

FILED
SUPREME COURT
STATE OF WASHINGTON
12/3/2020 9:10 AM
BY SUSAN L. CARLSON
CLERK

No. 989559

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO SALAZAR,

Petitioner.

ANSWER TO PETITION FOR REVIEW

Respectfully submitted by:

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A. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

B. RELIEF REQUESTED

Respondent asserts this Court should deny review and affirm the decision of the Court of Appeals.

C. ISSUES

1. Is imposition of a sanction under the Drug Offender Sentencing Alternative (“DOSA”) a resentencing?
2. May the State argue for sanctions after Mr. Salazar violated the terms of the DOSA?

D. STATEMENT OF THE CASE

On November 9, 2015, Eduardo Salazar was sentenced to a DOSA sentence after pleading guilty to an amended charge of Assault in the Third Degree – DV. CP 18; RP 13. The State recommended the DOSA, consistent with the plea offer. RP 10-11; CP 10 (“The prosecuting attorney will make the following recommendation to the judge: prison-based DOSA sentence, 12.75 months incarceration, 12.75 months community custody. . .”). Mr. Salazar was explicitly advised the court could sentence him to anywhere within the standard range if he violated the DOSA. RP 13. Mr. Salazar agreed he understood. RP 13.

On July 22, 2019, Mr. Salazar admitted to three violations of the DOSA. RP 19. Mr. Salazar argued for the balance of the mid-point of the sentence to be imposed as a sanction. RP 19-20. The State argued for the high end of the standard range. RP 20.

Mr. Salazar's attorney responded:

Technically one-half the midpoint, your Honor, is what he bargained for when he accepted the DOSA. I don't think it would be prudent or fair for him to accept anything other than that.

We have a longstanding tradition in this county to go along with the half in/half out with regard to prison based DOSA."

RP 21. There was no plea agreement between the parties about what recommendation would be made if Mr. Salazar violated the DOSA sentence after release from prison.

E. ARGUMENT

I. The Court Had Authority to Impose Sanctions on Mr. Salazar for Violating the DOSA.

The first issue is whether the court could sanction Mr. Salazar for repeatedly violating his DOSA sentence. The trial court imposed a standard range sentence and imposed a new term of community custody because the defendant was terminated from the DOSA program for violations of sentence conditions. RP 29; CP 42-43. Mr. Salazar assumes this process was a new sentencing or re-sentencing, or an amendment to the original judgment and sentence. PetRev 3; *see* RP 27-28. However, revocation of a

DOSA is not a resentencing. *State v. Bell*, 198 Wn. App. 1028, No. 48633-4-II, 2017 WL 1163139, at *1 (Div. II Mar. 28, 2017) (unpublished) (“But DOSA revocation is not a resentencing. DOSA revocation is one of the ‘sanctions’ the superior court can impose when an offender violates any conditions of the sentence.”); *State v. Westlund*, 175 Wn. App. 1042, No. 43768-6-II, 43775-9-II, 43778-3-II, 2013 WL 3477586 (Div. II Jul. 9, 2013) (unpublished) (The DOSA scheme “does not treat DOSA revocation as a resentencing, but rather defines imprisonment as one ‘sanction’ that the court can impose in the event it concludes that an offender violated any ‘conditions or requirements of the sentence.’”); *see* GR 14.1 (citation to unpublished opinion permitted for non-binding, persuasive value); *cf. State v. Badger*, 64 Wn. App. 904, 909-10, 827 P.2d 318 (1992) (recognizing revocation of a SSOSA sentence results in imposition of the *original* sentence).

Rather, revocation of a DOSA is a sanction under the DOSA framework. The sentencing court's authority to modify a prison DOSA after finding a defendant violated sentence conditions is limited under RCW 9.94A.660(7) and RCW 9.94A.662(3). *Cf. State v. Beer*, 93 Wn. App. 539, 543, 969 P.2d 506 (1999) (addressing revocation of a suspended SSOSA sentence, recognizing “the sentencing court can only impose sanctions authorized by statute.”) “The court may bring any offender sentenced under

this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.” RCW 9.94A.660(7)(a). “If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.” RCW 9.94A.660(7)(b).

The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.660(7)(c); *see also* RCW 9.94A.662(3).

The DOSA statute expressly characterizes the imposition of a term of total confinement within the standard sentence range as a *sanction*. This sanction is imposed upon “failure to complete, or administrative termination from, the special drug offender sentencing alternative program. . . .” RCW 9.94A.660(8).

Here, Mr. Salazar admitted to violating the DOSA in three distinct ways, warranting revocation of his DOSA pursuant to RCW 9.94A.660(7) and RCW 9.94A.662(3). The court had authority to sanction Mr. Salazar’s conduct to a term “within the standard range.” RCW 9.94A.660(7)(b). The standard range was 22-29 months. CP 19. The court sentenced Mr. Salazar to 29 months, consistent with that authority.

The Court of Appeals held as follows:

¶ 10 The judgment and sentence warned Mr. Salazar that he could face the remaining half of the sentence in prison if he failed to comply. That warning notice, however, did not circumscribe the trial court's statutory authority to impose its own sanctions if he violated the terms of community custody.

¶ 11 The trial court did not err by imposing the 29-month term.

State v. Salazar, 13 Wash. App. 2d 880, 883, 468 P.3d 661, 662.

II. The State Could Recommend a Sanction for Mr. Salazar's Admitted Violations.

The next issue is whether the State could request the court impose a sanction of the high end of the standard range due to Mr. Salazar's repeated violations of his DOSA sentence. Mr. Salazar confuses the State's obligation at the sentencing hearing and the State's role at a DOSA revocation hearing. Here, the State fulfilled its obligation to recommend a DOSA sentence, RP 10-11, so there was no violation of the plea agreement. Mr. Salazar's contention is based on the State's conduct *after* he failed to comply with the terms of his sentence.

"A prosecutor's duty to abide by the terms of a plea agreement applies both at an original sentencing hearing as well as at resentencing after remand." *State v. Gleim, Jr.*, 200 Wn. App. 40, 41, 401 P.3d 316 (2017). However, once the State has fulfilled its obligation at sentencing, it dons a

different role for subsequent proceedings. For example, in *State v. Gleim*, the court recognized the prosecutor may have to argue on appeal in defense of a judgment substantially different from the plea agreement. 200 Wn. App. at 45. The prosecutor then may have a different duty again if the court of appeals remands to the trial court for a limited purpose other than resentencing. *Id.* Similarly, the State adopts a different role during a DOSA violation hearing. This new role requires the State to address appropriate sanctions for any violations of the DOSA sentence.

Nevertheless, Mr. Salazar severely misapprehends the language of the statement of defendant on plea of guilty. The statement of defendant laid out the entirety of the agreement between the parties in section (h):

The prosecuting attorney will make the following recommendation to the judge: Prison-based DOSA sentence, 12.75 months incarceration, 12.75 months community custody, no contact order to be agreed, defendant to be liable for restitution on all counts including dismissed counts.

CP 10 (all-caps language modified to standard capitalization). Mr. Salazar instead erroneously relies on the notice to the defendant about how additional criminal history can affect the standard range and argues that language was also part of the plea negotiations. *See* CP 9 (section (e)) (“If I am convicted of any new crimes before sentencing, or any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney’s recommendation may increase.”). However, that

language is not part of the plea offer: it is simply part of the form notice to all defendants about their rights. *See* CrR 4.2(g) (providing the form for statements on plea of guilty). Section (b) discusses the standard range, section (c) discusses the importance of a complete criminal history, and section (d) discusses the scenario of a juvenile convicted in adult court. CP 8. Section (e) was just a continuation of that explanation of a defendant's rights. None of those sections contractually bound the State with additional obligations. Mr. Salazar's argument is meritless.

The State had the authority to make a recommendation in light of the gravity of the admitted violations. There was no agreement between the parties tying the State's hands in making a recommendation. Mr. Salazar agreed he understood he could face the high end of the standard range if he violated the DOSA sentence. RP 13. The State followed the plea agreement at sentencing in November 2015, but that agreement had no bearing on the DOSA revocation hearing. The State's conduct was appropriate, and the sanction should be affirmed.

The Court of Appeals held as follows in affirming the sentence:

¶ 12 Mr. Salazar also argues that the prosecutor breached the plea agreement by failing to recommend the 25.5-month sentence upon revocation of the DOSA. We need not discuss this argument at any length because there is no factual support for it.

¶ 13 Mr. Salazar rightly contends that the government is bound to follow its plea agreement. However, he cannot show any breach of

that agreement. The agreement does not address the possible sanction the prosecutor might seek in the event that Mr. Salazar violated the sentence after it was imposed. The prosecutor simply cannot violate an agreement he did not make. *State v. Church*, 5 Wn. App. 2d 577, 585, 428 P.3d 150 (2018), *review denied*, 192 Wn.2d 1020, 433 P.3d 812 (2019).

¶ 14 There was no breach of the plea agreement.

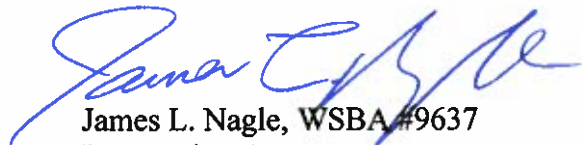
State v. Salazar, 13 Wash. App. 2d 880, 883, 468 P.3d 661, 663.

F. CONCLUSION

For the foregoing reasons, the State respectfully submits the Court should deny review and affirm the decision of the Court of Appeals.

DATED: December 3, 2020

Respectfully submitted:


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I certify that I sent a true and correct copy of the foregoing
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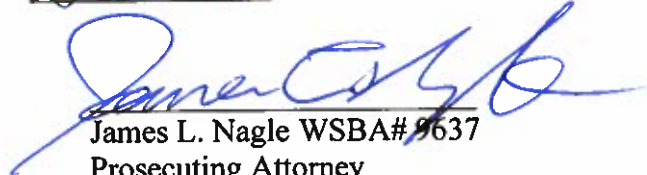
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30(b)(4) to:

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on the 3rd day of December, 2020.



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