

71264-1

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No. 71264-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

DEVIN LANE FORD,

Appellant.

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

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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TABLE OF CONTENTS

A. SUMMARY OF APPEAL 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT..... 6

THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING
ON UNPROVEN AND CONTESTED ALLEGATIONS AT
SENTENCING 6

1. A trial court abuses its discretion if it denies a DOSA sentence
by relying on disputed material facts without holding an
evidentiary hearing..... 6

2. The trial court violated the SRA by relying on unproven facts at
sentencing, requiring that Mr. Ford be resentenced by a different
judge..... 9

F. CONCLUSION 10

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3	7
U.S. Const. amend. XIV	7

Cases

<u>State v. Bankes</u> , 114 Wn. App. 280, 57 P.3d 284 (2002).....	10
<u>State v. Cobos</u> , 178 Wn. App. 692, 315 P.3d 600 (2013)	8
<u>State v. Crockett</u> , 118 Wn. App. 853, 78 P.3d 658 (2003).....	8, 10
<u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005)....	6, 7, 8, 9, 10
<u>State v. Harkness</u> , 145 Wn. App. 678, 186 P.3d 1182 (2008).....	9

Statutes

RCW 9.94A.530(2)	7, 8, 9, 10
RCW 9.94A.660	6

A. ASSIGNMENT OF ERROR

The trial court abused its discretion in relying on unproven and contested factual allegations at sentencing.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court may not rely on unproven factual allegations to impose a sentence. If the defendant disputes material facts, the court must either not consider the facts or grant an evidentiary hearing to resolve the dispute. Here, the trial court relied on unproven, contested and highly incriminating factual allegations in denying Devin Ford's request for a Drug Offender Sentencing Alternative (DOSA). Must Mr. Ford be resentenced?

C. STATEMENT OF THE CASE

Devin Ford pled guilty under two separate cause numbers to one count of possession of heroin and one count of possession of methamphetamine with intent to deliver. CP 90, 105, 156, 167; 9/23/13RP 20. The first charge arose when a police officer stopped the car that Mr. Ford was driving for speeding and a missing license plate. CP 188. A search of his car turned up a bag containing heroin. CP 188. The second charge arose after the police arranged a controlled buy involving a confidential informant at the house where Mr. Ford

was living. CP 120. When the police executed a search warrant at the house, they found drug paraphernalia and a quantity of methamphetamine and heroin in Mr. Ford's bedroom, and a digital scale and drug packaging materials in his car. CP 120.

In exchange for Mr. Ford's agreement to plead guilty, the State agreed to move to dismiss a charge of attempting to elude and a charge of bail jumping. CP 96, 162. The State also agreed to recommend a mid-range standard-range sentence. CP 94, 152, 160.

In pleading guilty, Mr. Ford "agree[d] that chemical dependency contributed to the commission of this offense." CP 159. He said at the guilty plea hearing that he and the community would benefit if he receive a DOSA. 9/23/13RP 21. The State said it would consider recommending a DOSA after reviewing the risk assessment and chemical dependency screening report. CP 94, 160. The court set the sentencing hearing far enough in advance to allow time for Mr. Ford to be screened for a DOSA sentence. 9/23/13RP 26-27. The court ordered Mr. Ford to turn himself in to jail one week later, on September 30. 9/23/13RP 26-27.

Staci Rickey, a Department of Corrections community corrections officer, evaluated Mr. Ford and concluded he was an

appropriate candidate for a DOSA sentence. Sub #68.¹ Officer Rickey interviewed Mr. Ford in jail. Id. at 2. She reported that Mr. Ford, who was 30 years old, had grown up in an abusive household and had used drugs since he was a teenager. Id. at 2. He attributed his criminal behavior to his drug addiction and poor lifestyle choices and believed he would not have committed the offenses but for his addiction to drugs. Id. at 4. He said the treatment he would receive as part of a DOSA sentence would provide him with the opportunity to change his life for the benefit of himself and his family. Id. Officer Rickey thought Mr. Ford was sincere about wanting to rid himself of his addiction and comply with the terms of community custody. Id. Mr. Ford's own community corrections officer believed Mr. Ford should be given the chance to prove to himself that he could succeed at treatment. Id. Thus, Officer Rickey concluded that Mr. Ford should be granted a prison-based DOSA and that "[t]he benefits offered by the DOSA appear to outweigh the need for further punitive sanctions." Id.

Despite the DOC counselor's recommendation that Mr. Ford be granted a DOSA, at sentencing the deputy prosecutor refused to recommend it. Instead, the prosecutor urged the court to impose a

¹ A supplemental designation of clerk's papers has been filed for this document.

sentence at the top of the standard range. 11/13/13RP 6. The prosecutor asserted that Mr. Ford had breached the plea agreement by failing to turn himself in to the jail on September 30 as ordered by the court.² 11/13/13RP 3-6. When Mr. Ford did not turn himself in as ordered, a warrant was issued for his arrest and he was arrested a short time later while leaving his grandmother's house in Spokane. CP 36.

In recommending against a DOSA, the prosecutor relied on unproven allegations regarding items that police officers supposedly found in Mr. Ford's possession at the time of his arrest. CP 36-37. The prosecutor asserted, without proof, that the police found over one-half pound of methamphetamine and two loaded semi-automatic rifles in the car that Mr. Ford was driving when he was arrested. 11/13/13RP 3. Based largely on these unproven allegations, the prosecutor argued that Mr. Ford was not an appropriate candidate for a DOSA sentence. 11/13/13RP 8.

Defense counsel acknowledged that Mr. Ford did not turn himself in to jail on September 30 as ordered by the court, but disputed

² The guilty plea statement stated, "If the defendant fails to appear for sentencing, commits a new offense or violates any condition of release prior to sentencing, or violates any other provision of this agreement, the State may recommend a more severe sentence, re-file charges that were dismissed as part of this plea agreement, or file additional or greater charges." CP 163.

the other factual allegations. 11/13/13RP 9; CP 32-33. Counsel pointed out that the allegations were neither charged nor proven. 11/13/13RP 9. Like Officer Rickey, counsel argued that Mr. Ford was an appropriate candidate for a DOSA because his criminal behavior stemmed from his long-time addiction to drugs. 11/13/13RP 10-12. Mr. Ford needed treatment and was not likely to receive it in prison. 11/13/13RP 10-11. He had substantial support from friends and family in the community and was motivated to succeed in treatment. 11/13/13RP 11-13. A DOSA would benefit both Mr. Ford and the community. 11/13/13RP 10-13.

The trial court refused to impose a DOSA, concluding that the unsupported factual allegations showed Mr. Ford was not a good candidate for it. 11/13/13RP 19-21. The court expressly relied on the allegations that Mr. Ford “had a significant amount of drugs” and that he “had weapons there.” 11/13/13RP 19. The court told Mr. Ford he was not an appropriate candidate for a DOSA because “you ha[d] weapons when you shouldn’t possess weapons which puts our community in danger.” 11/13/13RP 19. The court found Mr. Ford was a danger to the community for the additional reason that he was arrested with an amount of drugs that suggested he was going to sell

them. 11/13/13RP 19-20. The court concluded Mr. Ford must spend the entirety of his sentence in prison, without treatment, because “[w]eapons and drugs don’t mix and that’s the lifestyle that you have chosen. And you had, if the allegations are true, a significant amount of drugs and you had those weapons.” 11/13/13RP 20-21. Thus, the court imposed a sentence at the top end of the standard range.

11/13/13RP 21; CP 21-31, 139-49.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING ON UNPROVEN AND CONTESTED ALLEGATIONS AT SENTENCING

1. A trial court abuses its discretion if it denies a DOSA sentence by relying on disputed material facts without holding an evidentiary hearing

The SRA authorizes trial courts to grant a DOSA sentence to nonviolent drug offenders deemed likely to benefit from it. State v. Grayson, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005); RCW 9.94A.660. An offender receiving a DOSA sentence is granted a reduced prison sentence, treatment, and increased supervision in an attempt to help him recover from his drug addiction. Id. Under a DOSA sentence, the defendant serves one-half of a standard-range sentence in prison and receives substance abuse treatment while

incarcerated. Afterward, he is released into closely monitored community supervision and treatment for the balance of the sentence. Id.; RCW 9.94A.660.

In deciding whether or not to impose a DOSA sentence, the court must follow the procedures provided by the Sentencing Reform Act (SRA) and in accordance with constitutional due process. Grayson, 154 Wn.2d at 338-40; U.S. Const. amend. XIV; Const. art. I, § 3. Although a court generally has discretion to grant or deny a DOSA sentence, the court abuses its discretion if it reaches its decision by violating a provision of the SRA. Grayson, 154 Wn.2d at 338-40.

It is well-established that a trial court may not rely on unproven factual allegations when imposing a sentence. The SRA provides:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

RCW 9.94A.530(2).

Thus, when a defendant objects to facts that are material to the sentence, the trial court must hold an evidentiary hearing in order to resolve the dispute. State v. Cobos, 178 Wn. App. 692, 697, 315 P.3d 600 (2013), review granted, No. 89900-2 (April 30, 2014). If the court does not hold an evidentiary hearing, it may not rely on the disputed facts. Id. at 698; RCW 9.94A.530(2).

The purpose of RCW 9.94A.530(2) is to prevent *ex parte* contact with the judge, *sua sponte* investigation and research of a judge, and sentencing based on speculative facts. Grayson, 154 Wn.2d at 340. Underlying this statutory procedure is the principle of due process. Id. The court should only consider evidence that the parties in an adversarial context have “the opportunity to scrutinize, test, contradict, discredit, and correct.” Id. (internal quotation marks and citation omitted).

In order to be entitled to a hearing to resolve a dispute of fact, the defendant must make a specific, timely challenge. State v. Crockett, 118 Wn. App. 853, 858-59, 78 P.3d 658 (2003). But the defendant need not expressly request an evidentiary hearing; it is the trial court's responsibility under RCW 9.94A.530(2) to hold an evidentiary hearing if it wants to consider disputed facts. Id.

In sum, a trial court violates the SRA if it relies on unproven facts in deciding to deny a DOSA sentence. Grayson, 154 Wn.2d at 338-40; RCW 9.94A.530(2). Whether the sentence was imposed in violation of the SRA is a question of law reviewed *de novo*. State v. Harkness, 145 Wn. App. 678, 684, 186 P.3d 1182 (2008).

2. The trial court violated the SRA by relying on unproven facts at sentencing, requiring that Mr. Ford be resentenced by a different judge

Mr. Ford candidly acknowledged he had a drug addiction that contributed to his criminal behavior. CP 159; Sub #68. He was a nonviolent drug offender who was eligible for a DOSA sentence. Sub #68. Mr. Ford was in need of treatment which, if successfully completed, would benefit both him and the community. Sub #68; 11/13/13RP 10-13. Even the trial court acknowledged that Mr. Ford needed treatment and was unlikely to receive it in prison if a DOSA sentence was not imposed. 11/13/13RP 21.

The trial court violated the SRA and constitutional due process by relying on unproven and contested factual allegations in denying Mr. Ford's request for a DOSA sentence. The court relied heavily on the State's unproven assertions that Mr. Ford was found in possession of "a significant amount of drugs" and firearms at the time of his arrest.

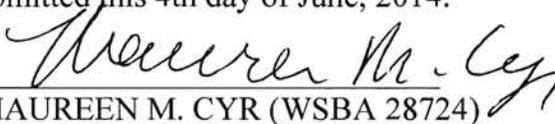
11/13/13RP 19-21. The court concluded those allegations showed Mr. Ford was not an appropriate candidate for a DOSA sentence. Id. But Mr. Ford disputed the allegations. 11/13/13RP 9. Thus, the court was not authorized to rely on them without holding an evidentiary hearing to determine if they were true. Grayson, 154 Wn.2d at 338-40; Crockett, 118 Wn. App. at 858-59; RCW 9.94A.530(2). By relying on the unproven facts, the court abused its discretion, requiring reversal of the sentence. Grayson, 154 Wn.2d at 338-40.

When a court imposes a sentence based on facts it should not have considered, the offender is entitled to resentencing before a different judge. State v. Bankes, 114 Wn. App. 280, 290-91, 57 P.3d 284 (2002). Thus, Mr. Ford must be resentenced by a different judge.

E. CONCLUSION

Because the trial court relied on disputed material factual allegations at sentencing without holding a hearing to resolve the dispute, the sentence must be reversed and Mr. Ford must be resentenced by a different judge.

Respectfully submitted this 4th day of June, 2014.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 71264-1-I
)	
)	
DEVIN FORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JUNE, 2014, 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:

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