

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

STATE OF WASHINGTON,	)	No. 66004-7-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
GILBERT WHITE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 30, 2012
	)	

Ellington, J. — Gilbert White appeals the sentencing court’s denial of his request for a special sex offender alternative (SSOSA). Because White fails to establish an abuse of discretion, we affirm his sentence. White also contends the court imposed certain community custody conditions without authority. We accept the State’s concession and remand for the sentencing court to strike some of the challenged conditions.

BACKGROUND

Gilbert White pleaded guilty to first degree rape of a child and second degree rape of a child involving his two stepdaughters. At sentencing, the State and White recommended a SSOSA. The prosecutor stated that the victims “were willing to support the SSOSA, if that meant that they would not have to be put through the trauma of testifying at trial.”<sup>1</sup> Defense counsel stated that White had begun treatment,

acknowledged some reports indicating White had not been fully engaged in treatment, claimed that White had since addressed the problem regarding his efforts in treatment, and indicated that the doctor evaluating White believed he was amenable to and would benefit from treatment.

Referring to the description of a doctor's statements included in the presentence report, the trial court expressed concern that during the first six to seven months White had been in treatment and up to one month before sentencing, he was very guarded, minimized his actions, failed a polygraph before acknowledging his offense during group therapy, and did not express remorse. The trial court offered to continue the hearing to allow the parties to obtain more information or a statement directly from the doctor before deciding on the SSOSA. The parties agreed to a continuance.

At the next hearing, defense counsel reported that he had spoken with the doctor, who was "rather guarded about Mr. White's progress."<sup>2</sup> According to defense counsel, the doctor opined that treatment "would do some good" for White, "but it would take a lot of work."<sup>3</sup> White also addressed the court, expressing remorse and explaining that he had been ashamed and afraid when he began treatment but he had recently been engaging more in group therapy and felt he was making progress.

The trial court stated:

I can't in good conscience sentence you to a SSOSA. I just can't. There is nothing in all these things that I have reviewed that indicates to me that

---

<sup>1</sup> Report of Proceedings (RP) (July 23, 2010) at 6.

<sup>2</sup> RP (Aug. 13, 2010) at 2.

<sup>3</sup> Id. at 3.

a SSOSA is appropriate in this case.

Mr. Todd said that Dr. Arnold relates that you would benefit from a SSOSA, and I'm sure you would. I'm sure you would. But these were really heinous crimes committed against girls, young women, who looked to you as a father figure. And you denied them initially. You did not only deny them, but you blamed the victims. You were saying that they, at least one of them was coming onto you and it was her fault somehow that you raped her. You were deceptive in your first polygraph, you weren't engaging in treatment. Once you got caught, then you started engaging a little bit more. I am impressed with that. But the statute says that I'm not only to consider whether you would benefit from treatment, but whether the SSOSA alternative is too lenient in light of the extent and circumstances of the offense. And in this case, clearly, in my mind, it is. For that reason, I'm going to sentence you within the standard range for these crimes.<sup>[4]</sup>

White appeals.

### DISCUSSION

We review the trial court's denial of a request for a SSOSA for an abuse of discretion.<sup>5</sup> RCW 9.94A.670(4) provides the procedure the trial court must follow:

After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. . . . The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.

White claims the trial court failed to apply the correct legal standard and

---

<sup>4</sup> Id. at 8.

<sup>5</sup> State v. Frazier, 84 Wn. App. 752, 753, 930 P.2d 345 (1997).

ignored the evidence presented by both parties in favor of a SSOSA. He claims that the court was motivated by a disagreement over the term of treatment as three years, rather than five, based on the charging period.<sup>6</sup> The record does not support White's speculation.

Instead, the record reveals that the trial court reviewed the evidence provided by both parties regarding the criteria set forth in the statute. The court noted the circumstances of the crimes, and read from the presentence report submitted in support of a SSOSA. The court gave the parties more time to provide additional information and considered supplemental argument, as well as White's statement. The trial court also referred to the statutory criteria when making the decision to deny the SSOSA. The trial court is not required to make explicit findings regarding the statutory criteria, only to consider them. The record clearly shows that the court considered the statutory criteria. Under the circumstances, the trial court did not abuse its discretion.

White also contends that the trial court lacked authority to impose community custody conditions prohibiting him from accessing the internet and from possessing, consuming, or purchasing alcohol, and requiring him to "[p]ay for counseling costs for victims and their families."<sup>7</sup> The State concedes that because there was no evidence

---

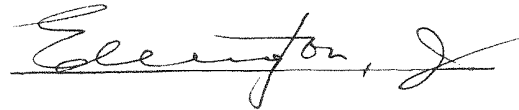
<sup>6</sup> At the first sentencing hearing, the trial court referred to the State's recommendation and asked for an explanation of the three-year term of treatment listed rather than a five-year term. The parties pointed out that the charging periods, between May 5, 2004 and August 8, 2005 and between June 2, 2004 and August 8, 2005, required application of the term for offenses occurring prior to July 1, 2005. The court asked the State to provide authorities but did not explicitly address the issue again at either hearing. See Clerk's Papers at 35.

<sup>7</sup> Clerk's Papers at 46.

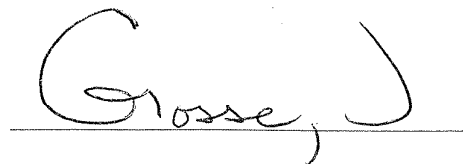
that use of the internet contributed to the offenses or that White was using alcohol at the time of the offenses, the trial court lacked authority to prohibit White from accessing the internet or purchasing or possessing alcohol.<sup>8</sup> The State also concedes that the payment of counseling costs is properly addressed in a restitution order rather than a community custody condition. We accept the State's concessions and remand for the sentencing court to strike these invalid conditions.

However, as the State correctly points out, the trial court had express statutory authority to prohibit White from consuming alcohol without a finding that alcohol consumption was related to the crime.<sup>9</sup> A trial court also may require affirmative acts, such as submission to testing, necessary to monitor compliance with other conditions.<sup>10</sup> We therefore affirm the condition prohibiting White from consuming alcohol and requiring him to submit to testing to monitor his compliance.

Affirmed in part, remanded for correction of the judgment and sentence.



WE CONCUR:



---

<sup>8</sup> See State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).

<sup>9</sup> Former RCW 9.94A.700(5)(d) (Laws of 2003, ch. 379, § 4).

<sup>10</sup> See State v. Acevedo, 159 Wn. App. 221, 234, 248 P.3d 526 (2010); Former RCW 9.94A.715(2)(a) (Laws of 2003, ch. 379, § 6).