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

STATE OF WASHINGTON, Respondent, v. JERRY DANIEL SHEEHAN, Appellant.	)	No. 29857-4-III UNPUBLISHED OPINION

Kulik, J. — A jury found Jerry Daniel Sheehan guilty of four counts of child molestation and one count of incest. Based on the jury's finding of aggravating circumstances, the trial court imposed an exceptional sentence. Mr. Sheehan appeals. He contends that the statutes governing imposition and review of an exceptional sentence violate his due process rights and right to meaningful appeal because the statutes lack an objective standard to guide application. He also raises other errors related to his judgment and sentence. We find that the substantial and compelling standard used in imposing an exceptional sentence is constitutionally valid. Thus, we affirm Mr. Sheehan's exceptional sentence. However, we remand the judgment and sentence for the

trial court to clarify the length of community custody, to correct the sex offender registration requirement, and to revise the crime-related prohibition regarding dating relationships. We also strike other crime-related prohibitions and conditions.

FACTS

A jury found Jerry Daniel Sheehan guilty of four counts of child molestation and one count of incest. The jury also found that on all five counts, Mr. Sheehan abused his position of trust to facilitate the crime.

The trial court imposed the following exceptional sentence on Mr. Sheehan: count I, second degree child molestation, 120 months confinement (10 years); count II, second degree child molestation, 120 months confinement (10 years); and count III, third degree child molestation, 24 months confinement (2 years). The court ordered the remainder of all time for count III, count V, third degree child molestation, and count VI, incest, to be spent in community custody, a term of 156 months (13 years). The judgment and sentence noted that confinement was the statutory maximum.[1] The court also ordered the

[1] Based on Mr. Sheehan's offender score of 9+, the standard range sentence for counts I and II was 87 to 116 months each. The statutory maximum sentence for the remaining counts was 60 months each. Each of the five counts was subject to a period of 36 months community custody pursuant to RCW 9.94A.701(1).

sentences to run consecutively.

At the sentencing hearing, the trial court gave several reasons for imposing the exceptional sentence. The victim was groomed at the age of 12 by her stepfather, Mr. Sheehan, to think that the abuse was normal. When the victim came to the realization that the abuse was not right, the abuse continued. The abuse caused the victim embarrassment and humiliation in her small community and at her small high school. The overall effect produced extreme anxiety for the victim. The court also recognized that Mr. Sheehan made a calculated decision to participate in community organizations in order to create the illusion that he was an upstanding citizen and to discredit the victim.

The trial court imposed several crime-related prohibitions and conditions. The court required Mr. Sheehan to undergo mental health and chemical dependency evaluations and prohibited him from dating or forming relationships without prior approval. The court also prohibited Mr. Sheehan from possessing pornography and placed restrictions on Mr. Sheehan's Internet access and usage.

Mr. Sheehan appeals the imposition of the exceptional sentence and several crime-related prohibitions.

ANALYSIS

EXCEPTIONAL SENTENCE

A statute is presumed to be constitutional; a party challenging a statute bears the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Out of respect for the legislature, a statute should not be deemed unconstitutional "unless [the reviewing court is] fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id*. at 147.

A statute violates the due process clause if (1) it "'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed' or (2) it 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Zigan*, 166 Wn. App. 597, 604, 270 P.3d 625 (internal quotation marks omitted) (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)), *review denied*, 174 Wn.2d 1014 (2012).

The court's findings of fact and conclusions of law on the imposition of an exceptional sentence are reviewed under a three-prong test. First, the appellate court reviews "whether the record supports the jury's special verdict on the aggravating circumstances." *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008). The jury's

findings are upheld unless the findings are clearly erroneous. *Id*. (quoting *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). Next, as a matter of law, the appellate court determines whether the reasons given justify the exceptional sentence. *Id*. at 305 (quoting *Fowler*, 145 Wn.2d at 405-06). The appellate court undertakes a de novo review to determine if the trial court's reasons for imposing an exceptional sentence are substantial and compelling. *Id*. at 308. Finally, the appellate court reviews the sentence to determine if the sentence is clearly excessive or clearly lenient. *Id*. at 305-06 (quoting *Fowler*, 145 Wn.2d 405-06). This last prong is reviewed for an abuse of discretion. *Id*. at 306. "A sentence is clearly excessive if it is based on untenable grounds or untenable reasons or if it is an action no reasonable judge would have taken." *State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010), *review denied*, 170 Wn.2d 1017 (2011).

In exceptional sentences issued prior to 2004, judges were assigned the duty of determining the factual basis for the aggravating circumstances to support an exceptional sentence. *See State v. Hughes*, 154 Wn.2d 118, 133 n.3, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *see also State v. Applegate*, 147 Wn. App. 166, 170, 194 P.3d 1000 (2008). However, in 2004, the United States Supreme Court held that Washington's procedure for imposing an exceptional sentence did not comply with the Sixth

Amendment because aggravating facts to support a sentence above the prescribed standard range must be found, beyond a reasonable doubt, by a jury and not by a judge. *Blakely v. Washington*, 542 U.S. 296, 302-06, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Thus, the Washington legislature enacted changes to the Sentencing Reform Act (SRA), chapter 9.94A RCW, creating a new criminal procedure for imposing greater punishment than the standard range. Laws of 2005, chapter 68. The new procedure instructed a jury to find any aggravating circumstances and for a sentencing court to decide whether the aggravating circumstance was a substantial and compelling reason to impose greater punishment. Laws of 2005, chapter 68; *see* RCW 9.94A.535; RCW 9.94A.537.

Under RCW 9.94A.535,

> the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.537(3) requires that all fact supporting aggravating circumstances must be decided by a jury and proven beyond a reasonable doubt. If the jury finds one or more of the alleged facts that would support an aggravated sentence, the court may

sentence the offender to an exceptional sentence. RCW 9.94A.537(6). An exclusive list of aggravating circumstances that support an exceptional sentence is found in RCW 9.94A.535(2).

As part of an exceptional sentence, a trial court can depart from the applicable statutory standard and order a sentence to run consecutively or concurrently. RCW 9.94A.535.

The trial court must enter written findings of fact and conclusions of law setting forth the reasons for imposing an exceptional sentence. RCW 9.94A.535. However, a trial court does not have an obligation to state its reasons for the length of an exceptional sentence. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).

"To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

Constitutionality of the Exceptional Sentence. Mr. Sheehan contends that the exceptional sentence statutes violate his right to due process. He maintains that, as a result of the *Blakely* decision, the "substantial and compelling" standard for imposing an

exceptional sentence is subjective. Since *Blakely*, the trial court no longer has the authority to engage in fact finding to determine aggravating circumstances and, consequently, no longer has a foundation to find a substantial and compelling reason to impose the exceptional sentence. Without some basis for what constitutes a substantial and compelling reason for imposing an exceptional sentence, the standard leads to arbitrary enforcement. Mr. Sheehan also contends that the subjective standard results in rubber-stamping the jury's findings and impairs meaningful appellate review. We disagree.

First, contrary to Mr. Sheehan's position, *Blakely* did not have an effect on the substantial and compelling determination by the trial court. *Hughes*, 154 Wn.2d at 137. The *Blakely* decision addressed only the portion of the exceptional sentence statute that pertained to the factual findings. *Id*. "*Blakely* left intact the trial judge's authority to determine whether the facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence under RCW 9.94A.535. That decision is a legal judgment which, unlike factual determinations, can still be made by the trial court." *Hughes*, 154 Wn.2d at 137.

Second, the substantial and compelling standard is not subjective after *Blakely*. Instead, the standard remains a legal conclusion based on facts found by the jury. The

court determines as a matter of law whether the facts supply a substantial and compelling reason to impose an exceptional sentence. The finding of aggravating circumstances by a jury creates a substantial and compelling reason. The substantial and compelling standard is not arbitrary simply because the trial court retains its discretion in deciding to impose an exceptional sentence based on the facts.

Also, the trial court's discretionary power negates Mr. Sheehan's contention that *Blakely* relegated the trial court's duty to rubber-stamping the jury's findings. A jury finding of an aggravating circumstance does not compel the imposition of an exceptional sentence. Again, the trial court retains the discretion to impose the sentence even after the jury's finding of aggravating circumstances.

Last, appellate review of the trial court's decision based on the substantial and compelling standard is possible. Like any other conclusion of law, the appellate court enters into a de novo review of an exceptional sentence. In the case of an exceptional sentence, this court looks to the facts found by the jury to determine if the trial court correctly concluded that a substantial and compelling reason existed to support the sentence. If the jury found the aggravating circumstances and the trial court based its sentence on those circumstances, then as a matter of law, the trial court's decision will be upheld. The substantial and compelling standard does not impede appellate review.

Upon review of Mr. Sheehan's case, the jury found that Mr. Sheehan abused his position of trust in commission of all four counts of his felony sex offenses. Abuse of trust is a substantial and compelling reason for imposing an exceptional sentence. *State v. Melhaff*, 158 Wn.2d 363, 365, 143 P.3d 824 (2006). Based on the jury's finding, the trial court correctly found as a matter of law that substantial and compelling reasons existed for imposing an exceptional sentence.

In sum, the substantial and compelling standard in imposing an exceptional sentence is not subjective and does not impede appellate review. The standard does not lead to arbitrary enforcement and does not violate Mr. Sheehan's right to due process. The trial court did not err in imposing a constitutionally valid exceptional sentence upon Mr. Sheehan.

Length of the Exceptional Sentence. Mr. Sheehan contends that the trial court's failure to give a reason for the length of his sentence violates his constitutional and statutory right to appeal. However, as previously decided in *Ritchie*, the trial court does not need to set forth the relevant reasons supporting the length of an exceptional sentence. *Ritchie*, 126 Wn.2d at 392. Once a trial court reasons that the facts meet the substantial and compelling standard, there is often no more to say. *State v. Ross*, 71 Wn. App. 556, 571-72, 861 P.2d 473, 883 P.2d 329 (1993). This court looks only to whether the length

of the sentence shocks the conscience or if the trial court's stated basis for the length is based on untenable grounds or for untenable reasons. *Id*. at 571. The record is reviewed to determine if the trial court abused its discretion. *Ritchie*, 126 Wn.2d at 392 (quoting *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986)). Evaluating the decision for an abuse of discretion does not make appellate review impossible.

The length of Mr. Sheehan's exceptional sentence was not clearly excessive. The trial court ordered Mr. Sheehan to serve 22 months incarceration and 13 years community custody for five sex offenses involving a minor. Considering the jury's finding that Mr. Sheehan abused his position of trust, this sentence does not shock the conscience, nor did the trial court base the sentence on untenable grounds or untenable reasons.

Furthermore, the trial court gave additional reasons supporting the sentence. The trial court stated that Mr. Sheehan groomed his victim from an early age, the victim endured considerable embarrassment and humiliation in her small town, and Mr. Sheehan participated in community organizations to discredit the accusations of the victim. The trial court did not abuse its discretion when determining the length of Mr. Sheehan's exceptional sentence.

INDETERMINATE SENTENCE

Child molestation in the second degree is a class B felony with a statutory maximum sentence of 10 years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b). Child molestation in the third degree and incest in the second degree are class C felonies with a statutory maximum of five years each. RCW 9A.44.089(2); RCW 9A.64.020(2)(b); RCW 9A.20.021(1)(c).

Except for the purpose of recovering restitution, a court may not impose a sentence providing for a term of confinement or community supervision or placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW. RCW 9.94A.505(5). Moreover, the term of community custody shall be reduced whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime. RCW 9.94A.701(9).

When a sentence of confinement and community custody could possibly exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the judgment and sentence. *See State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).

Mr. Sheehan contends that his sentence is indeterminate because the trial court did

not define the length of community custody for each count. Because the term of community custody is not delineated, we agree that the sentence for any one of the counts could potentially exceed the statutory maximum.

In the judgment and sentence, the trial court ordered the statutory maximum sentence for all counts to run consecutively. Based on the statutory maximum for each count, the trial court's sentence could not exceed 35 years. The judgment and sentence clearly sentenced Mr. Sheehan to 10 years of confinement on count I, 10 years of confinement on count II, and 2 years of confinement for count III. This equals 22 years of confinement. The trial court ordered the remainder of all time to be spent in community custody. The judgment and sentence simply noted 13 years of community custody for all counts. The trial court's total sentence did not exceed 35 years.

While Mr. Sheehan's total term of confinement and community custody does not exceed the statutory maximum for the combined offenses, we agree that the judgment and sentence should clearly state the exact term of community custody for each count. Therefore, we remand the judgment and sentence to clarify the length of confinement and/or community custody for each count within the statutory maximum.

SEX OFFENDER REGISTRATION REQUIREMENT

Statutory construction is a question of law reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

A person convicted of a sex offense must register with the county sheriff. RCW 9A.44.130(1). For a sex offender whose offense was a class B felony, the duty to register ends 15 years after the release from confinement, if the offender spends 15 years in the community without being convicted of a disqualifying event. RCW 9A.44.140(2).

Mr. Sheehan contends that the trial court exceeded its statutory authority by imposing a registration requirement in excess of 15 years following release from confinement.

On the judgment and sentence, the trial court ordered Mr. Sheehan to register as a sex offender for 15 years after release from community custody, ending 50 years after the date of the judgment and sentence. At oral argument before this court, the State conceded that Mr. Sheehan's registration requirement should end 15 years after his release from incarceration. We remand the matter to the trial court to correct the judgment and sentence in accordance with the State's concession.

CRIME-RELATED PROHIBITIONS

Imposing crime-related prohibitions is generally within the discretion of the sentencing court and will be reversed only if manifestly unreasonable. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

The SRA allows a court to impose crime-related prohibitions that are independent of community custody conditions. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Under former RCW 9.94A.030(12) (2003), a "crime-related prohibition" is an order of the court prohibiting conduct that directly relates to the circumstances of the crime. "Although the conduct prohibited during community custody must be directly related to the crime, it need not be causally related to the crime." *State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000).

Imposing a prohibition that is unconstitutional is manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). However, if imposed sensitively, limitations on fundamental rights are permissible. *Riley*, 121 Wn.2d at 37 (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975)).

Prohibition on Possession of Pornography. A general restriction on accessing or possessing pornographic materials implicates First Amendment rights and is unconstitutionally vague. *Bahl*, 164 Wn.2d at 757-58. Any limitations on the right need to be reasonably necessary to accomplish the needs of the State. *Id*. And the vagueness

problem becomes more apparent when the condition does not provide any ascertainable standards for enforcement. *Id*. at 758.

The trial court imposed a crime-related prohibition that Mr. Sheehan shall not possess, create, use, down load, or purchase any form of pornography. The State concedes that the prohibition on pornography is unconstitutionally vague, as set forth in *Bahl*. Therefore, we strike the prohibition and remand to the trial court to delete this prohibition.

Prohibition on Forming Relationships. Mr. Sheehan challenges the order that he "not date anyone or form relationships without prior approval from your therapist and community corrections officer." Clerk's Papers at 321.

The First Amendment freedom of association protects a person's right to enter into and maintain certain human relationships. *State v. Moultrie*, 143 Wn. App. 387, 399 n.21, 177 P.3d 776 (2008). The SRA expressly authorizes a sentencing court to restrict an offender's freedom of association with a specified class of individuals "'if reasonably necessary to accomplish the essential needs of the state and public order.'" *Moultrie*, 143 Wn. App. at 399 (internal quotation marks omitted) (quoting *Riley*, 121 Wn.2d at 37-38). However, "[o]ur courts have also recognized that it would not be reasonable to order a sex offender to have no contact with a class of individuals who do not share a

relationship to the offender's crime." *Moultrie*, 143 Wn. App. at 399.

The prohibition against dating or forming relationships without prior approval is overbroad and unreasonable because it does not accurately describe the class of persons that Mr. Sheehan is not allowed to contact, based on his crime. Mr. Sheehan's crime involved a child. However, this condition prohibits Mr. Sheehan from entering into platonic relationships with childless adults. Also, this prohibition is not reasonably related to the State's essential need to protect children.

A more focused prohibition is required. We remand for the trial court to revise the prohibition to limit Mr. Sheehan from forming relationships with persons having minor children.

Other Crime-Related Prohibitions and Conditions. Mr. Sheehan contends that the condition relating to mental health treatment should be stricken because the court did not find that he was mentally ill under the requisite statutory procedures before imposing the condition.

Former RCW 9.94A.505(9) (2002) (recodified as RCW 9.94B.080) authorizes that a trial court order mental health treatment as a condition of community custody if the court complies with the statutory procedures. The court must find, "based on a presentence report and any applicable mental status evaluation, that the offender suffers

from a mental illness which influenced the crime." *State v. Jones*, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

The State admits that the trial court did not follow the procedure set out in former RCW 9.94A.505(9). However, the State argues that the mental health condition is allowable because it is crime related and is part of Mr. Sheehan's exceptional sentence. We disagree that the court had the authority to order Mr. Sheehan to undergo a mental health evaluation without first following statutory procedure. We remand to the trial court to strike the order requiring a mental health evaluation and treatment.

Mr. Sheehan also challenges the order that he undergo a chemical dependency evaluation and the order that placed limitations on his Internet access. The State admits that drug usage and Internet usage were not implicated in Mr. Sheehan's crime and are not crime related. We remand to the trial court to strike the orders related to chemical dependency and Internet usage.

In conclusion, we affirm the trial court's imposition of the exceptional sentence. We remand the judgment and sentence to clarify the length of confinement and community custody for each count, to order that Mr. Sheehan register as a sex offender for 15 years after his release from incarceration, and to revise the prohibition on forming relationships to limit Mr. Sheehan from forming relationships with persons having minor

children. We also strike the challenged prohibitions and conditions relating to pornography, mental health, chemical dependency, and Internet usage.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

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Sweeney, J. Korsmo, C.J.