

NO. 47671-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RUBEY,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

GREGORY C. LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR ..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 1

D. ARGUMENT ..... 2

**The trial court erroneously concluded Mr. Rubey was  
statutorily ineligible for a DOSA** ..... 2

E. CONCLUSION ..... 6

TABLE OF AUTHORITIES

**Washington Supreme Court**

*In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31,  
604 P.2d 1293 (1980)..... 2  
*State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) ..... 2, 3  
*State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993) ..... 3  
*State v. Quismundo*, 164 Wn.2d 499, 192 P.3d 342 (2008)..... 3  
*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*,  
122 Wn.2d 299, 858 P.2d 1054 (1993)..... 3

**Washington Court of Appeals**

*State v. White*, 123 Wn. App. 106, 97 P.3d 34 (2004)..... 3

**Statutes**

RCW 9.94A.533 ..... 4, 5  
RCW 9.94A.660 ..... 1, 2, 4, 5  
RCW 9.94A.662 ..... 2

A. ASSIGNMENT OF ERROR.

The trial court improperly denied Michael Rubey a Drug Offender Sentencing Alternative (DOSA).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A sentencing court must consider a request for a DOSA sentence and may not deny such a request based on a misunderstanding of the law or by failing to consider mandatory statutory criteria. The trial court erroneously concluded the provisions RCW 9.94A.660 rendered Mr. Rubey ineligible for a DOSA. Did the court deny Mr. Rubey a DOSA on an impermissible basis?

C. STATEMENT OF THE CASE.

A jury convicted Mr. Rubey of two counts of second degree possession of a firearm and one count of obstructing law enforcement CP 34-36. At sentencing, Mr. Rubey requested the court impose a DOSA for the two felonies. RP 421. The court denied the request concluding Mr. Rubey was statutorily ineligible because the present offenses involved weapons. RP 422.

D. ARGUMENT.

**The trial court erroneously concluded Mr. Rubey was statutorily ineligible for a DOSA.**

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Consistent with this general limitation on a court’s sentencing authority, the DOSA statute structures a court’s authority when considering a DOSA. *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.

If the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range or 12 months, whichever is greater. RCW 9.94.660(3); RCW 9.94A.662(1)(a). Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.662(1)(b). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may

result in serving the remainder of the sentence in prison. RCW 9.94A.662(3); *Grayson*, 154 Wn.2d at 338.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. But every defendant is entitled to ask the trial court for meaningful consideration of a DOSA request. *Id.* at 342. A party may challenge a trial court's failure to exercise discretion where the trial court categorically or unreasonably denies a DOSA sentence. *Id.*; *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

“[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law.” *Grayson*, 154 Wn.2d at 338. A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); *see also State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal).

The trial court found Mr. Rubey was ineligible for a DOSA because the court mistakenly believed any offense involving a firearm is ineligible under the statute. RP 422. RCW 9.94A.660 provides.

(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.

The trial court misread the provisions of RCW 9.94A.660(1)(a) to exclude any conviction which “involved a weapon.” However, it is clear the statute only excludes offenses which involve a firearm or deadly weapon enhancement— offenses which “involve a sentence enhancement under RCW 9.94A.533 (3) or (4).” RCW 9.94A.533(3) and (4), of course, concern firearm and deadly weapon enhancements. Each of those subsections expressly exempt unlawful possession of a firearm from their provisions. RCW 9.94A.533(3)(f); RCW 9.94A.533(4)(f).

Because they are not violent or sex offenses and do not involve a weapon enhancement, Mr. Rubey’s convictions for unlawful possession do not render him statutorily ineligible for a DOSA. The trial’s court contrary conclusion is simply incorrect under the plain language of the statute.

Because the trial court failed to properly apply the statute, Mr. Rubey is entitled to a new sentencing hearing at which a court gives proper consideration to his eligibility for a DOSA sentence.

E. CONCLUSION.

For the foregoing reasons, Mr. Rubey respectfully requests this Court remand his case for a new sentencing hearing.

Respectfully submitted this 10<sup>th</sup> day of December 2015.

*s/ Gregory C. Link*  
GREGORY C. LINK – 25228  
Washington Appellate Project  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 47671-1-II
	)	
MICHAEL RUBEY,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] NEIL HORIBE, DPA	( )	U.S. MAIL
[PCpatcecf@co.pierce.wa.us]	( )	HAND DELIVERY
PIERCE COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA
930 TACOMA AVENUE S, ROOM 946		COA PORTAL
TACOMA, WA 98402-2171		
[X] MICHAEL RUBEY	(X)	U.S. MAIL
374187	( )	HAND DELIVERY
MCC-WASHINGTON STATE REFORMATORY	( )	_____
PO BOX 777		
MONROE, WA 98272		

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF DECEMBER, 2015.



X \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

**December 11, 2015 - 4:19 PM**

## Transmittal Letter

Document Uploaded: 8-476711-Appellant's Brief.pdf

Case Name: STATE V. MICHAEL RUBEY

Court of Appeals Case Number: 47671-1

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

[PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us)