

No. 40262-9-II

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

STATE OF WASHINGTON,

Respondent,

vs.

LARRY DOUGLAS STOVALL,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
2012 SEP 24 AM 9:06
STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

OPENING BRIEF OF APPELLANT
AMENDED

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A. ASSIGNMENT OF ERRORS

Assignment of Errors

1. The defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.
2. Reversal of the conviction should be granted & Stovall should be allowed to choose his remedy because the prosecutor implicitly breached the terms - of the plea agreement by arguing against a Drug offender Sentencing Alternative (DOSA) Sentence.
3. The State held unlawfully seized personal property, that were no longer needed as evidence at trial. An evidentiary hearing should be held to allow Stovall to claim his personal property and to demonstrate his entitlement.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERRORS

Issue Pertaining To Assignment of Errors

1. Whether the defendant was denied effective assistance of counsel, when his attorney failed to object to the State's breach of the plea agreement & then supported the State's breach of the plea agreement during sentencing? (Assignment of Error 1.)

2. Whether the prosecutor offered Stovall plea deal? And whether the terms were that Stovall would enter an "ALFORD PLEA" to all the charges, and bus zone enhancement with the understanding the prosecution would request a sentence of 84 months with -- DOSA, and credit for time served, while Stovall would argue for DOSA sentence. Did the prosecutor implicitly breach the plea where, at sentencing, he did not simply argue in favor of the 84 months sentence, but also argued at length against the DOSA sentence where the ability to request that sentence was clearly the basis for Stovall's decision to enter the plea in the first place? (Assinment of Errors 2.).

3. During the December 31, 2009. Whether the prosecution denied Stovall's due process when it held unlawfully seized personal property nolonger needed as evidence by refusing to return it, or allowing Stovall to demonstrate his right to entitlement? (Assignment of Error 3.).

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Larry Douglas Stovall, was charged by information, November 3, 2008, with unlawful deliv-
APPELLANT STOVALL'S OPENING BRIEF PAGE 2-of-35

ery of a controlled substance, and unlawful possession with intent to deliver cocaine. CP 1-2. The -- court found there was probable cause. CP 3-4.

On May 12, 2009, Stovall entered an Alford Plea to an Amended Information, filed February 5, 2009, as to count one, unlawful delivery of a controlled substance, unlawful possession with intent to deliver cocaine, and a bus zone enhancement. 1RP6. That same day, the Honorable Frederick W. Fleming - accepted that plea. 1RP12.

As part of the colloquy, the court said to Stovall:

The prosecutor makes a recommendation which is 84 months, in count I and II it says to run concurrent. Is that what you're agreeing with? 1RP9.

Do you understand that recommendation? 1RP9. 1RP9.

And then community custody is nine to 12 months in each count. 1RP10.

\$500 crime victim penalty assessment; \$100 DNA sample; \$200 court costs; \$400 to DAC recoupment. And the defense can argue for a DOSA sentence. And forfeit seized property. 1RP10.

Now, with that in mind, you, of course understand that the court doesn't have to follow anyone's recommendation. 1RP10.

That same day, the Honorable Frederick W. Fleming, Judge accepted that plea. 1RP12. See CP 7-15 The Honorable Frederick W. Fleming set sentencing for June 19, 2009, at 1:30 p.m. and signed an order for DOSA screening. 1RP12. See CP 5-6.

Sentencing was set over several times, as defense counsel claimed to have problems contacting the correct person at DOC for DOSA screening, so he said. See 2RP5; 3RP25; 4RP4; and 5RP6-7.

At the September 18, 2009, post-trial proceedings, the State made the following statement: "The State is going to "change it's recommendation and -- agree with defense counsel that DOSA is an appropriate sentence in this case". 3RP5.

Appellant Stovall maintain he had the support of the State for DOSA screening and approval -- for a DOSA sentence upon the verification of a chemical dependency, which is required for a DOSA -- sentence. 1RP10; 2RP4; 3RP5;, and 5RP4.

Sentencing was held before the Honorable Judge Frederick W. Fleming on December 31, 2009, after which the judge imposed a standard range sentence and at the State's request, denied appellant

Stovall the return of two cellphones out of three - cellphones that were seized at evidence, and held - by the State, and never objected to by the defense counsel Shane M. Silverthorn, in either matter before the court. 6RP20-24.

2. Facts relevant to issues on appeal

On May 12, 2009, Stovall argued to enter an Alford Plea¹ to all the charges filed by the State, to include, unlawful delivery of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and a bus stop zone enhancement. See 1RP9.² At the plea hearing, the court informed Stovall that the standard range was 84 to 144, as to count 1, and 60 to 120 as to count 2, -- and the bus stop enhancement of 24 months to be ran concurrent, based on Stovall's offender score and the statutory maximum and that the prosecution would be recommending such a sentence. 1RP9.

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

²The verbatim report of proceedings consists of four volumes, which will be referred to as follows:

May 12, 2009. as "1RP"
Aug 7, 2009. as "2RP"
Sept 18, 2009, as "3RP"
Dec 4, 2009, as "4RP"
Dec 18, 2009, as "5RP"
Dec 31, 2009, as "6RP"

The court also ensured that Stovall understood that under the agreement, he would be permitted to argue inter alia, for a Drug Offender Sentence Alternative (DOSA) sentence. 1RP9. Indeed, the court said the plea agreement specifically focused on the DOSA option, declaring that "I am just saying I am not going to order DOSA unless I have some verification that there's money available for it is a reality". 3RP7.

At the December 31, 2009 hearing, the State informed the court that Stovall had filed motions and bar complaints about misconduct as to DOSA recommendation and the plea agreement use to obtain the plea. 5RP4.

At the final sentencing hearing held before the Honorable Frederick W. Fleming, judge, December 31, 2009. The State, was represented by James H. Curtis, deputy prosecuting attorney, for Pierce County and defense counsel for Mr. Stovall, was represented by Shane M. Silverthorn, private attorney court appointed. Both attorneys argued at length against Stovall receiving a (DOSA) sentence. 6RP7-9.

Appellant Stovall informed the court of his investigation as to the State and defense counsel DOSA recommendation, plea agreement and his whole - waiting to be screen for DOSA, while other inmates were being screened and leaving to prison on a DOSA related sentences. 6RP14-16.

Here, the Honorable Frederick W. Fleming judge stated, " I am convinced that the just and fair sentence in this matter is not DOSA, so I am going to follow the recommendation of the State. I am going to impose the 84 months with credit for how time you served". 6RP20.

Defense counsel failed to object to the State's request for the 84 months with out DOSA and also failed to request and object to the State's denial to the return of Mr. Stovall two of three cellphones. As only one was used to receive a call from the informant on October 31, 2008, but the court -- denied the return of the cellphones. The State called all the cellphones contraband. 6RP20-23.

D. ARGUMENT

1.) THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL!

On December 31, 2009, defense counsel Shane M. Silverthorn failed to object to the State's request for a sentence with out DOSA, and the return of Mr. Stovall's cellphones, and chose to support the State in their efforts to deprive Mr. Stovall of his - "Alford Plea Agreement", and "Personal Property". 5RP4; 6RP7-9; and 6RP20-23. See CP 7-15.

(a) Standard of Review

According to In re Riley, 122 Wn.2d 772, 863 P.2d 554 (1993):

"The sixth amendment to the United States Constitution guarantees a criminal defendant the right 'to have assistance of counsel for his defense.' U.S. Const. amend. 6 The right to counsel means the right to the effective assistance of counsel".

id. at 779-80, (citing Strickland v. Washington, 46 6 U.S. 668, 686,80 L.Ed674, 104 S.Ct. 2052(1984) - (citing McMann v. Richardson, 397 U.S. 759, 771 n. 14, 25 L.Ed. 763,90 S.Ct. 1441 (1970)). See also, - article one, section 22 of the Washington Constitution.

The Strickland test is set forth in State v. Thomas, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987):

"First, the defendant must show that counsel's performance was deficient. That requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense.. See also, State v. Jeffries, 105 Wn.2d 398,418, 717 P.2d 722, cert. denied, 93 LE.d2d 301 (1986); State v. Sardinia, 42 Wn.App. 533, 713 P.2d 122 (1986)."

(citing Strickland v. Washington, 466 U.S. at 687)

According to State v. Benn, 120 Wn.2d 631,6-63, 845 P.2d 289 (1993):

"A defendant is denied effective assistance of counsel if the complained of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct,and (2) there is a probability that the outcome would be different but for the attorney'S conduct Strickland v. Washington, 466 U.S. 668,687-88,694,80 LE.2d 674, 104 S.Ct. 2052 (1984)."

Both prongs of the Strickland test have been described as:

"Under one prong the performance prong the defendant must show that counsel's performance was deficient. Under the other prong the prejudice prong the defendant must show how that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780, citing Strickland, 466 S. Ct. at 687. The Supreme court adopted this test in State v. Jeffries, 105 Wn.2d at 418.

According to Thomas:

"To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

A reasonable probability is probability is a probability sufficient to undermine confidence in the outcome.

109 Wn.2d at 226 (citing Strickland, at 694) ((court's italics

However,

"If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Adams, 91 Wn.2s 86,90,586 P.2d 1168 (1978)."

State v. Lord, 117 Wn.2d 829,883,822 P.2d 177 (1991), cert. denied, 113 S. Ct. 164 (1992).

(b) Ineffective Assistance Post Conviction

First, on May 12, 2009, defense Counsel Shane M. Silverthorn worked out "Alford Plea" with deputy prosecuting attorney James H. Curtis, for appellant Stovall, which was signed by the parties, and accepted by the Honorable Frederick W. Fleming, Judge. 1RP12. CP 7-15.

Second, on May 12, 2009, the court and Counsel had the following communication between them about

the drafting of a pleading dealing with the request for DOSA for appellant Stovall.

THE COURT: And I just read on my e-mail that there's more money, I notice in here that there's a recommendation for DOSA. And I just heard that there's more money. I think it's a judge of Clallam County who is most familiar with this DOSA. I think it is Clallam County. So, if you are going to put this thing together to ask for DOSA, I want all the details. I want it all spelled out. 1RP13.

MR. SILVERTHORN: Yes, Your Honor. 1RP13.

THE COURT: And, as I said, there is money available now, and what the plan will be specifically. 1RP13.

MR. SILVERTHORN: And to that end, also, your Honor, I will come back. I have a DOSA screen that was e-mailed to me, so I will print it out from the library downstairs and then bring that back up. It is an order to have the DOC do the in-custody screening. So, we will have the assessment and I can bring that back. 1RP13.

THE COURT: But, the assessment and the plan. And then the thing that would be prudent to put together is there is money now available, so a court knows that you can order this and have the money available to order it. 1RP13.

MR. SILVERTHORN: Yes, Your Honor. 1RP13.

THE COURT: Anything else from the State? 1RP13.

MR. CURTIS: Nothing else from the State, your Honor. 1RP13.

THE COURT: From the defense, Mr. Silverthorn? 1RP14.

MR. SILVERTHORN: Nothing further. Thank you, Your Honor. 1RP14.

THE COURT: Do you have anything else to add Mr. Stovall? 1RP14.

THE DEFENDANT: No, not at this time, Your Honor. 1RP14.

THE COURT: Pardon? 1RP14.

THE DEFENDANT: Not at the time. 1RP14.

THE COURT: No. Okay. 1RP14.

THE COURT: Okay. You just turned 50? 1RP14.

THE DEFENDANT: Yes, sir, I just turned 50! 1RP14.

THE COURT: In January! Have you ever been to treatment before? 1RP14.

THE DEFENDANT: No, I haven't! 1RP14.

THE COURT: All right. Are you ready to be excused? 1RP14.

MR. CURTIS: Yes. 1RP14.

THE COURT: Are you ready to be excused? 1RP15.

MR. SILVERTHORN: Yes, Your Honor. But I will return forthwith with my DOSA screening order. 1RP145

THE COURT: Okay. How long have you been in jail now? 1RP15.

THE DEFENDANT: Been in jail since October 31st, 2008; about five, six months. 1RP15.

MR. CURTIS: Okay. I think we're ready now. 1RP15.

(Proceeding concluded.)

On August 7, 2009, again, sentencing was held before the Honorable Frederick W. Fleming, Judge, - the State represented by deputy prosecuting attorney James H. Curtis, and defense was represented by Shane M. Silverthorn, and minutes of the following hearing was held below.

AUGUST 7, 2009

AFTERNOON SESSION

* * * * *

MR. CURTIS: Your Honor, this is State of Washington v. Larry Douglas Stovall, Cause Number 08-1-05203-8. 2RP4.

James Curtis on behalf of the State of Washington. The defendant is present. Do you want to bring the defendant up here? 2RP4.

The defendant is present, in custody, with counsel, Shane Silverthorn. Your Honor, we are here today for sentencing. This case I believe, back in May, we were here for trial, May 11th. And there was on the 12th, the defendant pled guilty to unlawful delivery of controlled substance and unlawful possession of controlled substance with intent to deliver. And there was a school enhancement. He's looking at 84 to 144 months in prison. 2RP4

We set it over so he could receive a DOSA evaluation so the defense can argue for a DOSA. That hasn't happened yet, the DOSA evaluation. Here we stand, Your Honor. I believe that defense counsel is going to make a motion to continue. There's no obj-

ection from the State. However, the State is eager to put this case to rest and allow the Court to move on. So, I will pause for the Court at this time. 2RP4.

MR. SILVERTHORN: Your Honor, I'am Shane Silverthorn, on behalf of Larry Stovall. We continued this last time, before the hearing, because there was yet no report. 2RP5.

THE COURT: That's in July, the 16th 2RP5.

MR. SILVERTHORN: Yes, Your Honor. There's no report yet from DOSA. 2RP5.

At that time, I had called the screening office at the Department of Corrections. They referred me to Pioneer Human Services, who they out source the screening to. They gave me the name of a person named Belinda who does this. She was on vacation. I left several messages, sent several faxes, never got a call back. We eventually did get a call back, saying we're not the office that does that anymore; went back to DOC got a different name. This week we have called no less than 15 different numbers until we finally figured out who is doing the DOSA screening for DOC. We faxed them conformed copies of the Court's order that we printed off from LINX, and they assure us that they're going to be working on it. They have yet to then go in and interview Mr. Stovall. 2RP 5.

He's eligible for DOSA under his criminal history. We need to know whether he's appropriate and what sort of treatment they would line out. And I've been working on a DOSA brief that Your Honor had requested, but I can't finalize that, either, until I determine whether or not they think he is appropriate for DOSA. So, we are asking to set this over to the September 18, calendar. 2RP6.

Mr. Stovall is agreeable. Last time he waived speeding sentencing. This time, we have enumerated the same. 2RP6.

THE COURT: So, another 60 days, another 30 days. 2RP6.

MR. SILVERTHORN: Yes, please, Your Honor. 2RP6.

THE COURT: And that's what you want to do, Mr. Stovall? 2RP6.

THE DEFENDANT: Yes, Your Honor. 2RP6.

THE COURT: Okay. You don't care, Mr Curtis? 2RP6.

MR. CURTIS: Well, Your Honor, I'm not in a position, I think I will defer to the Court on this one. I don't have any objections. I want to get this matter resolved. 1RP6-7.

THE COURT: Are you retained ? Or. 2RP7.

MR. SILVERTHORN: Assigned Counsel, Your Honor. 2RP7.

(Proceeding concluded.)

On December 1, 2009, Mr. Stovall filed a motion to Discharge Counsel, with supporting memorandum, memorandum in support request for sentencing, - and a motion for specific performance, with supporting declaration of George Hendricks, declaration - Michael Allen, and declaration of Lee Petry. See Pierce County Criminal Case Docket, in (APPENDIX-A). However, the State, represented by deputy James H. Curtis failed to appear. The matter was presented - by defense counsel Shane M. Silverthorn, who obtained a continuance. 4RP4.

On December 18, 2009, both parties appeared before the Honorable Frederick W. Fleming, Judge -- for sentencing and the following hearing was held - below:

DECEMBER 18, 2009

AFTERNOON SESSION

* * * * *

THE COURT: This is Cause Number 08-1-05203 -8, State of Washington v. Larry Douglas Stovall.

That's your full, true name, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. State ready?

MR. CURTIS: Yes Your Honor. If I may, Your Honor, James Curtis, on behalf of the State of Washington. We're here today for sentencing on Mr. Stovall. 5RP4.

Your Honor, this case was originally set for trial. The defendant pled guilty under the agreement that the State would recommend 84 months in the Department of Corrections and that the defendant would have the right to argue for DOSA. I reviewed the Defendant's Statement on Plea of Guilty, and it's reflected in that document. 5RP4.

Now, for this purpose, the State is making a record, because there's been a lot of motions filed by Mr. Stovall, accusing the State of misconduct. And I just want to make sure that the record is clear. In the judgment, in the plea agreement, the State agreed to. 5RP4.

THE COURT: The Statement of the Defendant on Plea of Guilty? 5RP4-5.

MR. CURTIS: Yes. The State recommended 84 months, and the defendant was going to argue for DOSA. At that time, the Court gave the defense counsel a task of researching whether not just whether the defendant qualifies for DOSA, there was appropriate funding for the DOSA. 5RP5.

Here, the State argues indirect against DOSA, with out any objection by counsel Shane M. Silverthorn:

MR. CURTIS: As for the position on this the State is not objecting to the defendant receiving a DOSA, However, I think, because of the documentation that's been filed, I just want to make the record about DOSA. 5RP5.

The defendant testified during the 3.5 hearing, Your Honor. He testified. He took the stand, and he was asked questions by me. And I asked him questions regarding drug use and drug possession. And the defendant denied any

possession of drugs. He denied any drug use. In fact, he indicated that the Lakewood Policemen lied and put drugs on his person and -- planted the drugs. That was his testimony. 5RP6.

I understand that DOSA is a program that the Court likes to utilize when the individual has an identifiable drug issue and wants to get help. When the defendant testified at the 3.5, he indicated he didn't use drugs. And he has never admitted that much on the record to this Court, Your Honor. 5RP6.

The Court has the final say in whether the defendant gets a DOSA, but I know that he was sentenced with 14 felony points, Your Honor. And I am going to defer to the Court as to whether he gets a DOSA, but I just wanted to clarify the record of what the State's initial offer to the defendant was with regards to the plea agreement and the defendant's assertions that have become part of the record. 5RP6. Defense counsel made no objection to the State's argument.

Thank You. 5RP6.

THE COURT: Mr. Silverthorn, what do you want to tell me? 5RP6.

MR. SILVERTHORN: Your Honor, when I originally set about for doing the screening, DOC had outsourced most of their screening to a few different agencies, Civigenics, and Pioneer, and a few others. I copied all of them, the order for DOSA screen, and received results from them that they no longer do pre-sentence screenings for prison-based DOSA. 5RP7.

So, then I was just climbing up the food chain, and it took me months and months, and months, and I finally got ahold of the right person who is Joseph Sofia with the Department of Corrections, who informed me that, indeed they stopped doing pre-screened DOSAs, but then they started over again. 5RP7.

So, on the date of our last hearing, two weeks ago today, I got him another copy of that order. They did send somebody in. He has been screened and they found a chemical dependency. 5RP7. See Supp. CP ____ (Chemical Dependency Form, Dated 12-10-2009, in (APPENDIX-B)).

THE COURT: That's this order or this evaluation screening that's dated 12-10-2009. See Supp. CP ____ (Chemical Dependency Form, dated 12-10-2009 5RP7. See Chemical Dependency Form in (AP-B)).

On December 18, 2009, during defense counsel Shane M. Silverthorn presentation to the court he failed to produce, and file the memorandum, or brief to the court demonstrating that whether DOSA is available, funded program as requested by the court. 5RP5-27. See Pierce County Criminal Case Docket 08-1-05203-8, in (APPENDIX-A). As a result made him ineffective during post conviction proceedings. 5RP5-27.

On December 31, 2009, during the last scheduled sentencing hearing before the Honorable Frederick W. Fleming, Judge of the Pierce County Superior Court, to allow defense counsel to argue for a DOSA sentence for Mr. Stovall. The following presentation by defense Shane M. Silverthorn was made on

behalf of the State of Washington, and defendant Mr Stovall, which placed in to question his conduct, and state of mind, with respect to his failure to - object to the State's arguement against DOSA for Mr Stovall. Counsel agreement that the State could -- argue against DOSA for Mr. Stovall, failure to request specific performance, and his failure to file a motion under CrR 2.3(e) for the return of 2 cell phones of three below. 6RP4-24.

DECEMBER 31, 2009

AFTERNOON SESSION

* * * * *

MR. CURTIS: This is State of Washington v. Larry Douglas Stovall, Cause Number 08-1-05 203-8. James Curtis on behalf of the State of Washington. The defendant is present, in custody, with counsel. 6RP4.

Your Honor, we're here today for a sentencing.. The last time we were here, the defendant refused to stipulate to his criminal history, and the State was forced to obtain every certified Judgment and Sentence for his past 13 felonies. 6RP4.

THE COURT: So, that's the agreement? And what's State recommending, then? 6RP7.

MR. CURTIS: Your Honor, at trial, the defendant decided he wanted to plead guilty, and the State agreed that it would recommend 84 months; and the defense was going to argue to the Court for

for a DOSA, special Drug Offender Sentencing Alternative. 6RP7.

Your Honor, I just want to briefly, I'm not going to take too much time, because I think we have done this plenty of times. I just want the court to know that, in considering whether to sentence the defendant to the drug offender program, I would like the court to know that the defendant each of the defendant's drug convictions, past convictions, except for one in King County, were for delivering cocaine. He has a history of delivering drugs. He's a drug dealer. And when he was on community custody, instead of under community custody, instead of getting treatment, instead of following the court's instructions of not hanging out with drug users or dealers, he continued to deal drugs, Your Honor. and I know that the Court has expressed that the defendant is intelligent and that he knows the law, yes, Your Honor, he's been able to play the system but, at his last trial, Your Honor, the trial judge sentenced him to 144 months. And, not less than a year after he was let out of prison, Your Honor, he was back on the streets, selling dope. He is a drug dealer. He's smart. He can say the right things, but he's a drug dealer. 6RP8.

On December 31, 2009, the State represented James H. Curtis, went from conferring with the court, to a full out right argument to deny Mr. Stovall the right to obtain the DOSA sentence agreed upon in his closing presentation to the court with no objection by defense counsel Shane M. Silverthorn to the State's breach of the plea agreement. - 6RP9.

"He's a drug dealer. And I hope the Court recognizes that in considering what sentence.

The last time he was in front of a judge, he had 144 months. I'm recommending 84 months, and I'm asking the court not to give him the Drug Offender Special Sentencing -- Alternative. 6RP9."

THE COURT: Mr. Silverthorn, what do you want to tell me? 6RP9.

(Defendant and defense counsel confer of record.)

MR. SILVERTHORN: I just don't think I can do or say anything. Mr. Stovall has a memorandum in support of motion and declaration, attorney/client conflict of interest, exigent circumstance, mandating the immediate discharge of counsel. He's filed Bar complaints against me. He's filed Bar complaints against Mr. Curtis. They've been dismissed. He has filed appeals on the dismissal. 6RP9.

MR. SILVERTHORN: At one point, Mr. Curtis was even agreeing with me that he would support the DOSA, but so much has happened. 6RP11.

THE COURT: In the recommendation, though, you agree that the State's recommendation, through the deputy prosecutor, is 84 instead of 144; and to argue against the Drug Offender Sentencing Alternative is within the discretion of the agreement and the prosecutor? 6RP11.

MR. SILVERTHORN: I do. I do agree that, I guess what I'm saying here, just for the record, is that there was an evolution which began with this offer that State made and is sticking to and has come back to. Somewhere in the middle there, Mr. Curtis, working with me, time and time again, his mind was beginning to change. And it looked like we were going to maybe have agreed recommendation. But, all of these motions, all of these Bar complaints, all this stuff that's going on, you know,

so, I understand his position. I'm not moving for specific performance. I don't think there, there was never a DOSA recommendation by the State. 6RP11.¹

MR. CURTIS: The State made a recommendation for 84 months. I have clarified that. Now I 6RP11.

MR. SILVERTHORN: I'm still talking. 6RP11.

MR. CURTIS: Yes, but you are making allegations against me and saying. 6RP11.

MR. SILVERTHORN: If you would listen to the rest of the statement, Mr. Curtis, I think you will understand the difference. 6RP11.

THE COURT: Go ahead. 6RP11.

MR. SILVERTHORN: I 'am protecting myself on this record, okay. This is what I'm doing. I'm making a record for Shane Silverthorn I tried, sentencing after sentencing after sentencing, to get more information from Mr. to come through for You Honor, to get studies for you, to show the program is viable, and to keep working with Mr. Curtis. And I feel like Mr. Curtis and I were close to an agreement at one point. That's all I'm saying. I'm saying that the advocacy continued throughout. 6RP11-12.

THE COURT: You are not at all stating that the State, through Mr. Curtis, has violated their recommendation and agreement, then? 6RP12.

MR. SILVERTHORN: "That's correct!" The State has been nothing but helpful; in fact, knowing

¹ On September 18, 2009, the State, represented by deputy James H. Curtis, made the following presentation to the court:

MR. CURTIS: The State is going to change its recommendation and agree with defense

I start a new job in Kitsap County on Monday, kicked everything into high gear and got certified copies from throughout the -- State of Washington, you know, to proceed during this calendar year. Okay: So, that's the record that I want to make. 6RP12.

On December 31, 2009, defense counsel Shane M Silverthorn misinformed, misled and "out-right" lied to the court as to the facts dealing with the DOSA plea, on the Statement of Defendant On Plea and the recommendation by the State, represented by James H Curtis on the above date, demonstrating he was without complete memory as to the facts, acting in concert with the State to obtain an unfavorable sentence for defendant Stovall, out of retaliation or revenge after being exposed by Mr. Stovall that he -- never contacted Department of Corrections about the DOSA evaluation for a period of 14 months until the e Bar complaints, and Motions, and Memorandums were filed against counsel Silverthorn. 6RP14-15 CP 7-15.

¹ On September 18, 2009, the State, represented by deputy James H. Curtis, made the following presentation to the court:

counsel that DOSA is an appropriate sentence in this case. I understand that he hasn't been screened, but based on my research and preparation in the case, I know I believe that he is a drug user. 3RP5¹

MR. CURTIS: One last thing. I'm ready for this matter to be done with. I talked to Mr. Silverthorn about this matter, am I'm not opposed to DOSA. Ultimately, the Court is going to make a decision. 3RP7.¹

(c) Ineffective Assistance At Sentencing

On December 31, 2009, during sentencing and a motion made in open court by defendant Stovall for the return of two cellphones of three. Defense counsel allowed the State to move the court for forfeiture of the property with out conducting a proper hearing pursuant to CrR 2.3 (e), as demonstrated by the proceedings below. 6RP22-24.

(Defendant & defense counsel confur off record.)
6RP22.

THE DEFENDANT: There is an issue of property, though. 6RP22.

THE COURT: I entered an order the said all contraband that's in the property will be forfeited. So, if there's something that's not contraband is a cell phone. 6PR22.

THE DEFENDANT: The only thing that's there in property that's not contraband is a cellphone. 6RP22.

THE COURT: Will, then, they'll have that order that they can retrieve anything that's not contraband out of the property room.
6RP23

MR. CURTIS: Your Honor, it's the State's position that that is contraband. It's a cellphone. It was used as partt of drug delivery. 6RP23.

THE DEFENDANT: There were three cellphones. One is a personal phone. One was a -- business phone. And one was a phone that I was transferring numbers out of in to -- one of the working phones. The informant did call me on one of the phones. 6RP23.

THE COURT: Well, it would appear, then -- that that is not something that can be returned, that that's part of the evidence in the criminal case, even though you pled guilty and it wasn't used. 6RP23.

(Defendant counsel and defendant confur off record.) 6RP23.

THE COURT: Did I sign the warrant of commitment? 6RP23.

JUDICIAL ASSISTANT: Yes. 6RP23.

THE COURT: Did you put the 426 days in -- here, counsel? 6RP23.

MR. CURTIS: Yes, I did. 6RP23.

THE COURT: Did you check it, Mr. Silvert-horn? 6RP24.

MR. SILVERTHORN: Yes, Your Honor. 6RP24.

THE COURT: Did you sign this Judgment and Sentence, Mr. Stovall? 6RP24.

THE DEFENDANT: Yes, I did, Your Honor. 6- RP24.

THE COURT: Did you check the credit for time served being right. 6RP24.

THE DEFENDANT: Yes. 6RP24.

(Proceedings Concluded)

According to the rules of Professional Conduct 8.4 RPC. It is Professional Misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty; trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the rules of Professional Conduct or other law;

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) N/A

(h) N/A

(i) N/A

(j) Willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) Violate his or her oath as an attorney;

(l) Violate a duty or sanction by or under the Rules for Enforcement of Lawyer Conduct in connections with a...;

(m) Violate the Code of Judicial conduct;

(n) engage in conduct demonstrating unfitness to practice law.

Defense counsel Shane M. Silverthorn, lied to the court when he told the court that there was no DOSA deal between Mr. Stovall, and the State presented by James H. Curtis, deputy prosecuting for Pierce County December 31, 2009, during sentencing on the plea agreement. 6RP11-12. Whether counsel violate the rules of professional conduct, and Mr. Stovall constitutional rights to effective assistance of counsel is a matter of law, and the court's understanding of the facts as presented. See 6RP11-12.

2.) THE STATE VIOLATED STOVALL'S DUE PROCESS RIGHTS BY BREACHING THE PLEA AGREEMENT AND STOVALL SHOULD BE ALLOWED HIS CHOICE OF REMEDY!

Pleas agreements are contracts between the -- prosecution and the accused. See State vs. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). As part of a plea agreement, the defendant gives up many important constitutional rights. See e.g., State vs

Jerde, 93 Wn.App. 774, 780, 970 P.2d 781 review, denied, 138 Wn.2d 1002 (1999). As a result, a prosecutor has a due process duty to act in good faith - and with fairness in upholding a plea agreement in to which the prosecutor's office has entered. See Sledge, 133 Wn.2d at 839-40; State vs. Shineman, 94 Wn.App. 57, 6061, 971 P.2d 94 (1999). The terms of the agreement became binding on the State once the trial court accepts the plea. See State vs. Miller, 110 Wn.2d 528, 536, 756 P.2d 122 (1988).

When a prosecutor breaches a plea agreement, due process mandates that the conviction must be reversed and the defendant is entitled to his choice of remedies, i.e., either to withdraw the plea and go to trial, or to sepcifically enforce the terms - of the agreement. See Sledge, 133 Wn.2d at 846. If the defendant chooses specific enforcement he is entitled to a new sentencing hearing in front of a - different judge. State vs. Van Buren, 101 Wn.App. - 206, 218, 2P.3d 991, review denied, 142 Wn.2d 1015 (2000).

In this case, it is Stovall's position that the prosecutor breached the plea agreement by not -

just simply arguing for the 84 months sentence the prosecutor said he would recommend, but indeed whole heartly, and aggressively argued against the very sentence he knew Stovall would seek. As a threshold matter, this issue is properly before this Court. Even if a defendant fails to object or move to set aside the plea below, the breach of a plea agreement is an issue of constitutional magnitude which may be raised for the first time on appeal as a manifest error under RAP 2.5(a)(3). See VanBurn 101 Wn.App. at 211. Further, here, Stovall has specifically moved to withdraw his plea. See CrR 7.8 Motion, as Personal Restraint Petition #41575-5-II. Thus, this Court may address Stovall's arguments in this case.

On review, this court should reverse. While a prosecutor need not enthusiastically advocate for a specific recommendation based on a plea, the prosecutor must not violate the integrity of the plea -- bargaining process by engaging in conduct which either explicitly or implicitly circumvents the agreement. See State vs. Xaviar, 117 Wn.App. 196, 199, 69 P.2d 901 (2003).

Here, while the agreement indicated that the prosecutor would ask for a sentence of 84 months, - it also indicated that the prosecutor understood -- and agreed that Stovall would be seeking a (DOSA) - 1RP11-15, 2RP4-7, 3RP7, 5RP4-5, and 6RP7. See CP 7-15. Nothing in the agreement indicated that the prosecutor would actively advocate against Stovall's request for a DOSA sentence. CP 7-15. Yet, here, - the opportunity to seek a DOSA was clearly the only reason that Stovall agreed to enter the plea in the first place. See CP 7-15. Obviously, had Stovall -- known that the prosecutor was going to argue against the DOSA request, instead of just saying it preferred the 84 months sentence, Stovall would not -- have entered the plea. As the State's conduct is -- noted through out the record is conflicting and uncertain as to the State's real intent. 3RP5.

Notably, this was not a "Straight" guilty plea case. Instead, Stovall entered an "Alford Plea" an inherently equivocal plea the very nature of which requires greater scrutiny than the average guilty plea. See Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). Such pleas do -

not involve admissions of guilt and are instead the result of a defendant's "cost benefit" analysis of what is best for him, based upon his understanding of his options. See State vs. D.T.M., 78 Wn.App. 2-16, 220, 896 P.2d 108 (1995). It is thus, especially important to ensure that the defendant's understanding of what he is exchanging his important rights for is not undercut by the action of the prosecutor.

3.) THE STATE VIOLATED STOVALL'S DUE PROCESS RIGHTS BY REFUSING TO RETURN UNLAWFULLY SEIZED PERSONAL PROPERTY AND STOVALL SHOULD BE ALLOWED AN EVIDENTIARY HEARING IN ORDER TO DEMONSTRATE HIS ENTITLEMENT!

In State vs. Card, 48 Wn.App. 781, 741 P.2d 65 (8/1987), citing, State ex rel. Schillberg v. Everett District Court, 90 Wn.2d 794, 585 P.2d 1177 (11/1978).

A motion for return of property made after an information is filed is treated as a motion to suppress. 12 R. Ferguson, Wash. Prac., Criminal Practice § 2305, at 444 (1984). However, a motion for -- return of property may be made at any time including after a determination of guilt. 12 R. Ferguson, § 2305. Card at 786.

[3] State ex rel. Schillberg vs. Everett District. Justice Court, *Supra*, construed JCrR 2.3(e), which has the same wording as CrR 2.3. Here the court described the procedure contemplated by CrR 2.3 (e) as encompassing an evidentiary hearing in which the State and the claimant of the property had the better claim to possession of the property . State ex rel Schillberg vs. Everett Dist. Justice Court, *supra* at 796-98. There, both the State and the claimant of the property submitted affidavits which comprised the only evidence before the court. The court's description of the procedure contemplated by JCrR 2.3(e) (to include an evidentiary hearing) is applicable to CrR 2.3(e) by analogy. Therefore, CrR 2.3(e) requires an evidentiary hearing. See Card 48 Wn.App. at 786.

Mr. Stovall verbally motioned the trial court during sentencing December 31, 2009, and requested the return of two cellphone, of three cellphones, - as only one was used to talk to the informant, and for this reason alone, he believed he was entitled to the return of the other two cellphones that whee

re not apart of the police claimed drug transaction of October 31, 2008, buy bust operation conducted - by Lakewood Police Department. 6RP22-24.

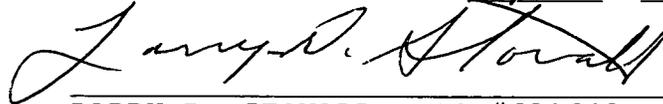
E. CONCLUSION

For the reasons outlined and stated herein the court should reverse, and remand back to the trial court with instruction to enter an order to impose a DOSA sentence, and to hold an evidentiary hearing to determine whether Mr. Stovall is entitled to the return of his personal property (two cellphones), - and for any other reasons this court finds to be in order, and just.

In the alternative, in conjunction with Mr. -- Stovall's PRP, this case should be reverse and remand for dismissal based on the PRP, and direct appeal.

Respectfully Submitted this: 19th of Sept, 2012

By:



LARRY D. STOVALL, DOC #631643
WASHINGTON STATE PENITENTIARY
MINIMUM SECURITY UNIT-10, B-11
1313 NORTH 13TH AVE
WALLA WALLA, WA 99362

Certificate of Service By Mail

I, Larry D. Stovall, certify under the penalty of perjury the laws of the State of Washington, that I placed an original of this document and one copy in the internal institutional mail system at Washington State Penitentiary - Security Unit, postage paid, and addressed to the individuals listed.

1.) DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIV. II
950 BROADWAY, SUITE #300
TACOMA, WA 98402

2.) THOMAS CHARLAES ROBERTS, DEPUTY
PIERCE COUNTY PROSECUTING ATTORNEY'S OFFICE
930 TACOMA AVE SO. RM #946
TACOMA, WA 99362

Dated: _____

09/19/2012

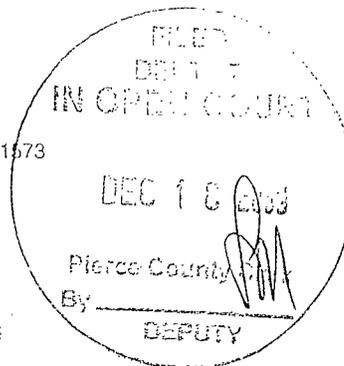
Larry D. Stovall

LARRY DOUGLAS STOVALL, DOC #631643
WASHINGTON STATE PENITENTIARY
MINIMUM SECURITY UNIT-10, B-11
1313 NORTH 13TH AVE
WALLA WALLA, WA 99362

(APPENDIX-A)



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100 • (360) 753-1573



December 10, 2009

Mr. Larry Stovall, DOC 631643
BKG#: 2008305026
Pierce County Sheriff's Department
910 Tacoma Avenue South
Tacoma, WA 98402-2168

Dear Mr. Stovall:

~~I have been asked to respond to your letter sent to Governor Gregoire dated October 22, 2009.~~
You wrote in regards to the Drug Offender Sentencing Alternative (DOSA) budget.

You have requested information regarding available funds for the DOSA program. I would like to inform you that there have been no changes or "budget cuts" proposed for DOSA. The funds available for this program operated by the Department of Corrections remain the same and there have been no future projected changes.

A presentation was made to the Pierce County Superior Court on October 20, 2009. They are aware that DOSA is fully operational.

Thank you for your interest.

Sincerely,


Richard Morgan, Director
Prisons Division

RM:bm:GOV2059

cc: Christine O. Gregoire, Governor
Eldon Vail, Secretary
Robert Reagan, Community Corrections Officer
Offender File

"Working Together for SAFE Communities"



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

CHEMICAL DEPENDENCY DRUG DEPENDENCE SCREEN

Screening Outcome Indicates: CD N

Instructions for administering the Drug Dependence Screen

The screen may be administered by a CCO or designee and may be done in the following manner:

1. Provide the offender with a copy and ask that it be completed, in the presence of DOC/CD staff, and return upon completion
2. Read the screen to the offender and circle the appropriate answers for them.

The CCO/designee who administers the screen is responsible to complete the scoring. **Do not provide the offender with a copy of the scoring guidelines.**

During the last 12 months or before being incarcerated (if applicable):

NO YES

1. Did you use larger amounts of drugs (including alcohol) or use them for a longer time than you had planned or intended? NO YES
2. Did you try to cut down on your drugs/alcohol use and were unable to do it? NO YES
3. Did you spend a lot of time getting drugs/alcohol, using them, or recovering from their use? NO YES
4. Did you get so high or sick from drugs/alcohol that it:
 - a. Kept you from doing work, going to school, or caring for children? NO YES
 - b. Caused an accident or put you or others in danger? NO YES
5. Did you spend less time at work, school, or with friends so that you could use drugs? NO YES
6. In the last 6 months before incarceration, did your drug/alcohol use cause:
 - a. Emotional or psychological problems? NO YES
 - b. Problems with family, friends, work, or police? NO YES
 - c. Physical health or medical problems? NO YES
7. Did you increase the amount of a drug/alcohol you were taking so that you could get the same effects as before? NO YES
8. Did you ever keep taking a drug/alcohol to avoid withdrawal or keep from getting sick? NO YES
9. Did you get sick or have withdrawal when you quit or missed taking a drug/alcohol? NO YES

APPENDIX-B

Larry Douglas Stovall
Print Patient/Offender Name

1031043
DOC Number/Target Agency Number

12/10/09
Date

10. Which drugs/alcohol caused you the **MOST serious problems**?
- 0. None
 - 1. Alcohol
 - 2. Inhalants
 - 3. Marijuana
 - 4. Cocaine or crack
 - 5. Other stimulants

- 6. Tranquilizers or sedatives
 - 7. Hallucinogens
 - 8. Opiates
- Worst Drug # 4
 Next Drug # 2
 Next Drug #
 Next Drug #

11. How often did you use each type of drug during the last 12 months or before incarceration?
- a. Alcohol and other drugs
 - b. Marijuana/Hashish
 - c. Hallucinogens/LSD/Psychedelics/PCP/Mushrooms/Peyote
 - d. Crack/Freebase
 - e. Heroin and Cocaine (mixed together as speedball)
 - f. Cocaine (by itself)
 - g. Heroin (by itself)
 - h. Street Methadone (non-prescription)
 - i. Other Opiates/Opium/Morphine/Demerol
 - j. Methamphetamine/Speed/Ice/Other Uppers
 - k. Tranquilizers/Barbiturates/Sedatives (downers)
 - l. Other (specify) _____

NEVER	ONLY A FEW TIMES	1-3 TIMES A MONTH	1-5 TIMES A MONTH	DAILY
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<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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12. In the last 12 months or before entering prison, how often did you inject drugs with a needle?

Never 1 Time 2 Times 3 Times 4 or More Times

13. How serious do you think your drug/alcohol problems are?

Not at all Slightly Moderately Considerably Extremely

14. How many times before now have you been in a drug or alcohol treatment program? [DO NOT INCLUDE AA/NA/CA MEETINGS]

Never 1 Time 2 Times 3 Times 4 or More Times

15. How important is it for you to get drug/alcohol treatment?

Not at all Slightly Moderately Considerably Extremely

The records contained herein are protected by Federal Confidentiality Regulations, 42 CFR Part 2. The Federal rules prohibit further disclosure of this information to parties outside of the Court a Criminal Justice system unless such disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2

LARRY D. STOVALL, DOC #631643
WASHINGTON STATE PENITENTIARY
MINIMUM SECURITY UNIT-10, B-11
1313 NORTH 13TH AVE
WALLA WALLA, WA 99362

SEPTEMBER 19, 2012

TO:
DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIV. II
950 TACOMA AVE SO. SUITE# 300
TACOMA, WA 98402-4454

RECEIVED
SEP 24 2012

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

RE: STOVALL'S AMENDED OPENING BRIEF
COURT OF APPEALS, DIV. II #402620-9-II

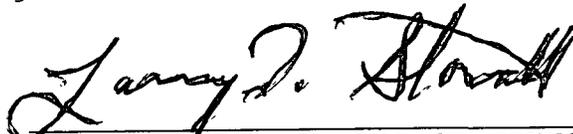
Dear Clerk:

Please find enclosed, my Amended Opening Brief for filing and processing in your court.

On July 14, 2012, I placed in the institutional mail, a motion and declaration for leave to amend the appellant's brief to -- include ineffective assistance of counsel under the above appellate cause number. However, this court failed to respond to the request to amend the appellant's opening brief to date. Thus, I file this timely amended opening brief with the court's objections.

Dated: _____

9/19/2012



LARRY D. STOVALL, PRO SE COUNSEL