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Washington State
Court of Appeals
Division Two

October 6, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARK ANTHONY LUGLIANI, Appellant.	No. 53210-7-II UNPUBLISHED OPINION

LEE, C.J. — Mark A. Lugliani appeals his exceptional sentence above the standard range for third degree child molestation. He contends his exceptional sentence is clearly excessive. In his statement of addition grounds (SAG) for review, Lugliani contends the trial court violated his due process rights by not imposing a special sex offender sentencing alternative (SSOSA), by imposing an exceptional sentence when the evidence does not support it, and by imposing a clearly excessive sentence. We affirm.

FACTS

Lugliani was a substitute teacher at RMM's[1] school. RMM is on an Individualized Education Plan due to disabilities from Muscular Dystrophy, Scoliosis, and Charcot-Marie-Tooth disease. Lugliani called RMM into a room and hugged and kissed her. Lugliani next took RMM

[1] We use initials instead of names for victims of sex crimes to protect their privacy. Gen. Order 2011-1 of Division II, In re Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases (Wash. Ct. App Aug. 23, 2011).

into a closet where he touched her vagina and breasts over her underclothing. Lugliani then had RMM touch his penis until he ejaculated. RMM was 15 years old.

The State charged Lugliani with third degree child molestation, aggravated by the fact that he abused a position of trust in the commission of the offense.

Lugliani pleaded guilty to the charge. He also admitted to the aggravating factor that he "violated a position of trust or confidence." Verbatim Report of Proceedings (VRP) (Jan. 24, 2019) at 9. Lugliani's standard sentencing range was 6 to 12 months with a maximum sentence of 60 months.

The State argued for an exceptional sentence of 48 months. Lugliani asked for a SSOSA. The trial court denied Lugliani's SSOSA request. The trial court stated that it considered the evaluator's reports, the purposes of the Sentencing Reform Act (SRA) as "set out in RCW 9.94A.010," the fact that Lugliani was an educator, and the stipulated aggravator that he abused a position of trust. VRP (Feb. 22, 2019) at 39. Based on these factors, the trial court stated that it could not "in good conscience issue a [SSOSA]." VRP (Feb. 22, 2019) at 39.

Given Lugliani's aggravator stipulation, the trial court found that Lugliani "used his position of trust or confidence to facilitate the commission of the current offense under RCW 9.94A.535(3)(n)." Clerk's Papers (CP) at 28. Based on this finding, the trial court imposed an exceptional sentence of 48 months. The trial court also imposed 12 months of community custody. The trial court stated, "I am exercising restraint, I'll have you know . . . in terms of what I had available to me, an additional twelve months, but because you've been responsible at this juncture, in terms of pleading guilty and even to the aggravator, I'm reflecting that in the fact that it's—it's only forty-eight months." VRP (Feb. 22, 2019) at 40.

Lugliani appeals.

ANALYSIS

Lugliani contends that the trial court did not intend to impose the statutory maximum when combining his term of confinement with his community custody; therefore, his sentence is clearly excessive and must be reversed. We disagree.

A. EXCEPTIONAL SENTENCE ABOVE THE STANDARD RANGE

Sentences must generally fall within the standard sentence range established by the SRA of 1981. RCW 9.94A.505(2)(a)(i). The court may impose a sentence outside the standard range for an offense if it finds "that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. An aggravated exceptional sentence is appropriate when certain aggravating factors have been determined. RCW 9.94A.535(2), (3).

Lugliani argues his exceptional sentence above the standard range is clearly excessive. We review whether a sentence is clearly excessive under an abuse of discretion standard. *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). Discretion is abused if a decision is based on untenable grounds or untenable reasons. *State v. Davis*, 195 Wn.2d 571, 581, 461 P.3d 1204, 1210 (2020), *pet. for cert. filed*, No. 20-5379 (U.S. July 28, 2020). A "clearly excessive" sentence is one that is clearly unreasonable, "'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (quoting *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)).

A sentence may not exceed the statutory maximum term set by the legislature. RCW 9.94A.505(5). The sentence includes both the term of confinement and community custody; these combined cannot exceed the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012). The statutory maximum for the crime of third degree child molestation is 60 months. RCW 9A.44.089(2); 9A.20.021(1)(c).

Here, the trial court imposed a term of 48 months in confinement plus 12 months of community custody. The trial court expressed its intent to impose an exceptional sentence above Lugliani's standard range based on the agreed aggravator that Lugliani "used his position of trust or confidence to facilitate the commission of the current offense." CP at 28. However, the trial court stated, "I am exercising restraint, I'll have you know . . . in terms of what I had available to me, an additional twelve months." VRP (Feb. 22, 2019) at 40

Although the trial court recognized its authority to impose an additional twelve months of confinement, it did not do so. Instead, the trial court made a deliberate decision to impose 48 months of confinement and 12 months of community custody. Thus, contrary to Lugliani's assertion, the trial court intended to impose a sentence that reached the statutory maximum. Moreover, the trial court relied on the aggravating factor that Lugliani abused a position of trust in the commission of the offense as the basis for the exceptional sentence. The trial court's decision was based on tenable grounds. For these reasons, the trial court's exceptional sentence of 48 months was not clearly excessive.

B. SAG ISSUES

In his SAG, Lugliani challenges his exceptional sentence above the standard range, arguing the trial court violated his due process rights[2] (1) by not imposing a SSOSA, (2) by imposing an exceptional sentence above the standard range when there was no basis for the sentence, and (3) by imposing a clearly excessive sentence. We disagree with Lugliani's arguments.

[2] Under both the state and federal constitutions, government may not deprive an individual of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1.6; WASH. CONST. art. I, § 3.

1. SSOSA

Lugliani contends the trial court abused its discretion in denying his SSOSA request by not considering the SSOSA factors and categorically refusing his request.

Under SSOSA, certain first-time sex offenders may receive a suspended sentence if they meet the statutory requirements and comply with a treatment program as ordered by the court. RCW 9.94A.670(2), (5). In deciding whether to grant a SSOSA, the court considers (1) whether the offender and the community will benefit from the program; (2) whether the alternative is too lenient in light of the extent and circumstances of the offense; (3) whether the offender has additional victims; (4) whether the offender is amendable to treatment; (5) the risk the offender would present to the community, to the victim, and to other persons of similar age and circumstances as the victim; and (6) the victim's opinion as to whether the offender should receive a SSOSA. RCW 9.94A.670(4).

Our Supreme Court has made it clear that a trial court cannot "categorically refuse[]" to consider a SSOSA, but the trial court has "considerable discretion under the SRA." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). RCW 94A.670(4) sets forth factors the court shall consider, but the trial court is not required to enter findings stating its reasons in determining whether a SSOSA sentence is appropriate unless a sentence imposed is contrary to the victim's opinion. RCW 9.94A.670(4); *State v. Hays*, 55 Wn. App. 13, 15, 776 P.2d 718 (1989). If the sentence is not contrary to the victim's opinion, the trial court has no obligation "to give reasons for its determination" that an alternative to a standard range sentence is inappropriate. RCW 9.94A.670(4); *Hays*, 55 Wn. App. at 15.

We review a trial court's decision on a request for a SSOSA for an abuse of discretion. *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). "A court abuses its discretion if it

categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis." *Id*.

Here, the trial court stated that it considered the evaluator's reports, the purposes of the SRA in RCW 9.94A.010, that Lugliani was an educator, and the stipulated aggravator that Lugliani abused a position of trust. The trial court also stated that it could not "in good conscience issue a [SSOSA]." VRP (Feb. 22, 2019) at 39. There is nothing in our record to show that the trial court's decision was contrary to the victim's opinion. Therefore, because the trial court considered the SSOSA factors and did not categorically refuse to consider a SSOSA and because the denial was on a permissible basis, there was no abuse of discretion in denying Lugliani's SSOSA request.

2. Factual Support for Exceptional Sentence

Lugliani next contends that there was no factual support for his exceptional sentence above the standard range and that the trial court's reason for imposing an exceptional sentence was not substantial and compelling. The crux of his argument is that the trial court's actual basis for imposing an exceptional sentence was that RMM was a vulnerable victim, but the State failed to allege, or prove, this fact. Thus, Lugliani argues, his exceptional sentence violates the real facts doctrine.

Under the "real facts" doctrine, a defendant may not be sentenced for a crime the State could not or chose not to prove. *State v. Randoll,* 111 Wn. App. 578, 584, 45 P.3d 1137 (2002) (citation omitted). For sentences above the standard range, the court "may rely on no more information than is admitted by the plea agreement." RCW 9.94A.530(2). The parties are bound by the terms of their agreement. *In re Personal Restraint Petition of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). Abuse of trust is an aggravator that supports an exceptional sentence. RCW 9.94A.535(3)(n).

Here, the parties entered into a plea agreement where Lugliani stipulated to the aggravating circumstance that he abused a position of trust. Based on Lugliani's aggravator stipulation, the trial court found that Lugliani "used his position of trust or confidence to facilitate the commission of the current offense under RCW 9.94.535(3)(n)." CP at 28. Based on this finding, the trial court imposed an exceptional sentence of 48 months, which was above the standard range. Lugliani's argument that the trial court actually relied on the victim's vulnerability in violation of the real facts doctrine when imposing Lugliani's exceptional sentence is simply not supported by the record. If Lugliani has additional evidence outside our record, his proper recourse is the filing of a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

3. Clearly Excessive

Lastly, Lugliani argues that his sentence is clearly excessive because it violates the real facts doctrine and the trial court failed to discuss the purposes of the SRA as set forth in RCW 9.94A.010.

Lugliani's argument that his sentence is clearly excessive because it violates the real facts doctrine fails for the same reasons as discussed above.

Lugliani's argument that his sentence is clearly excessive because the trial court did not discuss in detail the purposes of the SRA as set forth in RCW 9.94A.010 also fails.

RCW 9.94A.010 describes the purposes of the SRA. It states:

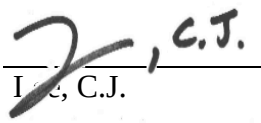
> The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:
>
> (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Promote respect for the law by providing punishment which is just;
>
> (3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;
(5) Offer the offender an opportunity to improve himself or herself;
(6) Make frugal use of the state's and local governments' resources; and
(7) Reduce the risk of reoffending by offenders in the community.

RCW 9.94A.010. The trial court stated on the record that it considered the purposes of the SRA as set forth in RCW 9.94.010. There is no legal authority requiring the trial court to discuss in detail each section of RCW 9.94A.010 on the record and that the failure to do so creates a clearly excessive sentence. Because Lugliani fails to identify any error, we decline to address this issue further. RAP 10.10(c).

We affirm.

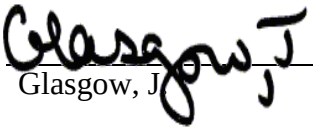
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, C.J.

We concur:

Maxa, J.



Glasgow, J.