

**FILED**

SEP 16 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. ~~27829-8-III~~

40063-4-II

IN THE COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON

Respondent

v.

PAULETTE MELVILLE

Appellant

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BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred in denying Ms. Melville a drug offender sentencing alternative.
2. Ms. Melville received ineffective assistance of counsel.

II.

ISSUES PRESENTED

- A. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MS. MELVILLE A DRUG OFFENDER SENTENCING ALTERNATIVE (DOSA).
- B. WHETHER MS. MELVILLE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

STATEMENT OF THE CASE

For the purposes of this appeal the State accepts the Appellant's Statement of the Case.

#### IV.

#### ARGUMENT

#### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MS. MELVILLE A DRUG OFFENDER SENTENCING ALTERNATIVE (DOSA).

“As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable.” *State v. Grayson*, 154 Wash.2d 333, 338, 111 P.3d 1183 (2005); RCW 9.94A.585(1). In other words, review of DOSA rulings is not automatic. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision. RCW 9.94A.660(2); *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). “Generally, a standard range sentence, of which a DOSA is an alternative form, may not be appealed.” *Smith*, 118 Wn. App. at 292, 75 P.3d 986 (citing *State v. Williams*, 149 Wash.2d 143, 146, 65 P.3d 1214 (2003)).

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. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Discretionary decision of trial court will not be disturbed if it was based on tenable grounds or tenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). In addition, if “a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence [the trial court has then] exercised its discretion, and the defendant may not appeal that ruling.” *Garcia-Martinez*, 88 Wn. App. at 330.

In this case, the trial court had considered all the facts and arguments on a sentencing hearing conducted on July 8, 2005. After the sentencing hearing the trial judge stated that Ms. Melville’s prior ten convictions is a significant legal consideration when determining sentencing. (RP 158 – 60).<sup>1</sup> The trial judge explains that Ms. Melville’s criminal history is a “felony criminal history, to get to your

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<sup>1</sup> The Report of Proceedings (RP) in this brief refers to the sentencing hearing conducted on July 8, 2005.

standard range of punishment.” (RP 159) “Your standard range of punishment is 60 months and one day to 120 months.” (RP 159)

The trial judge’s reasoning for denying a DOSA sentencing is because of Ms. Melville’s long criminal history and prior convictions.

(RP 159 -61) The trial judge specifically states:

I know you are requesting that I do that [give you a DOSA]. But I will tell you what: I looked carefully at the convictions and what you got as sentences, and particularly out of Idaho. You had a substantial amount of time hanging over your head, still do, in Idaho and in Utah. A substantial amount of time hanging over your head to get you to comply with strict conditions of being drug-free, having no drugs in your possession, not associating with those who are involved with drugs, and that is where we are today. The comment I make about that is that that kind of sentence of suspending it, hanging it over your head, letting you try to do treatment and letting you – and trusting you to get a handle on your addiction, it didn’t work and it’s not going to work now. It’s not going to work now.”

(RP 160)

The trial judge goes on to explain that Ms. Melville “needs to be off the streets.” (RP 161) The trial judge then explicitly states that “DOSA request is not an option from my view, and the reason it isn’t is because you’ve had your chances, you have blown them; it’s now time to have you face the consequences.” (RP 162)

Based upon these facts, Ms. Melville requested a sentencing alternative authorized by statute, and the judge refused it based upon

tenable grounds and reasons relating to her extensive criminal history. There is no abuse of discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). And given the legal facts of this case the “a standard range sentence, of which a DOSA is an alternative form, may not be appealed.” *Smith*, 118 Wn. App. at 292, 75 P.3d 986 (citing *State v. Williams*, 149 Wash.2d 143, 146, 65 P.3d 1214 (2003)).

**B. MS. MELVILLE DID NOT RECEIVE  
INEFFECTIVE ASSISTANCE OF COUNSEL.**

Court reviews challenge to effective assistance of counsel de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption that counsel’s representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337, 899 P.2d 1251 (1995).

To prove ineffective assistance of counsel on appeal the Appellant must prove that 1) defense counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and 2) defense counsel’s deficient

representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Effective does not mean successful. The competency of counsel is not measured by the result. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 335, 337 (1995).

In this case, Ms Melville provides allegations regarding defense counsel's representation. There is no evidence from the record to provide a sufficient basis to rebut the strong presumption that counsel's representation was effective. Furthermore, Ms. Melville fails to provide facts regarding how this alleged representation was prejudicial to her. In other words, how there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d

674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Ms. Melville does not meet the two prong test to prove ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

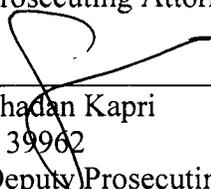
V.

#### CONCLUSION

For the reasons stated, the conviction of the Appellant should be affirmed.

Dated this 14 day of September, 2009.

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Prosecuting Attorney

  
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# 39962  
Deputy Prosecuting  
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**Affidavit of Certification**

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar Street, Spokane, WA 99201, and to Nancy P. Collins, Washington Appellate Project, 1511 3<sup>rd</sup> Ave., Ste. 701, Seattle, WA 98101-3635, and to Paulette Margaret Melville, #749695, P.O. Box 300, Medical Lake, WA 99022-0300 on September 14, 2009.

Michele Lembcke

Michele Lembcke, Legal Assistant  
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