

original

No. 35958-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD LEE CARLSON,

Appellant.

Wm

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Katherine M. Stolz,  
The Honorable Lisa Worswick, Judges

*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove an essential element of first-degree escape.
2. The trial court's CrR 6.1 Findings of Fact and Conclusions of Law (Findings) were insufficient to support the conviction.
3. Appellant assigns error to conclusion of law II in the Findings, which provides:

The defendant, RICHARD LEE CARLSON, is guilty beyond a reasonable doubt of ESCAPE IN THE FIRST DEGREE in that: On or about July 29, 2006, RICHARD LEE CARLSON knowingly escaped from custody or a detention facility while being detained pursuant to a conviction of a felony, in the State of Washington.

CP 32-33.

4. The sentencing court erred as a matter of law in holding that Mr. Carlson was not eligible for a Drug Offender Sentencing Alternative (DOSAs) sentence and counsel was ineffective.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove that Mr. Carlson committed the crime of first-degree escape, the prosecution had to show that he knew the conduct in which he engaged would result in his failing to return to work release on time. The prosecution proved only that Carlson knew or should have known there was a substantial risk that he could be arrested and detained past the time when he was supposed to return to the work release facility. Under RCW 9A.08.010(1), such evidence proves only recklessness, not knowledge. Is reversal and dismissal required for the prosecution's failure to prove the essential mental element of the crime?

2. Were the CrR 6.1 findings insufficient where they failed to set out each element of the crime separately, did not specifically state whether those elements have been met, and did not set forth the factual basis for the conclusions of law?

3. Former RCW 9.94A.660(1)(f) (2007), provides that a person is eligible for a Drug Offender Sentencing Alternative sentence if he has not received a similar sentence “more than once” in the past 10 years. Did the trial court err in holding that Mr. Carlson was not statutorily eligible for a DOSA sentence where he had only received one such sentence during the relevant time? Further was counsel ineffective in failing to know the law he was asking the court to apply?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Richard Carlson was charged by information with first-degree escape and unlawful possession of cocaine. CP 1-2; RCW 9.94A.525(17); RCW 9A.76.110(1); RCW 69.50.4013(1).

The Honorable Judges Katherine Stolz and Lisa Worswick granted several continuances, and a bench trial was then held before Judge Worswick on January 30, 2007. 1RP 1; 2RP 1; 3RP 1; 4RP 1.<sup>1</sup> The judge found Mr. Carlson guilty of both the escape and the drug offense. CP 27-

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<sup>1</sup>The verbatim report of proceedings consists of two volumes, one of which contains several days, separately paginated. The transcript will be referred to as follows:  
the proceedings of September 13, 2006, contained in volume 1, as “1RP;”  
the proceedings of December 13, 2006, contained in volume 1, as “2RP;”  
the proceedings of January 29, 2007, contained in volume 2, as “3RP;”  
the proceedings of January 30, 2007, contained in volume 1, as “4RP;”  
the proceedings of February 23, 2007, contained in volume 1, as “5RP.”

33; 4RP 90.<sup>2</sup> On February 23, 2007, Judge Worswick imposed a standard range sentence. CP 38-50; 5RP 6.

Mr. Carlson appealed, and this pleading follows. CP 23.

2. Overview of facts relating to offenses<sup>3</sup>

On July 29, 2006, at about 10 p.m., Officer Gary Tracy of the Puyallup Tribal Police Department saw a white van parked on the opposite side of the street facing the wrong direction, pointing down a hill. 4RP 17-20. He was concerned because it was a “bad location to park,” so he pulled up behind the vehicle and put on his spotlight and “takedown lights.” 4RP 21. He then saw “movements” in the vehicle, which he thought were the passenger and driver “pulling their pants up.” 4RP 21.

The officer approached the van and spoke with the driver, later identified as Richard Carlson. 4RP 5, 17, 22. The officer asked why they were parked where they were and what they were doing there. 4RP 22. Mr. Carlson said they were just talking. 4RP 22. The officer asked for identification, and Mr. Carlson complied while the male passenger gave only a “verbal identification.” 4RP 23.

At that point, the officer asked Mr. Carlson to get out and step to the back of the van, then asked more questions about why he was there and the identity of his passenger. 4RP 25. According to the officer, Mr. Carlson said he did not know the other man and had just picked him up on South Tacoma Way. 4RP 25.

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<sup>2</sup>An aggravating factor originally charged was dismissed by the prosecution prior to trial. CP 1-2.

<sup>3</sup>More detailed discussion of relevant facts is contained in the argument, *infra*.

The officer then went back to his car and “ran” both Mr. Carlson’s and the passenger’s names, suspicious that there was “some type of prostitution” going on. 4RP 24-25. The records search showed nothing on the passenger but indicated that Mr. Carlson was “active” with the Department of Corrections. 4RP 26.<sup>4</sup>

According to the officer, when he returned to talk to Mr. Carlson, Carlson said he was on work release and needed to be back by 6 p.m. 4RP 27. As it was then 10 p.m., the officer arrested Mr. Carlson for escape. 4RP 27. In a “search incident” of the van, the officer found some “whitish colored crumb substance” on the passenger and driver’s side of the vehicle, which resembled and later tested positive for cocaine. 4RP 28.

The officer never checked to see if Mr. Carlson actually had to be home by 6 that particular day but said that another officer spoke with the registered owner of the vehicle, the person Mr. Carlson worked for, about it. 4RP 34.

Leonard Parker, a supervisor at Brush Work Painting, said Mr. Carlson was working with him at the company that day but Mr. Parker had to leave at some point to do some other work. 4RP 39-41. Mr. Carlson was driving the company van and was allowed to use it to go back and forth to his job sites. 4RP 41. After that, usually, he would get a ride to the bus stop to get back to work release. 4RP 45.

At some point, Mr. Carlson called Mr. Parker and said he needed

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<sup>4</sup>The passenger was later detained because he gave the same identifying information which gave no records or reports. 4RP 26-27. He ultimately gave his real name after admitting to having given false information to the officer. 4RP 27-30. He had an outstanding warrant under his real name. 4RP 29-30.

more time to get the job done. 4RP 41. Mr. Parker then called work release to verify that Mr. Carlson was needed for a few more hours that day. 4RP 42. Parker confirmed that he needed Carlson for three more hours, knowing that Mr. Carlson would also be given two hours on top of that for "traveling time." 4RP 42. Nevertheless, when Mr. Carlson's traveling time was not even close to being up, a program manager at work release called and asked if Mr. Carlson was on his way back because he had not arrived back yet. 4RP 42, 51.

Mr. Parker was going to find out what happened but, before he could make any calls, his boss called him and told him that Mr. Carlson had been arrested and the van needed to be picked up. 4RP 43. Mr. Parker conveyed that information to the work release facility. 4RP 43.

At that point, it was still about an hour before Mr. Carlson was actually due to return. 4RP 43.

The program manager testified that Mr. Carlson was originally due back at 6:30 p.m. but there was an approved extension allowing him to return by 11:30 p.m. that night. 4RP 54. The time was broken down as an authorization to work until 9:30 and then travel until 11:30. 4RP 59. Mr. Parker had told the manager that he thought Mr. Carlson would be back "well before" 11:30 that night. 4RP 59.

When Mr. Carlson was not yet back at about 11, the manager called the original supervisor and did not reach him, then managed to get the cell phone number for Mr. Parker. 4RP 60. The manager thought Mr. Parker had said he had "just dropped Mr. Carlson off at the bus stop." 4RP 60. About 15 minutes later, Mr. Parker called and said Mr. Carlson

had been arrested by the police. 4RP 60. The jail confirmed they had booked Carlson. 4RP 60.

The manager admitted it was common for Mr. Carlson to work beyond the regular time and get overtime. 4RP 61. There had never been any problems before. 4RP 62. Indeed, Mr. Carlson was always back well before he was expected. 4RP 62. He was limited, however, to performing his work for the painting company, wherever that work took him. 4RP 64. It was assumed there would be different locations where Carlson would be working and the manager did not track exactly where he would go on a particular job. 4RP 65.

Mr. Carlson testified that he had been permitted to return late almost every day, because his work for the company often required it. 4RP 66-68.

That evening, he was pulled over so the person he had picked up to give a ride to could "finish drinking his beer." 4RP 70. Mr. Carlson himself did not drink, because he had to take "U.A.'s and breathalyzers" twice a month and was subject to breath tests "any time" he returned to the facility. 4RP 70.

Mr. Carlson said he was coming back from the job site and was planning to take the bus home after dropping off the van. 4RP 77-78. He did not know anything about drugs in the vehicle. 4RP 72. When he spoke with the officer, he was cooperative and told him he normally had to return by 6 but was working late that night. 4RP 72.

Mr. Carlson was certain he would have been back to the center by 11:30 if he had not been detained by the officer. 4RP 73.

Mr. Carlson had several prior crimes of dishonesty. 4RP 76. He had previously been on work release at two other places, at some point in his past. 4RP 76. He admitted he was not authorized to pick up strangers when he was on his way back from a job. 4RP 79. He was just going to drop the passenger off at the casino on the way. 4RP 79.

The parties stipulated that, on July 29, 2006, Mr. Carlson was being detained in a work release facility pursuant to a felony conviction. 4RP 11. They also stipulated that the drug testing was accurate and showed the drug was cocaine, and that Mr. Hunt had entered a no contest plea to a charge of cocaine possession for January 27, 2007, “resulting from the same investigation presented in this case.” 4RP 11.

D. ARGUMENT

1. REVERSAL AND DISMISSAL IS REQUIRED  
BECAUSE THERE WAS INSUFFICIENT EVIDENCE  
TO PROVE AN ESSENTIAL ELEMENT OF THE  
OFFENSE

Under both the state and federal due process clauses, the prosecution is required to prove each essential part of its case, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); 14<sup>th</sup> Amendment; Article I, § 3. Where the evidence is insufficient to support a conviction, reversal and dismissal is required. See Hickman, 135 Wn.2d at 103.

In this case, this Court should reverse and dismiss the conviction for first-degree escape, because the prosecution failed to meet its burden of proving the essential elements of the crime, beyond a reasonable doubt.

Mr. Carlson was charged with committing the crime by failing to return to work release, as follows:

RICHARD LEE CARLSON, on or about the 29<sup>th</sup> day of July, 2006, did unlawfully and feloniously, while being detained pursuant to a felony conviction, or an equivalent juvenile offense, knowingly escape[d] from custody, to wit: *fail[ed] to return to custody from work release.*

CP 1-2 (emphasis added). Thus, to prove Carlson guilty as charged, the prosecution had to prove that Carlson committed the crime by failing to return to custody from work release.

The prosecution failed to meet this burden. Evidence is sufficient if, taken in the light most favorable to the prosecution and drawing all reasonable inferences therefrom, a rational trier of fact could have found the essential elements of the crime, beyond a reasonable doubt. See State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

As a threshold matter, the prosecution failed to propose and the court failed to enter sufficient written findings of fact and conclusions of law. Under CrR 6.1, after a bench trial, the superior court is required to enter findings of fact and conclusions of law addressing each element of the charged crime separately. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The purpose of the rule is to assist the appellate court in review, and the findings must specifically state whether each element has been proven, as well as “setting out the factual basis for each conclusion of law.” State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003).

The findings and conclusions in this case did not meet those requirements. The elements of first-degree escape were not set forth, nor

was the evidence the court relied on in finding those elements. CP 27-33. Even the conclusion of law regarding guilt failed to meet the requirements, because it provided only that Carlson “knowingly escaped from custody or a detention facility while being detained pursuant to a conviction of a felony,” but never set out a factual basis for that conclusion. CP 27-33.

An appellate court “should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” Head, 136 Wn.2d at 624. The failure to enter written findings and conclusions which are sufficient to comply with the mandates of CrR 6.1 has made the work of this Court and counsel that much harder. While that failure may be subject to “harmless error” analysis as far as Mr. Carlson’s conviction is concerned, it is not “harmless” in terms of judicial and defense resources which have to be expended because of the prosecution’s failure to present proper findings. See, e.g., Banks, 149 Wn.2d at 43-45 (“harmless error” analysis applies).

In any event, regardless of the error regarding the findings and conclusions, reversal would be required, because the prosecution failed to present sufficient evidence to prove the essential element that the escape was committed “knowingly.” This mental element was formally added to the escape statute in 2001. See Laws of 2001, ch. 264, § 1. Even before that time, however, the Supreme Court had examined the mental element required to prove escape and held that a defendant had to be proven to have escaped “knowingly” in order to prove the crime. See, State v. Descoteaux, 94 Wn.2d 31, 34-35, 614 P.2d 179 (1980), overruled in part

on other grounds by, State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982).

A person acts “knowingly” when he or she is “aware of a fact, facts, or circumstances or result described by a statute defining an offense” or “he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b)(i) and (ii); see State v. J.M., 144 Wn.2d 472, 476, 28 P.3d 720 (2001). The word “knowingly” is an adverb, which “generally modifies the verb or verb phrase with which it is associated.” J.M., 144 Wn.2d at 480. In RCW 9A.76.110(1), the Legislature required the state to prove that a defendant “knowingly escape[d].” Because the adverb “knowingly” modifies the verb “escape,” in order to prove a defendant guilty of the crime of first-degree escape, the prosecution must prove that he engaged in conduct knowing that the conduct would result in the conduct amounting to the escape.

Thus, in Descoteaux, when the defendant was accused of committing escape by leaving confinement without permission, the prosecution had to prove the defendant “knew that his actions would result in leaving confinement without permission.” 94 Wn.2d at 34-35. Similarly, in State v. Christian, 44 Wn. App. 764, 723 P.2d 508 (1986), where the defendant was accused of committing escape by leaving work release without permission, the prosecution had to show that the defendant “knew his or her actions” would result in his leaving work-release without permission. See also, State v. Ammons, 136 Wn.2d 453, 456 n.3, 963 P.2d 812 (1998); State v. Warfield, 103 Wn. App. 152, 5 P.3d 1280 (2000)

(where statute required defendant to “knowingly restrain” someone, “knowingly” modified all components of “restrain”).

Here, Mr. Carlson was accused of escaping by failing to return to work release on time. CP 1-2. To prove he “knowingly escaped” as charged, the prosecution was therefore required to prove that Mr. Carlson engaged in acts *knowing* the result of those acts would be that he would fail to return to work release on time.

The state failed to prove such knowledge. Instead, it - and the court - relied on the theory that Mr. Carlson knew the activities he was engaged in were illegal and thus set a “chain in motion” the end result of which was his arrest and subsequent failure to return to work release on time. When counsel argued that Mr. Carlson had not “knowingly” failed to return, the prosecutor argued the element of “knowingly” was proven because Carlson had “intentionally” been in the van on the side of the road engaging in improper activities and that resulted in his inability to return. 4RP 85-87. The court agreed with the prosecution’s claim, stating that it would not “accept” that Mr. Carlson had not acted “knowingly” when he “set in action a chain of events” which resulted in his inability to return on time. 4RP 90.

But RCW 9A.76.110(1) does not provide that a defendant commits the crime of escape if he “knowingly” engages in activities which he knew or should have known *could* result in his arrest and detention beyond the time when he was due to return to the facility. It requires that he “knowingly escape[d].” A person acts knowingly when they are aware “that the result is practically certain to follow from his conduct, whatever

his desire may be as to that result.” United States v. Bailey et. al., 444 U.S. 394, 403, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), quoting, United States v. United States Gypsum Co., 438 U.S. 422, 443, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). As the court and prosecutor themselves tacitly admitted, there was no evidence that arrest, detention and inability to return on time was “practically certain” to result from Mr. Carlson’s conduct that night.

Instead, the evidence established only that Mr. Carlson acted “recklessly.” A person acts “recklessly” if he “disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” State v. Chadderton, 119 Wn.2d 390, 394 n. 1, 832 P.2d 481 (1992); see RCW 9A.08.010(1)(c).

Thus, a child who points a loaded shotgun at another child has acted recklessly because, even though he has been told the gun will not fire when loaded, he knew there was a substantial risk that it would and disregarded that risk. State v. Marshall, 39 Wn. App. 180, 181-82, 692 P.2d 855 (1984). And a person who had taken driver safety courses and knew the potential risks of driving fast, not paying attention, and playing games with the steering wheel was properly found to have acted “recklessly” because she knew that conduct *could* cause an accident and disregarded the risk to commit that conduct anyway. State v. Graham, 153 Wn.2d 400, 408-409, 103 P.3d 1238 (2005). In both situations there was no *certainty* that the defendant’s conduct would have the prohibited result. Instead, there was a substantial risk of that result, the defendant knew or

should have known of that risk, and the defendant disregarded the risk, a deviation from the standard of behavior of the ubiquitous “reasonable man.” See Graham, 153 Wn.2d at 408-409; Marshall, 39 Wn. App. at 181-82.

Here, just as in Marshall and Graham, there was no certainty that the conduct in which Mr. Carlson engaged would result in his not being able to return to the facility on time. Instead, there was a *risk* of that result, which Mr. Carlson disregarded by engaging in the conduct anyway. Further, it could be argued that Carlson’s disregard was a deviation from the standard of behavior of a “reasonable man,” or that a “reasonable man” in Mr. Carlson’s position would know that it was possible the end result of his conduct that night might result in his being arrested and detained so that he could not return to the facility that night.

The prosecutor and court were correct that Carlson knew or should have known of the possible risk that his conduct could result in his not being able to comply with the work release requirements and return to the facility on time. See 4RP 85-87. But that did not amount to a “knowing” escape. By “set[ting] in action a chain of events” by engaging in his conduct that night, Mr. Carlson at most acted “recklessly,” but did not act “knowingly” as required under the statute. There was insufficient evidence to prove the essential element of the offense that Mr. Carlson “knowingly” escaped. This Court should so hold and should reverse.

2. THE SENTENCING COURT ERRED IN HOLDING THAT MR. CARLSON WAS NOT STATUTORILY AUTHORIZED TO RECEIVE A DOSA SENTENCE AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Under the Sentencing Reform Act, one of the sentencing alternatives available to defendants in certain drug cases is a Drug Offender Sentencing Alternative (DOSA). See former RCW 9.94A.660(1)(2007). Although the decision whether to impose such a sentence is discretionary, a defendant is entitled to have the trial court give a defendant's sentencing request "meaningful consideration." State v. Grayson, 154 Wn.2d 333, 338, 342, 111 P.3d 1183 (2005). As a result, a defendant is entitled to have this Court review the denial of a request for a DOSA in order to correct a legal error or an abuse of discretion. See State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Further, a defendant may challenge the procedure by which a sentence was imposed. Grayson, 154 Wn.2d at 342.

In this case, even if the Court does not reverse and dismiss based on the insufficiency of the evidence and counsel's ineffectiveness on that point as argued herein, reversal of the sentence is required because the court erred as a matter of law in holding that Mr. Carlson was not eligible to receive a DOSA sentence. Further, reversal is required because counsel was prejudicially ineffective in representing his client.

a. Relevant facts

At sentencing, counsel emphasized the facts of the case and told the court that all of Mr. Carlson's prior convictions were "drug related." 5RP 5. Counsel said Mr. Carlson had gotten a DOSA sentence once in

Thurston county and had ended up not succeeding because of “dirty U.A.’s.” 5RP 5. Counsel asked the court to consider giving Mr. Carlson a sentence in the middle of the range and allow him to go “through the qualification” for such a sentence. 5RP 5.

The court responded that it thought Mr. Carlson was not eligible for a DOSA if he had received such a sentence once before, in 2003. 5RP 6. A discussion ensued in which counsel could not answer the question of whether his client was actually eligible for a DOSA or whether the fact that he had already received one such sentence disqualified him. 5RP 6. The court then went off the record to research the issue itself. 5RP 10. When the court returned, it stated that its reading of the DOSA statute was that Mr. Carlson was ineligible because “DOSA is only available once every 10 years,” regardless whether there was a prior success or failure at such a sentence. 5RP 6.

b. The sentencing court erred because Mr. Carlson was statutorily eligible to be considered for a DOSA

The sentencing court erred as a matter of law in holding that Mr. Carlson was not statutorily eligible to receive a DOSA sentence. Former RCW 9.94A.660(1)(2007)<sup>5</sup> provides:

An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and that does not involve a sentence enhancement. . .[;]

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<sup>5</sup>Statutory amendments which were effective July 1, 2007, renumbered the subsections due to addition of a new clause, unrelated to this case. See Laws of 2006, ch. 73, §10; Laws of 2006, ch. 339, § 302.

(b) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(c) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such weight, purity, packaging, sale price, and street value of the controlled substance;

(d) The offender has not been found by the United States attorney general to be subject to deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(e) The standard sentence range for the current offense is greater than one year; and

(f) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

In construing a statute, a court “must give effect to its plain meaning as what the Legislature intended.” J.M., 144 Wn.2d at 480. The “plain meaning” of RCW 9.94A.660(1)(f) (2007) is clear. A defendant is eligible if he has not received a DOSA sentence “more than once” during the previous ten years. Thus, under the plain language of the statute, to be *ineligible* for such a sentence, he must have received at least *two* such sentences during that time.

In this case, it was established that Mr. Carlson had received only *one* DOSA sentence in the prior ten years. 5RP 5. As a result, the superior court erred as a matter of law in holding that the single prior DOSA sentence Mr. Carlson had received rendered him statutorily ineligible for another.

Where, as here, the court errs as a matter of law in holding that the

defendant is not eligible for a DOSA, reversal is required to allow the court to conduct the required analysis of whether such a sentence should be imposed. See e.g., In re Sentencing of Holt, 105 Wn. App. 619, 622, 20 P.3d 1033 (2001). Here, had the court not erred in thinking Carlson was statutorily ineligible, it likely would have imposed a DOSA. At sentencing, the court specifically held that the facts of the case were such that it was not appropriate to impose the highest penalty. 5RP 7. Indeed, the court seemed concerned that the penalty Mr. Carlson would serve would be “significant” even if he received a sentence at the bottom end of the standard range. 5RP 7. And after hearing the evidence, the court noted that there was “not a large quantity of drugs” involved in the case. 4RP 91.

Further, Mr. Carlson’s prior convictions did not include any excluding offenses. CP 34-35; see former RCW 9.94A.660(1)(2007).

Reversal and remand with instructions to consider Mr. Carlson’s eligibility for a DOSA sentence is required.

c. Counsel was prejudicially ineffective

In a hearing on remand, new counsel should be appointed, because counsel was ineffective in failing to know the relevant law for the sentence he sought to have the court impose. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. These rights extend to sentencing. See State v. Thieffault, 160 Wn.2d 409, 412, 158 P.3d 580 (2007).

Counsel is ineffective if his performance falls below an objective standard of reasonableness and that deficiency prejudiced the defendant. State v. Stenson, 132 Wn.2d 668, 705-706, 940 P.2d 1239 (1997), cert. denied sub nom Stenson v. Washington, 523 U.S. 1008 (1998). While there is a presumption that counsel was effective, that presumption can be overcome by evidence of such things as the attorney's failure to properly investigate, determine appropriate defenses, or properly prepare for trial or sentencing. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

In this case, counsel was prejudicially ineffective. As noted above, the court's declaration of the "ten-year" clause in the current statute was erroneous and Mr. Carlson was, in fact, statutorily eligible for a DOSA sentence. Counsel must have known that he might be required to provide some argument to establish that Mr. Carlson was actually eligible for a DOSA, the very sentence counsel was planning to ask the court to impose. Yet counsel apparently did not even read the statute prior to sentencing, nor did he marshal any caselaw regarding the proper way to interpret the language of a statute.

While the court's error of law is by itself reversible error, counsel's failure to prepare to present any support for the sentence he was going to ask the court to impose was ineffective. Further, that ineffectiveness was prejudicial to Mr. Carlson, who was, in fact, statutorily eligible for a DOSA sentence and would likely be serving such a sentence today, absent counsel's unprofessional failure to prepare. No reasonably competent

attorney would so fail to know the law and be prepared to argue and present it on his client's behalf. See, e.g., State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (counsel's failure to object to legally improper instructions was ineffective where it allowed the client to be convicted under a statute which did not apply). Nor could such a complete failure to provide a client with even minimally competent assistance at sentencing amount to a "tactical decision." This Court should reverse the sentence not only because the sentencing court erred as a matter of law in finding Mr. Carlson statutorily ineligible for a DOSA but also because of counsel's part in effectively ensuring that error occurred by failing to investigate the relevant issues of defense and prepare even minimally for sentencing.

E. CONCLUSION

To prove Mr. Carlson guilty as charged, the prosecution had to showing that he “knowingly escape[d]” by engaging in conduct he knew was virtually certain to result in his not being able to return to the facility on time. The prosecution proved only that Mr. Carlson disregarded a substantial risk that his conduct might have that result. Because the prosecution did not prove the essential mental element of the crime, reversal and dismissal is required.

Even if this Court does not reverse the conviction, reversal and remand for resentencing is required, because the trial court erred in concluding that Mr. Carlson was not statutorily eligible for a DOSA. On remand, new counsel should be appointed, because counsel was ineffective in failing to know the law he was asking the court to apply on his client’s behalf and that failure was prejudicial to Mr. Carlson.

DATED this 28<sup>th</sup> day of August, 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Mr. Richard Carlson, DOC #940000, Washington State Penitentiary, 1313 North 13th Street, Walla Walla WA 99362.

DATED this 22<sup>nd</sup> day of August, 2007.

  
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*Handwritten mark or signature*