70714-1

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No. 70714-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

DEREK CARTMELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by failing to exercise discretion and denying Mr. Cartmell a DOSA, based upon the court's erroneous belief it lacked the discretion to grant the sentencing alternative.

2. The amended information was constitutionally deficient because it did not include every element of the crime of bail jumping.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Under the Sentencing Reform Act of 1981, a sentencing court must consider a defendant's eligibility for a DOSA and then use its discretion in imposing or not imposing a DOSA. In the instant case, Mr. Cartmell was eligible for a DOSA, but the sentencing court denied his request without a hearing or inquiry, based upon the court's mistaken understanding that Mr. Cartmell was ineligible, and thus, that the court lacked the authority to impose the DOSA. Did the court fail to exercise its discretion, thus, erroneously and categorically denying the DOSA?

2. The accused has the constitutional right to be informed of the charges against him, and all essential elements of a crime must therefore be set forth in the information. Among the elements of bail jumping is that a person "knowingly failed to appear." Where the

amended information did not allege the hearing to which Mr. Cartmell knowingly failed to appear, must the bail jumping conviction be reversed and dismissed because the information was constitutionally deficient?

C. STATEMENT OF THE CASE

Derek Cartmell was charged with a series of felonies arising from an incident on November 1, 2012. RP 100-02 (hereinafter "eluding case").[1]

Mr. Cartmell was arraigned on November 20, 2012, and pled not guilty to the charges, indicating his intention to go to trial. RP 93-95. Bail was set, and Mr. Cartmell was eventually released on bond. Id. He received a scheduling order with dates and received conditions of release, including the condition to appear at future proceedings as ordered. Id.; Ex. 2.

The case was next scheduled for a hearing on January 14, 2013; Mr. Cartmell attended that court appearance, as ordered. RP 174-76, 179.

[1] The verbatim report of proceedings is referred to as "RP." Motions in limine and sentencing proceedings are not consecutively paginated, and are referred to specifically by date.

The trial date for the eluding case was set for January 29, 2012. RP 97. Mr. Cartmell had been told by his public defender that the trial was set to begin at 1:30 PM, so he arrived at the courthouse at that time. RP 183-84, 192-93. Since the scheduling order had actually stated an 8:30 AM start time on January 29th, a bench warrant had already been issued for Mr. Cartmell's arrest by the time he appeared at the courthouse. RP 106-07, 123-25; Ex. 4. The Island County Prosecutor charged Mr. Cartmell with bail jumping. CP 146-47.

At trial, as proof of the bail jumping charge, the State called the Island County Superior Court Clerk as a witness. RP 88. Through the Clerk, the State introduced certified copies of the order for conditions on release and the scheduling order, which included the dates and times of all court dates. RP 93-97; Ex. 1, Ex. 2. The State also called Detective Rick Felici, a witness on the eluding trial, who had appeared to testify on January 29th at 8:30 AM, and had waited for Mr. Cartmell to appear for trial. RP 105. The detective also stated that he had received information that Mr. Cartmell had appeared in the courthouse later in the day, but had not cleared the warrant nor been arrested on it for several weeks. RP 106-07.

Testimony from a number of other witnesses, including the security officer who manned the courthouse metal detector, verified that Mr. Cartmell had appeared for his eluding trial at approximately 1:30 PM on January 29th, as he had been instructed by his attorney. RP 117-18, 179-82, 197-99.

Following a jury trial, Mr. Cartmell was convicted, as charged.[2] CP 92. At his sentencing hearing, Mr. Cartmell requested the Drug Offender Sentencing Alternative (DOSA). 7/1/13 RP 9. The sentencing court denied the DOSA without a hearing. Id. at 11.

D. ARGUMENT

1. THE SENTENCING COURT ERRED BY FAILING TO EXERCISE ITS DISCRETION TO CONSIDER THE DRUG OFFENDER SENTENCING ALTERNATIVE.

At sentencing, Mr. Cartmell requested a DOSA. 7/1/13 RP 9. Mr. Cartmell met the criteria and was accordingly eligible for a DOSA. Id. Mr. Cartmell argued that he had a long-term drug addiction, and that the last two times he had been incarcerated, he had not been offered treatment. He stated that he could benefit from the treatment available through a DOSA, as his addiction has "lead [sic] me to make

[2] Mr. Cartmell represented himself at trial. CP 144-45 (Waiver of Counsel).

the decisions that I make." Id. at 9.[3] Mr. Cartmell told the court that he wanted "to get help for my mental health problems and my drug addiction so I can be a productive member of society." Id.

When asked by the court, the State agreed that Mr. Cartmell was statutorily eligible for the program. "I don't think he's statutorily excluded from a DOSA, because if the last one that he got was sentenced in 2000, then that would be outside the 10 year range, and he would be statutorily eligible." Id. at 10. However, the prosecutor inaccurately informed the court that due to Mr. Cartmell's pending 57-month sentence on the eluding case, he was ineligible for the DOSA on the bail jumping case. Id.

Due to this mistaken information, the trial court denied Mr. Cartmell's request for a DOSA on the instant case without a hearing. Id. at 11. The court ruled:

> I wish you had been eligible for drug court. I think you could have done well there. But for one reason or another you weren't eligible for drug court. There's not much I can do about the lack of services in prison. Thank you.

Id. at 11 (emphasis added).

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[3] One of the counts of which Mr. Cartmell was convicted in the prior case – the matter on which he purportedly jumped bail -- was possession of methamphetamine. RP 100-02.

a. This Court should review the sentencing court's ruling denying Mr. Cartmell a DOSA. Sentencing errors may be raised for the first time on appeal. In re Personal Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Permitting defendants to challenge an illegal sentence on appeal helps ensure that sentences are in compliance with the sentencing statues and avoids sentences based only upon trial counsel's failure to pose a proper objection. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004) (quoting State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024 (1993)). Moreover, the rule inspires confidence in the criminal justice system and is consistent with the Sentencing Reform Act's goal of uniform and proportional sentencing. Mendoza, 165 Wn.2d at 920; State v. Ford, 137 Wn.2d 472, 478-79, 484, 973 P.2d 452 (1999); RCW 9.94A.010(1)-(3).

A defendant may appeal a standard range sentence if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. State v. J.W., 84 Wn. App. 808, 811, 929 P.2d 1197 (1997) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State v. Porter,

133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing State v. Elliott, 144 Wn.2d 6, 17, 785 P.2d 440 (1990)). A defendant is not barred from appealing a standard range sentence when the appeal raises a challenge to the sentencing court's determination of eligibility for a sentencing alternative. See State v. Mail, 121 Wn.2d at 712; State v. McNeair, 88 Wn. App. 331, 336-37, 944 P.2d 1099 (1997); State v. Garcia-Martinez, 88 Wn. App. 322, 328-30, 944 P.2d 1104 (1997).

In general, a reviewing court will not reverse a trial court's decision not to grant a DOSA sentence. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1); State v. Bramme, 115 Wn.2d 844, 850, 64 P.3d 60 (2003)). Nevertheless, a defendant may challenge the procedure by which the sentence was imposed, as every defendant is entitled to request the trial court to properly consider such a sentence and give the request meaningful consideration. 154 Wn.2d at 342 ("every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered"). Moreover, a defendant is entitled to a review of the denial of a DOSA request in order to correct a legal error or the trial court's abuse of discretion. State v. Williams, 149 Wn.2d 143, 147, 65

P.3d 1214 (2003); State v. White, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

A sentencing court abuses its discretion by refusing to exercise its discretion or by relying on an impermissible basis for its sentencing decisions. State v. Garcia-Martinez, 88 Wn. App. at 330. Here, the sentencing court erred by refusing to consider the defense request for a DOSA sentence based on its erroneous determination that treatment was not available due to the fact that Mr. Cartmell had been sentenced on another matter. Mr. Cartmell thus requests that this Court review the trial court's denial of a DOSA below. RAP 2.4; Garcia-Martinez, 88 Wn. App. at 330 (appellate review appropriate "where a defendant has requested an exceptional sentence below the standard range" and the trial court "has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range."); see also State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (remand granted where trial court refuses to exercise its discretion to consider an exceptional sentence because it erroneously believed it lacked the authority to do so).

b. The Sentencing Reform Act requires the sentencing court determine a defendant's eligibility for a DOSA and then use its

discretion in imposing a DOSA if the defendant meets the criteria. The purpose of the DOSA statute is to provide "treatment-oriented sentences" for drug offenders. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519, rev. denied, 136 Wn.2d 1004 (1998). The Sentencing Reform Act requires a judge to determine eligibility for a DOSA and to use her discretion to determine whether to impose the DOSA. RCW 9.94A.505(2)(a)(vi); RCW 9.94A.660.[4]

c. Because Mr. Cartmell was eligible for a DOSA, the sentencing court had a duty to exercise its discretion and either grant or deny the request under the criteria set forth by the Legislature. The legislature enacted RCW 9.94A.660 to address the substance abuse problems of offenders. RCW 9.94A.660(1) provides only that the person requesting a DOSA have a felony conviction that is not a violent or sex offense and demonstrate he or she has a chemical dependency

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[4] Under RCW 9.94A.660(1), a defendant is eligible for a DOSA if, among other requirements:

(1) his or her current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon sentence enhancement;
(2) his or her prior convictions do not include violent offenses or sex offenses;
(3) the end of the standard range of incarceration for the current offense is greater than one year;
(4) he or she has not received a DOSA more than once in the prior ten years before the current offense; and
(5) he or she is not subject to deportation.

problem such that he or she would likely benefit from the sentencing alternative. In fact, under RCW 9.94A.660(2), the statute provides during incarceration, the offender:

> shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

Following the period of incarceration, the statute contemplates the offender be released on community custody with the provision that the terms of release include "appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services." RCW 9.94A.660(2)(a).

Instead of properly considering Mr. Cartmell's eligibility for a DOSA and exercising its discretion, the sentencing court summarily decided the DOSA program was not an option, due to Mr. Cartmell's other sentence. 7/1/13 RP 11. The sentencing court did no balancing test, refusing to consider a DOSA because of the court's mistaken belief that the DOSA was not an option. Id. The court's misapprehension is clear from the court's own words, mistakenly

referring to the DOSA as "drug court" twice during sentencing. Id. ("for one reason or another you weren't eligible for drug court"). The court also improperly based its denial of the DOSA on its lack of knowledge of available treatment programs: "There's not much I can do about the lack of services in prison." 7/1/13 RP 11.

Lastly, because Mr. Cartmell proceeded pro se, the court should have liberally construed his request for the DOSA at sentencing, at least granting a hearing to determine his eligibility. Federal Exp. Corp. v. Holowecki, 552 U.S. 389, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) ("Even in the formal litigation context, pro se litigants are held to a lesser pleading standard than other parties") (citing Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (Pro se pleadings are to be "liberally construed")); Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). Documents filed pro se are "to be liberally construed, [and] ...however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice"). The Ninth Circuit has long protected the rights of pro se litigants by affording pro se pleadings liberal construction. Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir.

1984) ("The rights of pro se litigants require careful protection where highly technical requirements are involved").

The sentencing court abused its discretion when it categorically denied Mr. Cartmell a DOSA sentence without exercising its discretion to consider it. Williams, 149 Wn.2d at 148. As this Court stated in McGill, "Remand for resentencing is often necessary where a sentence is based on a trial court's erroneous interpretation of or belief about the governing law." 112 Wn. App. at 100.

d. Remand for resentencing is required. This Court must reverse and remand for resentencing because the sentencing court abused its discretion by relying on an improper and erroneous basis in denying a DOSA and imposing the standard range sentence. McGill, 112 Wn. App. at 100; Garcia-Martinez, 88 Wn. App. at 330. Accordingly, this Court must remand so that the sentencing court may consider Mr. Cartmell's eligibility for the DOSA and sentence him accordingly.

2. THE INFORMATION DID NOT ADEQUATELY NOTIFY MR. CARTMELL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF BAIL JUMPING IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

a. The accused has the constitutional right to notice of the charges he faces at trial. A defendant has the constitutional right to

be informed of the nature and cause of the charges against him.[5] U.S. Const. amends. VI, XIV; Const. art. I § 22. Accordingly, the charging document must set forth the essential elements of the alleged crime in order to permit the accused to prepare his defense. State v. McCarty, 140 Wn.2d 420, 424-25, 998 P.2d 296 (2000); State v. Green, 101 Wn.App. 885, 889, 6 P.3d 53 (2000), rev. denied, 142 Wn.2d 1018 (2001). In order to satisfy this constitutional requirement, Washington's "essential elements rule" requires the charging document to clearly set forth every material element of the crime along with essential supporting facts. McCarty, 140 Wn.2d at 425; State v. Leach, 113 Wn.2d 679, 686-89, 782 P.2d 552 (1989); CrR 2.1(a)(1).

Although Mr. Cartmell did not challenge the information in the trial court, a challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. Leach, 113 Wn.2d at 690-91, 697; RAP 2.5(a). A charging document challenged after the State rests will be found valid only if (1) the necessary facts appear in some form or if they can be found by fair construction on the face of the document, and, if so, (2) if the defendant was not actually

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[5] The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." Article I, section 22 similarly provides in part, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him."

prejudiced by the inartful language. State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If, however, the information does not include all the essential elements of the offense, the insufficiency alone is enough to warrant dismissal; the defendant need not show prejudice. Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992); State v. Franks, 105 Wn. App. 950, 22 P.3d 269 (2001).

A conviction for bail jumping requires proof that the accused failed to appear, having been released by a court order "with knowledge of the requirement of a subsequent personal appearance." RCW 9A.76.170(1). This knowledge element is the only mental state required for conviction. The statute requires that the defendant have knowledge of his subsequent court date, and assuming knowledge is established at the time of release, the defendant is strictly liable for a failure to appear; nonappearance is not excused by poor memory or mistake. State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004).

b. The information is constitutionally deficient because it failed to specify the essential element of knowledge. In the instant case, the amended information, filed on November 24, 2010, charged Mr. Cartmell as follows:

> Comes now GREGORY M. BANKS, Prosecuting Attorney of Island County, State of Washington, or his

> deputy, and by this Information accuses the above-named defendant of violating the criminal laws of the State of Washington as follows:
>
> COUNT I – Bail Jumping:
>
> On or about the 29th day of January, 2013, in the County of Island, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state … did fail to appear.

CP 146-47.

To charge bail jumping, the information must allege that the defendant had "knowledge of the requirement of a subsequent personal appearance before any court of the state." RCW 9A.76.170(1) (emphasis added). It is not sufficient to simply state that the defendant was admitted to bail and failed to appear on a particular date, unless it is specified that he had notice of his obligation to appear on that date. RCW 9A.76.170(1); State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004); Carver, 122 Wn. App. 300.

Here, the information merely informed Mr. Cartmell that he was released by court order or admitted to bail with knowledge of the requirement to appear, without specifying at what date or time he was required to be in court. The information neglects to state how Mr. Cartmell had been notified to appear, when he had been notified to

appear, or that he had either actual or constructive knowledge that his trial date was scheduled to begin at precisely 8:30 AM on January 29, 2013. The information is therefore constitutionally deficient.[6]

c. The proper remedy is reversal of the conviction and dismissal of the charge without prejudice. The information in this case does not set forth the essential elements of bail jumping because it does not properly allege the hearing to which Mr. Cartmell knowingly failed to appear. Thus, even under a liberal construction, the information fails the first part of the Kjorsvik test. Mr. Cartmell's conviction must therefore be reversed without prejudice. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (Washington courts "have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State's ability to re-file charges"); McCarty, 140 Wn.2d at 428; Green, 101 Wn. App. at 891.

E. CONCLUSION

The conviction for bail jumping must be reversed and dismissed without prejudice because the charging document does not set forth the essential elements of bail jumping. In the alternative, the matter should

[6] The information fails, for example, allege that Mr. Cartmell received either personal or written notice of his subsequent appearance dates.

be remanded for resentencing, at which time Mr. Cartmell's eligibility for a DOSA should be assessed by the trial court.

Respectfully submitted this 21st day of February, 2014.

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Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70714-1-I
v.	)	
	)	
DEREK CARTMELL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DEREK CARTMELL 810130 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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2014 FEB 24 PM 12: 45

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