NO. 44840-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANDREW MARK STEELE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 11-1-05225-9

BRIEF OF RESPONDENT

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2. Whether the sentencing court properly exercised its discretion in denying Defendant's motion for a Drug Offender Sentencing Alternative (DOSA).

B. STATEMENT OF THE CASE.

1. Procedure

On December 30, 2011, the State charged Appellant Andrew Mark Steele, hereinafter referred to as "Defendant," with possession of a stolen firearm in count I, first degree unlawful possession of a firearm in count II, and third degree possession of stolen property in counts III and IV. CP 1-3. *See* CP 4-5. Counts I and II alleged, as an aggravating circumstance under RCW 9.94A.535(2)(c), that the "defendant ha[d] committed multiple current offenses and the defendant's high offender score will result in some of the current offenses going unpunished." CP 1-2.

On January 4, 2012, the State filed an amended information, which added count V, theft of a firearm. CP 6-9.

Finally, on March 18, 2013, the State filed a second amended information, which eliminated counts IV and V, removed the allegation of an aggravating circumstance from counts I and II, made count I unlawful possession of a firearm, and made count II possession of a stolen firearm. CP 21-22; RP 2-3. Count III remained unchanged. CP 21-22, 6-8; RP 2-3.

The case was called for trial on March 18, 2013, and the court heard the defendant's motions in limine. RP 4-13.

The defendant stipulated that he had been previously convicted of a serious offense, been informed that he was not allowed to own or possess a firearm, and that his right to own or possess a firearm had not been restored. RP 13; CP 19-20.

The parties selected a jury, which the court swore in. RP 16.

The court then conducted a hearing pursuant to Criminal Rule (CrR) 3.5, at which the State called Tacoma Police Detective Stuart Hoisington, RP 28-64, and later, Detective Erik Timothy, RP 208-14. The defendant also testified. RP 28-95, 206-18; CP 69-70. The court concluded (1) that "[t]he defendant was not in 'custody' for ***Miranda*** purposes," in that his freedom was not "curtailed to the degree associated with a formal arrest, until he was handcuffed and detained after his formal interview at the police station" (conclusion of law 1), (2) that before this time, his "interaction with law enforcement was a voluntary, consensual, and

cordial social contact that was free of coercion" (conclusion of law 2), and (3) that, "[o]nce advised of his ***Miranda*** rights, the defendant knowingly, voluntarily, and intelligently waived those rights and spoke with law enforcement" (conclusion of law 3). CP 72. *See* RP 93-95. The court therefore held that the defendant's "pre- and post- ***Miranda*** statements" were admissible at trial. CP 73 (conclusion of law 4); RP 93-95. *See* RP 381.

The parties gave opening statements. RP 96-97.

The State called Tacoma Officer Gerald Bratcher, RP 97-105, Tacoma Police Officer Joshua Deroche, RP 105-15, James Baldwin, RP 117-47, Tacoma Police Detective Stuart Hoisington, RP 147-87, 200-03, Tacoma Police Detective Erik Timothy, RP 203-08, 221-24, and Travis Boyer, RP 227-90.

The court read the following stipulation to the jury:

> Prior to the December 28, 2011, the defendant had been convicted of a felony offense that prohibited him from owning or possessing a firearm. That conviction was for a crime that is defined as a serious offense for the purposes of the charge of Unlawful Possessing of a Firearm in the First Degree as charged in Count I. The defendant's conviction was valid on December 28, 2011. At the time of his conviction, the defendant was informed that he was not allowed to own or possess any firearm from that date forward until a court restored his right to do so. As of December 28, 2011, the defendant's right to own or possess a firearm had not been restored. The content of this

> stipulation shall be deemed by the jury as proof beyond a reasonable doubt.

RP 292-93.

The State rested. RP 293.

The defendant called Brian Matter. RP 293-317; the defendant did not testify at trial. RP 323.

The defendant moved to dismiss the possession of a stolen firearm charge for insufficient evidence, but the court denied that motion. RP 318-21.

The defendant rested. RP 328.

The court discussed the State's proposed jury instructions, and the defendant took no exception to those instructions. RP 324-27. The court read its instructions to the jury. RP 329. *See* CP 31-52.

The parties gave their closing arguments. RP 329-41 (State's closing argument); RP 341-55 (Defendant's closing argument); RP 356-63 (State's rebuttal argument).

On March 21, 2013, the jury returned verdicts finding the defendant guilty as charged in the second amended information. RP 374-76; CP 28-30.

On April 30, 2013, the court conducted a sentencing hearing. RP 381. During that hearing, the State recommended that the court impose a sentence equal to the low end of the standard range. RP 382.

The defendant asked the court to grant him a Drug Offender Sentencing Alternative, or "DOSA." RP 384-88.

The deputy prosecutor argued against granting the defendant a DOSA, for three reasons. First, the deputy prosecutor noted that there was no evidence that the instant crime was "drug-related." RP 382-83. Second, he noted that the defendant had been under Department of Corrections' supervision for nine and a half of the eleven years before his arrest in this case, and that he had already been given drug treatment opportunities. RP 383. Finally, he noted that the defendant had earlier rejected an offer of a DOSA. RP 383-84.

The court considered whether to grant a DOSA by reviewing notes from the defendant's previous two cases, including a 2007 conviction where he had also asked for a DOSA. RP 387-88. It noted that an examiner had indicated that if the defendant didn't "stop hanging with people that get him to use once again and cause him to relapse, he [would] be right back in the system." RP 391. The court went on to find that the defendant "knew what his issues were," but did not correct them and accumulated an offender score greater than 9. RP 391. The court held that

it would not grant a DOSA simply to avoid a lengthy prison term, which was created by the defendant's own actions, and therefore denied a DOSA. RP 391-92.

The court sentenced Defendant to a standard range sentence of 87 months on count I, 72 consecutive months on count II, and 364 concurrent days on count III for a total of 159 months in total confinement. RP 392; CP 53-66.

On May 2, 2013, the defendant filed a timely notice of appeal. CP 74-75.

2. Facts

On December 28, 2011, Joshua Deroche, who is an Auburn Police Officer, was off-duty and having dinner with his wife at a restaurant in Tacoma, Washington. RP 106-07. He parked his vehicle near the Temple Theater in Tacoma between 5:30 and 6:00 that afternoon. RP 107. As he and his wife were walking back after dinner, Deroche observed that a rear passenger-side window had been broken out of his truck. RP 107. He then noticed that a backpack was missing from inside the vehicle, and called 911. RP 107-08.

Deroche described the pack as a tactical-style backpack, similar to the Army's MOLLE, which he used to carry his equipment to and from

work. RP 108. Inside that pack were a police uniform, a department-issued police badge on a chain, Deroche's personal Glock 27 .40-caliber pistol, which he used as a backup weapon, and an estimated five AR-15 magazines. RP 109, 111. Both the pistol and rifle magazines were loaded. RP 111-12.

Deroche had recently used the pistol and testified that it was capable of firing. RP 113.

No one had permission to enter his vehicle or remove the backpack or items therein. RP 114.

On December 29, 2011, at about 8:30 to 9:00 in the evening, the defendant came to James Baldwin's residence and told him that he "wanted to show [him] a secret." RP 120-24. The defendant then showed him a "camouflage backpack" that was sitting in the trunk of his vehicle. RP 125. Baldwin saw a gun on top of that backpack. RP 127. Baldwin opened the pack and found two AR-15 magazines, binoculars, and a police badge on a chain. RP 129-30.

Baldwin testified that he believed he was holding "a police officer's gun and badge," and told the defendant he needed to turn it in. RP 131-32. The defendant chuckled about it, and said that he couldn't because he "crashed some dude's car and [he] owed money to fix it." RP

132. The defendant told Baldwin that he wanted to sell the gun. RP 132-33.

Baldwin called the police the next day to report what he had seen. RP 135.

Tacoma Police Department Detective Hosington testified that he was assigned to investigate the vehicle prowl of and theft from Deroche's vehicle on December 29, 2011. RP 149. Hoisington spoke with Baldwin on the telephone, RP 149, and thus learned that the defendant may have information regarding a stolen firearm. RP 46 (3.5 hearing). *See* RP 149-50.

Hoisington tried unsuccessfully to contact the defendant at the defendant's home and by calling the defendant's wife. RP 150-51. He then found a telephone number for the defendant himself, RP 150-51, and was able to contact the defendant by telephone. RP 151.

Hoisington told the defendant that he had learned that the defendant might know where some missing police equipment was, and the defendant ultimately agreed to meet him at an Albertson's store near 38th Street and Pacific Avenue in Tacoma, Washington. RP 31-35. (3.5 hearing); RP 151-54. The defendant was never told that he had to meet detectives or that he would be arrested if he did not do so. RP 61 (3.5 hearing).

During the meeting, Hoisington was accompanied by Detective Timothy, and both were dressed in plain clothes, and drove an unmarked vehicle. RP 32-33 (3.5 hearing); RP 155-56, 159-60. There were also patrol cars in and around the perimeter of the area, but out of sight of the defendant. RP 49 (3.5 hearing); RP 155.

The defendant called Detective Hoisington from the front of the store to notify him that he had arrived, and the detective walked to him on foot. RP 34, 66-67 (3.5 hearing); RP 156. Timothy joined them in his vehicle. RP 34, 67 (3.5 hearing).

When asked "[w]hat exactly did you tell the defendant about why you were contacting him," Hoisington responded

> [i]nitially when we contacted, you know, just explained, you know, that there was some missing items, that kind of thing and that his name had come up in the investigation as someone who might be able to help us locate them. So when we met initially, we were considering the fact that, you know, we were just trying to track down these items. He was someone whose name had come up in the investigation, and so we were just contacting him as someone who could help us find those items.

RP 35 (3.5 hearing).

The defendant then indicated that he knew the items to which the detective was referring and stated that he could show [the detectives] where the items were located. RP 35 (3.5 hearing); RP 157.

The defendant then got into Timothy's car, as did Hoisington. RP 35 (3.5 hearing); RP 158. Prior to entering that car, the defendant agreed to a brief frisk for weapons. RP 36-37, 53 (3.5 hearing). The defendant was not handcuffed or in any way restrained, and Timothy's car was an unmarked vehicle, with no partition or cage inside. RP 36-37 (3.5 hearing). The defendant directed them to Love's Truck Stop in Fife. RP 35 (3.5 hearing); RP 158.

During the ten to fifteen minute drive to the truck stop, the defendant and Detective Hoisington continued to have a conversation about where the items were located. RP 37-38 (3.5 hearing).

Once they arrived, the defendant indicated the last place he had seen the items, and the detectives took turns searching unsuccessfully for the items while the defendant remained in the car. RP 38-39 (3.5 hearing); RP 160. This process took 20 to 30 minutes. RP 39 (3.5 hearing). Afterwards, Hoisington asked the defendant "if he would be willing to accompany [detectives] to Tacoma Police Headquarters and make a formal statement." RP 40 (3.5 hearing). The defendant agreed to do so, and the three drove ten to fifteen minutes to the station. RP 40 (3.5 hearing); RP 161-62. Once there, they went to an interview room, where Detective Hoisington read the defendant the ***Miranda*** warnings from a Tacoma Police Department form. RP 40-41 (3.5 hearing).

After advising the defendant of these rights, detectives conducted an interview which was recorded and subsequently transcribed. RP 43-44 (3.5 hearing); RP 162-63. The detectives read the ***Miranda*** warnings to the defendant a second time at the beginning of this recorded interview. RP 44 (3.5 hearing).

The recording of that interview was played for the jury. RP 163-69.

The defendant was never told he was under arrest and never placed in handcuffs until after the interview was complete. RP 45 (3.5 hearing). The defendant never asked to leave or to speak to an attorney, and never indicated that he wished to remain silent. RP 45 (3.5 hearing). He was never threatened or coerced in any way, and did not appear to be impaired or under the influence of "any substance." RP 45-46 (3.5 hearing).

At the CrR 3.5 hearing, the defendant admitted that between 2003 and 2008, he was convicted of forgery, two counts first degree theft, making a false statement to a public servant, third degree possessing stolen property, seven counts of second degree identify theft, five counts of second degree possessing stolen property, and possession of an identification device. RP 73-74.

He testified that based on his criminal history, he understood that he was not required to speak with the detectives in this case. RP 78-79 (3.5 hearing). He agreed that he had heard the ***Miranda*** warnings many times

before. RP 83-85 (3.5 hearing). In fact, he testified that he knew that he had the right to remain silent, that he knew that anything he said could be used against him, that he knew he had a right to an attorney, and that he knew that if he could not afford one, one would be provided to him at public expense. RP 84 (3.5 hearing).

The defendant testified that he agreed to meet with the detectives because he was trying to do the right thing and clear the air. RP 79-81 (3.5 hearing).

On direct examination, he testified that he agreed to go with detectives to show them where he had placed the pistol. RP 68-69 (3.5 hearing). However, on cross-examination, he testified that he told detectives that he "d[id]n't want to show them right now," RP 81 (3.5 hearing), before again testifying that he chose to go with them. RP 82 (3.5 hearing)

The defendant also testified that he understood that he didn't have to give a formal statement at the police headquarters, and that he was not handcuffed until after the interview was complete. RP 82-83 (3.5 hearing).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT'S STATEMENTS TO DETECTIVES BECAUSE THE DEFENDANT WAS NOT IN CUSTODY WHEN HE MADE THOSE STATEMENTS.

"The Fifth Amendment to the United States Constitution states, in part, no person 'shall... be compelled in any criminal case to be a witness against himself'" and applies to the states through the Fourteenth Amendment. ***State v. Easter***, 130 Wn.2d 228, 235, 922 P.2d 1285, 1289 (1996) (*citing* ***Malloy v. Hogan***, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Similarly, Article I, section 9 of the Washington State Constitution guarantees that "[n]o person shall be compelled in any criminal case to give evidence against himself." Hence, "[b]oth the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence." ***State v. Knapp***, 148 Wn. App. 414, 420, 199 P.3d 505, 508 (2009) (*citing* U.S. Const. amend. V; Wn. Const. art. I, sec. 9). The Washington State Supreme Court has stated that it "interpret[s] the two provisions equivalently." ***Easter***, 130 Wn.2d at 235; ***State v. Russell***, 125 Wn.2d 24, 55-62, 882 P.2d 747 (1994).

"To give force to the Constitution's protection against compelled self-incrimination, the [United States Supreme] Court established in [***Arizona v.***] ***Miranda***[, 384 U.S. 436, 86 S. Ct. 1602 (1966),] 'certain procedural safeguards that require police to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments before commencing custodial interrogation.'" ***Florida v. Powell***, 559 U.S. 50, 130 S. Ct. 1195 (2010) (*quoting* ***Duckworth v. Eagan***, 492 U.S. 195, 201, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989)); ***State v. Lorenz***, 152 Wn.2d 22, 93 P.3d 133 (2004). Specifically,

> ***Miranda*** prescribed the following four now-familiar warnings:
>
> "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Powell (*quoting* ***Miranda***, 384 U.S. at 479).

"***Miranda*** warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." ***State v. Heritage***, 152 Wn.2d 210, 214, 95 P.3d 345 (2004); ***State v. Grogan***, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008), *review granted and case remanded,* 168 Wn.2d 1039 (2010), *reaff'd on reconsideration*, 158 Wn. App. 272, 246 P.3d 196 (2010), *review denied*, 171 Wn.2d 1006 (2011) (*quoting* ***State v.***

Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002) (*citing* ***State v. Post***, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992)).

A defendant is in custody for purposes of ***Miranda*** when "a reasonable person in a suspect's position would have felt that his for her freedom was curtailed to the degree associated with a formal arrest." ***Heritage***, 152 Wn.2d at 217-18; ***Grogan***, 147 Wn. App. at 517 (*quoting* ***Solomon***, 114 Wn. App. at 787); ***Berkemer v. McCarty***, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

"Custody is a mixed question of fact and law." ***Grogan***, 147 Wn. App. at 517. "'The factual inquiry determines 'the circumstances surrounding the interrogation,'" and "'[t]he legal inquiry determines, given the factual circumstances, whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id.*

"Without ***Miranda*** warnings, a suspect's statements during custodial interrogation are presumed involuntary." ***Heritage***, 152 Wn.2d at 214.

"[F]indings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." ***State v. Broadaway***, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). "'Substantial evidence is evidence

sufficient to persuade a fair-minded, rational person of the truth of the finding.'" ***State v. Grogan***, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). "'[T]he court must determine de novo whether the trial court 'derived proper conclusions of law' from its findings of fact.'" *Id.* (*quoting* ***State v. Armenta***, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

In the present case, the defendant argues that the court improperly found his statements admissible because he contends he "was in custody" and "subject to interrogation prior to being advised of [the ***Miranda*** warnings]." Brief of Appellant (BOA), p. 8-14. The record shows otherwise.

While the defendant may have been subject to questioning which constituted interrogation under ***Miranda***, *see* RP 37-39, he was not in custody during such questioning, and hence, ***Miranda*** warnings were not required for his otherwise voluntary statements to be admissible.

This is established by the court's findings of fact (1) through (4), which the defendant does not challenge here. *See* BOA, p. 1-19.

In finding of fact (1), the court found that when Detective Hoisington contacted the defendant about the stolen police property and that "***[t]he defendant voluntarily agreed to meet with the detective*** at a Tacoma grocery store parking lot." CP 69 (emphasis added).

In finding of fact (2), the court found that, once he had arrived in that parking lot, it was the defendant who then initiated the contact with the detectives, by "call[ing] the detective to let him know that he was standing outside in front of the store." CP 70.

In finding of fact (3), the court found that "***[t]he defendant voluntarily agreed to show the detectives where he claimed that he had last seen the stolen police property*** that they were looking for." CP 70 (emphasis added).

In finding of fact (5), the court found that "[a]fter the search was completed, the detective asked if the defendant would agree to come to the police station to give a formal taped statement," and that "***[t]he defendant agreed***" to do so." CP 70 (emphasis added).

Because none of these findings of fact are challenged here, *see* BOA, p. 1-19, they are "verities on appeal." ***Broadaway***, 133 Wn.2d at 131.

Given that the defendant (1) voluntarily agreed to meet the detectives, (2) voluntarily agreed to take them to the truck stop where he had last seen the gun, and (3) voluntarily agreed to go to headquarters for an interview, the defendant was able to go where he chose.

Hence, his freedom was not curtailed at all, and "a reasonable person" in his position could not "have felt that his... freedom was

curtailed to the degree associated with a formal arrest." ***Heritage***, 152 Wn.2d at 217-18.

As a result, the defendant was not "in custody for purposes of ***Miranda***," *Id.*

Although the defendant argues that the fact that he "was never informed that he did not have to respond to questioning" and that he "was free to terminate the interview" is "an important indicium of the existence of a custodial setting," BOA, p. 10-11, the defendant testified, and the court found in its finding of fact (11), that he understood these rights beforehand. RP 83-85; CP 71.

Specifically, the defendant testified that, based on his criminal history, he understood that he was not required to speak with the detectives in this case. RP 78-79. He agreed that he had heard the ***Miranda*** warnings many times before. RP 83-85. In fact, he specifically testified that he knew that he had the right to remain silent, that he knew that anything he said could be used against him, that he knew he had a right to an attorney, and that he knew that if he could not afford one, one would be provided to him at public expense. RP 84.

The defendant testified that he agreed to meet with the detectives because he was trying to do the right thing and clear the air. RP 79-81. Although he equivocated somewhat on cross-examination, RP 81-82, he

testified that he agreed to show detectives where he had last seen the pistol. RP 68-69. Finally, he testified that he understood that he didn't have to give a formal statement at the police headquarters, RP 82, and that he was not handcuffed until after the interview was complete. RP 83.

Hence, the court's finding of fact (11) that the defendant understood his ***Miranda*** "rights even before meeting with law enforcement that day," CP 71, was "supported by substantial evidence in the record," ***Broadaway***, 133 Wn.2d 118, and is therefore, a verity on appeal.

Although the defendant argues that "it is unreasonable to conclude Detective Hoisington would have allowed [him] to freely leave the parking lot or refuse to go to the police station," BOA, p. 11, there is nothing in the record to suggest that he would not have or that he felt he had probable cause to arrest the defendant until after the completion of the interview at headquarters.

Rather, the testimony was clear that the defendant agreed to meet with the detectives because he was trying to do the right thing and clear the air, RP 79-81, that he agreed to show them where he placed the items, RP 68-69, and that he agreed to "accompany [detectives] to Tacoma Police Headquarters and make a formal statement." RP 40.

This testimony supports the court's unchallenged findings of fact that that the defendant voluntarily agreed to meet the detectives, voluntarily agreed to take them to the truck stop where he had last seen the gun, and voluntarily agreed to go to headquarters for an interview. CP 69-70 (findings of fact (1), (3), & (5)).

These findings, which must be considered verities here, confirm that the defendant was able to go where he chose, and thus, that his freedom was not curtailed.

Hence, "a reasonable person" in his position could not "have felt that his... freedom was curtailed to the degree associated with a formal arrest," and the defendant was not "in custody for purposes of ***Miranda***." ***Heritage***, 152 Wn.2d at 217-18.

As a result, the police were not required to give him ***Miranda*** warnings before interrogating him, *see, e.g.,* ***Heritage***, 152 Wn.2d at 214, and the court properly found his statements to be admissible.

Therefore, the trial court's decision to admit those statements should be affirmed.

2. THE SENTENCING COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A DOSA SENTENCE.

The Drug Offender Sentencing Alternative or "DOSA" program "authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions." ***State v. Grayson***. 154 Wn.2d 333, 337, 111 P.3d 1183 (2005) (*citing* RCW 9.94A.660). "Under a DOSA sentence, the defendant serves only about one-half of a standard range sentence in prison and receives substance abuse treatment while incarcerated." ***Grayson***. 154 Wn.2d at 337-38. *See* RCW 9.94A.662 (prison-based DOSA). *Compare* RCW 9.94A.664 (residential chemical dependency treatment alternative). After prison, "he or she is released into closely monitored community supervision and treatment for the balance of the sentence." *Id.* at 338; RCW 9.94A.662.

A defendant is eligible for DOSA if:

> (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);
>
> (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance.

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9.94A.660(1).

Nevertheless, to grant a DOSA, the court must not only find that the offender is eligible but also "that the alternative sentence is appropriate." RCW 9.94A.660(3). It must therefore decide "whether a DOSA will benefit both the offender and the community." ***State v. White,*** 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

"[W]hether to give a DOSA is a decision left to the discretion of the trial judge, and [an appellate court's] review of that exercise of discretion is limited." ***Grayson***, 154 Wn.2d at 335. "[A] trial court abuses its discretion when its decision is manifestly unreasonable or based upon

untenable grounds or reasons." ***State v. White***, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) (*citing* ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). In other words, a sentencing "court abuses its discretion when it can be said no reasonable person would adopt the trial court's view." ***White***, 123 Wn. App. at 114.

Although, "[a] criminal defendant may not appeal a trial court's decision to impose a standard-range sentence instead of the Drug Offender Sentencing Alternative under RCW 9.94A.660." ***State v. Jones***, 171 Wn. App. 52, 55, 286 P.3d 83 (2012), "'every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.'" ***Jones***, 171 Wn. App. at 55 (*quoting* ***Grayson***, 154 Wn.2d at 342.

Thus, "while the SRA vests broad discretion in the hands of the trial judge, the trial judge must still exercise this discretion in conformity with the law." ***Grayson***, 154 Wn.2d at 335. Hence, "where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *Id.* at 342; ***Jones***, 171 Wn. App. at 55. However, a decision not to grant a DOSA based on "infractions and an instance of drug abuse in prison occurring after [a defendant's] completion of a treatment program"

cannot be considered "manifestly unreasonable or based upon untenable grounds or reasons." ***White***, 123 Wn. App. at 114-15.

The remedy for an abuse of discretion in sentencing is vacation of the sentence and remand for resentencing. *See* ***Grayson***, 154 Wn.2d at 343.

In the present case, the defendant claims that "[t]he court abused its discretion" by "categorically refus[ing] to consider imposition of a DOSA for any defendant with an offender score above '9,' regardless of eligibility." BOA, p. 17-18. The record shows otherwise.

In asking the court to grant a DOSA, the defendant's attorney stated that the defendant "ha[d] a significant problem with alcohol and/or drugs." RP 384-88.

However, the deputy prosecutor also informed the court that the defendant had been under Department of Corrections supervision for nine and a half of the eleven years before his arrest in this case, and that he had already, "over and over and over" again, been given both in-patient and out-patient drug treatment opportunities. RP 383.

In considering whether to grant a DOSA, the court reviewed notes from the defendant's previous two cases, including a 2007 conviction after which the defendant had also asked for a DOSA. RP 387-88. The court then made the following statement in denying a DOSA in this case:

> Well, everyone has a sort of personal creed that they need to follow. I have a creed that I believe people can change you, but I also believe that people who have offenders [sic] that exceed nine shouldn't get the benefits of leniency. ***Mr. Steele knew what his issues were. He knew when he asked for the last DOSA that if he didn't change his ways, and specifically the examiner said if he doesn't stop hanging with people that get him to use once again and cause him to relapse, he'll be right back in the system. Those were prophetic words in 2007 when they were spoken.***
>
> With an offender score [of] nine plus, ***if you want to be an addict and you want to use, then you need to find a way to do that without stealing from other people or victimizing other people. You haven't done that.*** I don't feel an urge to give you a DOSA sentence to avoid a lengthy prison term. The prison term is caused by your offender score, and those are items you created yourself.

RP 391-92.

Hence, the sentencing court did not refuse to consider a DOSA. It certainly did not, as the defendant now claims, hold that "it never granted a DOSA for a defendant with an offender score above '9.'" BOA, p. 17.

Rather, it noted, quite reasonably, that people who have offender scores "that exceed nine shouldn't get the benefits of leniency." RP 391. It also found, as the prosecutor implied, that the defendant "knew what his issues were," i.e., that he knew he had a substance abuse problem as far back as 2007, but that despite opportunities "didn't change his ways" by addressing that problem through treatment. RP 391.

Instead, the court seemed to find that the fact that the defendant continued to commit crimes to apparently finance his addiction, seemed to indicate that he "want[ed] to be an addict and [he] want[ed] to use." RP 391.

Hence, the court considered granting the defendant a DOSA, but declined to do so because of the defendant's history of drug abuse and his failure to address this problem through treatment. RP 382-92.

Given that the defendant had failed to address his substance abuse problem over the course of approximately four years, and had instead committed another crime, it was reasonable for the court to conclude, as it did here, that a DOSA would not "benefit both the offender and the community," ***State v. White,*** 123 Wn. App. at 114, and therefore, to deny the DOSA.

Hence, it cannot be said that "no reasonable person would adopt the trial court's view," ***White***, 123 Wn. App. at 114, and the sentencing court did not abuse its discretion in denying a DOSA.

Therefore, the defendant's sentence should be affirmed.

D. CONCLUSION.

The trial court properly admitted the defendant's pre- and post-***Miranda*** statements to detectives because the defendant was not in custody when he made those statements.

The sentencing court properly exercised its discretion in denying Defendant's motion for a DOSA.

Therefore, the defendant's convictions and sentence should be affirmed.

DATED: January 22, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/22/14
Date Signature

PIERCE COUNTY PROSECUTOR

January 22, 2014 - 1:47 PM

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