Supreme Court No. (to be set)
Court of Appeals No. 59173-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington v. Joshua L. Mccabe

Appellant

Clark County Superior Court
Cause No. 19-1-02022-06

PETITION FOR REVIEW

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Introduction and Summary of Argument

When her father was being sentenced for committing three offenses against her, S.M. asked the sentencing judge to impose a treatment disposition under the special sex offender sentencing alternative (SSOSA). However, the court did not give "great weight" to her request and refused to impose a SSOSA disposition. This was an abuse of discretion. Mr. McCabe's sentence must be vacated, and the case remanded for a new sentencing hearing.

Decision Below and Issues Presented

Petitioner Joshua McCabe, the appellant in the Court of Appeals, asks the Supreme Court to review the Court of Appeals' unpublished opinion entered on December 17, 2024.[1] This case presents two issues:

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[1] A copy of the opinion is attached.

1. Did the sentencing judge abuse his discretion by refusing to impose a treatment disposition under the special sex offender sentencing alternative?

2. Did the sentencing court err by failing to give great weight to the victim's preference for a SSOSA sentence?

Statement of the Case

In December of 2023, Joshua McCabe appeared in court for resentencing following an appeal. CP 28. He had been convicted (in July of 2021) of three sex offenses[2] and bail jumping. CP 3-4, 28. When the Court of Appeals reversed his bail jumping conviction and ordered dismissal of that charge, Mr. McCabe became eligible for the Special Sex Offender Sentencing Alternative (SSOSA). CP 3, 27.

At the resentencing hearing, he asked the court to impose a treatment-based disposition under SSOSA. RP 10. He submitted an evaluation showing that he's

[2] He was acquitted of a fourth charge. CP 4.

amenable to treatment. CP 99. The evaluation also included a proposed treatment plan. CP 99-137.

Mr. McCabe's daughter, the victim of his offenses, supported a SSOSA disposition. RP 5, 11. Despite this, the court refused to impose the sentencing alternative. RP 13-19; CP 28. The court imposed a life sentence, with a minimum term of 129 months. CP 32-33.

Mr. McCabe timely appealed, and the Court of Appeals affirmed. CP 50. Mr. McCabe seeks review of that decision.

Argument Why Review Should Be Accepted

I. The trial judge should have sentenced Mr. McCabe to a treatment disposition under the special sex offender sentencing alternative.

Mr. McCabe is eligible for the special sex offender sentencing alternative under RCW 9.94A.670. The court should have sentenced Mr. McCabe to a treatment disposition under the statute. The sentencing judge abused his discretion by refusing to do so.

An offender is eligible for the special sex offender sentencing alternative if they have committed a sex offense that is not a serious violent offense or second-degree rape. RCW 9.94A.670(2)(a). The offender's criminal history may not include prior convictions for sex offenses, or for violent offenses committed within the past five years. RCW 9.94A.670(2)(b) and (c). The offender must have had an established relationship

with the victim, and may not have caused them substantial bodily harm. RCW 9.94A.670(2)(d) and (e). In addition, the standard range must "include[] the possibility of confinement for less than eleven years." RCW 9.94A.670(2)(f).

Mr. McCabe meets these requirements. He does not have a disqualifying prior conviction. CP 43-44. He had an established relationship with the victim (his daughter) and did not cause bodily harm. CP 3-4. His standard ranges included the possibility of confinement for less than eleven years. CP 31.

In addition, Mr. McCabe has been evaluated for his "amenability to treatment and relative risk to the community." RCW 9.94A.670(3)(b). CP 99-137. The evaluator found that he is "at a low to moderate risk," and that his risk "could significantly decrease" if he participates in treatment. CP 133.

She found him amenable to treatment, in that he "would greatly benefit from engagement in a community-based treatment program" lasting three to five years. CP 133-134. She concluded her evaluation by outlining a proposed treatment plan that meets statutory requirements. RCW 9.94A.670(3)(b); CP 133-137.

Mr. McCabe has a great deal of family and community support, as evidenced by the numerous letters submitted on his behalf at sentencing. RP 11; CP 80-98. In addition, his daughter—the victim of his offenses—asked the court to impose SSOSA. RP 5, 11.

At sentencing, the court must "consider the victim's opinion whether the offender should receive a treatment disposition." RCW 9.94A.670(4). The court must "give ***great weight*** to the victim's opinion." RCW 9.94A.670(4) (emphasis added).

Here, although Mr. McCabe's daughter supported his request for SSOSA, the court refused to impose a treatment disposition. RP 5, 11, 17-19; CP 32. Instead of giving "great weight" to her preference, the sentencing judge told Mr. McCabe's daughter that "your opinion is your opinion and I do take it into account." RP 14.

The record does not show that the court gave "great weight" to S.M.'s preference. This was an abuse of discretion.

In affirming Mr. McCabe's sentence, the Court of Appeals indicated that "the trial court understood the importance of the victim's opinion in considering whether to impose a SSOSA and ultimately concluded that the other relevant factors outweighed her opinion." Opinion, p. 4. Thus, according to the Court of

Appeals, "[t]he trial court thoughtfully exercised its discretion." Opinion, p. 5.

It is evident, even from the Court of Appeals' summary, that the trial judge gave *equal* weight to multiple factors, including S.M.'s opinion. Opinion, pp. 4-5. The statute requires more.

Instead of neutrally balancing the factors listed in RCW 9.94A.670(4), a sentencing court is required to give priority to the victim's opinion. Where the victim supports a SSOSA sentence, a sentencing judge should allow the offender to receive treatment in the community except in the most extraordinary of circumstances. RCW 9.94A.670(4).

The trial court abused its discretion by refusing to sentence Mr. McCabe under RCW 9.94A.670. The sentence must be vacated, and the case remanded for a new sentencing hearing.

II. The Supreme Court should grant review and reverse.

Review is appropriate because this case "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). A decision by the Supreme Court would establish the proper weight to be given a victim's preference when a sentencing court is considering a SSOSA sentence under RCW 9.94A.670.

The error is preserved because Mr. McCabe requested a SSOSA sentence, submitted an evaluation showing amenability to treatment, and pointed out his daughter's support for community-based treatment. RP 10-13; CP 99-137. Review is for an abuse of discretion. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006).

Nonconstitutional errors require reversal if they result in prejudice. *Bengtsson v. Sunnyworld Int'l, Inc.*,

14 Wn. App. 2d 91, 99, 469 P.3d 339 (2020). An error is prejudicial "if within reasonable probabilities, had the error not occurred, the outcome… would have been materially affected." *Id.* (internal quotation marks and citations omitted).

Here, the outcome of the proceedings was materially affected by the court's failure to give "great weight" to S.M.'s preference. If weighed properly, the balance of factors would have favored imposition of a SSOSA sentence. Mr. McCabe's sentence must be vacated, and the case remanded for a new sentencing hearing.

Conclusion

The Supreme Court should grant review and reverse Mr. McCabe's sentence. Upon resentencing, the trial court must give great weight to the victim's

preference for a treatment-based sentencing alternative under RCW 9.94A.670.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 1208 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted January 7, 2025.

BACKLUND AND MISTRY

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Joshua McCabe DOC# 385462
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on January 7, 2025.

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

December 17, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA L. MCCABE, Appellant.	No. 59173-1-II UNPUBLISHED OPINION

CHE, J. — Joshua McCabe appeals his standard range sentence following his convictions for first degree child molestation, second degree child molestation, and second degree incest. At sentencing, McCabe requested a special sex offender sentencing alternative (SSOSA), which the victim supported. After carefully weighing the various considerations, the trial court denied McCabe's request for a SSOSA and imposed a low-end standard range sentence. McCabe appeals, arguing that the trial court erroneously failed to give "great weight" to the victim's opinion and thus abused its discretion by denying a SSOSA. We disagree and affirm.

FACTS

McCabe's daughter, SM, reported to a school guidance counselor that her father had, on multiple occasions, inappropriately touched her genital area while she was trying to sleep. Following a jury trial, McCabe was convicted of first degree child molestation, second degree child molestation, second degree incest, and bail jumping. McCabe appealed, and this court

remanded for vacation of his bail jumping conviction. The trial court vacated the bail jumping conviction and resentenced McCabe.

At the resentencing hearing, the State recommend the low end of the standard range, and McCabe requested a SSOSA. The State opposed a SSOSA, arguing that McCabe was not amenable to treatment. The trial court noted that it had reviewed the original presentence investigation report from 2021, the SSOSA evaluation from 2023, and the 16 letters of support that were filed for the original sentencing. In particular, the trial court acknowledged SM's support of a SSOSA.

> [F]irst of all, I will acknowledge that the victim in the case was not of the opinion that Mr. McCabe needed to be incarcerated back in 2021. She made it pretty clear at that time, as did a number of people that were supportive of Mr. McCabe, that they didn't believe that he needed anything other than treatment. He didn't need to be incarcerated for a lengthy period of time. I take that into account. I do not discount that that's your feeling. I was aware of it and I understand you're aware of it as well.
>
> Just as I would not keep a person from being on the SSOSA alternative solely because of the victim's feelings, I would not impose SSOSA where I thought it was inappropriate, solely because of the victim's feelings. I'm just trying to say that your opinion is your opinion and I do take it into account. But, I have to balance a number of other factors related to whether I think treatment based in the community is appropriate, as opposed to ordering treatment as part of a prison sentence.

Rep. of Proc. (RP) at 13-14.

The trial court also expressed concern over differences between what McCabe told the initial presentence investigation interviewer and what he said during his SSOSA evaluation, suggesting that it showed a lack of amenability to treatment.

> So, at almost every aspect of the interview that you gave between 2021 and what you told the evaluator two years later, you've changed what it is you've said. And, that causes me concern. Because, one of the things that I have to see is whether a person is amenable to treatment in the community as opposed to being in treatment

> in a more structured setting. And, I'd feel more confident about it if I have a person who is at least taking the initial steps of being honest with yourself and I can't tell whether you can, you are, or aren't.

RP at 16. The trial court noted that given his history of substance abuse and failure to stop drinking even after community based treatment, McCabe may benefit from treatment in a "more structured setting" rather than in the community. RP at 17.

The trial court concluded that balancing all of the information before it, a SSOSA was not appropriate and imposed the low end of the standard range sentence of 129 months to life.

ANALYSIS

McCabe argues that the trial court abused its discretion by denying his request for a SSOSA. Specifically, he argues that the trial court erred by not giving SM's opinion "great weight." Br. of Appellant at 2. We disagree.

Generally, a defendant cannot appeal a sentence within the standard range. *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). But a defendant may appeal a standard range sentence if the trial court failed to comply with procedural or constitutional requirements. *Id.* at 481-82.

We review a sentencing court's denial of a request for a SSOSA sentence for an abuse of discretion. *Id.* at 482. A sentencing court abuses its discretion if its "'decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

The trial court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *Osman*, 157 Wn.2d at 482. If an offender is eligible for and requests a SSOSA sentence, the court must decide whether that alternative is appropriate. *Id.* In determining whether the SSOSA is appropriate, the sentencing court must consider several factors, including, but not limited to "whether the offender and the community will benefit from use of this alternative, . . . whether the alternative is too lenient in light of the extent and circumstances of the offense, . . . whether the offender has victims in addition to the victim of the offense, . . . whether the offender is amenable to treatment, . . . the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and . . . the victim's opinion whether the offender should receive a treatment disposition under this section. RCW 9.94A.670(4). The sentencing court is required to "give great weight to the victim's opinion whether the offender should receive" a SSOSA sentence. RCW 9.94A.670(4).

McCabe contends that the trial court failed to follow RCW 9.94A.670(4)'s "great weight" requirement. But the record reflects that the trial court understood the importance of the victim's opinion in considering whether to impose a SSOSA and ultimately concluded that the other relevant factors outweighed her opinion. The trial court began its discussion of the relevant considerations by thoughtfully acknowledging SM's opinion. Although the court did not use the words "great weight," it is clear that the trial court understood the relevant considerations it must weigh.

Ultimately, the trial court determined that SM's opinion did not outweigh the other factors, in particular McCabe's lack of amenability to treatment and history of unsuccessful

substance abuse treatment while in the community. On this record, the trial court's decision to deny a SSOSA was not manifestly unreasonable. The trial court thoughtfully exercised its discretion and did not deny the SSOSA on any impermissible ground. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Therefore, we hold that the trial court did not abuse its discretion.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Maxa, P.J.

Price, J.

BACKLUND & MISTRY

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Transmittal Information

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