

NO. 71093-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD C. ADORNETTO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE, JUDGE

**BRIEF OF RESPONDENT**

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A. ISSUE

A defendant is not entitled to an alternative sentence outside the standard range; however, the trial court must actually consider any request for such a sentence. Adornetto, who had pled guilty to residential burglary and three counts of firearm theft, asked for a sentence under the Parenting Sentencing Alternative (“PSA”). The sentencing court found that a PSA was not an appropriate resolution in Adornetto’s case, citing the need for accountability and even-handed treatment of offenders. The court added that it might find such a sentence appropriate if Adornetto’s incarceration would cause his child to be placed in foster care or endangered in some way. Was this a proper exercise of the trial court’s discretion?

B. STATEMENT OF THE CASE

Defendant Richard C. Adornetto was charged by information with residential burglary and three counts of theft of a firearm. The State alleged that, on August 8, 2012, Adornetto burglarized the residence of Joseph Rinaldi and took the firearms. CP 1-4.

Adornetto pled guilty as charged. CP 6-18. The plea was motivated in part by assurances from the U.S. Attorney’s Office that no federal charges would be pursued in the event of a guilty plea.

CP 16; 1RP<sup>1</sup> 9. In addition, the State agreed not to pursue additional charges related to the incident.<sup>2</sup> CP 10.

Adornetto's criminal history included a 2009 conviction for residential burglary.<sup>3</sup> CP 28; 2RP 7. His standard range for firearm theft, the more serious of the current crimes, was 31-41 months. CP 7, 31. The State agreed to recommend 36 months in custody. CP 10. The plea agreement allowed Adornetto to seek a Parenting Sentencing Alternative ("PSA")<sup>4</sup>, but the State gave notice that it would oppose such a resolution. CP 10; 1RP 7.

At the sentencing hearing, Adornetto's attorney asked the court to continue sentencing so that he could obtain necessary information from the Department of Corrections ("DOC") in support of the PSA. 2RP 4; see RCW 9.94A.655(2),(3) (in determining whether to impose PSA, court may order DOC to complete risk assessment and/or chemical dependency screening; if court is considering imposing PSA, court must request DOC to investigate

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<sup>1</sup> The verbatim report of proceedings below consists of two volumes, which will be referred to as follows: 1RP (guilty plea hearing held on July 24, 2013); 2RP (sentencing hearing held on September 27, 2013).

<sup>2</sup> In all, 22 firearms were taken from a safe in Rinaldi's residence. CP 4.

<sup>3</sup> Adornetto also had five prior misdemeanor convictions from California, all involving theft, burglary or embezzlement. CP 28.

<sup>4</sup> RCW 9.94A.655. While the statute refers to this alternative as the "parenting sentencing alternative," it is referred to in the transcript of proceedings below as "POSA" and in the Appellant's Opening Brief as "FOSA."

whether there is an open child welfare case or prior substantiated referrals of abuse or neglect). Counsel presented the court with a detailed summary of Adornetto's difficult childhood, and pointed out that Adornetto and his wife were both working and raising their four-year-old daughter. CP 49-51.

The judge rejected the request for a continuance, explaining that she did not find a PSA to be an appropriate resolution in this case:

I'm going to deny the request for continuance. I do so because having educated myself to the extent I think realistically possible on this sentencing alternative, and understanding – and I think well informed by materials that came in today from the Defense PowerPoint, I'm referring to, the Court does not see this as an appropriate resolution here given all of the different purposes of sentencing, and accountability being one of the [sic] them and even-handed treatment being another.

It appears to the Court that there may very well be appropriate cases for this kind of parenting sentencing alternative. And really the Court sees those, and I saw those in some of the PowerPoint demographic breakdown, situation where the child would be in foster care but for the parents being spared a prison sentence, or circumstances that would be really endangering to the child. And I don't mean to minimize any child having to be separated from any parent for a period of incarceration, but that's an unpleasant fact of life in this arena. But this

isn't a situation where the Court would exercise its discretion to grant such a sentence.

2RP 5-6.

The court nevertheless found the information provided concerning Adornetto's difficult childhood compelling:

And I am – in this case I'm going to depart somewhat from what the recommendation is. I think the information that's been provided by the Defense in this case is mitigating such that the low-end of the range is the appropriate place rather than the, I guess around a midpoint that was recommended.

2RP 16. The court imposed 31 months, the low end of the standard range for theft of a firearm. 2RP 16; CP 33.

C. ARGUMENT

THE TRIAL JUDGE PROPERLY EXERCISED HER DISCRETION IN DENYING THE PARENTING SENTENCING ALTERNATIVE.

Adornetto contends that the trial judge categorically denied him the Parenting Sentencing Alternative because his incarceration would not require that his child be placed in foster care. He argues that, in doing so, the court abused its discretion by failing to exercise it. The judge's remarks at sentencing, taken as a whole, show a reliance on several factors in making the decision, and reflect a proper use of the court's discretion.

A sentence within the standard range may not generally be appealed. RCW 9.94A.585(1). Thus, as a general rule, a trial court's decision whether to grant a special sentencing alternative is not reviewable. See State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (trial court's decision whether to grant Drug Offender Sentencing Alternative ("DOSA") not generally reviewable). "The legislature entrusted sentencing courts with considerable discretion under the SRA<sup>5</sup>, including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate." State v. Hender, \_\_\_ Wn. App. \_\_\_, 324 P.3d 780, 783 (2014).

A defendant may, however, challenge the procedure by which a sentence was imposed. Grayson, 154 Wn.2d 338. While a defendant is not entitled to a sentence that is below the standard range, he *is* entitled to ask the trial court to impose such a sentence and to have the sentencing alternative actually considered. Id. at 342. Where a defendant has requested a sentencing alternative that is statutorily authorized, a court's categorical refusal to consider the sentence, or its refusal to consider it for a class of

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<sup>5</sup> Sentencing Reform Act of 1981.

offenders, is a failure to exercise discretion and is subject to reversal. Id.

The State does not dispute that Adornetto was eligible for the Parenting Sentencing Alternative. However, eligibility does not automatically lead to an alternative sentence under the statute – the sentencing court must still determine that the alternative is appropriate. RCW 9.94A.655(4); see Hender, 324 P.3d at 782.

Nor does the State maintain that the statute is available only to an offender who is the sole custodian of his child, i.e., an offender whose child will be placed in foster care should the parent be incarcerated. The State *does* dispute Adornetto's characterization of the trial court's ruling on his request for a PSA. His contention that the court categorically excluded him from the alternative because his child would not be placed in foster care if Adornetto went to prison is not supported by the record.

The sentencing judge began by stating her reasons for denying Adornetto a PSA: "[T]he Court does not see this as an appropriate resolution here given all of the different purposes of sentencing, and accountability being one of them and even-handed treatment being another." 2RP 5-6. These were legitimate reasons on which to base the court's decision. See State v. Barnes, 117

Wn.2d 701, 707, 818 P.2d 1088 (1991) (accountability is one purpose of the SRA); RCW 9.94A.010(3) (one purpose of SRA is to make sentences “commensurate with the punishment imposed on others committing similar offenses”).

The judge then pointed out situations where she might be more inclined to impose a PSA, including the “situation where the child would be in foster care but for the parents being spared a prison sentence, or circumstances that would be really endangering to the child.” 2RP 6. This is in accordance with the statute’s focus on the welfare of the child. See RCW 9.94A.655(3).

But the court ultimately concluded that “this isn’t a situation where the Court would exercise its discretion to grant such a sentence.” 2RP 6. This is hardly the categorical exclusion that Adornetto claims, but a considered exercise of discretion by a judge who recognized that she had such discretion.

Adornetto relies primarily on Grayson to argue that the sentencing court here abused its discretion by making its decision based on a legally erroneous belief that the PSA was not available to a parent who was not the sole caregiver for his child. But the court in Grayson was faced with a different situation. In that case, the sentencing court articulated a single reason for denying the

defendant an alternative sentence: “And my main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people who go through a DOSA program.” Grayson, 154 Wn.2d at 337 (alteration in original).

When urged by the prosecutor to articulate additional reasons, the court declined to do so: “I’m not going to give a DOSA, so that’s it.” Id.

The Washington Supreme Court observed that, while the trial judge did not say that inadequate funding was the *sole* reason for denying the DOSA, “he did not articulate any other reasons” for his decision. Id. at 342. The supreme court reversed, concluding in a 5-4 decision that the trial court “did not appear to meaningfully consider whether a sentencing alternative was appropriate.” Id. at 343.

By contrast, the trial judge here articulated several reasons for denying the PSA – accountability and even-handed treatment. And while the court did not expressly rely on Adornetto’s prior conviction for residential burglary, or his five prior misdemeanor convictions for theft-related crimes, the court likely had this criminal

history in mind when speaking of “accountability.”<sup>6</sup> And the court properly took into consideration whether Adornetto’s child would be placed in foster care due to his incarceration; while this is not dispositive, it may certainly be a factor (as it was here) in the judge’s decision whether to grant a PSA.

This case is more like several cases where the appellate courts have affirmed a trial court’s decision to deny imposition of an alternative sentence. For example, in State v. Gronnert, the sentencing court said that it “[did] not at this point in time impose drug offender sentencing alternatives,” and commented that the DOSA program was a “sham” and a “scam” that was not an effective way to deal with drug offenders. 122 Wn. App. 214, 219, 93 P.3d 200 (2004). Gronnert claimed that this represented a failure to exercise discretion, and was thus an abuse of discretion. Id. at 225. The Court of Appeals found that, while the sentencing court’s statement that it did not impose DOSAs appeared to be a categorical denial of the alternative sentence, the court’s comment that DOSA was ineffective in dealing with drug offenders and

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<sup>6</sup> Indeed, the statute *requires* a judge to take an offender’s criminal history into account in deciding whether to impose a PSA. RCW 9.94A.655(4) (“The court shall consider the offender’s criminal history when determining if the alternative is appropriate.”).

provided little benefit beyond cutting the sentence in half demonstrated a proper exercise of discretion. Id. at 225-26.

In State v. Jones, the defendant had requested a prison-based DOSA. 171 Wn. App. 52, 54, 286 P.3d 83 (2012). The trial court, in denying the request, said that Jones needed “to be out of the community for a while” and that he would benefit from treatment. Id. On appeal, Jones argued that the trial court had refused to consider his eligibility for a prison-based DOSA and had thereby abused its discretion. Id. at 55. The Court of Appeals found that the trial court had not categorically refused the request, noting that the court had considered Jones’s criminal history, whether he would benefit from treatment, and whether a DOSA would serve either Jones or the community. Id.

Most recently, in State v. Hender, the sentencing court refused the defendant’s request for a DOSA on the ground that, contrary to Hender’s denial, methamphetamine *had* made him a criminal – he was not only using the illicit drug, he was selling it. 324 P.3d at 781. Hender contended that this ruling constituted a failure to exercise discretion. Id. at 782. The Court of Appeals disagreed, finding that the trial court had properly exercised its

discretion in relying on Hender's lack of accountability and refusal to accept responsibility for his conduct. Id. at 783.

As in Gronnert, Jones and Hender, and unlike Grayson, the trial judge here did not categorically refuse to consider Adornetto's request for an alternative sentence. Rather, the judge stated several reasons for her decision to deny Adornetto's request for a PSA. This was a proper exercise of discretion.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the judgment and sentence.

DATED this 16<sup>th</sup> day of July, 2014.

Respectfully submitted,

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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 **Maureen M. Cyr**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. RICHARD C. ADORNETTO**, Cause No. **71093-1-I**, in the Court of Appeals for the State of Washington, Division I.

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



Name  
Done in Seattle, Washington

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