

68121-4

68121-4

NO. 68121-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE KING,

Appellant.

2012 OCT 19 PM 2:13  
COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK OF COURT

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

Whether this Court should affirm the trial court's denial of a DOSA when the record reflects that trial court considered imposing a DOSA and articulated specific reasons why the trial court did not believe a DOSA would benefit King and the community, when the trial court considered the contents of King's testimony at trial, and when stand-in counsel, at sentencing, was familiar with the case?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On February 3, 2011, under King County Superior Court Cause Number 11-1-00386-4 SEA, Robert Lee King was charged with one count of Violation of the Uniform Controlled Substances Act (VUCSA) - delivery of cocaine. CP 1. Prior to trial the information was amended to the following: Count I, VUCSA - delivery of cocaine; Count II, VUCSA - possession with intent to deliver cocaine; and Count III, bail jumping. CP 96-97. The VUCSA incidents occurred on December 4, 2010. Id. Count III was later dismissed pursuant to a plea agreement on another cause number. CP 117-18. On October 22, 2011, a jury found King guilty of both Counts I and II. CP 93-94.

On February 11, 2011, under a separate cause number, King County Superior Court Cause Number 11-1-00483-6 SEA, King was charged with one count of VUCSA - delivery of cocaine. Prior to trial the information was amended to the following: Count I, VUCSA – delivery of cocaine; Count II, VUCSA – possession with intent to deliver cocaine; and Count III, bail jumping. CP 133-34. These VUCSA incidents occurred on February 8, 2011. Id. Count III was later dismissed, pursuant to a plea agreement on another cause number. CP 221-22. On November 2, 2011, a jury found King guilty of both Counts I and II. CP 183-84.

King was sentenced on both cause numbers on November 30, 2011. CP 106-14, 210-18. At sentencing, the trial court denied the joint request made by King and the State for a Drug Offender Sentencing Alternative (DOSA). 11 RP 13-16.<sup>1</sup> Instead, the trial

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<sup>1</sup> Reports of Verbatim Report of Proceedings consist of 11 volumes from nine separate dates. The volumes are not consecutively paginated. In this brief, the 10/24/11 report of proceeding before the Honorable Julie Spector is cited as 1 RP; the 10/25/11 report of proceeding before the Honorable Julie Spector is cited as 2 RP; the 10/26/11 report of proceeding before the Honorable Theresa B. Doyle is cited as 3 RP; the 10/26/11 report of proceeding before the Honorable Julie Spector is cited as 4 RP; the 10/27/11 four page transcription of the report of proceeding before the Honorable Julie Spector is cited as 5 RP; the 10/27/11 sixty five page transcription of the report of proceeding before the Honorable Julie Spector is cited as 5 RP; and each subsequent date's report of proceeding is sequentially numbered accordingly.

court imposed the bottom of the standard range, 60 months, on both counts on each case, all to run concurrent with each other.

## **2. SUBSTANTIVE FACTS**

On December 4, 2010, Seattle Police conducted a buy-bust operation on a suspected drug dealer who went by the name "Pigpin"; Pigpin was later discovered to be King. 1 RP 30. Officers called King's phone number and set up a drug transaction with him. Id. When Officer Maurice Washington met with King, King gave the undercover officer 4.1 grams of cocaine, in scorpion print baggies, in exchange for \$100 of prerecorded money. 2 RP 19-20, 22, 26, 32, 88. After the exchange, King was arrested and an additional 7.9 grams of cocaine packaged in 19 individual baggies with a scorpion print, was found on King. 2 RP 62, 88. Officers located \$133.00 of cash on King, along with the \$100 of the prerecorded buy money. 6 RP 16.

At trial, King testified that he gave the undercover officer ten baggies of what he assumed was cocaine and the undercover officer gave him money. 6 RP 33-35. King also testified that as to the nineteen other packages in his possession, he intended to 1) give to the driver of the car King was riding in for giving him a

ride, and 2) give to a woman whose house King had just moved into. Id.

On February 8, 2011, Seattle Police Officers conducted a buy-bust operation on King who was selling cocaine in the area of 12<sup>th</sup> and Judkins; the officers knew King's street name was "Pigpin." 7 RP 17, 20. Officer Maurice Washington again met with King, and King gave the officer 2.1 grams of cocaine, packaged in small yellow baggies, in exchange for \$100 of prerecorded money. 7 RP 20, 30; 8 RP 31. After the exchange and when officers were moving in to arrest King, King was seen tossing away yellow baggies of cocaine and additional yellow baggies of cocaine were found in his pockets. 7 RP 45-47; 8 RP 34. Officers located \$160.00 of cash on King, along with the \$100 of prerecorded buy money. 7 RP 56-57; 8 RP 12.

At trial, King testified that he was near 12<sup>th</sup> and Judkins because he formerly lived in the area and was looking for his possessions. 8 RP 76. King testified that he was standing outside for about 45 minutes, while a woman he previously lived with came in and out of her apartment. 8 RP 74. King explained that he received the \$100 of pre-recorded buy money from this woman just prior to his arrest. 8 RP 74-75. King denied ever giving Officer

Washington yellow baggies of cocaine and denied tossing any yellow baggies of cocaine. 8 RP 71, 75. King did admit to having cocaine in his possession and intending to sell that cocaine at some point. 8 RP 81.

**C. ARGUMENT**

**1. THE STANDARD RANGE SENTENCE IMPOSED SHOULD BE UPHeld BECAUSE THE TRIAL COURT DENIED THE IMPOSITION OF THE DOSA ON VALID TENABLE GROUNDS.**

The trial court's imposition of the standard range and denial of imposition of a DOSA was valid because the trial court properly exercised its discretion on valid grounds. At the sentencing hearing, the trial court outlined several reasons why it was denying the request for a DOSA.

A DOSA is an alternative sentence that can be imposed for certain eligible offenders. RCW 9.94A.660(1). When a DOSA is granted, the court imposes one-half of the midpoint of the standard range in prison and the remainder of the range is imposed as community custody. If the terms of a DOSA are violated, the offender may be ordered to serve the remainder of the standard range in prison. 9.94A.660(7)(c). The DOSA program is intended

to provide treatment for offenders who would benefit from the program. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A DOSA sentence is considered a privilege, not a right. State v. Watson, 120 Wn. App. 521, 532, 86 P.3d 158 (2004).

Whether a trial court imposes a DOSA at sentencing is not generally reviewable, because it is considered a sentence within a standard range. RCW 9.94A.585(1); State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). However, a defendant may appeal a sentence if, 1) the defendant alleges that the trial court refused to exercise its discretion by categorically refusing to impose the DOSA, or 2) the defendant raises a constitutional challenge, such as that the request was denied on impermissible grounds. Grayson, 154 Wn.2d at 338, 342; Bramme, 115 Wn. App. at 850; State v. McNeair, 88 Wn. App. 331, 336, 994 P.2d 1099 (1997); State v. Gronnert, 122 Wn. App. 214, 225, 93 P.3d 200 (2004). In the present case, the trial court explained that it did not think King was amenable to treatment considering that he was out of custody pending two VUCSA cases when he committed two more VUCSA offenses. 11 RP 6. The trial court considered King's criminal history, which spanned over a twenty year period. 11 RP 14. King's criminal history includes convictions from 2011, 2000 and

1992. CP 112, 216. At the time of this sentencing King was also being sentenced on another 2010 case, involving possession of cocaine. 11 RP 2-4. The trial court indicated its concern that King would not carry through with the strict conditions of a DOSA, in light of his recidivism. 11 RP 6-7. Additionally, the trial court considered the testimony of King during the two trials, as well as the information King provided at the sentencing hearing. 11 RP 7-8. King, at sentencing, told the trial court about his addiction to marijuana and how he used marijuana to self-medicate his mental health issues. 11 RP 10-12.

The trial court concluded that in light of the fact that King had been in the system for twenty years, continued to re-offend upon release, and did not come to court, imposing a DOSA was setting King up for failure and he would ultimately spend a longer period incarcerated if the DOSA was eventually revoked. 11 RP 13-16. The trial court said, "I think I would be remiss in putting you on DOSA just based on what you told me." 11 RP 14. The trial court also stated, "I just don't see any other way to keep you and the community safe." Id.

Courts have held that a trial court has properly exercised its discretion if it considers whether the community and defendant will

benefit from the imposition of a DOSA. In State v. Gronnert, 122 Wn. App. at 225-26, the trial court's denial of a DOSA was upheld because the court had a valid reason to believe that the DOSA was not going to be an effective way to deal with the defendant's drug offender behavior. In State v. White, 123 Wn. App. 106, 113-15, 97 P.3d 34 (2004), the trial court's denial of a DOSA was upheld because the trial court considered the defendant's infraction record in prison and an instance in prison where he used drugs after completion of treatment. In State v. Smith, 118 Wn. App. 288, 292-94, 75 P.3d 986 (2003), the trial court's denial of a DOSA was upheld because the trial court considered the fact that the defendant had failed to successfully complete drug court. In State v. Jones, 2012 WL 4510851, \_\_\_ P.3d \_\_\_ (2012), the trial court's denial of a DOSA was upheld because the trial court considered the defendant's criminal history.

In the present case, the trial court articulated specific reasons why it did not believe King was a good candidate for an alternative sentence. This is unlike the court in Grayson, where the only basis that was articulated for the denial of a DOSA was inadequate program funding. 154 Wn.2d 342-43. In Grayson, the court acknowledged other valid grounds by which the trial court, on

that case, could have denied the defendant's DOSA including the following: facing significant time on another charge that was ineligible for a DOSA, extensive drug-related criminal history, and continued commission of drug offenses while on conditional release. However, because those reasons were not the articulated reasons for the denial of the DOSA, the court found a categorical refusal. In the present case, unlike in Grayson, the trial court outlined that part of the basis for its denial of the DOSA was that King continued to commit VUCSA offenses while on release on other VUCSA matters and he had VUCSA criminal history over a twenty year period of time. The court did not categorically deny King a DOSA, but exercised its discretion based on consideration of the facts before the court.

Although the trial court did not have an assessment when it denied King's DOSA request, there is no statute that requires a sentencing court to consider an assessment during its consideration of whether to impose a prison-based DOSA. RCW 9.94A.660(4) provides that "[t]o assist the court in making its determination, the court *may* order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500." (emphasis

added). The trial court, in this case, did not have an assessment or chemical dependency report. However, King never requested that one be done. Nor did he request a continuance in order to obtain an evaluation for the court to consider. See Watson, 120 Wn. App. at 527-28 (defendant did not timely object or request an evidentiary hearing for evidence presented by the State in opposition of the defendant's DOSA request). The trial court had sufficient information to make a determination as to whether a DOSA was an appropriate sentence in this case.

The trial court did consider King's testimony at trial. The trial court did so in conjunction with King's comments at the sentencing hearing. The trial court did not indicate that it was not imposing the DOSA simply because King took these matters to trial. In State v. Montgomery, the court denied the defendant's request for a sentence alternative, a SSOSA, based solely on the fact that the defendant caused his victim to testify at trial. 105 Wn. App. 442, 446, 17 P.3d 1237 (2001). Unlike in Montgomery, the trial court in the present case did not deny the request for a DOSA because King proceeded to trial. Instead, the trial court grounded its denial in concerns regarding amenability to treatment in light of King's history of drug dealing in the community.

**2. KING WAS EFFECTIVELY REPRESENTED BY COUNSEL AT THE SENTENCING HEARING.**

King was effectively represented at the sentencing hearing by the trial attorney's stand-in counsel. A defendant has a right to representation at every critical stage of a criminal proceeding, including sentencing. U.S. Const. amend. VI, XIV; Wash. Const. art. I, § 22 (amend. 10). When represented at a critical stage, it is presumed that there is effective representation such that the defendant must make a showing of prejudice to overcome that presumption. United States v. Cronin, 466 U.S. 648, 659-60, 104 S. Ct. 239 (1984). Under Strickland v. Washington, when one claims ineffective assistance of counsel, the burden on the defendant is to 1) demonstrate that counsel's performance fell below an objective standard of reasonableness, and 2) demonstrate that the deficient performance prejudiced the defendant. 466 U.S. 668, 104 S. Ct. 2052 (1984); State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). A defendant is not entitled to a specific attorney for sentencing. In re Pers. Restraint of Morris, 34 Wn. App. 23, 24, 658 P.2d 1279 (1983).

In the present case, King had effective representation at the sentencing hearing on this matter. Trial counsel was not present

for the sentencing. However, stand-in counsel, Matt Pang, was present on King's behalf for the sentencing. 11 RP 2. Mr. Pang actively participated and made a presentation to the trial court as to why a request for a DOSA was being made. Unlike In re Pers. Restraint of Morris, where counsel was completely unfamiliar with one of the cases set for sentencing, the record reflects that Mr. Pang was familiar with the cases. King has failed to overcome the presumption of competence.

Even if the Court could find that counsel was deficient in his performance at the sentencing, King has failed to show any prejudice. The trial court was clear in its reasoning for denying the imposition of a DOSA. Even had the attorney of record been present for the sentencing, she would not have been able to refute King's longstanding and consistent criminal history. Nor would she have been able to redress King's statements that he made to the trial court at sentencing. Both of which formed a basis for the trial court's denial of the DOSA.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm King's sentence.

DATED this 9 day of October, 2012.

Respectfully submitted,

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