No. 83779-1

STEPHENS, J. (dissenting)—This case is about preserving a trial court's discretion to grant or deny a special sex offender sentencing alternative (SSOSA), not whether the State is entitled to affirmative relief on appeal. The majority's focus on RAP 2.4(a) distracts from what should be a straightforward resolution of this case that involves sending Sims back to square one before the SSOSA was imposed. While the majority agrees that Sims should be returned to the trial court for resentencing, it believes we should tie the trial court's hands and require it to retain a sentence it never intended to impose. Because the majority's analysis wholly discounts the trial court's discretion and relies on a misguided notion about chilling the right to appeal, I respectfully dissent.

"The decision to impose a SSOSA is entirely within the trial court's discretion." *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006) (citing *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992)). A trial court considers several factors in deciding to grant or deny a SSOSA, including whether the suspended sentence is too lenient in light of the nature of the offense, whether the defendant would present a risk to the community and the victim, and whether the

victim believes a SSOSA is an appropriate disposition of the charge. RCW 9.94A.670(4). As part of its decision to grant a SSOSA in the first instance, a trial court may also exercise its discretion to impose certain sentencing conditions. RCW 9.94A.670(6).

There can be little doubt in this case that the trial court exercised its discretion to grant a SSOSA because it believed it could banish Sims from the community. The Court of Appeals correctly observed that the banishment condition and the decision to grant the SSOSA were "inextricably linked." *State v. Sims*, 152 Wn. App. 526, 533, 216 P.3d 470 (2009). The trial court's reasoning on the record confirms this conclusion:

> [T]he only way I would grant SSOSA, because what I have heard, is—and it's not—it's an issue which neither one of you [counsel] dealt with and I am not sure how you are going to deal with it but I don't think this young girl should ever have to see him [Sims] again in her life. And I will not allow him to remain in that community and grant SSOSA.
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> I think you have—that's the issue in this case. I don't think that she should have to see him. I don't think she should have to see him drive by. I don't think that she should be walking down the street and just happen to see him. That presents a problem for you but I am not going to leave him in the community and allow him to have SSOSA. I will—I think that given the nature of this offense that I would grant SSOSA. Not if he remains in the community where she has to see him.
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> . . . I know it sounds like it is banishment but on the other hand, it's to protect that young girl. And your [defense counsel's] current plans are that he live in home and stay in his residence. That can't happen. Because that forces the family who was innocent in this case to move to protect their child from revisiting this issue and I am not going to do that.

Verbatim Report of Proceedings at 37, 41. Simply put, the trial court's belief that it could banish Sims from the community was the key reason it exercised its discretion to grant the SSOSA.

This exercise of discretion is meaningless if an appellate court can simply redline the conditions of a SSOSA while preventing the trial court from taking a second look at the SSOSA itself. In appealing his sentence, Sims designated in his notice of appeal the entire "judgment and sentence, and every part thereof." Clerk's Papers at 56. Yet the majority would restrict our review and the trial court's discretion on remand to considering only the invalid condition of the SSOSA. This results in a sentence that the trial court never intended and, based on the record, would never have imposed.[1] Sims appealed his sentence, and the possibility that he may need to be resentenced inheres in that.

The majority offers several reasons why the SSOSA must remain in place, none of which are persuasive. First, the majority believes that the SSOSA is not properly before us because Sims did not assign error specifically to the SSOSA. Majority at 5. It is true that we generally restrict our review to issues raised in assignments of error that are properly briefed and argued. But "this court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision." *Alverado v. Wash. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988); *see also* RAP 12.1(b) (explaining that appellate court can raise an issue sua sponte). A complete review of Sims's sentence is necessary here because

[1] The majority speculates that "[b]ecause the purpose of the condition [i.e., protection of the victim] can still be achieved, limiting the remand to revision of the condition does not subvert the trial court's original decision to grant a SSOSA." Majority at 12. Even assuming a more narrowly tailored geographical restriction is possible, we cannot say it will accomplish the trial court's intended result to protect the victim. Only the trial court can make that judgment, which is why the decision is vested in the trial court's sound discretion.

the SSOSA was expressly predicated on the invalid banishment condition. Sims cannot insulate the SSOSA from our review—after designating it in his notice of appeal—simply by neglecting to include it in his assignments of error.

Nor does RAP 2.4(a) limit either the scope of our review or the trial court's discretion on remand. Seeking resentencing when an imposed sentence is invalid is not a request for "affirmative relief." The majority says that the State is requesting partial reversal of the trial court's judgment. Majority at 6. But this is true only if we view the banishment condition and the SSOSA as two separate decisions of the trial court. We should not artificially bifurcate what can only be described as a single discretionary sentencing decision. And because the trial court would not have granted the SSOSA but for the banishment condition, Sims's appeal calls into question the validity of the entire sentence. A full resentencing is the natural consequence of Sims's decision to appeal his sentence, not the result of the State's request for "affirmative relief."

Even if RAP 2.4(a) were applicable, the "necessities of the case" would demand that the SSOSA remain on the table. The majority posits that the "necessities of the case" require review of a claim only when it cannot be considered separately from the issues properly raised on appeal. Majority at 8. The majority then concludes that, because the banishment condition can be narrowly tailored without disturbing the SSOSA, the "necessities of the case" do not require revisiting the SSOSA. Majority at 12. This conclusion ignores the discretionary nature of a SSOSA. While it may be possible in practical terms to adjust a SSOSA

condition without reconsidering the SSOSA, it is not possible to do so without infringing on the trial court's sentencing discretion. We cannot pretend to preserve the discretionary features of a SSOSA while at the same time mandating that the trial court retain a sentencing alternative it never would have granted.

The majority's analysis of RAP 2.4(a) is problematic for another reason. According to the majority, so long as the State cross appeals, the trial court can properly reconsider the SSOSA in addition to adjusting the SSOSA condition. *See* majority at 5-6. The effect of the majority opinion in future cases is clear: each time a defendant challenges a condition of the SSOSA, the State will cross appeal to preserve the SSOSA for review and reconsideration. So while Sims may get the benefit of a SSOSA crafted by an appellate court in this case, future appellants will not.

Finally, the majority gives undue weight to the alleged chilling effect on Sims's right to appeal. The majority accepts Sims's argument at face value but does not explain how the chilling effect is removed when the State does what the majority's analysis requires and files a cross appeal. To the extent there is a chilling effect from the prospect of full resentencing—and I am not convinced there is—the same chilling effect would necessarily be present when the State *does* cross appeal. And if, as the majority asserts, the chilling effect is enough to shield the SSOSA from review, then a trial court will simply never be able to revisit its discretionary decision to grant a SSOSA.

This reveals an internal inconsistency in the majority's decision. On one

hand, the majority chastises the State for failing to preserve the SSOSA for review by cross appealing under RAP 2.4(a). On the other hand, even if the State had cross appealed, the chilling effect on Sims's right to appeal would prevent reconsideration of the SSOSA. While the majority does not say it, under its analysis there are apparently no circumstances in which a SSOSA challenged as containing an invalid condition may be revisited on remand.[2]

Given the majority's resolution, it does not need to address Sims's alternative request to withdraw his appeal. Sims made this request in his briefing at the Court of Appeals, Suppl. Br. of Appellant at 13, and he renewed the request at oral argument before this court, Wash. Supreme Court Oral Argument, *State v. Sims*, No. 83779-1 (Nov. 9, 2010), at 13 min., 25 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http:www.tvw.org. The Court of Appeals rejected this request, citing only RAP 18.2, which concerns withdrawal before argument with the defendant's consent. Nothing in the appellate rules, however, limits our ability to grant a request to withdraw after argument. If my resolution were to prevail, and given that the remedy issue in this case arose belatedly on appeal, in fairness I would grant Sims's request to withdraw his appeal.

I respectfully dissent.

AUTHOR:

Justice Debra L. Stephens

[2] Limiting appellate review to redlining invalid SSOSA conditions might therefore create the unintended incentive for defendants not to resist especially restrictive sentencing conditions in order to obtain a SSOSA, then challenge them on appeal.

WE CONCUR:

Chief Justice Barbara A. Madsen