

NO. 41886-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

LORIN DEWAYNE JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Diane Woolard, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court committed reversible error when it commented on the evidence at trial.

2. The trial court erred in categorically refusing Jones a prison-based DOSA.

3. The trial court abused its discretion by denying Jones a prison-based DOSA based on an erroneous interpretation of the law.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial judge prejudicially comment on the evidence when she affirmed in open court and in front of the jury that the arresting officer correctly identified Lorin Jones as the driver of a stolen car? [Assignment of Error 1]

2. At sentencing, the trial court flatly refused to consider Jones for a prison-based DOSA sentence. The refusal was based on an erroneous interpretation of the law. Is Jones entitled to a new sentencing hearing? [Assignment of Error 2 and 3]

C. STATEMENT OF THE CASE

Kari Magistrale drives a 2008 Ford Focus. RP (“Report of Proceedings”) at 38.¹ She also plays on a kickball team. RP at 39. One

¹ There is only a single volume of verbatim in this case.

afternoon, she and her boyfriend drove to a park to play kickball. RP at 39, 42. She parked her car there and left a lot of personal items in it. RP at 39-42. When she returned to the parking lot three hours later, her car was gone. RP at 39-40. There was some telltale broken glass near where she'd left her car. RP at 40. No one had permission to take her car so she called the police and reported her car stolen. RP at 42.

The next day, Vancouver Police Officer Scott Telford was on the lookout for a car alleged to have been involved in a traffic complaint. RP at 50-51. He saw the car and stopped it. RP at 52. The car was Magistrale's Ford Focus. RP at 54, 58. The driver's window was missing and the car's driver was sitting on a blanket. RP at 54-55.

Per Officer Telford's trial testimony, he identified the car's driver and only occupant as Lorin Jones. RP at 53. "Lorin Jones" was the name on the identification the driver gave to Officer Telford. RP at 53. The driver's seat was covered with a blanket. RP at 55.

The driver told the officer that he borrowed the car the night before from a woman named Kayla. RP at 56. The driver was waiting for his ex-girlfriend to return to her house. RP at 57. He grew tired of waiting for his girlfriend so he left. RP at 57. As he was walking away, he saw Kayla and her boyfriend fighting. RP at 57. The boyfriend broke out the window of what the driver assumed was Kayla's car. RP at 57. The

driver asked Kayla if he could borrow the car and she said he could but that he needed to bring it back the next day. RP at 57. The driver did not get a phone number, a last name, or an address for Kayla. RP at 57.

During trial testimony, the prosecutor asked Officer Telford to “point out verbally by his location and the color of shirt he is wearing,” the person he saw driving Magistrale’s car. RP at 53. The officer apparently did something because the prosecutor asked the trial judge, “If the record can reflect that Officer Telford identified the Defendant, Lorin Jones?” The judge replied, “So it shall reflect.” RP at 53.

Jones did not testify at trial and presented no defense witnesses. RP 69-74.

Jones was convicted as charged with Possession of a Stolen Motor Vehicle. CP 20.

At sentencing, Jones requested that he be considered for a prison-based DOSA sentence. RP at 112, 131-39. The trial court categorically denied Jones’ request because Jones had another pending non-violent felony charge. RP at 131-39.

Jones received a 43-month sentence. CP at 23; RP at 139. He makes a timely appeal. CP 35-50.

D. ARGUMENT

1. THE TRIAL COURT DENIED JONES A FAIR TRIAL WHEN IT AFFIRMED OFFICER TELFORD'S TRIAL TESTIMONY THAT JONES WAS THE DRIVER OF THE STOLEN CAR.

Jones was denied a fair trial because the trial court told the jury that Jones was the driver of the stolen car. The court did this by affirming, at the prosecutor's request, that the arresting officer correctly identified Jones in the courtroom as the driver of the stolen car. The court's affirmation relieved the state of its burden to prove an element of the offense, namely that Jones, as the driver, was in possession of the stolen car. Jones is entitled to a new trial.

Article 4, Section 16, of the state constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional provision prohibits a judge from conveying to the jury her personal opinion regarding the merits of the case or a particular issue within the case. *State v. Theroff*, 95 Wn. 2d 385, 388-89, 622 P.2d 1240 (1980). The prohibition is intended to prevent a trial judge's opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Because a judicial comment on the evidence violates a constitutional prohibition, failure to object does

not prevent a defendant from raising the issue on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judicial comment is presumed prejudicial unless the state shows that the defendant was not prejudiced or the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006); *State v. Lundy*, ___ Wn. App. ___, 256 P.3d 466, 470 (2011).

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jones was charged with possession of a stolen motor vehicle.² CP 3. To convict Jones, the state had to prove the following four elements:

- (1) That on or about July 12, 2010, [Jones] knowingly received, retained, or possessed a stolen motor vehicle;
- (2) That [Jones] acted with knowledge that the motor vehicle had been stolen;
- (3) That [Jones] withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
- (4) That any of these acts occurred in the State of Washington.

CP 16.

² RCW 9A.56.068

In an effort to prove that Jones was in possession of Magistrale's stolen car, the following exchange occurred between the prosecutor, Mr. Ikata, and Vancouver Police Officer Scott Telford:

Q: And the person you saw driving that vehicle on that date, is that person here in the courtroom today?

A: Yes.

Q: And can you point him out verbally by his location and the color of shirt he is wearing?

A: He is sitting at the Defendant's table. Blue shirt, t-shirt.

MR. IKATA: If the record can reflect that Officer Telford identified the Defendant, Lorin Jones?

JUDGE WOOLARD: So shall it reflect.

RP at 53.

That Lorin Jones was the driver of the stolen car was a fact left to the state's proof; not the trial court's affirmation of fact. Judge Woolard's assurance to the jury that "the person [Officer Telford] saw driving that vehicle on that date" was Lorin Jones was a prejudicial comment on the evidence. The state can not establish otherwise.

In cross examining Officer Telford, Jones successfully demonstrated that Officer Telford was not detailed-oriented or one to necessarily notice things. For example, Officer Telford wrote nothing in his police report about the car window being broken. Yet, in trial, Officer

Telford testified that the window was in fact, broken. Officer Telford wrote nothing in his police report about there being a blanket on the car seat. Yet, Officer Telford testified that there was such a blanket on the driver's seat. Officer Telford also failed to note the address for Jones' ex-girlfriend, in his report. RP at 63. When Officer Telford searched the car prior to it being impounded, he made no effort to distinguish Kara Magistrale's possessions from items that might have identified who actually stole the car. RP at 64. Officer Telford did not take any photos of the car. RP at 64. Officer Telford did not make any effort to get fingerprints from the car. RP at 65.

The state could not prove its case without proof that it was actually Lorin Jones who possessed the stolen car. A statement by the trial court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation of a disputed issue can be inferred from the statement. *State v. Hansen*, 46 Wn.App. 292, 300, 730 P.2d 706, 737 P.3d 670 (1986). As our Supreme Court has stated, "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Jones cast enough doubt on Officer Telford's ability to carefully recall detail that the trial court's

impermissible bolstering of Telford's identity of Jones as the driver of the stolen car caused irreversible prejudice. Jones' conviction must be reversed.

2. JONES IS ENTITLED TO A REMAND FOR RESENTENCING BECAUSE THE TRIAL COURT ERRED IN REFUSING TO CONSIDER JONES' ELIGIBILITY FOR A DOSA SENTENCE.

At sentencing, Jones asked to be considered for a prison-based drug offender sentencing alternative (DOSA). RCW 9.94A.662. The trial court recognized that both the community and Jones would benefit from Jones receiving drug treatment. RP at 138. Yet, the court denied Jones an opportunity for DOSA because Jones had a pending non-violent felony charge. But Jones' pending charge did not preempt Jones from receiving DOSA. As such, the trial court erred by categorically refusing to consider Jones for a DOSA sentence and abused its discretion when it based the denial on an erroneous interpretation of the law.

As a general rule, the trial judge's decision of whether to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). However, an offender may always challenge the procedure by which a sentence was imposed. *Id.* Specifically, an offender may challenge a legal error in the trial court's determination of eligibility for a

DOSA sentence. *State v. Watson*, 120 Wn.App. 521, 529, 86 P.3d 158 (2004), *aff'd*, 155 Wn.2d 574 (2005). An offender may also challenge a sentence for an abuse of discretion. It is an abuse of discretion for a trial court to categorically refuse to seriously consider whether a DOSA sentence was appropriate. *Grayson*, 154 Wn.2d at 342. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *See, e.g., State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

RCW 9.94A.660 provides the prison-based DOSA eligibility requirements.

(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 end of 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.

Jones' conviction was for possessing a stolen motor vehicle, a non-violent felony. CP 1-2. His standard range was 43-57 months. CP 39. He had a long criminal history much of which "related to a persistent drug problem that Mr. Jones has had throughout his life." RP at 131; CP 31-32. When Jones asked to be considered for prison-based DOSA, the trial court categorically denied his request merely because Jones has another non-violent felony, attempted escape, pending. RP at 131. "[D]OC isn't going to accept somebody on prison based DOSA...with a full term sentencing that's pending with that." RP at 133. And, "[W]ith another case pending it seems to be a moot point at present time." RP at 135. And finally, "I am ruling [DOSA] out at this point because we have got something else out there that could make a prison based DOSA absolutely moot." RP at 135.

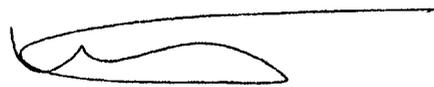
But the court had no legal basis for its opinion. RCW 9.94A.662 does not disqualify a defendant from prison-based DOSA merely because a defendant has a pending non-violent charge. The trial court erred by categorically refusing Jones DOSA and abused its discretion by basing its refusal on an erroneous interpretation of the law.

Both Jones and the community would benefit from Jones receiving drug treatment. Jones should be remanded to the trial court for reconsideration of his prison-based DOSA request.

E. CONCLUSION

Lorin Jones' conviction should be reversed. Alternatively, his case should be sent back to the trial court so the court can properly evaluate Jones as a prison-based DOSA candidate.

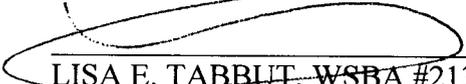
Respectfully submitted this 1st day of September 2011.



Lisa E. Tabbut, WSB # 21344
Attorney for Lorin Jones

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct. I emailed this document to: (1) Anne Cruser, Clark County Prosecutor's Office prosecutor@clark.wa.gov; and (2) the Court of Appeals, Division Two; and (3) that I mailed this document U.S.P.S., first class postage pre-paid, to Lorin D. Jones/DOC#963734, Larch Corrections Center, 15314 NE Dole Valley Rd., Yacolt, WA 98675-9531 on September 2, 2011.


LISA E. TABBUT, WSBA #21344

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