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STATE OF WASHINGTON
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NO. 37453-6-II
Clark County No. 07-1-00320-7

STATE OF WASHINGTON,

Respondent,

vs.

REBECCA BABBITT

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
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9/11/07

ORIGINAL

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A. ASSIGNMENT OF ERROR

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED A DOSA SENTENCE TO MS. BABBITT.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PUNISHED MS. BABBITT FOR HAVING FAILED TO APPEAR FOR A COURT HEARING BY DENYING HER A DOSA SENTENCE, DESPITE OVERWHELMING EVIDENCE THAT SHE IS DESPERATELY IN NEED OF TREATMENT AND CANNOT GET IT IN THE DEPARTMENT OF CORRECTIONS WITHOUT A DOSA SENTENCE.

C. STATEMENT OF THE CASE

Rebecca Babbitt pled guilty to two counts of Identity Theft in the Second Degree, two counts of Forgery and one count of Theft in the Second Degree. CP 3-15. Ms. Babbitt sought to a sentence under the Drug Offender Sentencing Alternative (DOSA) and the court ordered an evaluation. RP Vol. I, p. 14-20, CP 24. Ms. Babbitt was ordered to appear for sentencing on December 14, 2007 at 2:30 p.m. CP 31. She failed to appear and a warrant was issued. CP 29-32. She reappeared for sentencing, in custody, on February 5, 2008. RP Vol. III. At that time, the court reviewed the DOSA evaluation from Lifeline Connections. RP Vol. III.

Both the State and the defense noted that the report from Lifeline was one of the most alarming reports each attorney had ever seen. RP

Vol. III, p. 29, 32. The Lifeline evaluator stated “Rebecca cannot stop her drug use without intervention. Rebecca is in need of immediate inpatient treatment to arrest her IV meth use. This counselor is quite concerned Rebecca may die of a drug overdose before she gets to sentencing on 11/17/07.” CP 21. The evaluator further noted that Rebecca was emotionally unstable and both wanted, and knew that she needed, treatment. CP 21. The evaluator concluded that Rebecca was emotionally unstable with feelings of self-loathing and a lack of self control, and that she exhibited a failure to recognize relapse triggers. CP 22. According to the evaluator, Rebecca requires 24-hour monitoring and structured support, and that she is unable to cope for even limited periods of time outside a structured environment. CP 22. Mr. Ingraham, the evaluator, concluded that Rebecca needed treatment as soon as possible and “cannot control use.” CP 26. All parties agreed Rebecca was eligible for a DOSA sentence. RP Vol. III.

The State argued against DOSA, citing Rebecca’s failure to go to Spokane and enter in-patient treatment the prior November, and her failure to appear for sentencing on December 14, 2007. RP Vol. III, p. 29-30. Defense counsel Ms. Cloutier explained the circumstances of what occurred with Rebecca. RP Vol. III, p. 30-33. Ms. Cloutier explained that Rebecca didn’t enter treatment in Spokane because she didn’t have the

money to purchase gas to get there. RP Vol. III, p. 30. She also explained that at the time of the December 14 sentencing hearing Rebecca was in the courthouse but in the wrong courtroom downstairs.¹ RP Vol. III, p. 31. Rebecca and Ms. Cloutier eventually located each other and returned to Judge Harris' courtroom, where it was decided that Rebecca would have to turn herself in to the jail after the issuance of a warrant. RP Vol. III, p. 31. The State prepared the warrant, the court issued it, and Rebecca turned herself in. RP Vol. III, p. 31. In other words, the failure to appear was nothing more than Rebecca making the mistake of going to the Pit rather than Department Five. RP Vol. III. The State did not dispute this account. RP Vol. III.

The court denied the DOSA sentence. RP Vol. III, p. 34-38. The court stated that it probably would have given her the DOSA sentence had she appeared in the correct courtroom back in December, but that she had "forfeited" that opportunity by her actions. RP Vol. III, p. 34. The court was also under the impression that Rebecca could get treatment in prison without a DOSA sentence. RP Vol. III, p. 36. The court sentenced Rebecca to more than four years in prison. CP 37. After arriving at the Department of Corrections Rebecca learned that she would not be given

¹ In Clark County, the courtroom on the bottom floor is called the "pit," the central docket hub of the courthouse. However, when matters are put on a special setting, they will typically be held in one of the Department courtrooms on the upper floors.

the opportunity to obtain treatment while incarcerated unless she was under a DOSA sentence. CP 76 (Declaration of Rebecca Babbitt). She filed a motion for review of her sentence based on this information. CP 68. The court denied the motion. 78. This timely appeal followed. CP 51.

D. ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PUNISHED MS. BABBITT FOR HAVING FAILED TO APPEAR FOR A COURT HEARING BY DENYING HER A DOSA SENTENCE, DESPITE OVERWHELMING EVIDENCE THAT SHE IS DESPERATELY IN NEED OF TREATMENT AND CANNOT GET IT IN THE DEPARTMENT OF CORRECTIONS WITHOUT A DOSA SENTENCE.

The trial court abused its discretion in denying a DOSA sentence to Ms. Babbitt. RCW 9.94A.660 governs the drug offender sentencing alternative. 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* 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).

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 it didn't believe the State was adequately funding the program and administering treatment. *Grayson*, 154 Wn.2d at 337. 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.” *Grayson*, 154 Wn.2d at 342.

Here, the opinion of the DOSA evaluator could not have been clearer: Rebecca is in dire need of treatment, so much so that he feared she would die before sentencing. Rebecca is totally unable to function without methamphetamine and unable to control her urge to use. The evaluator said that Rebecca is unable to cope for even limited periods of time outside a structured environment. In other words, without treatment under a DOSA sentence, it is a forgone conclusion that Rebecca will reoffend to support her habit. Among the factors to be considered by the court in deciding whether to grant a DOSA are whether the offender suffers from a drug addiction; whether the addiction is such that there is a probability that criminal behavior will occur in the future; and whether the offender and the community will benefit from the use of the alternative. RCW 9.94A.660 (2) (a) through (d).

Here, it cannot be credibly disputed that Rebecca has a serious addiction to methamphetamine, that she unquestionably will return to her criminality without treatment, and that both she and the community will benefit from the use of DOSA (because it is the only way, short of imprisoning her for the rest of her life, to have a chance at ending her

criminal behavior). In spite of this, the court denied DOSA to Rebecca as punishment for having been in the wrong courtroom on December 14th, when she was supposed to be in Department Five for sentencing. The court found this to be evidence of her lack of good judgment, as though her addiction weren't sufficient evidence of that in itself. Although not explicitly stated by the court, it appeared to make reference to Rebecca having not made it to Spokane for a treatment bed when it stated that she forfeited her right to DOSA because of her actions after being released in September. This, however, is precisely the type of behavior that makes one a proper candidate for DOSA in the first place: An inability to control one's actions and drug use without court ordered treatment. The court also appeared to rely on its mistaken belief that treatment would be available to Rebecca in DOC even without a DOSA sentence, which proved to be untrue.

By ignoring the overwhelming evidence that Rebecca was in dire need of treatment, instead favoring a punishment for past failures that were entirely attributable to terminal drug addiction, the court elevated form over substance. It is difficult to imagine a more compelling candidate for DOSA than Rebecca Babbitt. The court abused its discretion because its decision was based on untenable grounds that were wholly unrelated to the legislature's intent in crafting DOSA. This court

should reverse the sentence and remand this case for reconsideration of DOSA utilizing proper grounds.

E. CONCLUSION

Ms. Babbitt's sentence should be reversed and she should be granted a new sentencing hearing where DOSA can be properly considered.

RESPECTFULLY SUBMITTED this 5th day of September, 2008.



ANNE M. CRUSER, WSBA#27944
Attorney for Ms. Babbitt

APPENDIX

RCW 9.94A.660 Drug offender sentencing alternative.

****Update notice:** This section has been amended by
Chapter 231, Laws of 2008

(1) 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 the violation does not involve a sentence enhancement under RCW **9.94A.533** (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW **46.61.502** (6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW **46.61.504** (6);

(c) 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;

(d) For a violation of the Uniform Controlled Substances Act under chapter **69.50** RCW or a 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 factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

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

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

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

(2) A motion for a sentence under this section may be made by the court, the offender, or the state. If the sentencing court determines that the offender is eligible for this alternative, the court may order an examination of the offender. The examination 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.

(3) 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.

(4) After receipt of the examination report, if the court determines that

a sentence under this section is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under subsection

(5) of this section or a residential chemical dependency treatment-based

alternative under subsection (6) of this section. The residential chemical

dependency treatment-based alternative is only available if the midpoint of

the standard range is twenty-four months or less.

(5) The prison-based alternative shall include:

(a) A period of total confinement in a state facility for one-half of the midpoint of the standard sentence range or twelve months, whichever is greater. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections;

(b) The remainder of the midpoint of the standard range as a term of community custody which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services. If the department finds that conditions have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court;

(c) Crime-related prohibitions including a condition not to use illegal controlled substances;

(d) A requirement to submit to urinalysis or other testing to monitor that status; and

(e) A term of community custody pursuant to RCW **9.94A.715** to be imposed upon failure to complete or administrative termination from the special drug offender sentencing alternative program.

(6) The residential chemical dependency treatment-based alternative shall include:

(a) A term of community custody equal to one-half of the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the offender entering and remaining in residential chemical dependency treatment certified under chapter **70.96A** RCW for a period set by the court between three and six months. If the court imposes a term of community custody, the department shall, within available resources, make chemical dependency assessment and treatment services available to the offender during the term of community custody. The court shall impose, as conditions

of community custody, treatment and other conditions as proposed in the plan under subsection (3)(b) of this section. The department may impose conditions and sanctions as authorized in RCW 9.94A.715 (2), (3), (6), and (7), 9.94A.737, and 9.94A.740. The court shall schedule a progress hearing during the period of residential chemical dependency treatment, and schedule a treatment termination hearing for three months before the expiration of the term of community custody;

(b) Before the progress hearing and treatment termination hearing, the treatment provider and the department shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment. At the hearing, the court may:

(i) Authorize the department to terminate the offender's community custody status on the expiration date determined under (a) of this subsection; or

(ii) Continue the hearing to a date before the expiration date of community custody, with or without modifying the conditions of community custody; or

(iii) Impose a term of total confinement equal to one-half the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.715;

(c) If the court imposes a term of total confinement under (b)(iii) of this subsection, the department shall, within available resources, make chemical dependency assessment and treatment services available to the offender during the terms of total confinement and community custody.

(7) If the court imposes a sentence under this section, the court may prohibit the offender from using alcohol or controlled substances and may require that the monitoring for controlled substances be conducted by the department or by a treatment alternatives to street crime program or a comparable court or agency-referred program. The offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring. In addition, the court may impose any of the following conditions:

(a) Devote time to a specific employment or training;

(b) Remain within prescribed geographical boundaries and notify the court

or the community corrections officer before any change in the offender's address or employment;

(c) Report as directed to a community corrections officer;

(d) Pay all court-ordered legal financial obligations;

(e) Perform community restitution work;

(f) Stay out of areas designated by the sentencing court;

(g) Such other conditions as the court may require such as affirmative conditions.

(8) (a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the terms of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(9) If an offender sentenced to the prison-based alternative under subsection (5) of this section is found by the United States attorney general to be subject to a deportation order, a hearing shall be held by the department unless waived by the offender, and, if the department finds that the offender is subject to a valid deportation order, the department may administratively terminate the offender from the program and reclassify the offender to serve the remaining balance of the original sentence.

(10) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(11) Costs of examinations and preparing treatment plans under subsections (2) and (3) of this section may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

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

STATE OF WASHINGTON,)	Court of Appeals No. 37453-6-II
)	Clark County No. 07-1-00320-7
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
REBECCA LYNNE BABBITT,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 5th day of September,
2008 affiant placed a properly stamped envelope in the mails of the United States

addressed to:

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Clark County Prosecuting Attorney
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AND

David C. Ponzoha, Clerk
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950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

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Rebecca Babbitt
DOC #790046
Washington Corrections Center for Women
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Gig Harbor, WA 98332

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MS. BABBITT)
- (3) VRP (TO MR. CURTIS)
- (4) AFFIDAVIT OF MAILING

Dated this 5th day of September, 2008


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 5, 2008, Kalama, Washington

Signature: Anne M. Cruser