

NO. 65116-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO GRAY,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUE PRESENTED

1. A trial court's decision whether to grant a Drug Offender Sentencing Alternative ("DOSA") is not subject to review unless the court made a legal error or failed to exercise its discretion. Here, the court repeatedly indicated that it was willing to sentence Gray to a DOSA on his drug case until Gray ultimately withdrew his request for a DOSA. Did the trial court properly exercise its discretion by sentencing Gray to a non-DOSA, standard range sentence after he indicated that he was no longer interested in a DOSA?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Alphonso Gray was charged by information with Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that Gray delivered an uncontrolled substance in lieu of a controlled substance on October 29, 2008.

CP 1.

Gray pleaded guilty to the VUCSA charge on January 1, 2010.¹ 1RP² 1-13. At the same time, Gray pleaded guilty to Assault in the Third Degree in an unrelated case.³ 1RP 1-13. Gray was sentenced on both cases on March 3, 2010. 2RP 1-15. The court imposed 60 months on the VUCSA. CP 25-34. Gray appeals the court's failure to grant a DOSA on the VUCSA.

2. SUBSTANTIVE FACTS.⁴

On October 29, 2008, Seattle Police Department officers conducted an undercover "buy-bust" in the area of 23rd Avenue and East Union Street. Sergeant Garth Green was working as an undercover buyer. At around 8:30 pm, Gray approached Green

¹ In his brief, Gray states that he entered a plea to delivery of cocaine. Brief of Appellant 2. The record reflects that Gray pleaded guilty to delivery of an uncontrolled substance in lieu of a controlled substance, or delivery of "bunk." CP 4-14; 1RP 2-13.

² The verbatim report of proceedings consists of two volumes, which are numbered separately. The volumes will be referred to in this brief as follows: 1RP (January 25, 2010 Plea Hearing) and 2RP (March 3, 2010 Sentencing Hearing).

³ The Assault in the Third Degree was filed under a different cause number; Gray did not file an appeal under that cause number. Gray's Assignment of Error Number 2 addresses the Assault in the Third Degree case. Because it is not properly before this Court, any assignment of error related to the Assault in the Third Degree case cannot be considered. RAP 5.1.

⁴ The substantive facts are based on the Certification for Determination of Probable Cause (CP 2), which the parties stipulated to as the real facts for the purpose of sentencing. CP 19.

and asked him, "What you need?" Green responded that he wanted "a twenty," which is slang for \$20 worth of crack cocaine. Gray responded, "I got you," and pulled out a small plastic bindle from inside his sweatshirt sleeve. Gray opened the bindle and dumped out three small pieces that looked like crack cocaine. Gray handed one piece to Green in exchange for \$20. Green gave his "good buy" sign as he was walking away and Gray was subsequently detained. During a search incident to arrest, officers found the \$20 that Green had paid Gray on Gray's person. A field test of the substance Gray sold Green was inconclusive. CP 2.

C. ARGUMENT

Gray contends that the trial court refused to consider his request for a DOSA, and thus failed to exercise the required discretion. This argument is not supported by the record, which clearly indicates that the court considered a DOSA until Gray withdrew his request for a DOSA.

1. RELEVANT FACTS.

Gray's offender score on the VUCSA was 11. CP 26.
Delivery of a material in lieu of a controlled substance is

categorized as a level II drug offense. RCW 9.94A.518. For a defendant with an offender score of six or higher, the standard range on a level II drug offense is 60 to 120 months. RCW 9.94A.517. However, because the statutory maximum for delivery of a material in lieu of a controlled substance is five years, Gray's standard range was fixed at 60 months. RCW 9A.20.021(c); 2RP 1-6.

At the sentencing hearing, the State explained that, although it was opposed to a DOSA on Gray's assault case, the State did not object to a DOSA on Gray's VUCSA case. 2RP 6. The State acknowledged that Gray was eligible for a DOSA and had multiple prior convictions for possession of narcotics. 2RP 6.

Gray asked the court to impose a DOSA on both cases.⁵ 2RP 7-10. The court indicated that it was willing to impose a DOSA on the VUCSA case "because I want you to get treatment. If you're serious about wanting treatment and bettering yourself, then I'm happy to give it to you on the drug case." 2RP 10-11.

⁵ In his brief, Gray indicates that the "DOSA referred to by the trial court was a prison-based DOSA, not the outpatient program which Mr. Gray had requested." Brief of Appellant, footnote 2. The record does not indicate that Gray ever requested a residential DOSA. Furthermore, because the midpoint of Gray's standard range exceeds 24 months, he was not even eligible for a residential DOSA. See RCW 9.94A.660(3).

The court first sentenced Gray in his assault case. The court denied Gray's request for a DOSA and imposed 55 months in custody, to be served concurrently with the VUCSA sentence. 2RP 12.

The court then began imposing the VUCSA sentence by stating, "I will provide -- give a DOSA on the Delivery of Bunk...." 2RP 13. Defense counsel then clarified, "Or in the alternative, do the 60 months concurrent with the 55?" 2RP 13. The court agreed that would be another option on the VUCSA and again asked Gray whether he wanted the treatment offered by the DOSA:

I guess the real question, Mr. Gray, is, do you want treatment or not? That's the real question. Here's an opportunity to better yourself and get treatment on the State's time.

2RP 13. After Gray discussed some of the personal factors playing into his decision, the court again emphasized its willingness to grant the DOSA, saying:

End of the day it's your decision. I -- I'm giving you an opportunity to get some treatment free of charge from what I understand. And if you really -- if that's really what you want, you can have it. If you don't, I'll be happy to sentence you to the -- to the 60 months. What would you prefer?

2RP 14. Gray answered that he wanted "the 60 months," which is what the Court ultimately imposed. 2RP 15.

2. THE SENTENCING COURT PROPERLY EXERCISED ITS DISCRETION IN NOT GRANTING THE DOSA AFTER GRAY WITHDREW HIS REQUEST.

Once a defendant is found to be eligible for a DOSA, it is then within the trial court's discretion whether to grant a DOSA. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A trial court's decision whether or not to grant a DOSA generally is not reviewable. Id. at 338. An appellant may, however, challenge the procedure by which a sentence was imposed. Id. An appellant may also challenge a legal error in determining eligibility for a sentencing alternative. State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004), aff'd, 155 Wn.2d 574, 122 P.3d 903 (2005). Likewise, an appellant may challenge a sentence for abuse of discretion. It is an abuse of discretion for a trial court to categorically refuse to consider whether a DOSA sentence is appropriate. Grayson, 154 Wn.2d at 342. A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

There is no showing that the trial court used an improper procedure or relied upon a legal error when sentencing Gray for the

case at hand. The court did not categorically deny the DOSA in this case. In fact, the court repeatedly offered to impose a DOSA if that was Gray's request. The record clearly reflects that it was Gray who decided that he did not want the DOSA. 2RP 15. The court's decision to impose 60 months was entirely reasonable given Gray's change of heart.

D. CONCLUSION

For the reasons cited above, this Court should affirm Gray's standard range sentence.

DATED this 18 day of November, 2010.

Respectfully submitted,

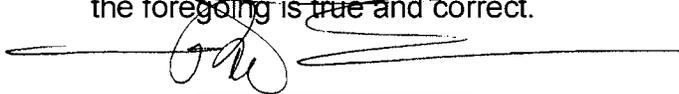
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Bridgette E. Maryman
BRIDGETTE E. MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ALPHONSO GRAY, Cause No. 65116-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington

11-19-10
Date