

08121-4

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NO. 68121-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE KING,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF  
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KING COUNTY

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A. SUMMARY OF ARGUMENT

Robert Lee King's sentence should be remanded for a new hearing so that the court can use appropriate criteria to determine whether to grant a Drug Offender Sentence Alternative (DOSA).

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it considered Mr. King's exercise of his constitutional right to testify as a basis to deny a DOSA.

2. The trial court erred when it denied a DOSA request based on insufficient evidence.

3. The trial court erred when it denied a DOSA request without Mr. King having meaningful legal representation.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A sentencing court abuses its discretion if it denies a DOSA request based on untenable grounds or refuses to exercise discretion at all. The court denied Mr. King a DOSA without adequate information concerning Mr. King's amenability to treatment, while Mr. King was not meaningfully represented by counsel, and based on Mr. King's exercise of his constitutional right to testify. Did the court abuse its discretion?

#### D. STATEMENT OF THE CASE

After separate jury trials, Mr. King was convicted of four counts Violation of the Uniform Controlled Substances Act (VUCSA): two counts delivery of a controlled substance and two counts possession with intent to deliver a controlled substance. CP 106, 210. In each instance, the controlled substance was cocaine. *Id.*

Pursuant to a plea agreement on severed charges, the State agreed to recommend a DOSA. 11/30/11RP 2-3.<sup>1</sup> The agreement was entered into the day before the scheduled sentencing hearing. 11/30/11RP 2-3, 6. Thus prior to the hearing, the court did not order an evaluation and the defense did not submit a presentence report in support of the DOSA. 11/30/11RP 6, 15-16. Mr. King's trial counsel was unable to attend sentencing and sent a colleague in her place. 11/30/11RP 2, 27. The court therefore had little information before it in considering the sentencing alternative. Nonetheless, the court did not continue the sentencing hearing. Rather, based on this lack of information and considering defendant's own testimony at trial, in which he did not discuss addiction or a need for treatment, the court did

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<sup>1</sup> The record contains verbatim reports from each cause number. However, the two causes were considered together for sentencing along with a third case. This hearing was held on November 30, 2011 and the verbatim report of proceeding is referred to herein as "11/30/11RP."

not believe Mr. King would be able to follow through with treatment.

11/30/11RP 14-16. Accordingly, it denied a DOSA. 1/30/11RP 16.

E. ARGUMENT

**The trial court abused its discretion by denying Mr. King's request for a DOSA based on untenable grounds.**

1. A trial court's denial of a DOSA is reviewable if based on untenable grounds.

“A trial court only possesses the power to impose sentences provided by law.” *In re the Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). Consistent with this general limitation on a court's sentencing authority, the DOSA statute structures a court's authority when considering a DOSA. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The 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. *See generally* RCW 9.94A.660; Department of Corrections, Drug Offender Sentencing Alternative Fact Sheet.

If the court determines a person is eligible for DOSA and that it is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence, to be served in prison while receiving chemical dependency

treatment. RCW 9.94A.660(3); RCW 9.94A.662. Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community supervision and treatment for the balance of the sentence. *Id.* The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(7)(c); *Grayson*, 154 Wn.2d at 338.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660. An offender is eligible for the special drug offender sentencing alternative if (a) he is not convicted of a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4); (b) he is not convicted of felony DUI-related charges; (c) he has no prior convictions for a sex offense or violent offense within ten years; (d) if convicted of a VUCSA violation, the violation was for a small quantity; (e) he is not subject to deportation; (f) the standard range is greater than one year; and (g) he has received no more than one prior drug offender sentencing in the prior ten years.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. But every defendant is

entitled to ask the trial court for meaningful consideration of a DOSA request. *Id.* at 342. Appellate review is appropriate where the court, “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” RAP 2.4.

“[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law.” *Grayson*, 154 Wn.2d at 338. A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); *see also State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal).

2. The DOSA request was denied on untenable grounds because the court considered Mr. King’s exercise of a constitutional right.

As the State and the court agreed, Mr. King satisfied the DOSA eligibility requirements. 11/30/11RP 2-3; CP 116; *see* 11/30/11RP 4 (defense counsel on another cause number agrees DOSA is appropriate on these charges). In fact, the State recommended a DOSA. *Id.* But the court abused its discretion and denied a DOSA on untenable

grounds when it considered Mr. King's trial testimony as a basis for denying the sentencing alternative.

Mr. King had a constitutional right to testify at trial. Const. art. I, § 22; U.S. const. amends. V, VI, XIV; *State v. Thomas*, 128 Wn.2d 553, 556-57, 910 P.2d 475 (1996). "The right to testify in one's own behalf has been characterized as a personal right of 'fundamental' dimensions." *Id.* at 558 (citing cases). Mr. King exercised this fundamental right at both trials.

The court considered Mr. King's testimony as a basis for denying him a DOSA. In finding him not amenable to treatment, the court stated he testified to selling cocaine, "essentially," but "[n]ever talked about anything dealing with habit." 11/30/11RP 7. In further explaining the denial, the court declared, "Your testimony was absolutely rejected by the jury. Two juries." 11/30/11RP 15. As defense counsel pointed out, whether Mr. King was addicted to drugs was irrelevant to his innocence for possession and possession with intent to deliver charges. 11/30/11RP 7-9. Likewise, the charges presented no occasion to testify regarding his willingness to comply with substance abuse treatment. But the court considered the alleged shortcomings of Mr. King's testimony anyway. *E.g.*, 11/30/11RP 15.

The exercise of his constitutional rights should not be used against Mr. King in imposing a greater sentence. In considering a related right, this Court held, “a defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.” *State v. Montgomery*, 105 Wn. App. 442, 446, 17 P.3d 1237 (2001). In *Montgomery*, the defendant was convicted by a jury of rape of a child in the first degree and child molestation in the first degree. *Id.* at 443. The sentencing court denied his request for a Special Sex Offender Sentencing Alternative (SSOSA) because his decision to go to trial caused his victim to testify. *Id.* at 446. “[T]he court also stated that Montgomery’s taking the case to trial was an indication of his unwillingness and inability to acknowledge what he did and his need for treatment.” *Id.* at 446, n.8. Although finding the error moot because the defendant was ineligible for SSOSA, this Court held,

[t]his was a violation of Montgomery's constitutional rights. Notwithstanding the common belief that an offender must accept past deviancy in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated. A defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.

*Id.*

Similarly, no penalty can be imposed for the exercise of the right to appeal under Article I, § 22. *City of Seattle v. Brenden*, 8 Wn. App. 472, 474, 506 P.2d 1314 (1973). “A person cannot be influenced to surrender a constitutional right by imposing a penalty on its use . . . . Legitimate objectives may not be pursued by means that needlessly chill the exercise of basic constitutional rights.” *State v. Eide*, 83 Wn.2d 676, 679, 682, 521 P.2d 706 (1974) (citations omitted).

There are many reasons why an individual might choose to stand trial, appeal a conviction, or testify at trial. Likewise, the decision to limit the content of one’s testimony is based on several factors, including constitutional rights and evidentiary rules. The sentencing court’s wide discretion over a DOSA request does not include consideration of a defendant’s exercise of basic constitutional rights. That fact can never be a permissible factor in the decision. Like in *Montgomery* and *Brenden*, no greater penalty should be imposed against Mr. King based on the exercise of his constitutional right to testify.

3. The DOSA request was denied on untenable grounds because the court had insufficient information to make the determination.

The trial court also abused its discretion when it denied a DOSA without sufficient information.

First, the court did not have enough information from which to determine Mr. King's amenability to treatment. Nonetheless, the court denied a DOSA on that basis. The State agreed to recommend a DOSA just 24 hours prior to the sentencing hearing. 11/30/11RP 2-3, 6. The court did not have time prior to the scheduled hearing to request an evaluation, though it certainly could have continued the hearing to do so. RCW 9.94A.660(4). The court noted, "I don't have any evaluation. I don't know if he is amenable to treatment." 11/30/11RP 6. Further, the court stated, "[T]here's nothing before this Court. I mean, I don't have an evaluation that's been done that shows your ability to succeed with treatment." 11/30/11RP 14-15. The court continued, "There are other people who have much more before a Court asking for a DOSA. I don't even have a presentence report from [defense counsel] asking for a DOSA." 11/30/11RP 15-16; *accord* 11/30/11RP 15 ("What makes me think you are going to follow through on a DOSA? There is nothing here to suggest, nothing before the Court . . ."). Despite the

lack of information, the court found that it would be doing Mr. King a “disservice” by imposing a DOSA, and denied the request. 11/30/11RP 13-16.

Second, Mr. King was not meaningfully represented because his trial counsel could not be present at sentencing. A defendant is entitled to an attorney at sentencing who is familiar with his case. *In re Morris*, 34 Wn. App. 23, 24, 658 P.2d 1279 (1983). In *Morris*, this Court reversed a sentence where the defendant’s counsel at sentencing represented him on only one the most recent charge subject to sentencing. *Id.* Mr. Morris was not represented at sentencing by his trial attorney on the first charge at issue. *Id.* Because he was not represented by someone familiar with his case, the sentence was reversed and remanded for a new hearing. *Id.* at 24-25.

Like Mr. Morris, Mr. King was not represented at sentencing by an attorney familiar with his case. Mr. King was represented at both trials by Emily Deckman. *E.g.*, 11/30/11RP 2. However, Ms. Deckman was ill and unable to attend the sentencing hearing; she sent a colleague, who was unfamiliar with Mr. King’s cases. 11/30/11RP 2, 5, 7-8, 27. As discussed above, the court was plainly frustrated by the lack of amenability and other information before it. Ms. Deckman had

not had an opportunity to submit a presentence report. 11/30/11RP 15-16. Stand-in counsel was unfamiliar with the trials and Mr. King's testimony and background. Thus, he could not effectively refute the court's concerns with his receptivity to treatment. 11/30/11RP 7-9. However, despite not being able to engage in a meaningful discussion about Mr. King's amenability to treatment, the court denied a DOSA.

The court's denial of a DOSA was on untenable grounds because the information before the court was insufficient. The matter should have been continued and heard once an evaluation was conducted, a presentencing report submitted, and Mr. King's trial counsel could be present.

4. The sentence should be reversed and the matter remanded for a new sentencing hearing.

The trial court's bases for the DOSA denial were untenable. Because the court abused its discretion, the sentence must be reversed and the matter remanded for a new sentencing hearing. *Grayson*, 154 Wn.2d at 342.

F. CONCLUSION

Because the trial court denied Mr. King's DOSA request based on untenable grounds, the sentence should be reversed and the matter remanded for a new hearing.

DATED this 14th day of August, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Zink', is written over a horizontal line.

Marla L. Zink – WSBA 39042  
Washington Appellate Project  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68121-4-I
v.	)	
	)	
ROBERT LEE KING,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ROBERT LEE KING DOC #353170 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF AUGUST, 2012.

x 

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