

**NO. 45814-4-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**KENNETH RAYMOND FORGA,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**I. ISSUE**

1. Was the Appellant denied effective assistance of counsel when his trial counsel did not request a prison DOSA?

**II. SHORT ANSWER**

1. **No.** The Appellant was not denied effective assistance of counsel.

**III. STATEMENT OF FACTS**

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

**IV. ARGUMENT**

**I. THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn. App. 256, 262, (1978); *see also* U.S. Const. Amend. VI, Wash. Const. art. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wn. App. at 262 (quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Jury*, 19 Wn. App. at 262.

(citing *State v. Myers*, 86 Wn.2d 419 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Jury*, 19 Wn. App. at 263.

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Visitacion*, 55 Wn. App. at 173. “A defendant must meet both prongs to satisfy the test.” *State v. Brockob*, 159 Wn.2d 311, 344-45 (2006).

Deference will be given to counsel’s performance in order to “eliminate the distorting effects of hindsight” and the reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. *State v. Lopez*, 107 Wn. App. 270, 275 (2001), *aff’d*, 147 Wn.2d 515 (2002). A decision concerning trial strategy or tactics will not establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996); *State v.*

*Garrett*, 124 Wn.2d 504, 520 (1994); *State v. McFarland*, 127 Wn.2d 322, 335 (1995).

**a. The Appellant cannot show that his trial counsel failed to provide effective representation.**

The Appellant argues that his trial counsel failed to effectively represent him because he failed to request a prison DOSA at the time of sentencing. The Appellant's main point of contention is simply that he would have qualified for a prison DOSA, therefore his trial counsel should have requested one. This argument makes two assumptions. First, it assumes that the Appellant wanted a prison DOSA. There is nothing in the record to even suggest that the Appellant himself ever contemplated requesting a prison DOSA, let alone instructed his trial counsel to request one from the trial court.

Secondly, this argument assumes what is in the mind of a defendant at the time of sentencing. Under a prison DOSA, the court would sentence a defendant to confinement for one-half of the midpoint of the standard range and community custody for one-half of the midpoint of the standard range. RCW 9.94A.662(1). In this case, the Appellant's standard sentencing range, with the school bus stop enhancements, was 68 to 108 months. CP 82. Under a prison DOSA, the trial court would have sentenced the Appellant to 44 months of confinement and 44 months of

community custody. The Appellant's argument assumes that the Appellant wanted to be placed on community custody for nearly four years. Once again, nothing in the record supports this contention.

At no point during the Appellant's allocution does he mention, infer, or state that he would like to seek out chemical dependency treatment. 2RP at 329-332. Instead, the Appellant utilized that time to express his view on the jury verdict. Furthermore, the Appellant's trial counsel conducted the sentencing hearing as any reasonably competent attorney would have done under these circumstances: he requested a sentence at the bottom of the range and he pointed out some of the mitigating factors the court should consider. 2RP at 328-29.

If this Court were to adopt the Appellant's rationale, a duty would be placed upon defense counsel to always request sentencing alternatives, possibly even if a defendant does not wish to request one. At a minimum, there needs to be something in the record that the Appellant wanted to seek out chemical dependency treatment, that he believed he was ready to address his drug addiction, and that he was willing to be placed on community custody for nearly four years. Since there is no record of this, we cannot say that the Appellant's trial counsel did not represent him effectively.

**b. The Appellant cannot show prejudice.**

Even if the Court finds that the Appellant's trial counsel was required to request a prison DOSA, the Appellant must show that he was prejudiced. The Appellant cannot meet this burden. The Appellant's argument assumes the trial court would have granted the prison DOSA simply because a request was made. However, we cannot assume what the trial court would have done if such a request had been made.

On the other hand, we can assume the opposite – that the court would not have granted a prison DOSA. “[E]ligibility does not automatically lead to a DOSA sentence. Instead, under RCW 9.94A.660(1)(a)-(g), the sentencing court must still determine that ‘the alternative sentence is appropriate.’” *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014) (quoting *State v. Barton*, 121 Wn. App. 792, 795 (2004)). In *Hender*, the defendant was convicted of two counts of delivery of methamphetamine with a single school zone enhancement. *Hender*, 180 Wn. App. at 897. At the time of sentencing, the defendant requested a DOSA sentence. *Id.* During his allocution, the defendant denied dealing methamphetamine. *Id.* at 898. The trial court denied the defendant's request for a DOSA, noting that the defendant lacked accountability and refused to be responsible for the conduct that led to his criminal conviction.

*Id.* at 898, 902. “If a user does not take responsibility for his behavior, he is not likely to be receptive to change in the behavior.” *Id.* at 902.

Here, just like the defendant in *Hender*, the Appellant denied selling or delivering methamphetamine. 2RP at 329. The trial court specifically noted that the Appellant refused to take responsibility for his actions. 2RP at 330. Therefore, like the court in *Hender*, based upon the Appellant’s allocution, we can make an assumption that the trial court would like not have granted a prison DOSA.

**V. CONCLUSION**

As stated above, the Appellant was not denied effective assistance of counsel. Therefore, the Appellant’s appeal should be denied.

Respectfully submitted this 3 day of November, 2014

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 3<sup>rd</sup>, 2014.

Michelle Sasser  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**November 03, 2014 - 11:58 AM**

## Transmittal Letter

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