

FILED  
Oct 14, 2015  
Court of Appeals  
Division I  
State of Washington

No. 73430-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NAKAMURA,

Appellant.

---

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

The Honorable Joseph P. Wilson

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in failing to meaningfully consider Mr. Nakamura's request for a Drug Offender Sentence Alternative (DOSA).

2. In denying a DOSA, the trial court conflated the standards for terminating a person from drug court with the standards for a person's eligibility for a DOSA.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The sentencing court has broad discretion in denying a DOSA. Nevertheless, the court abuses that discretion when it categorically refuses to consider a DOSA where the defendant is otherwise statutorily eligible. Did the court here abuse its discretion where Mr. Nakamura was statutorily eligible for a DOSA but the court simply refused to consider a DOSA and relied solely on his conduct in drug court and the reasons for his subsequent termination from that program?

C. STATEMENT OF THE CASE

In three consolidated cases, Christopher Nakamura was charged with one count of possession of heroin, one count of possession of heroin with intent to deliver, and one count of possession of a stolen

vehicle. CP 118-19, 208-09, 312-13. Mr. Nakamura was found eligible and agreed to enter the Adult Drug Treatment Court (drug court) on February 20, 2013. CP 103-08. As part of the agreement to enter drug court, Mr. Nakamura waived his right to a jury trial and stipulated to the admissibility of evidence. CP 103.

On January 30, 2015, Mr. Nakamura was terminated from drug court and, at a subsequent court trial based upon stipulated evidence, Mr. Nakamura was found guilty as charged. CP 38-39.

At sentencing, while urging the court to impose a standard range sentence, the prosecutor agreed Mr. Nakamura was eligible for a DOSA. RP 2-7. A Department of Corrections presentence report found Mr. Nakamura eligible for a DOSA. RP 2-3. Mr. Nakamura urged the court to impose a prison-based DOSA noting his attempts at completing drug court and his actions subsequent to his termination from drug court. RP 8-11. In denying Mr. Nakamura's request for a prison-based DOSA, the court relied solely on his conduct while enrolled in drug court and the reasons for his subsequent termination from drug court. RP 20-22. The court imposed standard range sentences on all three cases to run concurrent with each other. RP 22-23.

#### D. ARGUMENT

##### **The trial court erred in refusing to consider Mr. Nakamura's request for a DOSA.**

1. *The court must consider a request for a DOSA where the defendant is eligible.*

The DOSA program is an attempt by the Legislature to provide treatment for some offenders judged likely to benefit from it. *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. Under a DOSA sentence, the defendant serves one-half of a standard range sentence in prison and receives substance abuse treatment while incarcerated. After completion of the one-half sentence, the defendant is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.660(2).

Review of a court's ruling on the imposition of a DOSA is not automatic because "a standard range sentence, of which a DOSA is an alternate form, may not be appealed." *State v. White*, 123 Wn.App. 106, 113, 97 P.3d 34 (2004), *quoting State v. Smith*, 118 Wn.App. 288,

292, 75 P.3d 986 (2003). However, “it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.” *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Discretion is abused if a sentencing court's decision is ““manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”” *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

However, this prohibition [against appealing a standard range sentence] does not bar a party’s right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision. See *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (permitting appellate review of a criminal sentence where a defendant can demonstrate that the “sentencing court had a duty to follow some specific procedure required by the [Sentencing Reform Act], and that the court failed to do so”). Thus, it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies. See, e.g., *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999) (misclassification of out-of-state convictions for purposes of calculating offender score); *State v. Channon*, 105 Wn.App. 869, 876, 20 P.3d 476 (2001) (determination of whether two or more crimes should be considered the “same criminal conduct” for purposes of sentencing); see also *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (noting that an absolute prohibition on the right to appeal would violate article I, section 22 of the Washington Constitution).

*Williams*, 149 Wn.2d at 147.

2. *The court refused to consider Mr. Nakamura's request for a DOSA despite that fact he was eligible.*

Mr. Nakamura contends that the court abused its discretion by denying his request for a DOSA by refusing to consider his conduct subsequent to his termination from drug court and the positive aspects of his term in drug court.

Under RCW 9.94A.660(3), a trial court can impose a sentence on an offender seeking a residential-based DOSA or a prison-based DOSA, as long as the offender is eligible and the alternative sentence is appropriate. Here, the court found and the parties agreed that Mr. Nakamura was eligible for a DOSA. Because Mr. Nakamura was found eligible for a prison-based DOSA, the sentencing court had the discretion to impose a DOSA sentence if it determined that a DOSA sentence was appropriate. *State v. Smith*, 142 Wn.App. 122, 129, 173 P.3d 973 (2007).

In denying the DOSA, the court relied solely on Mr. Nakamura's negative conduct while engaged in drug court as well as the reasons he was termination from drug court. The court refused to consider Mr. Nakamura's positive achievements after his termination

from drug court as well as his positive conduct while engaged in drug court.

The court's actions conflated the standards for termination from drug court with the person's eligibility for a DOSA. Mr. Nakamura had already been terminated from drug court; the only remaining questions were eligibility and whether Mr. Nakamura would benefit from the DOSA. All parties agreed Mr. Nakamura was eligible for a DOSA. Further, a number of people came to court and spoke on behalf of Mr. Nakamura, stressing that he would benefit from the DOSA. Yet, the court ignored all of this and relied solely on Mr. Nakamura's negative conduct while in drug court. The court's actions were an abuse of discretion and Mr. Nakamura is entitled to reversal of his sentence and remand for a valid consideration by the court of a DOSA.

E. CONCLUSION

For the reasons stated, Mr. Nakamura asks this Court to reverse his sentence and remand for imposition of a DOSA.

DATED this 14<sup>th</sup> day of October 2015.

Respectfully submitted,

*s/Thomas M. Kummerow*

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73430-0-I
	)	
CHRISTOPHER NAKAMURA,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF OCTOBER, 2015, 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:

- |  |                   |  |
|--|-------------------|--|
| [X] SETH FINE, DPA<br>[sfine@snoco.org]<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [X] CHRISTOPHER NAKAMURA<br>313331<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WAY<br>ABERDEEN, WA 98520     | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 14<sup>TH</sup> DAY OF OCTOBER, 2015.



X \_\_\_\_\_

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