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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRUCE WAYNE OSGOOD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 05-1-04598-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant convicted of two crimes (manufacture of methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine), each of which required the State to prove a different fact in accordance with defendant's protection against Double Jeopardy?
2. Did the court properly deny defendant's request for a Drug Offender Sentencing Alternative when it considered factors particular to defendant's case and found no reason to deviate from the standard range sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On September 19, 2005, the Pierce County Prosecutor's Office filed an information charging BRUCE WAYNE OSGOOD, hereinafter "defendant," with one count of unlawful manufacture of a controlled substance. CP 1-2. On January 10, 2006, the court issued a scheduling order setting an omnibus hearing on January 26, 2006. RP (3/1) 62-64;¹

¹ The Verbatim Report of Proceedings is contained in 16 volumes, some of which are not numbered consecutively. Citations to the record will be preceded by "RP ([date])." For example, "RP (3/1) 1" refers to page 1 of the proceedings of March 1, 2007. All proceedings in this case took place in 2007.

CP 79. On January 26, 2006, defendant failed to appear at the omnibus hearing. RP (3/1) 64-68; CP 80-81. The State amended the information to add one count of possession of pseudoephedrine with intent to manufacture methamphetamine and one count of bail jumping. CP 6-7. The matter proceeded to jury trial. RP (2/23) 3. On March 9, 2007, the jury found defendant guilty of manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine. RP (3/9) 4-7. The jury found that these two crimes were committed within 1,000 feet of a school bus route stop. RP (3/9) 4-7. The jury also found defendant guilty of bail jumping. RP (3/9) 4-7.

The court held a sentencing hearing on April 6, 2007. RP (4/7) 3. The State asked the court to sentence defendant to the high end of the standard range due to defendant's apparent collusion with witnesses during the trial. RP (4/7) 4-20. Defense counsel rebutted this recommendation and asked for a Drug Offender Sentencing Alternative ("DOSA"). RP (4/7) 7. In considering whether it would grant DOSA, the court inquired about the DOSA terms. RP (2/7) 7-11. The court gave defense counsel a chance to respond each time the State made an argument at sentencing, and defense counsel did not indicate that he had any further argument regarding his request for DOSA. RP (4/7) 16-23. The court asked defendant twice whether defendant wanted to say anything; defendant refused the offer the first time and responded to the State's attack on his credibility the second time. RP (4/7) 15-16, 19. The court

denied both the State's recommendation of the high end of the range and defendant's DOSA request, stating,

I agree with the defendant that it would be inappropriate for me to assume that Mr. Osgood somehow interfered with the process or tried to coach a witness or tried to endorse false testimony in any way or relayed information from one witness to another. I just don't have proof of that, and to take it into account in sentencing would be, in effect, to find him guilty of a crime he wasn't charged with, which would be interfering with a witness.

But, having said that, Mr. Osgood can't have things both ways. 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.

That said, there's really nothing remarkable about this as a manufacturing case. It's not particularly aggravated. It's not particularly mitigated. That having been said, it appears to me that this ought to come out somewhere in the middle.

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

RP (4/7) 19-20. Defendant was sentenced to serve 108 months' confinement for Counts I and II and 36 months for Count III, all three sentences to run concurrently. RP (4/7) 20; CP 59-71. These sentences were the mid-point of defendant's standard sentencing ranges. CP 59-71. The court also ordered defendant to pay restitution in an amount to be determined at a later proceeding and other legal financial obligations. RP

(4/7) 20; CP 59-71. From entry of this judgment and sentence, defendant filed a timely notice of appeal. CP 75.

2. Facts

On September 17, 2005, Officers Michael Bos and James Kemper of the City of Pacific Police Department responded to a complaint of a suspicious vehicle on the railroad tracks near 13720 County Line Road in Pierce County. RP (2/26) 26, 29. Officer Bos located the vehicle and learned that it belonged to a group of cable company workers who were performing maintenance near the tracks. RP (2/26) 26. Officer Bos reported to Connie Rasmussen, the complaining witness, who informed Officer Bos that she was also concerned about a trailer to the east of her property. RP (2/26) 27; RP (2/27) 11. The trailer was broken down, was split down the sides, and had a tarp over the roof. RP (2/27) 16. Ms. Rasmussen told Officer Bos that there was a lot of traffic to the trailer at all hours of the day. RP (2/26) 27; RP (2/27) 15. She also said that there was an odor of ammonia emanating from the trailer. RP (2/26) 27; RP (2/27) 11, 16. Officers Bos and Kemper approached the trailer and smelled the scent of ammonia when they were 20 feet from the trailer. RP (2/26) 29-30; RP (2/28) 20-21. Upon detecting the smell of ammonia, the officers left the scene and consulted with Officer Jamie Douglass of the Auburn Police Department, who met them at a nearby elementary school. RP (2/26) 31; RP (2/27) 50-51; RP (2/28) 21.

Officers Bos, Kemper, and Douglass then returned to the trailer. RP (2.26) 32; RP (2/27) 51. As the officers approached the trailer, Officer Douglass noted that there was a small plastic bag near the trailer that looked like bags used to package methamphetamine. RP (2/27) 52-54. He also noted that there were coffee filters in an open garbage bag outside the trailer; coffee filters are used to manufacture methamphetamine. RP (2/27) 52-54. The officers knocked on the door of the trailer. RP (2/26) 32; RP (2/27) 52, 54; RP (2/28) 22. Defendant answered the door, stepped outside, and began speaking with the officers. RP (2/26) 33, 54-55; RP (2/28) 24-25. During the conversation, defendant admitted that he used methamphetamine, but denied manufacturing it. RP (2/28) 25. After this discussion, defendant gave the officers consent to search the trailer. RP (2/26) 34, 54-55; RP (2/28) 26. The officers advised defendant of his Ferrier² rights and then entered the trailer. RP (2/27) 55-56; RP (2/28) 26. When the officers entered the trailer, they immediately noticed a strong smell of chemical odors. RP (2/26) 34; RP (2/27) 57-60; RP (2/28) 27. Defendant's trailer contained six cans of Coleman fuel, a garden sprayer, coffee filters stained different colors, a coffee carafe with a bilayer liquid in it, and several mason jars with other liquids in them. RP (2/27) 57-60. At trial, Officer Douglass explained the two methods of manufacturing methamphetamine: the red phosphorous (or red P) method, and the Birch

² *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)

Reduction (or lithium ammonia) Method. RP (2/27) 68-81. He also testified that Coleman fuel, garden sprayers, coffee filters, bilayer liquids, and mason jars were all used in or produced during methamphetamine manufacture. RP (2/27) 68-85; RP (2/28) 61, 65, 89. After the officers entered the trailer, Officer Douglass concluded that the contents of the trailer were consistent with it being a red phosphorous methamphetamine lab and signaled to Officer Bos to arrest defendant; Officer Bos placed defendant under arrest. RP (2/26) 35; RP (2/28) 27, 88-89.

Because defendant had been exposed to the chemicals inside the trailer, Officer Bos called the Pacific Fire Department to wash defendant and provide him with clean clothes. RP (2/26) 36. Defendant was taken to the Pacific Police Department. RP (2/28) 150-152. Officer Bos also contacted the Pierce County Sheriff's Office, which has its own lab team. RP (2/37) 37. Deputy Kory Shaffer of the Pierce County Sheriff's Department arrived and spoke to Officer Douglass. RP (2/28) 145. Deputy Shaffer put on personal protective equipment and secured the trailer. RP (2/28) 147, 149. After the officers obtained a search warrant, the Pierce County Sheriff's Department processed the trailer. RP (2/26) 37-38; RP (2/28) 152-153. The Sheriff's Department found garbage bags containing yellow-stained coffee filters, several empty boxes of medicine that contained pseudoephedrine, and other items used in manufacturing methamphetamine. RP (2/28) 182-184, 186, 188, 190-191, 193-206; RP (3/1) 11-20, 34-35. The Pierce County Sheriff's Office also found a glass

bong and some glass drug pipes. RP (2/28) 193, 200; RP (3/1) 17. The Pierce County Sheriff's Office tested the items recovered from defendant's trailer and found pseudoephedrine on several of them, including paper filters, and a mortar and pestle. RP (3/1) 104-106, 110-112, 114-115; RP (3/5) 17-19. The Sheriff's Office also found a plastic bag containing white powder that contained pseudoephedrine. RP (3/1) 110-111. The pseudoephedrine was present in various forms that corresponded to the methamphetamine manufacturing process: powdered in a plastic bag, in solid form, in a residue, and as part of a bilayered liquid solution. RP (3/1) 104-106, 110-115, 130; RP (3/5) 17-20. The Sheriff's Office found methamphetamine in the trailer on several items including glass pipes, plastic bags, and a glass file. RP (3/1) 107-109, 118-121; RP (3/5) 13-14.

Defendant argued that the items recovered from his trailer did not indicate that defendant was manufacturing methamphetamine. RP (3/7) 108. He called witnesses to testify that some of the items, like the garden sprayer, had legitimate uses while other items had been planted by a neighbor who had recently cleaned up a methamphetamine lab in the area. RP (3/5) 69 - RP (3/6) 159. Defendant also called Kerry Glasoe-Grant, defendant's attorney at the time he failed to appear for his omnibus hearing. RP (3/7) 22. Ms. Glasoe-Grant testified that defendant appeared for his trial date of February 9, 2006. RP (3/7) 22.

C. ARGUMENT.

1. DEFENDANT’S CONVICTIONS FOR MANUFACTURE OF METHAMPHETAMINE AND POSSESSION OF PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE DO NOT VIOLATE DOUBLE JEOPARDY.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following conviction or acquittal, and (2) multiple punishments for the same offense. *State v. Hescoek*, 98 Wn. App. 600, 603-04, 989 P.2d 1251 (1999). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). “Among other things, double jeopardy principles bar multiple punishments for the same offense.” *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). When a defendant’s acts support charges under two statutes, “the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question.” *Borrero*, 161 Wn.2d at 536; *State v. Gaworski*, 138 Wn. App. 141, 156 P.3d 288, 291 (2007) (citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983)(quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L.Ed.2d 275 (1981))). If the legislature did intend to impose cumulative punishments for the crime, double jeopardy is not offended. *Borrero*, 161 at 536 (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)). Washington courts primarily rely on the

test announced in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed. 306 (1932), to determine legislative intent in these cases. *Borrero*, 161 Wn.2d at 536-537. Under the *Blockburger* test, “two offenses are not the same if each contains an element not contained in the other.” *State v. Corrado*, 81 Wn. App. 640, 649, 915 P.2d 1121 (1996) (citing *Blockburger*, 284 U.S. at 304). If the crimes meet this test, the court presumes that the legislature intended separate punishment. *Gaworski*, 138 Wn. App. at paragraph 8 (citing *Freeman*, 153 Wn.2d at 772). The *Blockburger* presumption may be rebutted by evidence of contrary legislative intent. *Id.*

A person commits the crime of manufacture of methamphetamine if he manufactures methamphetamine and knows it is methamphetamine. RCW 69.50.401(1) and (2)(b); RCW 69.50.206; CP 18-47 (Instruction 13).

“‘Manufacture’ means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.”

RCW 69.50.101(p); CP 18-47 (Instruction 10). “[A] person who knowingly plays even a limited role in the manufacturing process is guilty, even if someone else completes the process. Thus, a person need not possess the final product in order to engage ‘indirectly’ in the ‘production,

preparation, propagation, compounding, conversion, or processing of a controlled substance.”” *State v. Keena*, 121 Wn. App. 143, 148, 87 P.3d 1197 (2004).

A person commits the crime of possession of pseudoephedrine with intent to manufacture methamphetamine if he “possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.” RCW 69.50.440(1); CP 18-47 (Instruction 17). This court has held that, where a defendant possesses 440 loose pseudoephedrine pills, “this [fact] **alone** is sufficient to support [a] jury[] finding of intent to manufacture.” *State v. Moles*, 130 Wn. App. 461, 466, 123 P.3d 132 (2005) (emphasis added).

Defendant’s convictions for unlawful manufacturing of methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine do not violate double jeopardy because each crime contains an element that is not contained in the other.

A person can commit the crime of manufacturing methamphetamine without possessing pseudoephedrine. A person could be guilty of manufacturing methamphetamine if, in preparation to produce methamphetamine, he collects all the materials and equipment apart from the pseudoephedrine. RCW 69.50.101(p). He could be guilty if he played

a limited and indirect role in the manufacturing process that did not involve possessing pseudoephedrine. *See Keena*, 121 Wn. App. at 148. Thus, a person can be guilty of manufacturing methamphetamine without being guilty of possession of pseudoephedrine with intent to manufacture methamphetamine.

Moreover, a person can commit the crime of possession of pseudoephedrine with intent to manufacture methamphetamine without manufacturing methamphetamine. A person may collect large quantities of pseudoephedrine pills in their original packaging while planning to later use them to manufacture methamphetamine. If the police discover the horde of pills, a jury could still convict the person of possession of pseudoephedrine with intent to manufacture methamphetamine. The person would never get close to manufacturing methamphetamine, however, because he did not begin to prepare the pseudoephedrine to be manufactured into methamphetamine. *See, e.g., Moles*, 130 Wn. App. at 466. Thus, a person can be guilty of possession of pseudoephedrine with intent to manufacture methamphetamine without being guilty of manufacturing methamphetamine.

Division One recently rejected an argument that was identical to defendant's claim in *Gaworski*. Citing the definition of "manufacturing", the *Gaworski* court recognized that:

Possession of precursor ingredients is not a required element of manufacturing. A person who knowingly plays even a limited role in any of these processes manufactures

methamphetamine, and a person can knowingly commit the crime of manufacturing a controlled substance without ever constructively possessing it. . . . Conversely, a person may possess precursor ingredients with intent to manufacture methamphetamine without ever beginning the actual manufacturing process. The two crimes do not require proof of the same facts, and we presume the legislature intended separate punishments.

Gaworski, 138 Wn. App. at paragraph 9 (footnotes omitted). *Gaworski* is dispositive of petitioner's claim.

Manufacture of methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine each contain elements that the other does not. The Legislature is thus presumed to have intended multiple punishments for these crimes. Defendant's convictions thus do not run afoul of double jeopardy principles. *See Corrado*, 81 Wn. App. at 649.

2. THE COURT DID NOT DENY DEFENDANT HIS RIGHT TO DUE PROCESS WHEN IT REFUSED TO GRANT DEFENDANT'S REQUEST FOR A DRUG OFFENDER SENTENCING ALTERNATIVE.

Sentencing courts have the option in some circumstances to sentence drug offenders to a Drug Offender Sentencing Alternative ("DOSA"). RCW 9.94A.660. A DOSA is an exceptional sentence below the standard range. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Defendants are not entitled to receive a DOSA, and a court's decision whether to grant a DOSA is generally not reviewable. *Id.* An

offender may challenge the process by which a court denies his DOSA request. *Id.* (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). An appellate court reviews the procedure by which a sentencing court refuses a DOSA request for an abuse of discretion. *Grayson*, 154 Wn.2d at 342; *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004). A court abuses its discretion in denying a DOSA when it categorically refuses to impose a DOSA sentence “under *any* circumstances.” *Grayson*, 154 Wn.2d at 342 (citing *Garcia-Martinez*, 88 Wn. App. at 330) (emphasis added).

In the present case, the court considered facts particular to defendant’s case, and the defendant has failed to show that the court categorically denied his DOSA request. The court heard several arguments from both the State and the defense about whether it should grant defendant’s DOSA request. RP (4/7) 16-23. It rejected the State’s argument that defendant was untrustworthy. RP (4/7) 19-20. The court indicated that it had not heard anything that would suggest defendant had gained any “insight,...taken any responsibility,...[or] shown any remorse” as a result of his trial and conviction. RP (4/7) 19-20. It said there was “absolutely nothing in [the] record...to suggest that there ought to be some other reason to grant leniency or consideration to” defendant. RP (4/7) 19-20.

The court also demonstrated that it would not have categorically denied defendant's request under any circumstances. It noted that defendant might have been able to secure a DOSA if he could have shown insight or remorse or that defendant took responsibility for his crime. RP (4/7) 19-20. Because the court said there were facts that would have led it to grant a DOSA, defendant cannot claim that the court would have denied the DOSA request under *any* circumstance. *See Grayson*, 154 Wn.2d at 342. The court thus did not categorically deny defendant's DOSA.

Defendant improperly relies on *State v. Grayson*, 154 Wn.2d 333, 342-343, 111 P.3d 1183 (2005), for his proposition that the court denied him due process by categorically rejecting his DOSA request. The *Grayson* court held that a sentencing court abuses its discretion in denying a DOSA when the sentencing court categorically denies the DOSA. *Id.* at 342. The sentencing court in *Grayson* denied Grayson's request for a DOSA, stating, "*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.*" *Id.* at 337 (emphasis in original). Although the prosecutor stated that there were other facts that would undercut Grayson's DOSA request, the sentencing court refused to consider those facts or place them on the record. *Id.* at 337. The *Grayson* court found that the sentencing court categorically denied the DOSA request because the only reason it provided for denying the request was that there was not enough funding for DOSA. *Id.* at 342.

The current case is distinguishable from **Grayson**. Here, the court considered several factors particular to defendant's case, stating that there was no evidence in the record that defendant had developed any "insight,...taken any responsibility, [or] shown any remorse." RP (4/7) 19-20. The court described the case as one that was neither particularly mitigated nor one that was particularly aggravated. RP (4/7) 19-20. The court gave defense counsel an opportunity to rebut every argument that the State made against defendant's DOSA request, and defense counsel had every opportunity to argue in favor of the DOSA request. RP (4/7) 16-23. The court also gave defendant two separate opportunities to speak directly to the court about his sentence. RP (4/7) 15-16, 19. There is nothing in the record that suggests the court would have categorically denied the DOSA request under any circumstances. The court gave the parties ample opportunity to present facts specific to this case, and it considered those facts in deciding to deny DOSA. RP (4/7) 19-20.

Defendant's reliance on *State v. Grewe*, 59 Wn. App. 14, 796 P.2d 438 (1990), is likewise misplaced. Defendant states that **Grewe** prohibits a court from "skirt[ing] the Legislative dictates of the Sentencing Reform Act ("SRA") based on a perception that the DOSA is not adequate to punish defendant in light of the defendant's failure to take responsibility or show remorse." Br. of Appellant at 15. The court in this case, however, did not attempt to skirt the Sentencing Reform Act; it sentenced defendant to the mid-point of the standard range *required* by the SRA for

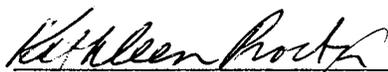
defendant's conviction. CP 59-71. Moreover, *Grewe* makes no mention about courts who consider a defendant's lack of remorse or failure to take responsibility for his crime. *Grewe*, 59 Wn. App. 14. *Grewe* stands for the proposition that judge's must have a reason to deviate from the standard range sentence because a trial court's "dissatisfaction with the standard sentencing ranges imposed under the SRA cannot, by itself, be a reason to justify a departure." *Id.* at 151. Because defendant provided no evidence at the sentencing hearing to support his DOSA request, *Grewe* actually supports the sentencing court's decision to deny the DOSA and order a sentence within the standard range.

D. CONCLUSION.

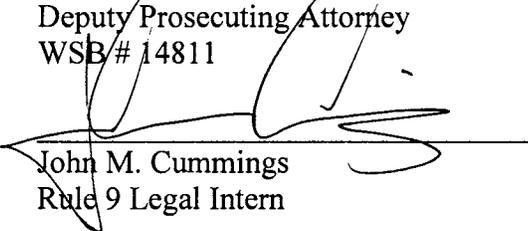
For the foregoing reasons, the State respectfully asks this Court to affirm defendant's judgment and sentence.

DATED: March 6, 2008.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/7/08 Theresa Kar
Date Signature

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