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COURT OF APPEALS DIV. II
STATE OF WASHINGTON
TMM

No. 36185-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE WAYNE OSGOOD,

Appellant.

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas J. Felnagle

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Imposition of convictions for manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture violated double jeopardy.

2. The trial court abused its discretion in refusing to impose a Drug Offender Sentencing Alternative (“DOSA”) sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has the constitutional right to be free from being placed twice in jeopardy. Multiple punishments for the same act where the Legislature has not authorized such multiple punishment violates double jeopardy. Where proof of the manufacturing of methamphetamine using the red phosphorus method which requires the use of pseudoephedrine as a starter also proved the possession of pseudoephedrine with the intent to manufacture as charged and proven here, did Mr. Osgood’s sentences for both offenses violate double jeopardy, where both offenses were the same in law and fact and there was no legislative authorization for the multiple punishments?

2. 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. Osgood was statutorily eligible for a DOSA but the court simply refused to consider a DOSA based on its own opinion that DOSA is only available to those offenders who merit leniency as opposed to those offenders who may benefit from treatment?

C. STATEMENT OF THE CASE

At a residence in Pacific on an unrelated matter, Pacific police officers were alerted to a complaint of strange chemical odors coming from a nearby trailer and an increase in traffic in and out of the trailer. 2/26/07RP 27, 2/27/07RP 11-15. The trailer was described as being in "rough shape" and the smell emanating from the area of the trailer was described as ammonia or urine smelling. 2/27/07RP 17. Pacific Police Officer Bos and Kemper walked over to the trailer and noted the odor of ammonia. 2/26/07RP 29; 2/28/07RP 20. The officers decided to contact an Auburn police officer who had training in investigating methamphetamine laboratories ("meth labs"). 2/26/07RP 31.

The officers returned to the trailer and contacted the resident, later identified as Bruce Osgood. 2/26/07RP 32-33. Outside the trailer the officers saw a number of garbage bags with used coffee filters spilling out of one of the bags. 2/27/07RP 52-53.

Mr. Osgood gave the officers consent to enter the trailer, and inside the officers observed what they believed to be a methamphetamine lab. 2/27/07RP 55-56. The officers immediately left the trailer and contacted additional officers and the fire department. 2/26/07RP 35-36. Mr. Osgood was placed under arrest. 2/26/07RP 35.

A subsequent detailed search of the inside of the trailer and the garbage bags strewn outside the trailer revealed various paraphernalia opined to be part of a methamphetamine lab using the red phosphorus method. 2/27/07RP 83, 131. Also found was trace amounts of pseudoephedrine, a small amount of methamphetamine and empty blister packs of cold tablets. 2/28/07RP 187-93, 3/1/07RP 105-19. Mr. Osgood admitted to the police that he used methamphetamine. 2/28/07 150-51.

Based upon the paraphernalia and other materials found at and in the trailer, it was opined that methamphetamine was being manufactured using the red phosphorus method which used pseudoephedrine extracted from cold tablets. 3/1/07RP 130-31. As a result, Mr. Osgood was charged with manufacturing methamphetamine, possession of pseudoephedrine with intent to manufacture both being committed while within 1000 feet of a

school bus route stop. CP 6-7. Following a jury trial, Mr. Osgood was convicted as charged. CP 51-56; 3/9/07RP 4-7.¹

Prior to sentencing, Mr. Osgood was evaluated for a DOSA. CP 57-58. At the sentencing hearing, Mr. Osgood requested the court impose a DOSA, which the State did not oppose. 4/6/07RP 7-11. The trial court refused to impose a DOSA instead imposing a standard range sentence, ruling:

One of the things the Court looks to in deciding whether or not to grant a DOSA or give some sort of sentencing relief to an individual is, have they demonstrated any insight, have they taken any responsibility, and have they shown any remorse. There's absolutely nothing in this record that suggests any of those things have taken place or to suggest that there ought to be some other reason to grant leniency or consideration to Mr. Osgood.

...
So, having not been able to identify reasons to grant a DOSA and not finding a reason to go to the high end either, I am going to impose 108 months and the financial obligations and other conditions as suggested by the State.

4/6/07RP 19-20.

¹ Mr. Osgood was also charged with bail jumping based on his failure to appear at a pretrial hearing. CP 7. Mr. Osgood was convicted of this offense as well. CP 54.

D. ARGUMENT

1. IMPOSITION OF CONVICTIONS FOR
MANUFACTURING METHAMPHETAMINE
AND POSSESSION OF PSEUDOEPHEDRINE
VIOLATED DOUBLE JEOPARDY

a. Double Jeopardy bars multiple punishments for a single act. Mr. Osgood did not raise this issue below, but a “manifest error affecting his constitutional right to be free from double jeopardy” may be raised for the first time on appeal. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); *State v. Turner*, 102 Wn.App. 202, 206, 6 P.3d 1226 (2000). See also *State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

The Double Jeopardy Clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment, provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” *Illinois v. Vitale*, 447 U.S. 410, 415, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The prohibition against double jeopardy consists of three separate guarantees: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *North*

Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). When a defendant is charged with violating a statute multiple times, “the proper inquiry for double jeopardy analysis is what ‘unit of prosecution’ the legislature intended.” *State v. Sutherby*, 138 Wn.App. 609, 613, 158 P.3d 91 (2007), *citing v. Adel*, 136 Wn.2d at 633-34.

Double jeopardy is implicated by multiple convictions arising from the same act, even if concurrent sentences are imposed. *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007); *State v. Read*, 100 Wn.App. 776, 793, 998 P.2d 897 (2000). This result recognizes the collateral consequences of conviction, such as the mere fact of conviction, separate and apart from the sentence imposed. *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985). *See also State v. Gohl*, 109 Wn.App. 817, 822, 37 P.3d 293 (2001), *review denied* 146 Wn.2d 1012 (2002) (“The fact of multiple convictions, with the concomitant societal stigma and potential to increase sentence under recidivist statutes for any future offense violated double jeopardy even where, as here, the trial court imposed only one sentence for the two offenses.”).

b. The Double Jeopardy Clause is violated unless the Legislature specifically authorizes multiple punishments. Nothing in the Constitution prevents a legislative body from punishing separately each component of a crime and also the completed, constituted offense. *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985), citing *Albrecht v. United States*, 273 U.S. 1, 11, 47 S.Ct. 250, 71 L.Ed. 505 (1927). Double jeopardy is not offended where the Legislature authorizes multiple punishments for the two offenses. *Womac*, 160 Wn.2d at 652; *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005).

To determine whether multiple punishments for the same offense violate the constitutional guarantee against double jeopardy, this Court must examine what punishment the legislative branch has authorized. *Freeman*, 153 Wn.2d at 773. In order to determine whether the Legislature authorized multiple punishments, one must look to the text of the statutes. *Id.* Neither RCW 69.50.401(1),(2)(b) (manufacturing methamphetamine) nor RCW 69.50.440(1) (possession of pseudoephedrine with the intent to manufacture) address whether multiple convictions may arise out of a single assault. *Contrast* RCW 9A.52.050 (authorizes cumulative punishment for crimes committed during commission of

a burglary). Since the Legislature has not expressly authorized multiple punishments for manufacturing methamphetamine and possession of pseudoephedrine with the intent to manufacture, this Court must turn to tools of statutory construction. *Freeman*, 153 Wn.2d at 776.

To determine legislative intent, this Court must first apply the “same evidence” test to determine whether the offenses “are identical both in fact and in law.” *Id.* The same evidence test involves an examination of the elements of each offense and is similar to the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) (“where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not”). *Freeman*, 153 Wn.2d at 776. See also *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (same).

The mere fact that each statute at issue has an element not found in the other is irrelevant, as *Blockburger* requires “proof of an additional fact which the other does not.” *Blockburger*, 284 U.S. at 304.

Where conviction of a greater crime cannot be had without conviction of the lesser crime, double jeopardy bars prosecution for the lesser crime. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (*per curiam*). Put another way, where the State's proof of the greater crime necessarily requires proof of all of the elements of the lesser crime, double jeopardy bars punishment on the lesser crime. *Vitale*, 447 U.S. 420-21. *See also Freeman*, 153 Wn.2d at 777 ("[I]f the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary."). In evaluating whether two offenses contain the same elements, this Court must consider the elements of the offenses "*as charged and proved, not merely as the level of an abstract articulation of the elements.*" (Emphasis added.) *Freeman*, 153 Wn.2d at 779.

c. Manufacture of methamphetamine and possession of pseudoephedrine as charged and proven in this matter required the same evidence to prove. Mr. Osgood was convicted of possession of pseudoephedrine with the intent to manufacture and manufacturing methamphetamine. The State proved that Mr. Osgood was manufacturing methamphetamine at his trailer using the red phosphorus method and that traces of pseudoephedrine as

well were found in some of the materials alleged to have been used in the manufacture. 3/1/07RP 104-07, 110-15, 131. The red phosphorus method of manufacturing requires the extraction of pseudoephedrine from cold tablets as part of the manufacturing process. 3/5/07RP 20-35. Obviously one cannot make methamphetamine using the red phosphorus method without possessing pseudoephedrine, a necessary ingredient. Thus, Mr. Osgood was convicted of manufacturing methamphetamine using a method which required pseudoephedrine, thus both convictions being based upon the same evidence.

The decision in *Dixon, supra*, is extremely relevant to the instant matter and provides this Court with the proper test to apply in finding the convictions for the two offenses violate double jeopardy. The importance of *Dixon* is its application of the test enunciated in *Blockburger, supra*, to the facts of *Dixon*. While there were a myriad of ways of violating the contempt provision of the defendant's release in *Dixon*, the government chose to base it on the defendant's arrest for possession of narcotics with intent to distribute. *Dixon*, 509 U.S. 691-92. The Supreme Court had no problem finding the defendant's subsequent conviction for the drug offense violated double jeopardy, finding the drug conviction did not

include any element not already contained in the contempt prosecution. *Id* at 698-700. Thus the two offenses, contempt and possession of narcotics, were the same in law and fact under the *Blockburger* test. *Id*. Under the State's analysis here, the two offenses, contempt and possession of narcotics, could never be the same in law and fact, and argument which is directly contrary to *Dixon*.

The same rationale applies here. Although there are many ways of manufacturing methamphetamine, two of which were discussed at trial, the State proved Mr. Osgood was manufacturing methamphetamine using a method which required pseudoephedrine as a necessary ingredient. Thus, once the State proved the elements of the manufacturing of methamphetamine using the red phosphorus method, there were no additional facts necessary to be proven for the possession of pseudoephedrine with intent to manufacture. The two offenses as charged and proven here were the same in law and fact under the *Blockburger* test as stated in *Dixon*. *Harris, supra*. Mr. Osgood's convictions for manufacturing methamphetamine and possession of pseudoephedrine violated double jeopardy.

d. One of the convictions must be dismissed. On a finding of double jeopardy, the proper remedy is vacation of the additional conviction(s). *Womac*, 160 Wn.2d at 659-60, *citing Ball*, 470 U.S. at 864-65. As a result, this Court must dismiss one of the convictions as it violated double jeopardy.

2. THE TRIAL COURT ABUSED ITS
DISCRETION IN REFUSING TO CONSIDER
A DOSA FOR MR. OSGOOD

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 only about 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).

Under RCW 9.94A.660(1)(c), a defendant is eligible for a DOSA sentence if his current offense is a violation of chapter 69.50

RCW and involved only a small quantity of drugs as determined by the judge. When determining whether the quantum of drugs involved is a "small quantity," the judge may consider such factors as the weight, purity, packaging, sale price, and street value of the controlled substance. *Id.* If an offender is determined to be eligible for a DOSA, the court may order an examination which may address:

- (a) Whether the offender suffers from drug addiction;
- (b) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;
- (c) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and
- (d) Whether the offender and the community will benefit from the use of the alternative.

Id. The examination report should also contain a treatment plan, designate a treatment provider, set forth a monitoring plan, and identify affirmative conditions. RCW 9.94A.660(3). If the court determines a DOSA 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 in prison receiving

chemical dependency treatment. RCW 9.94A.660(5)(a). 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. RCW 9.94A.660(2). 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(8)(c); *Grayson*, 154 Wn.2d at 338.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. Because a sentence under DOSA falls within the standard sentence range set by the legislature in the sentencing statute, appellate courts presume that the trial court did not abuse its discretion. *State v. Garcia-Martinez*, 88 Wn.App. 322, 329, 944 P.2d 1104 (1997). Although not every defendant is entitled to a DOSA, every defendant is entitled to ask the trial court for meaningful consideration of his request. *Grayson*, 154 Wn.2d at 342. A party may challenge a trial court's failure to exercise any discretion where the trial court categorically denies a DOSA sentence. *Grayson*, 154 Wn.2d at 342. A trial court's denial of a request for a DOSA is reviewed for abuse of discretion, which occurs when the trial court bases its decision on manifestly

unreasonable or untenable grounds. *State v. White*, 123 Wn.App. 106, 114, 97 P.3d 34 (2004).

In *Grayson*, the trial court refused the defendant's request for a DOSA on the basis that

the State no longer has money available to treat people who go through the DOSA program. So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I'm unwilling to do that for this purpose alone. There's no money available. He's not going to get any treatment; it's denied.

154 Wn.2d at 337 (emphasis in original). In reversing, the Washington Supreme Court ruled, "Considering all of the circumstances, the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error." *Id.* at 342.

Here the court refused to make a finding that the offense involved a small amount, instead refusing to even consider a DOSA, finding that the court would not grant Mr. Osgood any leniency. 4/6/07RP 19-20. The court cannot skirt the Legislative dictates of the Sentencing Reform Act ("SRA") based on a perception that the DOSA is not adequate to punish the defendant in light of the defendant's failure to take responsibility or show remorse. *State v. Grewe*, 59 Wn.App. 141, 796 P.2d 438 (1990),

as modified, 117 Wn.2d 211, 813 P.2d 1238 (1991). Similarly, the court's belief that the sentencing options provided by the Legislature do not adequately advance the goals of the SRA is not a valid basis for discarding sentencing alternatives. *State v. Allert*, 117 Wn.2d 156, 169, 815 P.2d 752 (1991).

The facts supported a finding that the offense involved a small amount of methamphetamine and supported Mr. Osgood's need for treatment. The search of the trailer revealed a small amount of methamphetamine among Mr. Osgood's personal possessions, an amount consistent with the personal use of Mr. Osgood and consistent with his admission to the police that he used methamphetamine. In addition, a very small amount of methamphetamine was left in the bilayered liquids.

To the extent the Legislature has made the DOSA sentence available to offenders convicted of these offenses, the judge's personal opinion that the defendant had not taken responsibility for the offense or shown remorse and therefore not deserving of a DOSA represents the form of second-guessing precluded by statute and caselaw. *Grayson*, 154 Wn.2d at 342 (categorical rejection of a DOSA for delivery of cocaine found to be an abuse of discretion). The court's denial of the DOSA was based upon just

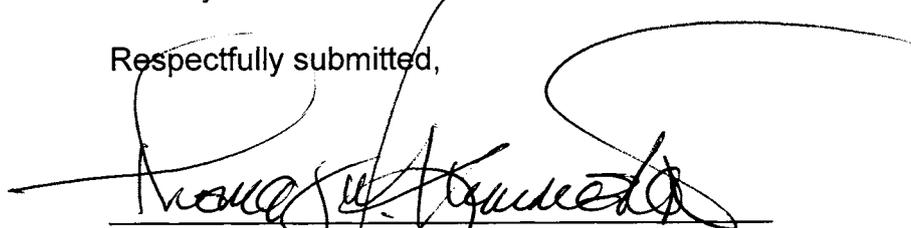
this personal opinion that the DOSA is limited to those who take responsibility or show remorse and ignored the clear dictates of the Legislature when it enacted the DOSA. The court abused its discretion and the appropriate remedy is reversal of the sentence and remand for resentencing. *Grayson*, 154 Wn.2d at 343 (“We reverse on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate.”).

E. CONCLUSION

For the reasons stated, Mr. Osgood submits his conviction for possession of pseudoephedrine with the intent to manufacture must be reversed and dismissed as violative of double jeopardy. Further, Mr. Osgood’s sentence on the manufacturing of methamphetamine must be reversed and remanded.

DATED this 27th day of December 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)
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APPELLANT.)

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CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 28TH DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR PIERCE COUNTY PROSECUTING ATTORNEY 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] BRUCE OSGOOD 830223 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF DECEMBER, 2007.

x _____ *grv*

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