

ORIGINAL

NO. 36295-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD STULTZ,

Appellant.

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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FILED
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-01847-6

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that a new trial is warranted must fail when the Defendant cannot show that was prejudiced by the trial court's order excluding testimony from two witnesses since the Defendant made no offer of proof regarding the witnesses' testimony?

2. Whether the trial court abused its discretion in admitting ER 404(b) evidence regarding other deliveries made by the Defendant on the same day as the charged offenses when such evidence is admissible under Washington law?

3. Whether the Defendant is precluded from challenging the trial court's decision below when a trial court's decision whether to grant a DOSA sentence is not reviewable except in situations where a court categorically refuses to consider such a sentence, and when the trial court below considered the Defendant's request for a DOSA sentence but declined to impose one after the Defendant failed to provide the information necessary for the court to find that such a sentence was warranted?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Donald Stultz, was charged by amended information filed in Kitsap County Superior Court with delivery of methamphetamine and

possession of methamphetamine with intent to deliver. CP 17. Both counts also had a school zone enhancement. CP 17.

B. FACTS

Trial began on February 27, 2007 when the trial court addressed preliminary matters (including motions in limine) and started the voir dire process. RP 17-23, 27. On February 27, the trial court specifically asked what witnesses were going to be called by the defense and defense counsel stated that the only witness for the defense was the Defendant. RP 7.

The following morning, voir dire continued. RP 30. During voir dire, the State found out that the confidential informant in the case had gone to the hospital the night before and was still at the emergency room. RP 31. The prosecutor informed the court that he had asked a detective to verify the information and that the Detective was going to the hospital to get more information. RP 32. The court then took its lunch recess and reconvened at 1:30. RP 37-38. After lunch, the Detective was present in court and informed the court that he went to the hospital and verified that the witness was in the emergency room and was going to be admitted due to a problem with his pancreas. RP 40. The Detective also spoke with one of the treating nurses who explained that they were going to try to treat the informant with medication, but that if that did not work, then surgery might be necessary. RP 41.

The trial court found that there was proof that a material witness was unavailable due to no action on the part of either party or misconduct on the part of the witness, and that there was no evidence of that a continuance would cause any prejudice. RP 46. The trial court then set a status hearing for March 7 and scheduled the trial to resume on March 12. RP 47.

At the March 7 status hearing, the State informed the court that the witness was now out of the hospital and that the State foresaw no additional problems with resuming the trial on the 12th. RP 53.

The trial resumed on March 12. RP 59. On that day, the Defendant provided the State with a witness list naming two witnesses that the Defendant had not previously identified as witnesses. RP 62. The State objected to these two defense witnesses. RP 62. The trial court stated that it was not inclined to allow additional witnesses added after the trial had previously begun unless the Defendant could persuade the court to the contrary. RP 63. The Defendant responded that the witnesses were not listed earlier because their location was unknown and noted that the location of one of the two witnesses on the list was still unknown. RP 63.

The State responded by noting that it appeared that the Defendant knew of these witnesses for several months, yet they were never disclosed as witnesses as required. RP 64. The trial court then ruled that he was not

going to allow the witnesses. RP 64. No offer of proof was ever made concerning these witnesses, and the Defendant merely stated that they were “for rebuttal purposes only” without any offer of proof regarding what evidence or testimony they were intended to rebut. RP 63.

i. The Evidence at Trial.

Detective Elton of the Bremerton Police Department testified that on December 27th, 2006, he was working with a confidential informant named Ralph Beckhorn. RP 99-100, 118. Mr. Beckhorn was working as an informant after he had himself been arrested for selling methamphetamine. RP 118. Beginning in September and prior to December 27th, Mr. Beckhorn had worked on several cases with Detective Elton including twelve controlled buys (several of which had led to arrests). RP 120-21.

On December 27th, Mr. Beckhorn called Detective Elton from the Defendant’s cell phone and stated that he was with the Defendant and that they could supply the detective with methamphetamine. RP 124. Mr. Beckhorn said that he was driving with the Defendant, and Detective Elton could hear road noise in the background. RP 126. Detective Elton and Mr. Beckhorn negotiated as to the amount of the drug to be purchased and the price, and Detective Elton could also hear another male voice in the car with Mr. Beckhorn. RP 127. It was evident to the Detective that Mr. Beckhorn was talking to someone else in the car and then relaying information back to

the detective. RP 170. Ultimately, the parties agreed on a price of \$200 for an "eightball." RP 127. It was agreed that the transaction would take place inside a Blockbuster store. RP 127-28.

Detective Elton arranged for other officers to be present, prepared prerecorded funds to use to purchase the drugs, photocopied the money, and then went to the Blockbuster store and waited for Mr. Beckhorn. RP 128-29.

Mr. Beckhorn then arrived at the store in a Cadillac, came inside, and gave Detective Elton methamphetamine in a clear baggie with a "Batman" logo on it in exchange for the \$200. RP 129-30. Mr. Beckhorn then got back into the Cadillac and Detective Elton informed the other officers that the "deal" had been made. RP 130-31. The other officers then stopped the Cadillac, and the Defendant and Mr. Beckhorn were taken out of the car and placed into handcuffs. RP 131-32. The Defendant was driving the car and Mr. Beckhorn was a passenger in the front seat. RP 131-32.

At the scene, Mr. Beckhorn told Detective Elton that once he got back into the car he gave the money to the Defendant and that the Defendant had shoved the money under the seat when the police stopped the car. RP 134. He also advised that bank bags with methamphetamine were under the driver's seat where the Defendant had been sitting. RP 135.

Detective Elton contacted the Defendant and advised him of his Miranda warnings. RP 135. During a search of the Defendant, a small baggie containing five pills was found in the Defendant's pants pocket. RP 135. This baggie also had a "Batman" logo on it. RP 151.

The car was also searched, and the officers found bank bags, additional packages of methamphetamine (some with the same "Batman" logo), a digital scale, needles, and money (including the prerecorded buy money and some additional funds) under the driver's seat. RP 136, 138. The baggie that the Detective purchased from the informant matched the baggie found in the Defendant's pocket and several of the baggies found under the driver's seat. RP 181.

The Defendant admitted to Detective Elton that he was a meth user, that he used needles to inject meth, and that the needles that were in the car were his and nobody else's. RP 138. The Defendant, however, denied being involved in the sale of methamphetamine. RP 138. When Detective Elton explained to the Defendant that the operative had met him inside the Blockbuster and had sold him (an undercover officer) methamphetamine, the Defendant said, "Oh, shit," and then stated that the operative had been driving around all day selling methamphetamine. RP 140-41. The Defendant was eventually transported to the jail and booked for the delivery. RP 141.

The informant, Ralph Beckhorn, also testified at trial. RP 188. Mr. Beckhorn met the Defendant through a roommate, and had known the Defendant for approximately two and a half months prior to the December 27th delivery. RP 195. On the 27th, Mr. Beckhorn contacted the Defendant in order to retrieve some tools. RP 196. The Defendant then came by and picked up the Defendant in a Cadillac. RP 197.

ii. Offer of Proof Regarding ER 404(b) Evidence.

At trial (and after a sidebar), there was a discussion outside the presence of the jury regarding the State's intent to offer testimony from Mr. Beckhorn that on the same day of the sale of methamphetamine to the detective, the Defendant had earlier sold methamphetamine to several other people. RP 198. Furthermore, the proposed testimony would be that the Defendant also asked Mr. Beckhorn if he knew of anyone that wanted to buy methamphetamine, and this is what prompted Mr. Beckhorn's call to the detective. RP 200. The State argued that this evidence was admissible to show that the Defendant was working with Mr. Beckhorn, and cited *State v. McBride* for this proposition. RP 198-99. The State also noted that the Defendant was charged with possession with intent to deliver, and cited *State v. Thomas* for the proposition that evidence of prior drug dealing was relevant to show the Defendant's intent. RP 199. Finally, the State also argued that

the evidence was admissible under other exceptions to ER 404(b), including motive, opportunity, intent and common scheme or plan. RP 198, 200.

The State made a brief offer of proof in which Mr. Beckhorn testified that the Defendant sold three bags of methamphetamine that day. RP 202. Mr. Beckhorn stated that he saw two of these transactions take place, and that the Defendant had obtained the baggies that were sold from a bank bag under the seat. RP 202-03. The Defendant also had a scale in the bank bag, and during one of the drug deals the Defendant had placed the scale on the dashboard of the car and used it to weigh one of the bags of methamphetamine that was sold. RP 202-03. After these sales, the Defendant stated he had an "eightball" left and asked Mr. Beckhorn if he knew where he could get rid of it. RP 204. Mr. Beckhorn told the Defendant that he could call a friend who would be getting off of work soon, and Mr. Beckhorn then placed the call to Detective Elton in order to initiate a controlled buy. RP 204.

The trial court ruled that the proposed evidence was admissible under ER 404(b) and the cases cited by the State. RP 207. In particular, the trial court noted that *State v. Thomas* and *State v. McBride* allowed testimony regarding prior drug transactions that were part of the same incident or event. RP 206. The court also noted that the Defendant claimed he had no knowledge of what was going on and that the State's proposed evidence

would “address that issue” since the evidence showed that the Defendant did have knowledge of what was happening. RP 206.

iii. The 404(b) Evidence is Presented to the Jury.

Mr. Beckhorn then testified in front of the jury, and stated that that after his initial phone call with the Defendant regarding his tools, the Defendant came to his residence and picked him up. RP 208. The Defendant told Mr. Beckhorn that he had to make a couple of stops and then drove to a residence. RP 208. Mr. Beckhorn then saw the Defendant make a number of drug deals: one for \$20 worth of methamphetamine, one for \$50, and one for \$90. RP 208-09. One of the deals occurred inside the residence, but the other two took place outside on the street and were witnessed by Mr. Beckhorn. RP 209. During one of the deals, the Defendant pulled a scale out of a bank bag and put the scale on the dash and weighed out the \$90 worth of methamphetamine, which he then gave to a person who had been seated in the back of the car. RP 209. In each of the transactions, the Defendant obtained the drugs from a bank bag under the driver’s seat. RP 210.

After these deals were completed, the Defendant told Mr. Beckhorn that he had an “eightball of chrys left,” and asked him if he knew anyone that might be interested. RP 210-11. Mr. Beckhorn called Detective Elton and left him a message to call him back. RP 211. About 45 minutes later, the detective called back and Mr. Beckhorn quoted him a price of \$230. RP 211.

The Defendant was driving the car at the time, but Mr. Beckhorn described that the conversation was a “three-way conversation,” and that the Defendant finally said, “charge him 200 bucks.” RP 211. Detective Elton agreed to this price and told Mr. Beckhorn where to meet him. RP 211.

The Defendant and Mr. Beckhorn then went to the Blockbuster store, and the Defendant threw the “eight ball” to Mr. Beckhorn. RP 213-14. Mr. Beckhorn went into the store, delivered the drugs to Detective Elton in exchange for \$200, and then went back to the car where he gave the money to the Defendant. RP 213-15. The car was then stopped by a number of officers, and Mr. Beckhorn told detective Elton about the bank bag under the driver’s seat. RP 216.

After testimony from the forensic chemist who examined the drugs found by the officers, the State rested. RP 230-39. The jury ultimately returned verdicts of guilty on the two charged offenses. CP 64.

iv. Sentencing.

The matter came on for sentencing on May 11, at which time the defense counsel noted that the sentencing hearing had previously been set over to allow the defense to obtain a pre-sentence investigation report (PSI) regarding whether the Defendant “was a good candidate” for a potential DOSA sentence. RP (5/11) 3. Defense counsel informed the court that DOC

had informed him that they did not do PSI's for DOSA sentences and had referred him to a treatment agency. RP (5/11) 4. The Defendant provided the court with a "chemical dependency assessment" from this treatment agency that indicated that the Defendant had a chemical dependency, but the assessment did not contain any other report regarding whether the Defendant was eligible for DOSA. RP (5/11) 4-5.¹

The State noted that the assessment did not indicate that the treatment agency had reviewed the police reports or prosecutor's file regarding the actual crime and the Defendant's conduct. RP (5/11) 6. The court indicated it wanted an actual PSI so that it would have an "investigatory basis" for its DOSA decision and that it "didn't feel very comfortable doing a DOSA" without a presentence investigation. RP (5/11) 6-7. The trial court, however, never stated that it would not consider a DOSA sentence at all; rather, the court stated, "I will, as with any sentencing information, look at the evaluation that was presented and hear from the person that made it." RP (5/11) 7. The court stated that it would go ahead with the sentencing, and the Defendant stated, "That's fine," and did not request a continuance. RP (5/11) 8.

¹ The actual assessment report has not been designated as a clerk's paper, nor does it appear in the Superior Court file. The record regarding the assessment, therefore, is limited to the

The State recommended that the trial court impose a sentence near the middle of the standard range. RP (5/11) 8. The State also recommended that the court not impose a DOSA sentence, noting that the facts of the case showed that this was not an isolated incident involving a small amount of methamphetamine. RP (5/11) 9. In addition, the amount sold to the detective was three and a half grams of methamphetamine, which the State considered to be a large amount of methamphetamine. RP (5/11) 9. The State also pointed out that the Defendant also had eight more baggies of methamphetamine in the car along with a scale and cash indicating that the Defendant was essentially in the business to sell methamphetamine and that this was a “crime of economics.” RP (5/11) 10-11.

The defense argued that although the Defendant had “some fairly significant criminal history,” the priors were not violent offenses and there were no previous drug convictions. RP (5/11) 13. The defense also argued that the laws regarding drug deliveries were “draconian.” RP (5/11) 14. Finally, the defense stated that the assessment indicated that the Defendant had a drug problem, and asked the court to impose a DOSA sentence. RP (5/11) 15. The Defendant declined to personally address the court. RP (5/11) 21.

discussion of the assessment and its contents that occurred at the sentencing hearing.

The trial court declined to impose a DOSA sentence, noting that the court didn't have "sufficient evaluation and factors to make a DOSA decision" and that, "If I had a DOSA and I had a recommendation and I saw you qualified, maybe I would give it to you." RP (5/11) 21, 25. The court then imposed a standard range sentence. RP (5/11) 24.

This appeal followed.

III. ARGUMENT.

A. THE DEFENDANT'S CLAIM THAT A NEW TRIAL IS WARRANTED MUST FAIL BECAUSE THE DEFENDANT CANNOT SHOW THAT WAS PREJUDICED BY THE TRIAL COURT'S ORDER EXCLUDING TESTIMONY FROM TWO WITNESSES AS THE DEFENDANT MADE NO OFFER OF PROOF REGARDING THE WITNESSES' TESTIMONY.

The Defendant argues that the trial court abused its discretion by not allowing the defense to call two witnesses who were not listed as witnesses until after the trial began. App.'s Br. at 6. This claim is without merit because the trial court's ruling was within the court's discretion and because the Defendant has failed to show any prejudice.

The admission and exclusion of evidence are within the sound discretion of the trial court and, thus, are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A decision to

admit or exclude evidence, therefore, will be upheld absent an abuse of discretion, which may be found only when no reasonable person would have decided the same way. *Thomas*, 150 Wn.2d at 869.

An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The error is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002), quoting *Bourgeois*, 133 Wn.2d at 403.

In addition, ER 103(a) states, inter alia, that a claim of error may not be predicated upon a ruling which excludes evidence unless, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978); *State v. Negrin*, 37 Wn. App. 516, 525, 681 P.2d 1287, review denied, 102 Wn.2d 1002 (1984). See also *State v. Williams*, 34 Wn.2d 367, 384, 386-87, 209 P.2d 331 (1949). The offer of proof allows the trial court to properly exercise its discretion when reviewing,

reevaluating, and, if necessary, revising its rulings. *Cameron v. Boone*, 62 Wn.2d 420, 425, 383 P.2d 277 (1963).

In the present case, the Defendant failed to make any offer of proof regarding what the potential testimony of the two witnesses would be. In addition, the Defendant noted that it had not even been unable to even locate one of the two witnesses, Autumn Cole, who was apparently in the car when the Defendant was arrested. RP 63. The only mention of any statement made by Ms. Cole in the record below was a passing mention of her in the statement of probable cause which stated that the female who was present in the car told Detective Elton “that the operative handed [the Defendant] some money after going to the Blockbuster.” CP 4-5. This statement, however, is consistent with the evidence at trial as was of no assistance to the Defendant. See RP 134 (where Mr. Beckhorn testified that once he was in the car he gave the money to the Defendant).

The other witness listed by the Defendant, Ronaldo Opao, is not referenced in the record below and the record contains no mention of what potential testimony this witness would have provided.

In short, even if this court were to find error, the Defendant has failed to show prejudice, and an evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *Bourgeois*, 133 Wn.2d 389, 403,

945 P.2d 1120 (1997). In addition, the Defendant fails to demonstrate prejudice because he has not shown that, “ within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Everybodytalksabout*, 145 Wn.2d at 469, *quoting Bourgeois*, 133 Wn.2d at 403. For these reasons, the Defendant’s claim must fail.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING ER 404(B) EVIDENCE REGARDING OTHER DELIVERIES MADE BY THE DEFENDANT ON THE SAME DAY AS THE CHARGED OFFENSES BECAUSE SUCH EVIDENCE IS ADMISSIBLE UNDER WASHINGTON LAW.

The Defendant next claims that the trial court erred in permitting testimony that the Defendant delivered methamphetamine prior to the delivery for which he was charged. This claim is without merit because evidence regarding the prior deliveries (that occurred on the same day as the charged delivery), was properly admitted under ER 404(b).

The Defendant acknowledges that the trial court specifically stated that it was admitted the challenged evidence pursuant to *State v. McBride*, 74 Wn. App. 460, 873 P.2d 589 (1994) and *State v. Thomas*, 68 Wn. App. 268, 843 P.2d 540 (1992), and the Defendant also admits that in both of these cases the courts balanced the relevance of the evidence against the prejudicial effect. App.’s Br. at 10-11. The Defendant, however, argues that the analysis

in the present case is different because the 404(b) evidence in the present case was witnessed by someone other than a police officer and was not relevant. App.'s Br. at 11.

Other than the fact that the witness to the prior deliveries was not a police officer in the present case, the Defendant does not otherwise distinguish *McBride* and *Thomas*. In addition, the Defendant fails to explain why this factual difference is relevant to the inquiry, or why the testimony of a non-officer should be treated differently than the testimony of a police officer for 404(b) purposes.

Furthermore, the facts of the present case are similar to the relevant facts in *McBride* and *Thomas*. In *State v. McBride*, 74 Wn. App. 460, 873 P.2d 589 (1994), the trial court admitted evidence of three drug transactions that occurred before the transaction for which the defendant was charged. The *McBride* court held that evidence of the prior drug transactions was properly admitted in order to demonstrate how the defendant and co-defendant worked together to sell drugs to show why the police focused on the defendant, and to complete the sequence of events involved in the investigation of the defendant. *McBride*, 74 Wn. App. at 464. Moreover, the court in *McBride* determined that the testimony about the prior suspected drug transactions was not unduly prejudicial. *McBride*, 74 Wn. App. at 464.

Similarly, in *Thomas*, the defendant was charged with possession with intent to deliver, and the court of appeals affirmed the trial court's ER 404(b) ruling that admitted two police officers' testimony of the defendant's alleged drug dealings observed by the officers shortly before his arrest. *Thomas*, 68 Wn. App. at 273-74. The officers observed three separate transactions, in which an individual or several individuals approached Thomas, briefly conversed with him, and gave him money in exchange for apparent drugs kept in a small white pill bottle. *Thomas*, 68 Wn. App. at 270-71. An officer later searched Thomas and found in his pockets a pill bottle containing rock cocaine, a baggie of cocaine, cash, and a pager. *Thomas*, 68 Wn. App. at 271. The court of appeals held that the testimony about the pre-arrest contacts was both relevant to prove intent to deliver and necessary for the jury to see the complete picture of what happened: "In addition, the officers' testimony tends to make it more probable that Thomas intended to deliver the cocaine he possessed. It also provided the jury with a complete picture of what occurred that evening." *Thomas*, 68 Wn. App. at 273. In addition, the testimony was "highly probative of what Thomas intended to do with the cocaine, and its probative value greatly outweighed the prejudicial effect." *Thomas*, 68 Wn. App. at 274.

As in *Thomas* and *McBride*, the witness's testimony in the present case provided immediate context for the arrest of the Defendant and was

relevant to prove intent to deliver. The evidence that the Defendant exchanged drugs for money shortly before his arrest makes it more probable that he intended to sell the drugs that he possessed when arrested.

Although a trial court should conduct the weighing analysis of the probative value versus the potential for unfair prejudice on the record, failure to weigh the evidence is harmless, however, “when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence.” *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). Similarly, when the trial court fails to conduct the on-the-record balancing process required by ER 404(b), a reviewing court should decide issues of admissibility if it appears possible after reviewing the record as a whole. *State v. McGhee*, 57 Wn. App. 457, 460, 788 P.2d 603 (1990), citing *State v. Bowen*, 48 Wn. App. 187, 191, 738 P.2d 316 (1987); *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986); *State v. Mahmood*, 45 Wn. App. 200, 724 P.2d 1021, review denied, 107 Wn.2d 1002 (1986).

In the present case the trial court stated that it had reviewed *Thomas* and *McBride* as well as “the updated Tegland,” and held that the evidence was admissible under these cases and ER 404(b). RP 206-07. The record, therefore, is sufficient for this court to either: (1) infer that the trial court did weigh the probative value versus the potential for unfair prejudice since the

trial court expressly stated that it was relying on the similar cases of *Thomas* and *McBride* where the court did weigh these factors; or, (2) find that the trial court would still have admitted the evidence if it had considered the relative weight of probative value and prejudice. In addition, even though the trial court failed to conduct the on-the-record balancing process required by ER 404(b), this court should find that the evidence admissible since the record as a whole allows this court to do so.²

As the evidence of the prior deliveries was admissible under ER 404(b) the trial court did not abuse its discretion in admitting this evidence and the Defendant's arguments to the contrary must fail.

² As argued below, the evidence of the prior deliveries was admissible pursuant to a number of exceptions or theories under ER 404(b), including to show intent, motive, *res gestae*, common scheme or plan, to show that the Defendant and the informant were working together, and that the Defendant possessed the methamphetamine found under his seat with the intent to deliver that methamphetamine at a later time as charged in the second count. In addition, as the trial court alluded to, the evidence served to rebut the Defendant's assertion that he had not been involved in the delivery and that the informant had been driving around selling methamphetamine that day. See RP 138, 141, 206.

C. THE DEFENDANT IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S DECISION BELOW BECAUSE A TRIAL COURT'S DECISION WHETHER TO GRANT A DOSA SENTENCE IS NOT REVIEWABLE EXCEPT IN SITUATIONS WHERE A COURT CATEGORICALLY REFUSES TO CONSIDER SUCH A SENTENCE, AND BECAUSE THE TRIAL COURT CONSIDERED THE DEFENDANT'S REQUEST FOR A DOSA SENTENCE BUT DECLINED TO IMPOSE ONE AFTER THE DEFENDANT FAILED TO PROVIDE THE INFORMATION NECESSARY FOR THE COURT TO FIND THAT SUCH A SENTENCE WAS WARRANTED.

The Defendant next claims that trial court erred when it failed to impose a DOSA sentence. App.'s Br. at 12. This claim is without merit because the trial court considered the Defendant's request for a DOSA sentence but ultimately declined to impose such a sentence because the Defendant failed to provide the court with the information that was necessary for the court to find that such a sentence was appropriate. In particular, RCW 9.94A.660 provides that a court may require an examination and a report outlining a number of considerations, and the record below does not indicate that the Defendant ever provided the trial court with the information outlined in the statute. The trial court, therefore, did not abuse its discretion when it found that the DOSA sentence was not appropriate given the limited record before it.

As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005), *citing* RCW 9.94A.585(1); *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). However, an offender may always challenge the procedure by which a sentence was imposed. *Grayson*, 154 Wn.2d at 338, *citing*, *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *Grayson*, 154 Wn.2d at 342, *citing* *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A trial court abuses discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” *Grayson*, 154 Wn.2d at 342, *quoting* *Garcia-Martinez*, 88 Wn. App. at 330. Thus, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. *Grayson*, 154 Wn.2d at 342. However, a court's decision, after consideration, not to apply DOSA and impose a standard sentence range is not reviewable. *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519 (1998).

The critical issue in the present case, therefore, is whether the trial court meaningfully considered a DOSA sentence. If the trial court considered a DOSA sentence but rejected it, then that decision is not reviewable. If, however, the trial court refused to consider a DOSA sentence or refused categorically to consider such a sentence, then a remand for resentencing is appropriate.

RCW 9.94A.660(2) provides that if a sentencing court determines that the offender is eligible for a DOSA sentence, the court may order an examination which shall, at a minimum, address the following issues:

- (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.

In addition, RCW 9.94A.660(3) provides that the examination report must contain:

- (a) Information on the issues required to be addressed in subsection (2) of this section; and
- (b) A proposed treatment plan that must, at a minimum, contain:
 - (i) A proposed treatment provider that has been licensed or

certified by the division of alcohol and substance abuse of the department of social and health services;

(ii) The recommended frequency and length of treatment, including both residential chemical dependency treatment and treatment in the community;

(iii) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(iv) Recommended crime-related prohibitions and affirmative conditions.

In the present case, the Defendant has failed to show that he provided the trial court with the necessary information outlined in RCW 9.94A.660. In addition, the Defendant failed to request a continuance in order to seek a more comprehensive report after learning that DOC would not prepare a PSI.

Although the record shows that the sentencing hearing was set over at least once for the Defendant to seek information regarding whether he was a good candidate for a DOSA sentence, the Defendant ultimately only provided the court with a treatment assessment which stated that he suffered from an addiction. RP (5/11) 3-5. The record does not show that this assessment addressed any of the following issues:

Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

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

Whether the offender and the community will benefit from the use of the alternative.

Likewise, the record does not show that the Defendant provided a proposed treatment plan that contained:

- (1) A proposed treatment provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services;
- (2) The recommended frequency and length of treatment, including both residential chemical dependency treatment and treatment in the community;
- (3) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and
- (4) Recommended crime-related prohibitions and affirmative conditions.

Ultimately, the trial court declined to impose a DOSA sentence, stating that the court didn't have "sufficient evaluation and factors to make a DOSA decision" and that, "If I had a DOSA and I had a recommendation and I saw you qualified, maybe I would give it to you." RP (5/11) 21, 25. The record, therefore, shows that the trial court considered a DOSA sentence, but that the Defendant failed to provide the court with sufficient information regarding the factors outlined in the statute which a trial court should address when deciding whether to impose a DOSA sentence. In addition, the Defendant failed to request a continuance to seek a further examination or an opportunity to provide a more complete examination report. RP (5/11) 8.

Given the limited information provided to the trial court, the trial court did not abuse its discretion by declining to impose a DOSA sentence. Rather, the trial court acted within its discretion when it considered the Defendant's request, but declined to impose a DOSA sentence when the Defendant failed to provide the court with the information necessary for the court to find that such a sentence was appropriate. For this reason, the trial court did not abuse its discretion and the Defendant's claim must fail.

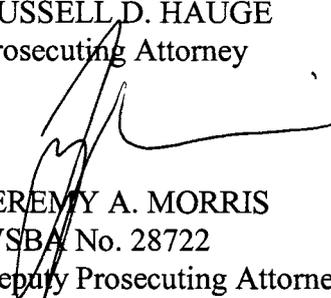
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED January 28, 2008.

Respectfully submitted,

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