

69522-3

69522-3

NO. 69522-3-1

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

---

STATE OF WASHINGTON,

Respondent,

v.

D.M.S.,

Appellant.

---

BRIEF OF RESPONDENT

---

MARK K. ROE  
Prosecuting Attorney

CHARLES F. BLACKMAN  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

2018 APR 22 PM 1:43  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 6

    A. A COURT’S AUTHORITY TO IMPOSE POST-CONVICTION  
    SANCTIONS GENERALLY IS LIMITED..... 6

        1. Adult Offenders. .... 6

        2. Juvenile Offenders. .... 7

    B. MORE SEVERE POST-CONVICTION SANCTIONS CAN BE  
    IMPOSED UNDER THE SPECIAL SEX OFFENDER  
    SENTENCING (ADULT) AND DISPOSITION (JUVENILE)  
    ALTERNATIVES. .... 8

        1. Adult Sex Offenders Under A “SSOSA.” ..... 8

        2. Juvenile Sex Offenders Under A “SSODA.” ..... 9

    C. BECAUSE THE ALLEGEDLY UNLAWFUL SANCTION WAS  
    NEVER IMPOSED, THE ISSUE IS MOOT..... 11

    D. AFFORDING THE JUVENILE COURT GREATER FLEXIBILITY  
    IN FASHIONING SANCTIONS FOR JUVENILE SEX OFFENDERS  
    IS CONSISTENT WITH STATUTORY LANGUAGE AND POLICY  
    GOALS..... 13

IV. CONCLUSION ..... 15

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>In re Swanson</u> , 115 Wn.2d 21, 804 P.2d 1 (1990).....	12, 13
<u>Sorenson v. City of Bellingham</u> , 80 Wn.2d 547, 496 P.2d 512 (1972).....	11, 12
<u>State v. Badger</u> , 64 Wn. App. 904, 827 P.2d 318 (1992) .....	9
<u>State v. Barker</u> , 114 Wn. App. 504, 58 P.3d 908 (2002) .....	7, 8
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999).....	9
<u>State v. Diaz-Cardona</u> , 123 Wn. App. 477, 98 P.3d 136 (2004).....	9, 10
<u>State v. Edgley</u> , 92 Wn. App. 478, 966 P.2d 381 (1998), <u>review</u> <u>denied</u> , 137 Wn.2d 1026 (1999).....	7
<u>State v. Hennings</u> , 129 Wn.2d 512, 919 P.2d 580 (1996) .....	14
<u>State v. Howell</u> , 119 Wn.2d 513, 833 P.2d 1385 (1992).....	10
<u>State v. Linssen</u> , 131 Wn. App. 292, 126 P.3d 1287 (2006).....	10
<u>State v. McDougal</u> , 120 Wn.2d 334, 350, 841 P.2d 1232 (1992) ....	7
<u>State v. McNally</u> , 125 Wn. App. 854, 106 P.2d 794 (2005).....	8, 9
<u>State v. Partee</u> , 141 Wn. App. 355, 170 P.3d 60 (2007) .....	6, 7, 9
<u>State v. Sansome</u> , 127 Wn. App. 630, 111 P.3d 1251 (2005).....	11
<u>State v. T.E.C.</u> , 122 Wn. App. 9, 92 P.3d 263 (2004).....	15
<u>State v. Taplin</u> , 55 Wn. App. 668, 779 P.2d 1151 (1989).....	6

### WASHINGTON STATUTES

RCW 13.40.0357 .....	10
RCW 13.40.127(7) .....	7, 10
RCW 13.40.127(7)(b)(ii) .....	7
RCW 13.40.160(3) .....	9, 10, 14
RCW 13.40.160(3)(b)(ix) .....	10, 14
RCW 13.40.162.....	9
RCW 13.40.163(3) .....	10
RCW 13.40.162(4) .....	10
RCW 13.40.162(8) .....	12, 14, 15
RCW 13.40.162(8)(a) .....	10, 14
RCW 13.40.162(8)(b) .....	10, 14
RCW 13.40.200.....	7, 11, 13, 14
RCW 13.40.200(3) .....	7, 8, 13
RCW 9.94A.633(1).....	6, 9, 14
RCW 9.94A.633(1)(a).....	6
RCW 9.94A.670(10).....	9, 14
RCW 9.94A.670(4).....	8, 9

RCW 9.94A.670(5) .....	8, 9
RCW 9.94A.670(9) .....	9
RCW 9.94A.670(10)(a) .....	14
RCW 9.94A.670(11) .....	9
RCW 9.94A.670(12) .....	14

**OTHER AUTHORITIES**

Fine & Ende, 13B <u>Wash. Practice: Criminal Law</u> §§ 3707-08 at 355-59 (2d ed. 1998) .....	9
<u>Washington State Adult Sentencing Guidelines Manual</u> , Pt. 2, p. 219 (2011) .....	8

## **I. ISSUES**

1. A juvenile offender under the Special Sex Offender Disposition Alternative (“SSODA”) was sanctioned for repeated and chronic noncompliance with conditions. The Juvenile Justice Act permits sanctions only up to 30 days per hearing, no matter how many violations, if under a regular juvenile dispositional order. However, provisions governing violations of SSODA dispositions contain no such limitation. Did the juvenile court err when it imposed a 30-day sanction, then ordered an additional 30 days, suspending the latter?

2. Is the issue moot when the additional sanction was never imposed, despite opportunities to do so?

## **II. STATEMENT OF THE CASE**

When he was 17, D.M.S. (juvenile respondent below, appellant on appeal; here termed defendant) had sex with a 13-year-old runaway. 1 CP 89-92. There were no allegations of force or duress. Id. While the State initially considered seeking a decline hearing, ultimately the parties agreed to have the juvenile court retain jurisdiction. 3 CP \_\_\_ (sub 4, motion for decline hearing; sub 7, March 2, 2011 minute entry (arraignment); sub 8, order to retain jurisdiction). D.M.S. pled guilty to second-degree child molestation

on April 6, 2011. 1 CP 71-86. The juvenile court imposed sentence under the Special Sex Offender Disposition Alternative ("SSODA," about which more below) on May 18, 2011. 1 CP 42-70.

The defendant was out of compliance with conditions even before sentencing. Court probation sought sanctions for defendant's alleged marijuana use the day before his plea. 3 CP \_\_ (sub 18, motion to revoke PR). At a hearing on April 20, 2011, the court revoked release on personal recognizance. 3 CP \_\_ (sub 19, minute entry; sub 20 and 21, orders setting bail and authorizing detention). At sentencing the defendant was sentenced to, and given credit for, 28 days served. 1 CP 51.

As he concedes on appeal, D.M.S. remained chronically noncompliant. Court probation sought sanctions for use of alcohol, and the court imposed an additional 7 days on August 3, 2011. 1 CP 39-41; 3 CP \_\_ (sub 29, motion to show cause; sub 34, minute entry). Court probation again sought sanctions, this time for use of alcohol and violating curfew, and the juvenile court imposed 15 days, with 6 suspended, on August 24, 2011. 2 CP 98-100; 3 CP \_\_ (sub 37, motion to show cause; sub 39, minute entry). On October 12, 2011, the trial court imposed 22 days for yet more

alcohol or drug consumption. 1 CP 36-38; 3 CP \_\_ (sub 45, minute entry).

One month later, court probation sought sanctions for alcohol use, failure to attend treatment, DUI, and malicious mischief (domestic violence). 3 CP \_\_ (sub 48 and 49, motions to show cause; sub 50, minute entry). On November 30, 2011 the court imposed 30 days. 2 CP 95-97.

Chronic noncompliance continued. Court probation alleged the defendant failed to engage in drug and alcohol treatment, missed a sex offender treatment appointment, and failed to report to probation as scheduled. 3 CP \_\_ (sub 53, motion to show cause). On February 17, 2012 the court imposed another 30 days on these new violations. 1 CP 33-35; 3 CP \_\_ (sub 55, minute entry). Similar violations were alleged in March, and on April 25, 2012, the court imposed yet another 30 days. 1 CP 30-32; 3 CP \_\_ (sub 58, motion to show cause; sub 61, minute entry).

Continuing noncompliance led to the orders from which the defendant appeals. Court probation alleged another DUI; another failure to meet with probation; and defendant's unsupervised contact with his infant son, this last contrary to his therapist's safety plan. 3 CP \_\_ (sub 64, motion to show cause). At a hearing on

September 14, 2011, the judge expressed frustration over this case's history after both defense and prosecution opined that only 30 days could be imposed for all violations at a single hearing. 9/14/12 RP 2-3. The judge imposed 30 days for the failure to meet with probation and set the other two violations over for a second hearing for possible additional sanctions. 9/14/12 RP 3-4; 1 CP 27-29. Counsel for D.M.S. acknowledged whether the court could do this was a "gray area," 9/14/12 RP 3, but filed briefing in objection. 1 CP 16-19, 22-26. The State's briefing suggested SSODA's were different. 1 CP 20-21.

At the next hearing on October 5, 2012, before the same judge, the court found defendant's conduct "egregious" and wondered why the SSODA had not simply been revoked. 10/5/12 RP 3-5. Court probation indicated it did not want to revoke. 10/5/12 RP 3. The defense renewed its objections to additional sanctions. The prosecution thought the statute not entirely clear, but thought its language contemplated 30 days for multiple violations. 10/5/12 RP 2-3. The judge indicated he had consulted with other jurists and believed he had discretion to impose additional sanctions for the additional violations. 10/5/12 RP 4-5. The juvenile court ordered an additional 30 days, suspended for

120 days on condition there be no new violations. 10/5/12 RP 6; 1 CP 13-15.

Not surprisingly the defendant did violate again, for having unsupervised contact with his infant son. 1 CP 8-12. A hearing was held on October 19, 2012, before a different judge. The prosecution asked for a new 30-day sanction, but also asked the court disregard the earlier suspended sentence "just to avoid any appeal issue in that regard." 10/19/12 RP 2-3. The defense asked for less time, and also that SSODA probation not be terminated. 10/19/12 RP 3-5. The court noted the repeated violations. 10/19/12 RP 6-7. Court probation noted that the defendant had come before the court nine times, and had had a total of 157 days imposed. 10/19/12 RP 2. Probation asked for an additional 30 days. Id. In the end, the court imposed a new 30-day sanction, and left the previously-suspended 30 days for the other judge to handle "if he wants to address that." 10/19/12 RP 11; 1 CP 5-7.

Court probation noted new alleged violations of accessing pornography; failing to verify 12-step attendance; and, again, unsupervised contact with D.M.S.'s infant son. 3 CP \_\_ (sub 88 and 89, motions to show cause). A third judge imposed a new 30

day sanction on February 15, 2013. 3 CP \_\_ (sub 91, minute entry; sub 92, order modifying disposition).

The suspended 30-day sanction, complained of on appeal, was never imposed. Meanwhile court probation had informed the court that probation under the SSODA alternative expired on May 18, 2013. 10/19/12 RP 8.

### **III. ARGUMENT**

#### **A. A COURT'S AUTHORITY TO IMPOSE POST-CONVICTION SANCTIONS GENERALLY IS LIMITED.**

##### **1. Adult Offenders.**

When dealing with non-compliant adult offenders post-conviction who violate the terms of their probation, the trial court in general is limited by the determinate-sentencing scheme of the Sentencing Reform Act to a maximum 60-day sanction per violation. RCW 9.94A.633(1)(a). The court is limited to imposing sanctions for the number of violations alleged by the prosecution. State v. Partee, 141 Wn. App. 355, 364, 170 P.3d 60 (2007). And any 60-day sanction is per each specific violation, not per judgment and sentence violated. State v. Taplin, 55 Wn. App. 668, 670-71, 779 P.2d 1151 (1989) (addressing identical violations of terms of concurrent sentences). However, sanctions for multiple violations

can run consecutively. Partee, 141 Wn. App. at 363-65; State v. McDougal, 120 Wn.2d 334, 340, 350, 841 P.2d 1232 (1992).

## **2. Juvenile Offenders.**

When dealing with a non-compliant juvenile offender who violates the terms of his or her probation, the trial court can either revoke deferral and impose a deferred sentence, if disposition had been deferred pursuant to RCW 13.40.127(7), or it can impose a maximum 30-day sanction per violation. RCW 13.40.200(3). The latter sanction can be imposed either post-disposition or during the pendency of a deferred disposition. RCW 13.40.127(7)(b)(ii); RCW 13.40.200(3). In the language at issue here, “[p]enalties for multiple violations occurring prior to the hearing shall not be aggregated to exceed thirty days’ confinement.” RCW 13.40.200(3); State v. Barker, 114 Wn. App. 504, 507-08, 58 P.3d 908 (2002) (interpreting this specific provision). This statutory language limits the number of punishments for multiple violations of a single disposition order, but does not limit number of punishments for violations of different disposition orders. State v. Edgley, 92 Wn. App. 478, 482-83, 966 P.2d 381 (1998), review denied, 137 Wn.2d 1026 (1999) (upholding imposition of consecutive sentences for violations of separate disposition orders). “Regardless of the

number of times a [juvenile offender] respondent is brought to court for violations of the terms of a single disposition order, the combined total number of days spent by the respondent in detention shall never exceed the maximum term to which an adult could be sentenced for the underlying offense.”<sup>1</sup> RCW 13.40.200(3); Barker, 114 Wn. App. at 507-08.

**B. MORE SEVERE POST-CONVICTION SANCTIONS CAN BE IMPOSED UNDER THE SPECIAL SEX OFFENDER SENTENCING (ADULT) AND DISPOSITION (JUVENILE) ALTERNATIVES.**

Unique sentencing and dispositional alternatives available to certain adult and juvenile sex offenders afford the sentencing court more discretion when imposing post-conviction sanctions.

**1. Adult Sex Offenders Under A “SSOSA.”**

A sentence under the Special Sex Offender Sentencing Alternative (“SSOSA”) suspends an eligible first-time adult sex offender's sentence and places the offender in a community sexual deviancy treatment program for up to five years. RCW 9.94A.670(4) and (5); State v. McInally, 125 Wn. App. 854, 862, 106 P.2d 794 (2005). The trial court first imposes a sentence within the standard-

---

<sup>1</sup> The standard range for second-degree child molestation for an adult offender on a score of “0” is 15-20 months. Caseload Forecast Council, Washington State Adult Sentencing Guidelines Manual, Pt. 2, p. 219 (2011).

range and then suspends it pursuant to an offender's complying with certain conditions, including completion of sex-offender treatment from a certified therapist, and serving up to a year in jail. RCW 9.94A.670(4), (5); McInally, 125 Wn. App. at 862; see generally Fine & Ende, 13B Wash. Practice: Criminal Law §§ 3707-08 at 355-59 (2d ed. 1998) and 2012 pocket part at 203-06.

Upon a violation of conditions during the treatment term the entire unsuspended original standard-range sentence – typically, years in prison – can be reinstated in a revocation hearing. State v. Dahl, 139 Wn.2d 678, 682-83, 990 P.2d 396 (1999), citing State v. Badger, 64 Wn. App. 904, 908-09, 827 P.2d 318 (1992); RCW 9.94A.670(9) - (11). Alternatively, a trial court can choose to impose up to 60 days of confinement for each violation pursuant to RCW 9.94A.633(1). RCW 9.94A.670(10); Partee, 141 Wn. App. at 361-63; Badger, 64 Wn. App. at 905, 908, 909-10. The court has discretion to do either. Id.

## **2. Juvenile Sex Offenders Under A “SSODA.”**

A disposition under the Special Sex Offender Disposition Alternative (“SSODA”) authorizes a juvenile court, in its discretion, to suspend a sex-offense disposition upon certain conditions. RCW 13.40.160(3); RCW 13.40.162; State v. Diaz-Cardona, 123 Wn.

App. 477, 480, 98 P.3d 136 (2004); State v. Howell, 119 Wn.2d 513, 517, 833 P.2d 1385 (1992). The juvenile court first determines the standard range, pursuant to the disposition grid at RCW 13.40.0357, and imposes disposition within that range. State v. Linssen, 131 Wn. App. 292, 295, 126 P.3d 1287 (2006); RCW 13.40.162(3). After an examination addressing amenability to treatment, the juvenile court, if finding the offender eligible, may then suspend the disposition upon conditions including thirty days of confinement and at least two years of supervision and community-based sex offender treatment. Diaz-Cordona, 123 Wn. App. at 480; Howell, 119 Wn.2d at 517; RCW 13.40.162(4).

The juvenile court has a range of options upon finding non-compliance:

(a) If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the disposition or the court may impose a penalty of up to thirty days' confinement for violating conditions of the disposition.

(b) The court may order both execution of the disposition and up to thirty days confinement for the violation of the conditions of the disposition.

RCW 13.40.162(8)(a), (b) (former RCW 13.40.160(3)(b)(ix)).

Unlike its adult SSOSA counterpart, this statute does not reference

back to the general authority to sanction probationers at RCW 13.40.200, but instead stands alone. And it permits a juvenile court to impose both the revoked underlying disposition and a 30-day sanction for the violation.

**C. BECAUSE THE ALLEGEDLY UNLAWFUL SANCTION WAS NEVER IMPOSED, THE ISSUE IS MOOT.**

This Court should decline to reach the issue posed on appeal because it is moot. As discussed above, the additional 30-day sanction, ordered suspended at the October 5, 2012 hearing, 10/5/12 RP 6; 1 CP 13-15, was never actually imposed. This was despite the defendant's having re-violated at least twice during the 120-day suspension period. The State expressly asked it not be imposed to avoid any appellate issue. 10/19/12 RP 2-3. And the juvenile court did not impose it, despite two hearing opportunities after October 5, 2012, to do so. 1 CP 5-7 and 10/19/12 RP 11; 3 CP \_\_\_ (sub 91, 2/15/13 minute entry; sub 92, order modifying disposition). Appellant asks the Court reach the issue anyway.

Issues are moot when the court can no longer provide effective relief and only abstract questions remain. Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972); State v. Sansome, 127 Wn. App. 630, 636, 111 P.3d 1251 (2005). An

appellate court will generally dismiss an appeal if the issues presented are moot. Sorenson, 80 Wn.2d at 558.

A reviewing court may nonetheless decide a technically moot issue if it involves matters of continuing and substantial public interest. In re Swanson, 115 Wn.2d 21, 24, 804 P.2d 1 (1990). And D.M.S. so argues here. He asserts that given the short time frames involved, such a juvenile-disposition issue will always have become technically moot before a reviewing court would have a chance to decide it.

But there is no evidence that imposing more than 30 days at a time upon a juvenile offender who chronically violates the terms of a SSOSA sentence is a continuing or common practice. If anything, one would expect the more common result would be revocation and imposition of the underlying SSODA disposition, an outcome clearly authorized under RCW 13.40.162(8).

Nor was the complained-of sanction ever imposed. In fact, the litigants – including the prosecution – asked it not be, precisely to avoid any appellate issue. And the juvenile court complied. *This held true despite new violations.* Moreover, according to court probation, the two-year period of probation has now run. 10/19/12 RP 8. Nothing here remains that is of “continuing and substantial

public interest.” Compare Swanson, 115 Wn.2d at 22, 25 (computing time parameters of civil commitment statute a matter of continuing and substantial public interest; multiple parties sought review).

**D. AFFORDING THE JUVENILE COURT GREATER FLEXIBILITY IN FASHIONING SANCTIONS FOR JUVENILE SEX OFFENDERS IS CONSISTENT WITH STATUTORY LANGUAGE AND POLICY GOALS.**

Respondent concedes that imposing more than 30 days for post-conviction violations presented at a single hearing is improper under a “regular” juvenile disposition per RCW 13.40.200(3). Respondent further agrees that, in such a setting, to simply set over some of the violations to a subsequent hearing, to avoid the statutory limitation, is improper. But the Special Sex Offender Disposition Alternative’s provision governing post-conviction violations is different and stand-alone:

(a) If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the disposition or the court may impose a penalty of up to thirty days' confinement for violating conditions of the disposition.

(b) The court may order both execution of the disposition and up to thirty days confinement for the violation of the conditions of the disposition.

RCW 13.40.162(8)(a), (b) (former RCW 13.40.160(3)(b)(ix)). While the statute speaks of thirty days' confinement for violating *conditions*, it nowhere defines this term as the maximum for all *violations* at a given hearing. The Legislature certainly could have, and knew how to: The comparable adult SSOSA statutory provision refers back to the authorizing statute (and its limitations) for probation violations generally, whereas the juvenile statute does not. Compare RCW 9.94A.670(10)(a) and (12) (expressly referencing back to RCW 9.94A.633(1)) with RCW 13.40.162(8)(a), (b) (containing no reference to RCW 13.40.200). That greater flexibility is to be accorded the juvenile court is further evidenced by the Legislature's drafting the SSODA statute to permit revocation and imposing the underlying disposition *as well as* imposing a 30-day sanction for violation, whereas under a SSOSA the post-sentencing court must choose between the two. Compare RCW 9.94A.670(10) (allowing one or the other) with RCW 13.40.162(8)(b) (contemplating both).

Given the ambiguity in RCW 13.40.162(8), it is "the primary duty of the court in interpreting the statute . . . to ascertain and give effect to the intent and purpose of the Legislature." State v. Hennings, 129 Wn.2d 512, 522, 919 P.2d 580 (1996). That the

Legislature intended maximum flexibility in the SSOSA context is consistent not only with the differences in comparable provisions, highlighted above, but also with the goals of the Juvenile Justice Act (“JJA”) generally:

The goals of the JJA are “more complex” than those of the SRA, “reflecting an intent to protect community safety while also responding to the needs of juvenile offenders.” *Public policy militates against a stringent interpretation of SSODA protocol.* The Supreme Court has emphasized the “need for sentencing flexibility” in “fashioning supervised release for sex offenders, and it is particularly acute in the juvenile context, where it is well-established that to achieve the rehabilitative purpose of the JJA, the Legislature ‘built [flexibility] into the system to allow the court, in appropriate cases, to fit the disposition to the offender.’ ”

State v. T.E.C., 122 Wn. App. 9, 27, 92 P.3d 263 (2004) (citations omitted; emphasis added). Consistent with public policy and legislative intent, RCW 13.40.162(8) should be read as permitting sanctions in excess of 30 days for multiple violations at post-conviction SSODA hearings.

#### **IV. CONCLUSION**

Neither the underlying disposition nor the multiple findings of violations themselves being challenged, the juvenile disposition

should be *affirmed*. Alternatively, the appeal should be *dismissed*  
as moot.

Respectfully submitted on July 19, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: Seth A Fine #10937   
CHARLES FRANKLIN BLACKMAN, WSBA # 19354  
Deputy Prosecuting Attorney  
Attorney for Respondent