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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 13-1-00023-8

BRIEF OF RESPONDENT

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A. Whether the appellant's sentence should be upheld when the sentencing court considered his request for a Drug Offender Sentencing Alternative and determined such a sentence was not appropriate.

B. Whether the appellant's conviction should be upheld when the charging document included all essential elements of the crime of bail jumping and the appellant was able to present a prepared defense.

II. STATEMENT OF THE CASE

A. Substantive Facts

The appellant was charged with Possession of a Stolen Vehicle, Attempting to Elude a Pursuing Police Vehicle, Possession of Methamphetamine, and Hit and Run (Property Damage) based on an incident that occurred November 1, 2012. 6/11/2013 RP 101-103; Ex. 3. On December 3, 2012, the appellant signed a scheduling order in that case that set, among other hearings, a jury trial for January 29, 2013 at 8:30 am. 6/11/2013 RP 97; Ex. 2. The appellant did not appear for the jury trial. 6/11/2013 RP 105-06; Ex. 10.

B. Statement of Procedural History

Following the appellant's failure to appear for his jury trial, the appellant was charged with one count of Bail Jumping in the

current case. CP 146-47. A Criminal Information was filed that described the bail jumping charge as:

> 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 or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to-wit: Island County Superior Court Cause No. [*sic*] Island County Superior Court No. 12-1-00250-0; contrary to Revised Code of Washington 9A.76.170.

CP 146.

The appellant made no objection to the Information, entered a plea of not guilty, and proceeded to a jury trial pro se. 3/18/2013 RP 4; 6/3/2013 RP 10-11. Following the jury trial, the appellant was found guilty of bail jumping. CP 92.

At sentencing, the State recommended a standard-range sentence of 60 months in custody, to be served consecutively to a sentence already imposed in the 2012 case. 7/1/2013 RP 3. The appellant requested a sentence under the Drug Offender Sentencing Alternative (DOSA). 7/1/2013 RP 9. The State conceded the appellant was statutorily eligible for a DOSA sentence, but recommended against an alternative sentence based on the facts of the case and the appellant's criminal history. 7/1/2013 RP 10. The

court imposed the standard-range sentence recommended by the State. 7/1/2013 RP 10-11; CP 2-12

The appellant now timely appeals. CP 1.

III. ARGUMENT

A. The appellant is precluded from challenging the imposition of a standard-range sentence.

A sentence within the standard sentence range for an offense shall not be appealed. RCW 9.94A.585(1). As a matter of law, there can be no abuse of discretion and, thus, no right to appeal when the sentence imposed is within the presumptive sentence range. *State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719 (1986). A sentencing court only abuses its discretion when it categorically refuses to consider alternative sentencing or if it errs regarding an offender's eligibility for a sentencing alternative. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. Watson*, 120 Wn.App. 521, 529, 86 P.3d 158 (Div. 2, 2004), *aff'd but criticized*, 155 Wn.2d 574, 122 P.3d 903 (2005) (citing *State v. Onefrey*, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992)). However, a trial court that has considered the facts and has concluded an alternative sentence is not appropriate has exercised its discretion, and the defendant may not appeal that

ruling. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (Div. 2, 1997).

A court may impose a DOSA if an offender meets certain eligibility requirements and if the court determines that the alternative sentence is appropriate. RCW 9.94A.660(1), (3). While the eligibility requirements are statutorily defined, a court's determination of the appropriateness of an alternative sentence is discretionary and not reviewable. *State v. Conners*, 90 Wn.App. 48, 53-54, 950 P.2d 519 (Div. 3, 1998) (citing *State v. J.W.*, 84 Wn.App. 808, 811-12, 929 P.2d 1197 (Div. 1, 1997)). When both parties agree that an offender meets the eligibility criteria, but dispute whether the court should grant or deny the offender's DOSA request, that decision lies within the proper exercise of the court's discretion. *State v. Watson*, 120 Wn.App. at 530. The appellant's standard-range sentence in this case should be upheld because the sentencing court considered his request for a DOSA and determined an alternative sentence was not appropriate.

At sentencing, the State recommended a sentence at the top of the standard sentencing range. 7/1/13 RP 3. The State argued that the appellant's high offender score, which included twelve prior felony convictions, and his flight from law enforcement

constituted aggravating factors that supported the recommendation. 7/1/13 RP 3-4. In addition, the State recommended the sentence be served consecutively to a 57-month sentence imposed in a prior case because a concurrent sentence, even if imposed at the high end of the standard range, would add only three months to the appellant's total jail term, which was not proportionate to the seriousness of this case. 7/1/13 RP 3-5.

The appellant requested a DOSA due to his drug addiction and lack of available treatment options outside the DOSA program. 7/1/13 RP 9. The State conceded that the appellant was eligible for DOSA consideration, but opposed the DOSA request for the above reasons and because sentence in the prior case would likely interfere with an alternative sentence. 7/1/13 RP 10. The court agreed with the State, found the appellant's high offender score was an aggravating factor, and imposed the recommended standard-range sentence, to be served consecutively to the sentence imposed in the earlier case. 7/1/13 RP 11, CP 2-12.

As in *Watson*, neither party challenged the appellant's statutory eligibility for a DOSA sentence, but the parties did dispute the appropriateness of such a sentence. The court did mention drug court; however, the drug court and DOSA programs,

of course, are separate alternatives, with different eligibility criteria. *Compare* RCW 2.28.170 (drug court) *and* RCW 9.94A.660 (DOSA). Significantly, the court did not dispute the appellant's DOSA eligibility. 7/1/13 RP 11.

The court did consider both parties' arguments, agreeing with one of the State's aggravating factors and addressing the appellant's request for treatment options. See 7/1/13 RP 10-11. The court then exercised its discretion and agreed with the State that the appellant's high offender score was an aggravating factor and, as recommended, imposed a sentence consecutive to the appellant's earlier-imposed term.

A standard-range sentence may not be challenged absent a structural error in the sentencing procedure. A court's decision to impose a standard range sentence and not a DOSA is not an abuse of discretion where there is no error in eligibility determination and where the court does not categorically refuse to consider the alternative sentence. The sentencing court in this case considered the appellant's DOSA request and, despite his statutory eligibility, imposed a standard-range sentence. Because the court did not abuse its discretion, that sentence should be upheld.

B. The charging document included all essential elements of the charge of bail jumping.

The appellant's conviction should be upheld because the charging document described all the essential elements of bail jumping. All criminal defendants have the right to be informed of the nature and cause of the accusation. U.S. CONST. amend. VI. To that end, a criminal indictment or information must be a plain, concise, and definite statement of the essential facts constituting offense charged. CrR 2.1(a)(1). A charging document satisfies these requirements when it states all the essential elements of the crime charged. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). A challenge to the sufficiency of the charging document is reviewed de novo. *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). An information which is not challenged until after the verdict is liberally construed in favor of validity and is sufficient if the necessary facts appear in any form, or by fair construction can be found in the charging document. *Kjorsvik*, 117 Wn.2d at 102-05. If the essential elements can be found, the conviction must be upheld unless the appellant can show he was nonetheless actually prejudiced. *Id.* at 106. The appellant's conviction in this case should be upheld because the essential

elements of bail jumping were in the Information and the appellant was not prejudiced.

It is sufficient to charge in the language of a statute if the statute defines the offense with certainty. *Id.* at 99. A person commits bail jumping when, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court, he fails to appear. RCW 9A.76.170(1). Thus, bail jumping has three essential elements: (1) the defendant was held for, charged with, or convicted of a particular crime, (2) the defendant was released by court order or admitted to bail with the requirement of a subsequent personal appearance, and (3) the defendant knowingly failed to appear as required. *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007) (citing *State v. Pope*, 100 Wn.App. 624, 627, 999 P.2d 51 (Div. 2, 2000)). The language of the charging document in this case mirrored the language of bail jumping statute. *Compare* CP 146 *and* RCW 9A.76.170(1).

More importantly, the charging document included all three essential elements. It accused the appellant of failing to appear for appearance in which a Class B or Class C felony had been filed and specified the Island County Superior Court cause number for

that case. It also alleged the appellant "ha[d] been released by court order or admitted to bail." And, it charged that although the appellant was "admitted to bail with knowledge of the requirement of a subsequent personal appearance," he "did fail to appear."

The appellant admits the information "informed Mr. Cartmell that he was released by court order or admitted to bail with knowledge of the requirement to appear." Brief of Appellant at 15. Thus, there is no contest that the information included the knowledge element. Instead, the appellant claims, without authority, that the charging document required additional information beyond the essential elements. At most, the appellant's argument is that the charging document is vague; however, there is a distinction between charging documents that are constitutionally deficient and those that are merely vague. *State v. Winings*, 126 Wn.App. 75, 84, 107 P.3d 141 (Div. 2, 2005). Where an information states each statutory element of a crime but is vague to some other matter, the proper remedy is a request for a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989). A defendant may not challenge such a charging document if he failed to request a bill of particulars at trial. *Id.* The appellant did not request a bill of particulars in this case; so, even assuming

the charging document was vague, his challenge on appeal must fail.

When all essential elements are in included in the charging document, an appellant must show prejudice from any vague or unartful language in the document. *Kjorsvik*, 117 Wn.2d at 106. The appellant bears the burden of raising and demonstrating prejudice. *State v. Lindsey*, 177 Wn.App. 233, 246, 311 P.3d 61 (2013). The appellant in this case has not argued prejudice, so the second *Kjorsvik* prong cannot be considered. *Id.*

Even if this court is willing to consider the second prong, the appellant cannot show prejudice. There is no prejudice when a charging document is accompanied by additional materials that allowed adequate defense preparation. *Williams*, 162 Wn.2d at 186. Like *Williams*, the information in this case was filed with additional materials, including a scheduling order, signed by appellant, setting trial for January 29, 2013 at 8:30 am. CP 152. The appellant was additionally informed of the specifics of the charge on March 8, 2013 when the prosecutor argued for bail because the appellant "failed to appear to the scheduled jury trial in this case at 8:30 in the morning." 3/8/2013 RP 4. The appellant clearly knew of that specific allegation and tailored his defense to

it by claiming that he was confused as to the time of his trial. He argued at trial that he appeared at the courthouse on the correct day, but at the wrong time and he called witnesses to support his attempted defense. 6/12/2013 RP 136-37. 179-83, 198-99. Of course, forgetting the correct appearance date and time is not a defense to bail jumping. *State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (Div. 2, 2004). But, the appellant's evidence and argument showed he was aware of the specific allegation against him and was able to attempt to mount a prepared defense.

A charging document is sufficient if it describes all the essential elements of crime charged. When challenged for first time, an information will be construed liberally, and the appellant must show the elements cannot be found or that he was prejudiced by the document. All essential elements were described in the charging document. And, the appellant has not even attempted to claim he was prejudiced. Therefore, the appellant's conviction should be upheld.

IV. CONCLUSION

The sentencing court considered the appellant's request for a DOSA and properly exercised its discretion in imposing a standard-range sentence. In addition, the information properly

informed the appellant of the essential elements of the crime of bail jumping. The appellant's conviction and sentence should, therefore, be upheld.

Respectfully submitted this 25th day of April, 2014.

GREGORY M. BANKS
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By: _____
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	
Plaintiff/Respondent,	NO. 70714-1-I
vs.	DECLARATION OF SERVICE
DEREK JOHN CARTMELL,	
Defendant/Appellant.	

I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 25th day of April, 2014, a copy of the Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Jan Transen
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 25th day of April, 2014.

Jennifer Wallace