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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH ALAN WUCO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian E. Chushcoff

No. 17-1-00419-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does defendant incorrectly claim his case should be remanded so a previously unrequested exceptional sentence can be considered, as the record is devoid of proof the trial court misunderstood its discretion to grant that unrequested relief when it *reluctantly* granted the DOSA¹ defendant said was necessary to effectively treat the addiction that ruined his life?
2. Has defendant failed to prove his counsel deficient in obtaining the DOSA defendant said he needed, for the available record only supports the presumption defendant sought the DOSA as part of an informed strategy to reduce his imprisonment while ensuring access to intensive drug treatment that did not attend the unrequested exceptional sentence the trial court had no inclination to grant?

¹ Drug Offender Sentencing Alternative. RCW 9.94A.660; .662.

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant is now a 33-year old recidivist drug and property crime offender who started accumulating his 18 criminal convictions at 19. CP 57. He was charged with theft of a firearm, unlawful possession of it and vehicle prowling for breaking into Charles Benzinger's Chevy and stealing a pistol hidden within. 3RP 325. Defendant's guilt was proved by the testimony of seven witnesses as well as video of him committing the crimes. 3RP 274; Ex.1. So, he was convicted as charged. 5RP 493. The available record does not contain privileged communications regarding the sentencing strategy adopted by the defense to compare against the DOSA pursued.

The State argued for a high-end sentence of 218 months. 6RP 513. Defendant beseeched the court to grant him a DOSA. 6RP 523-24, 540-47. Defendant led the court to believe he "hate[s]" what he is "capable of doing" when he allows his addiction to "meth" and "opioids" get the best of him. 6RP 540-41. He attributed his crimes to a series of skipped 12-step meetings that opened a gap for his addiction to take hold. *Id.* He *expressed* remorse for the people he hurt, then stressed that he was "tired of feeling hopeless and lonely and desperate." 6RP 542. He represented the "best chance" he had was "to take advantage of any programs ... to deal with the problem at the source, addiction." 6RP 542.

The court tested his sincerity by pressing him for details during an extended colloquy. 6RP 543-47. Defendant's mental health history was discussed. 6RP 546. The court carefully weighed attributes that made him eligible for a DOSA against those that made him a recidivist to "put away for just as long as" the law allowed. 6RP 555. In the end, after hearing from defendant's counsel, two witnesses who spoke on defendant's behalf and defendant, the court was persuaded to give him the chance he pleaded for by granting the DOSA. 6RP 555. The result was a 95.5-month term of confinement followed by an equal term of community custody instead of the 218 months sought by the State.²

A notice of appeal was timely filed. CP 94. In spite of defendant's effort to convince the trial court to grant the DOSA needed for his recovery, defendant now claims the judge who granted that mercy misunderstood his discretion to instead—*sua sponte*—grant defendant an exceptional sentence below the standard range. Defendant also claims his counsel was deficient for failing to argue for accelerated release before a court that contemplated sending defendant away for as long as the law allowed.

² 6RP 513, 524-30, 555.

2. FACTS

Food chemist Charles Benzinger parked his Chevy outside Johnny's Fine Foods in Tacoma where he worked for over 17 years. 3RP 322-23. A pistol he carried under permit was concealed inside the car. 3RP 324-25. Shortly thereafter, he learned the car had been prowled. 3RP 311, 316-17. Security video showed defendant arrive in his truck, walk up to Benzinger's car, punch its passenger window, reach in, then flee. 3RP 324, 348; Ex. 1. Defendant got away with the pistol. *Id.*, 327-28; Ex.1. But he was good enough to drop his phone at the scene. 3RP 312. Police tracked him to his home. 3RP 393. The pistol turned up later. 3RP 395.

C. ARGUMENT

The Sentencing Reform Act (SRA) generally governs the sentences courts can impose. It aims to ensure criminals are held accountable through consistent punishment proportionate to their offenses. RCW 9.94A.010. Those who commit multiple felony firearm offenses receive consecutive sentences. RCW 9.94A.589(1)(c). Courts nevertheless retain discretion to impose more lenient exceptional sentences, yet only if an offender proves by a preponderance of the evidence that there are substantial and compelling mitigating circumstances to make a presumptive sentence clearly excessive in light of the SRA's purpose. *State v. McFarland*, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017); RCW 9.94A.535.

In appropriate cases, courts can *instead* grant eligible defendants a DOSA. *State v. Murray*, 128 Wn.App. 718, 726, 116 P.3d 1072 (2005); RCW 9.94A.660. But if a DOSA is granted, the trial court cannot create a “hybrid” sentence by using an exceptional sentence to reduce a DOSA’s legislatively prescribed prison term. *Id.* For to do so invades the province of our Legislature to balance an offender’s drug treatment needs with society’s interests. *Id.* Trial courts are not permitted to decide for themselves that a DOSA prison term triggered by an offender’s convictions is inadequate to meet the offender’s particular treatment needs. *Id.*

1. THE RECORD IS DEVOID OF PROOF THE COURT MISUNDERSTOOD ITS DISCRETION TO IMPOSE AN EXCEPTIONAL SENTENCE THAT WAS NOT REQUESTED WHEN IT TOOK DEFENDANT AT HIS WORD AND GRANTED THE DOSA HE SAID WAS NEEDED TO PUT AN END TO THE ADDICTION RUINING HIS LIFE.

A trial court’s decision to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Review is limited to resolving challenges to the procedure by which a DOSA was imposed. *Id.* Sentences within the standard range are likewise unreviewable, unless the court impermissibly refused to meaningfully consider an offender’s request for an exceptional sentence or the court operated under a mistaken belief it could not grant the request. *McFarland*, 189 Wn.2d at 56. A mistaken belief about discretion can be found in statements of discomfort which imply the

court misperceived itself to be without options; however, courts are rightly presumed to know the law, so a strong showing of misunderstanding is required. *State v. Cantu*, 156 Wn.2d 819, 834, 132 P.3d 725 (2006).

"Context matters," *Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301 (2006). So it is in the context of defendant's unmistakable strategy of trying to persuade the court to impose a DOSA that its remarks about its discretion must be considered. A DOSA was the only sentence the defense requested. 6RP 523, 530. Defendant's mother recalled how addiction ruined his life. 6RP 525-26. She described a previous sentence that was too short to qualify him for the drug treatment he needed to avoid reoffense. 6RP 526.

Then on his behalf, she said:

[I]'m asking you [to] choose a sentence that would recognize that he is an addict.... [I]t is the DOSA program that I'm asking for you to consider him for so he can eventually come out and [make a] contribution

6RP 528. Similar sentiments were shared by his pastor and his counsel, who exclusively advocated for a DOSA. 6RP 529-32.

In conclusory fashion defendant claims the court misunderstood its discretion to impose concurrent sentences in his case. Yet the absence of meaningful analysis to support that assertion should preclude review. *See City of Bellevue v. Raum*, 171 Wn.App. 124, 149, 286 P.3d 695 (2012). Examination of the record he ignores reveals the court's only reference to

consecutive sentences arose in the context of the DOSA being discussed and was responsive to argument aimed at persuading the court a DOSA would not result in defendant's recidivism going unpunishment:

[Counsel] [A] DOSA sentence holds a very heavy hammer over [defendant's] head for a long period of time. The actual incarceration time that he would serve under DOSA sentence [sic] is serious....

[Court] You agree that because these have to be served consecutively, that the DOSA periods stack.

[Counsel] Yes.

[Court] So that he is looking at eight years in prison, maybe minus a couple years for good time ... even if we grant what you want.

[Counsel] Right.

6RP 532-33. Far from betraying confusion, the court's remarks manifest its appreciation that granting the DOSA requested would disable its discretion to impose concurrent sentences as hybrid sentences are forbidden. *Murray*, 128 Wn.App. at 726. Nothing about the court's DOSA-specific remarks could support an inference it misperceived its discretion to sentence defendant differently outside the DOSA context discussed. Nor can they support the analogy he draws to *McFarland*. For there, a judge expressed discomfort with his sentence in a way that betrayed his failure to appreciate an available alternative, as the Supreme Court explained:

The trial judge responded, “237 months is—just a little shy of 20 years, which is what people typically get for murder in the second degree ... I think that's a fairly apt analogy.” ... The court said, “I don't have—apparently [I] don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think—I don't think [the] high end is called for, here.”

McFarland, 189 Wn.2d at 58.

Defendant's sentencing court exclusively weighed the wisdom of granting him a DOSA. His recidivism and treatment failures presented a reason for society to have him “put away for just as long as [it] can.” 6RP 555. If there was any discomfort conveyed, it was in the court's reticence to grant a DOSA to an offender who seemed almost undeserving of that relief. Defendant inexplicably finds in the court's frank, now prophetic, appraisal of his probability for failure, a possibility for exceptional leniency. It is inconceivable a court that barely gave him a chance at leniency underwritten by the accountability for failure a DOSA assured would have just signed off on his early release with no strings attached. So, he failed to prove the court abused its discretion when it was, perhaps improvidently, exercised to give him a chance at the life-restoring recovery he once claimed to want.

2. THE AVAILABLE RECORD ONLY SUPPORTS A PRESUMPTION DEFENDANT PURSUED HIS DOSA AS A SENTENCING STRATEGY UPON SOUND ADVICE OF COUNSEL BECAUSE IT IS SEEMINGLY THE ONLY HOPE DEFENDANT HAD OF EARLY RELEASE FROM PRISON WITH A CHANCE TO AVOID QUICK RETURN.

Courts engage in a strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Ineffective assistance of counsel must be proved by more than a petitioner's self-serving allegations. See *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001); *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Defendants are burdened to prove ineffective assistance from the record. *McFarland*, 127 Wn.2d at 335. To prevail on an ineffective assistance claim, a defendant must prove counsel's performance was deficient and the deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984)). An inadequate record precludes review. *State v. Vazquez*, 66 Wn.App. 573, 583, 832 P.2d 883 (1992); *State v. Locati*, 111 Wn.App. 222, 226, 43 P.3d 1288 (2002).

- a. The available record reveals the DOSA to be the result of a sound strategy defendant once pursued to achieve some leniency and ensure he received treatment he needed to overcome the addiction blamed for his crimes.

Counsel is not obliged to pursue doubtful strategies. *State v. Brown*, 159 Wn.App. 366, 371, 245 P.3d 776 (2011). A finding of deficiency requires proof counsel's presumptively reasonable representation fell below an objective standard of care. *McFarland*, 127 Wn.2d at 335; *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To rebut the presumption, defendants must prove the absence of conceivable legitimate explanations for counsel's conduct. See *Id.* at 42.

There is ample evidence defendant decided the DOSA was his best chance to reclaim a life free of addiction. 6RP 546-55. While trying to convince the court of defendant's commitment to a DOSA, counsel said:

I think one of the things we can expect from [defendant] is not just that he will follow up and follow through with a DOSA ..., I think what we can expect is ... he will be a leader in that process, in the treatment component of it, ... and pursuing whatever it takes to stay out of prison. ... He understands also that it is risky for any judge to send anyone to a DOSA ... because it is ... a judge's way of saying, I'm really going to challenge this guy to follow through. I'm going to expect that he will. He understands that...He also - - and I also would like to mention that it is ... good ... for ... [his] reintegration with the community. In other words, to try to minimize the chance that he will return to this sort of lifestyle ... that was motivated by his heroin addiction.

6RP 534-35. That defendant apparently tricked his counsel into believing the claimed commitment to DOSA success would translate into not only completion but leadership in the program does not make counsel deficient. Counsel ably advocated for that outcome with the help of defendant's pastor and mother, and succeeded in persuading a reluctant court to give defendant the chance despite the court's sense of his limitations.

Defendant now says counsel was deficient for not requesting an exceptional sentence below the standard range. That argument proceeds without much analysis. Also missing is a record to prove counsel neglected to advise defendant of that alternative or advocated for the DOSA against defendant's wishes. Contrary to defendant's contention, there was no reason for counsel to bring *McFarland* to the court's attention because it governs an exceptional sentence that could not have been combined with the DOSA being pursued. *Murray*, 128 Wn.App. at 726. Reasonable strategies need not adjust to request relief prohibited by precedent. See *State v. Slighte*, 157 Wn.App. 618, 624, 238 P.3d 83 *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011).

Still, there is no way to know from the record if the DOSA was a strategy advanced according to or against counsel's advice. See *Strickland*, 466 U.S. at 691; *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). Although it is hard to imagine the confidential conversations

between defendant and his counsel differing much from the record, given the representations that honorable member of the bar made on defendant's behalf. This Court is to presume counsel abided by his responsibility to advocate for the type of sentence defendant chose after being competently advised of his options. See *State v. Grier*, 171 Wn.2d 17, 30, 246 P.3d 1260 (2011); RAP 1.2. Deficiency has not been proved.

- b. Prejudice cannot be shown since the record refutes the notion an exceptional sentence below the standard range was there for the asking, for the court seemed far more inclined to impose as much prison time as it could.

Defendant cannot overcome the actual prejudice prong of the test unless he can prove there is a reasonable probability the trial court would have imposed an exceptional sentence below the standard range but for counsel's failure to request that relief. *State v. Hernandez-Hernandez*, 104 Wn.App. 263, 266, 15 P.3d 719 (2001). *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986); *State v. Neff*, 163 Wn.2d 453, 466, 181 P.3d 819 (2008); see also *McFarland*, 189 Wn.2d at 58; *State v. Price*, 127 Wn.App. 193, 203, 110 P.3d 1171 (2005). Counsel need not raise all possible nonfrivolous issues. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004).

It is not at all probable the trial court would have done anything but sentence defendant somewhere near if not at the high-end of the range had

counsel failed to persuade it to take a chance on defendant's commitment to treatment. The Court listened to the people called to speak in support of a DOSA. When it was defendant's turn to allocute, he told the court he was abandoning his notes in favor of "speak[ing] from the heart." 6RP 539. Defendant expressed remorse for his victims. 6RP 539-40. He explained how his crimes against them were attributable to an addiction that turned him into the disappointment he became. 6RP 540-47. Those representations were challenged by the court. *Id.* Despite conveying due empathy for drug-addicted people, the court rightly recalled its responsibility to the victims of defendant's crimes as well as the community. 6RP 551.

The court believed that defendant committed his crimes aware of the harm they inflicted on innocent people. 6RP 552. His capacity to commit them despite that knowledge led the court to reflect upon whether he had become a person society should lock away to keep the rest of us safe. 6PR 552-53. Some evidence that he had passed the point of no return was found in his treatment failures. 6RP 555. After the DOSA was imposed, the court took one more moment to provide what is now a claim-defeating insight into how close the court came to imposing a far more severe sentence:

I hope the moment of this day – it's likely to fade certainly. I hope that you keep this really in mind and keep in mind the folks here that came here to support you. ... **I came this close to not doing this.** [6RP 559 (emphasis added)]

There is no reasonable probability a sentencing judge brought back from the brink of removing defendant from society for as long as possible, but for his slim prospect of DOSA success, would have walked him out the door with an exceptional sentence below the range. No doubt the sentencing judge who took a chance on defendant would be saddened to know how quickly defendant's memory of all that was done for him at sentencing did fade, and with it his commitments. Prejudice has not been proved.

D. CONCLUSION.

Defendant might do well to read the record of all that was done on his behalf to give him the chance his appeal rejects. Yet whatever its effect on him, the law should save him from himself. There is nothing in the DOSA-specific record of his sentencing to suggest the court misunderstood its sentencing discretion outside the DOSA context. Also absent is evidence

to refute proof he was more than competently served by his plainly under-appreciated counsel. Defendant's DOSA should be affirmed.

RESPECTFULLY SUBMITTED: July 16, 2018

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The undersigned certifies that on this day she delivered by E-File U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTING ATTORNEY

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