING ELIGIBILITY RESTS ON THE PARTY SEEKING SUCH A SENTENCE.

The defendant claims that the State bore the burden of proving his ineligibility for SSOSA. Again, he cites no authority for this proposition. The SRA sets out the procedure for granting a SSOSA sentence:

If the court finds that the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

RCW 9.94A.670(3) (emphasis added).

Thus, the court cannot even order an examination unless it first makes an affirmative finding that the offender is eligible. For the court to make this finding, there must be evidence in the record

to support it. The burden of proving eligibility therefore rests on the party or parties seeking SSOSA -- in this case, the defendant.

Under RCW 9.94A.670(2)(e), an offender is eligible for SSOSA only if “[t]he offender had an established relationship with, or connection to, the victim.” It is not clear whether this requirement can be satisfied if the crime has no victim: a defendant cannot have a relationship with a person who does not exist. But even if the requirement *could* be satisfied in this situation, the offender bears the burden of proving that there was no victim. He did not satisfy that burden in this case.

In its oral opinion, the sentencing court said:

I’m not sure this crime has a “victim” as that term is defined in [RCW 9.94A.670(1)(c)]. There’s no question these kids have been abused and victimized, at least by the person who took the photographs, maybe because the term “victim” means, referring to the same statute ..., “any person who has sustained emotional, physical, or financial injury as a result of the crime charged.”

I don’t know what has happened to these children. I can imagine, but I don’t know. I’m not sure we have a victim here.

RP 20.

The defendant suggests that these remarks indicate a failure of proof as to whether the children depicted in the photographs suffered harm. If this is correct, the court erred by incorrectly

allocating the burden of proof. It was undisputed that the defendant lacked any relationship with the children depicted in the child pornography. If the court could not determine whether those children were “victims,” it could not find that the defendant had an established relationship with the victims of the crime. This being so, it could not find that the defendant was eligible, as required by RCW 9.94A.670(3). Absent any proof on this point, the court could not properly impose a SSOSA.

C. UNDISPUTED EVIDENCE IN THIS CASE SHOWED THAT THE DISTRIBUTION OF PHOTOGRAPHS SHOWING GIRLS BEING RAPED IS HARMFUL TO THOSE GIRLS.

Even if the State bore the burden of proving that the children depicted in the child pornography were “victims,” that burden was satisfied. If the trial court is considered to have made a factual finding, that finding should be reversed if it is clearly erroneous. A finding is “clearly erroneous” if it is not supported by substantial evidence. “Substantial evidence” is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (review of findings supporting exceptional sentence).

Here, the State showed the following:

1. At least two of the images distributed by the defendant showed 5 to 7-year old girls being raped. One of them showed a girl in this age range with an adult male's penis inserted in her vagina. Another showed a different girl in the same age range performing oral sex on an adult male. CP 84.

3. In his pre-sentence interview, the defendant acknowledged the harm that he had inflicted on the victims:

Mr. Willhoite believes he has some insight into the harm caused by viewing and distributing child pornography. He has thought about the victims who are portrayed in the pictures and videos and how it has "messed them up for life ... they'll never have a normal relationship...." Mr. Willhoite added that "they have lost their childhood at an early age."

CP 4.

4. The pre-sentence report discusses the harm to the victims:

The victims depicted in these pictures are especially vulnerable. Their victimization is not only represented by the sexual assault they were made to suffer but by the ongoing distribution and viewing of these images by individuals such as Mr. Willhoite.

CP 10.

5. At sentencing, nothing was offered to refute any of this evidence. To the contrary, defense counsel expressed his specific

agreement with the portion of the pre-sentence report just quoted.
RP 12.

As the United States Supreme Court has pointed out, child pornography is a permanent record of the children's participation in sexual abuse. "[T]he harm to the child is exacerbated by [the pornography's] circulation." New York v. Ferber, 458 U.S. 747, 759, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982). This observation is particularly relevant in the present case, where the defendant distributed images that graphically depicted young girls being raped. Nothing in the record indicates that these particular girls are so different from most other girls that they were unharmed by having such images posted on the Internet. There is no evidence that would persuade a fair-minded person of the truth of that proposition. If the trial court so found, its finding is clearly erroneous.

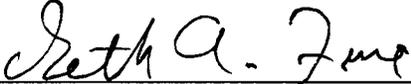
As pointed out in the State's opening brief, there is no genuine dispute about the facts in this case. The case presents an issue of law: are the children depicted in child pornography "victims" of the crimes of possessing and distributing child pornography? The answer is clearly "yes." The trial court erred in granting a SSOSA to a defendant who was statutorily ineligible.

IV. CONCLUSION

The sentence should be reversed and the case remanded for re-sentencing.

Respectfully submitted on June 10, 2011.

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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of June, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Respondent of the following documents in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18th day of June, 2011.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit