Filed
Washington State
Court of Appeals
Division Two

July 11, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRYAN EDWARD WHITLOCK, Appellant.	No. 49008-1-II UNPUBLISHED OPINION

WORSWICK, J. — Bryan Whitlock appeals his standard range sentence of 92.25 months for one count of attempted first degree rape of a child. He argues that the sentencing court erred when it denied his request for a special sex offender sentencing alternative (SSOSA). Specifically, Whitlock argues that the sentencing court improperly based its ruling on his lack of remorse. Holding that the sentencing court did not abuse its discretion, we affirm Whitlock's sentence.

FACTS

Whitlock pleaded guilty to attempted first degree rape of a child arising from the sexual abuse of his disabled stepdaughter. Before sentencing, Joseph Jensen, Ph.D. evaluated Whitlock to assess his amenability to treatment. Dr. Jensen concluded that Whitlock was amenable to treatment and recommended he receive a SSOSA.

At sentencing, Whitlock submitted Dr. Jensen's report and requested a SSOSA. Conversely, the Department of Corrections (DOC) submitted a presentence memorandum that recommended Whitlock be sentenced at the top of his standard range. The State agreed with DOC and also recommended a top-of-the-range sentence. The State noted that nowhere in Dr. Jensen's report was there any indication that Whitlock had remorse for what he had done or acknowledged how his actions affected the victim. The State also noted that according to Dr. Jensen's report, Whitlock blamed his wife for the offense, stating that he abused the victim to punish his wife. Whitlock's attorney stated that he disagreed with the State's portrayal and argued that Dr. Jensen's report likely did not reflect the true nature of his interview with Whitlock.

In addition to Dr. Jensen's and DOC's reports, the sentencing court considered letters both in support of Whitlock and in support of the victim and also heard from several people, including the victim's mother.[1] The victim's mother implored the court to not grant Whitlock a SSOSA. During Whitlock's allocution, he expressed remorse for his actions.

[1] The victim is blind, has cerebral palsy, is autistic, has chronic lung disease, is fed through a tube, and wears diapers. At the time of sentencing, she was 11 years old, though she had the mental age of 15 to 24 months. Consequently, her mother spoke as her representative to the court.

Before making its ruling, the sentencing court stated, "[N]owhere in any of the materials that I received did I have any acknowledgement or recognition of how your conduct harmed a developmentally disabled, nonverbal child." Verbatim Report of Proceedings (VRP) at 42. The court commented it was surprised Dr. Jensen had concluded that Whitlock was amenable to treatment, given the content of his report. The court further commented that the State would have easily been able to prove several aggravating factors had Whitlock not pleaded guilty, including that the victim was particularly vulnerable. The court ruled that, under the circumstances, it was not appropriate to grant Whitlock a SSOSA and sentenced him to the top of the standard range. Whitlock appeals his sentence.

ANALYSIS

I. LEGAL PRINCIPLES

Generally, a defendant cannot appeal a sentence within the standard range. *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). Moreover, the decision to grant a SSOSA is entirely at the sentencing court's discretion, so long as the court's decision does not rest on an impermissible basis. *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). Sex, race, and religion are impermissible grounds upon which to base a rejection. *Osman*, 157 Wn.2d at 482 n.8; *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A sentencing court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds. *State v. Autrey*, 136 Wn. App. 460, 470, 150 P.3d 580 (2006).

RCW 9.94A.670(4) identifies six factors sentencing courts should consider when determining whether a SSOSA is appropriate: (1) whether the offender and the community will benefit from use of the SSOSA, (2) whether a SSOSA is too lenient in light of the extent and

circumstances of the offense, (3) whether the offender has victims in addition to the victim of the offense, (4) whether the offender is amenable to treatment, (5) the risk the offender would represent to the community, to the victim, or to persons of similar age and circumstances as the victim, and (6) the victim's opinion whether the offender should receive a SSOSA. But the sentencing court is not limited to those factors. *State v. Frazier*, 84 Wn. App. 752, 754, 930 P.2d 345 (1997). Additionally, the sentencing court must give great weight to the victim's opinion whether the offender should receive a SSOSA. RCW 9.94A.670(4).

II. SENTENCE NOT BASED SOLELY ON LACK OF REMORSE

Whitlock argues that the sentencing court improperly based its ruling exclusively on Whitlock's lack of remorse when the court commented that "nowhere in any of the materials that I received did I have any acknowledgment or recognition of how your conduct harmed a developmentally disabled, nonverbal child."[2] Br. of Appellant 5; VRP at 42. However, the record shows that the sentencing court properly considered the statutory factors and the circumstances of the offense in deciding whether a SSOSA was appropriate.

[2] Whitlock briefly suggests that because Whitlock's lack of remorse was contested by his allocution, the sentencing court was obligated to either ignore that fact or hold an evidentiary hearing on the issue. Br. of Appellant 6-7 (citing *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005)). However, Whitlock did not object to the sentencing court considering the reports by DOC or Dr. Jensen or to the sentencing court's statement that Whitlock lacked acknowledgement of the harm he caused; nor did Whitlock request an evidentiary hearing. Moreover, it was Whitlock who submitted Dr. Jensen's report. Under the SRA, a sentencing court can consider any facts that are admitted, proved, or acknowledged to determine a sentence. RCW 9.94A.530(2).

In making its decision, the sentencing court focused particularly on whether Whitlock was amenable to treatment and whether a SSOSA would be too lenient in light of the extent and circumstances of the offense. The sentencing court noted that after reviewing numerous letters from both Whitlock's family and the victim's family, the DOC report, Dr. Jensen's report, it was "shocked and surprised" that Dr. Jensen found Whitlock amenable to treatment. VRP at 41. The court explained, "I understand you've started treatment. I think that's commendable. But I don't think that a SSOSA sentence is appropriate under these circumstances." VRP at 42. Whitlock focuses on the sentencing court's comment about Whitlock's lack of acknowledgment or recognition in the reports of how his conduct harmed the victim. However, reading the sentencing court's oral ruling in its entirety, it is clear that the court's comment regarding Whitlock's lack of acknowledgement was part of the sentencing court's recitation of its skepticism that Whitlock was truly amenable to treatment.

Contrary to Whitlock's contention on appeal that the sentencing court based its decision exclusively on Whitlock's lack of remorse, the record shows that the sentencing court's decision to not impose a SSOSA was based more so on the second statutory factor: whether a SSOSA was too lenient in light of the extent and circumstances of the offense. The sentencing court recognized that the 11-year old victim had a mental age of 15 to 24 months, and noted that several aggravating factors could have easily been proved including that the victim was particularly vulnerable, that Whitlock abused his position of trust, or that Whitlock violated the victim's privacy.

The sentencing court performed a sufficient analysis using the statutory factors and considering the circumstances of the offense to determine whether to impose a SSOSA. The sentencing court's determination was not so outside the range of acceptable choices that no reasonable person could have made the same determination. Therefore, we hold that the sentencing court did not abuse its discretion by declining to impose a SSOSA in this case.

III. LACK OF REMORSE IS NOT AN IMPROPER BASIS

Whitlock also argues that consideration of Whitlock's lack of remorse was an improper basis for denying his request for a SSOSA. We disagree.

As we stated above, the grant or denial of an alternative sentence, including a SSOSA, is completely at the court's discretion. *Osman*, 157 Wn.2d at 482. A court may not deny a SSOSA if the denial is based on untenable grounds. *Sims*, 171 Wn.2d at 445. To date, the courts have listed three untenable grounds for denial of a SSOSA: race, religion, and sex. *Osman*, 157 Wn.2d at 482 n.8.

Assuming that the sentencing court denied Whitlock's request for a SSOSA based, in part, on lack of remorse, such decision was not improper. Whitlock provides no authority to support his contention that lack of remorse is an untenable ground for denial of a SSOSA. Rather, he relies entirely on cases discussing exceptional sentences based on the "egregious lack of remorse" aggravating factor. *See* Br. of Appellant 8-9. Those cases do not apply here because a SSOSA is an alternative sentence, not an aggravator to a standard range sentence. RCW 9.94A.535(3)(q). Whitlock can point to no statutory authority or case law that otherwise prohibits a court from considering lack of remorse in the context of all of the circumstances of an offense.

The sentencing court did not abuse its discretion in denying a SSOSA and imposing a standard range sentence. Consequently, we affirm Whitlock's sentence.

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.

Worswick, J.

We concur:

Johanson, J.

Bjorgen, C.J.