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Court of Appeals
Division II
State of Washington
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No. 51448-6-II

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

State of Washington,

Respondent,

v.

David Brown,

Appellant

REPLY BRIEF OF DAVID BROWN

Appeal from Clark County Superior Court, 17-1-02475-9

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United States Sentencing Commission,
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The parties agree on several key points. The State agrees that Brown was almost 60 years old when he was arrested and convicted, and that his only prior conviction was a 2001 DUI. The State does not dispute that, at sentencing, counsel failed to file anything—a brief, letters of support, or information about recidivism and age. The State record shows that, at the sentencing hearing, counsel distanced himself from Brown. Finally, the State agrees that Brown can raise the issue of ineffective assistance of counsel.

The parties disagree over whether counsel’s lack of advocacy, the distancing from the client, the lack of preparation, and the failure to request a DOSA show ineffective assistance of counsel. Among the questions this case presents: Does counsel have a duty to advocate for a 59-year-old first-time offender at sentencing? Does a person so desperate for drugs that he apparently filtered his own urine to see if he could salvage any undigested methamphetamine show a probability that he would receive a sentencing alternative focused on treatment? Brown argues that counsel does have a duty to advocate at sentencing and that there is a strong possibility that treatment, rather than incarceration, would have been given here, where the defendant was an elderly first-time offender

who cooperated with police and explained that his dealing consisted of helping out his friends, not making a profit.

In Clark County, attorneys are paid a flat fee of \$800 for a felony case.¹ The rate has not changed since 2009. *Id.* The incentive is to simply slide through sentencing, without reviewing the trial transcript, without submitting a brief, without doing mitigation investigation, without bothering to make an argument.

While most counsel perform their duties despite the pay, that did not happen here. Our constitutional rights depend on real advocacy by defense counsel. The fairness of a sentence depends on real advocacy by defense counsel. Where, as here, advocacy is missing, this Court must right that wrong.

¹ https://www.clark.wa.gov/sites/default/files/dept/files/council-meetings/2018/2018_Q1/022118_WS_IndigentDefense.pdf at page 9. This document, produced and prepared by Clark County, is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b).

The same is true of the federal data on age and recidivism cited in Brown’s opening brief, which are U.S. government publications. *See, e.g.*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf at page 3 (“Older offenders were substantially less likely than younger offenders to recidivate following release.”). That document is cited not for its truth, but for the fact that such persuasive information was readily available to trial counsel, who did not even bother to Google the issue.

On this record, failing to advocate, and failing to request a DOSA, was ineffective. The case should be remanded for a new sentencing.

Argument

In failing to advocate at sentencing, including distancing himself from his client, counsel's performance was deficient. Because the DOSA sentence was much better for Brown than his prison sentence, he can show prejudice. The case should be reversed for a new sentencing.

A. Brown's counsel's performance was deficient because he presented no argument and failed to propose a sentencing alternative

There were three key moments at sentencing. First, Brown insisted that if he had been informed of a plea bargain "I would've taken that plea bargain way back when." RP 232. He told the court he was never informed of any plea. RP 233. Second, Brown's counsel asked for an exceptional downward departure—but distanced himself from the request, telling the court that "there is no basis" for such a sentence but that it was "[Brown's] request." RP 231. And finally, counsel did not request a DOSA or make any argument on Brown's behalf.

Counsel did not mention the DOSA statute. RP 230; RCW 9.94A.660. Instead, counsel said that his client wished to ask for an

exceptional downward departure, while telling the court—contrary to his client’s interests—that there was no basis for such a departure. RP 230. Instead, counsel requested 36 months in prison, the low end of the standard range. Brown was sentenced to 36 months in custody (the State asked for 40 months, RP 229), 12 months of community supervision, and \$1150 of fees and fines. CP 64; 68-77 (Judgment and Sentence).

Counsel’s performance was deficient as there was a basis for both a request for an exceptional downward departure and a request for a DOSA.

A sentencing court has the authority to waive a school zone enhancement in favor of a DOSA under RCW 9.94A.660. *State v. Mohamed*, 187 Wn. App. 630, 636, 350 P.3d 671 (2015). The standard range for the underlying conviction here is 12-20 months, with a 24 month school bus zone enhancement. CP 70. Waiving the school bus zone enhancement is a benefit to Brown, one that he could not get unless his counsel advocated for a DOSA.

The State argues that it might have been strategic not to ask for a DOSA because it would have prevented Brown from arguing for 36 months in prison. State br. at 5. But that makes no sense, since arguments in the alternative are common, and, indeed, Brown had already made an alternative argument, when his counsel said his client wanted an

exceptional downward departure. The State's argument appears to be that the trial court's practice is to increase a sentence based on its annoyance at a DOSA request. If so, the problem is more systemic than the error in Brown's appeal. At a minimum, such behavior would abuse the court's discretion by using improper factors to determine Brown's sentence.

The State claims that counsel had to distance himself because counsel is an officer of the court. State br. at 5-6. Again, the State's position, if taken seriously, would raise more serious and systemic issues than Brown initially raised. It cannot be that, in Clark County, advocating for a reduced sentence or a DOSA based on age, lack of criminal history, and difficulty with drug addiction violates a lawyer's duty as an officer of the court. Regardless, the State's position is inconsistent with the responsibilities of defense counsel.

RPC 3.1 contains a carveout for criminal defense lawyers, allowing them to push the State to prove its case. RPC 3.1 ("A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established"). RPC 3.1 allows, and the Constitution requires, counsel to advocate at sentencing, including advocating for a DOSA sentence that would be better for a 59 year old first time offender. Counsel had a duty to force the

State to explain why a DOSA would not be appropriate. Failure to push the State here harmed the client and failed to meet the standard of practice.

Counsel must suggest alternatives, investigate for mitigating circumstances, and offer argument at sentencing.² An argument is a “statement that attempts to persuade by setting forth reasons why something is . . . better or worse, etc.; esp., the remarks of counsel in analyzing and pointing out or repudiating a desired inference, made for the assistance of a decision-maker” or the “act or process of attempting to persuade.” ARGUMENT, Black’s Law Dictionary (10th ed. 2014)(accessed via Westlaw). On this record, there was no argument by Brown’s counsel.

The State contends that counsel’s representation was adequate because the trial court knew that alternatives such as DOSA existed and the court could have moved sua sponte for an alternative. State br. at 6. But counsel’s deficient performance was the difference between the court

² ABA Criminal Justice Standards, 4-8.1, available at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html; opening brief at 8.

possibly knowing of an alternative and having to consider reasons for imposing that alternative.³

And the State is wrong, as was Brown's counsel, that age cannot be a mitigating factor justifying an exceptional downward departure.

RCW 9.94A.585(4)(1) contains an "illustrative" list of factors, and there is no reason that Brown could not have used age and the low recidivism of older offenders to argue for an exceptional downward sentence. *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015) (holding that youth can be mitigating factor justifying an exceptional sentence); *see also In re Young*, 120 Wn. App. 753, 761, 86 P.3d 810 (2004), as amended on denial of reconsideration (May 7, 2004) (noting that the apparently uncontradicted trial testimony there, in a sex offender case, was that "By age 60, the recidivism rate falls to zero percent." *Young* has been superseded by statute. *In re Meirhofer*, 182 Wn.2d 632 (2015)). *O'Dell* provides a good

³ *See* National Legal Aid and Defender Association Guideline 8.2, Sentencing Options, and 8.3, Preparation for Sentencing. Available at <http://www.nlada.org/defender-standards/performance-guidelines/black-letter>. *See also* ABA Criminal Justice Standards, 4-8.1 (defense counsel must, "at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs").

faith basis to ask to depart based on the demographic characteristics of a defendant; being an officer of the court does not prevent defense counsel from performing his or her constitutional duty to prepare for, and argue at, sentencing.

Counsel's deficient performance at sentencing is further shown by his failure to object when the trial court justified its sentence based on Brown's knowledge of common drug terms. State br. at 8-9; RP 233-34 (calling use of the term "eight ball" "evidence" that Brown was a "highly sophisticated" drug dealer). That is factually wrong, as shown by the trial transcript, but counsel did not object or seek to correct the court. Counsel was silent, because he was not advocating for his client, and an objection could easily have countered the trial court's mistaken analysis.⁴

Terms like "eight ball" are not specific to drug dealers or evidence of sophistication, but simply common terms—as explained in trial testimony from the State's witnesses in Brown's trial. A law enforcement

⁴ Failure to correct the trial court's erroneous statement violated counsel's duty "to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed." National Legal Aid and Defender Association Guidelines 8.1(a)(2), available at <http://www.nlada.org/defender-standards/performance-guidelines/black-letter>.

officer explained that users would know the term. RP 164 (stating that the term eight ball is “commonly referred to among **users and sellers** of drugs” and is “**such a widely used term** that it’s patently obvious that when someone asks for an eight ball, it refers to a quantity of a controlled substance . . .”). Although the State’s own witnesses contradicted the trial court’s statements at sentencing, there was total silence from Brown’s counsel. If Brown had retained counsel, paid hourly, that lawyer would have done the work of reviewing the trial transcript and objected to the trial court’s reasoning. A lawyer paid \$800 for the whole case, however, showed up at the sentencing hearing completely unprepared.

Even if Brown’s counsel forgot the trial testimony, it takes seconds to find the term in the case law. Cases at least as far back as 1994 refer to the term, *State v. Trujillo*, 75 Wn. App. 913, 914, 883 P.2d 329 (1994), and an eight-ball is a common amount for a user to purchase. *See, e.g., State v. Lo Sheng Saelee*, 75748-2-I, 2018 WL 2021865, at *1 (Wash. Ct. App. Apr. 30, 2018), reconsideration denied, 75748-2-I, 2018 WL 3026074 (Wash. Ct. App. June 18, 2018) (unpublished) (one of many cases from our courts of appeal, most unpublished, where police informants purchased an eight ball of cocaine from a dealer, showing that this is an amount that would be known by a user, not just a dealer). Trial testimony that a gram of meth is

worth about \$16 (RP 169-71) means that an eight ball, about 3.5 grams (RP 165), would cost around \$50. Knowing a term used for \$50 quantities of drugs is not evidence of a highly sophisticated drug dealer, but Brown's counsel said nothing when the trial court used this as the basis for his sentence.

Finally, the State argues that *Mohamed* does not control here—and thus counsel's performance was adequate—because the trial court knew of the DOSA alternative. State br. at 8-9. But there is no record at all that the trial court considered an alternative; the trial court never used the term DOSA, so we simply do not know if the trial court knew it had authority to grant a DOSA. Indeed, the trial court specifically, and properly, put the burden on Brown's counsel to raise the issue of any sentencing alternative. RP 224-25 (trial court instructing that Brown had “a lot to be discussed with your attorney about whether or not you want any sentencing alternatives . . .”). Brown's counsel did not raise the issue, and the issue here is whether that was ineffective assistance. Since a DOSA would have benefitted Brown, the failure to ask for a DOSA was ineffective.

Brown's counsel's performance fell below an objective standard of reasonableness under the circumstances.

B. Brown was prejudiced by his counsel’s deficient performance

Having shown deficient representation, Brown must also show prejudice. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The absence of advocacy at a critical stage is prejudicial here for two reasons. First, courts assume prejudice where there is a failure to advocate at sentencing; and second, because there is a reasonable probability that a 59-year-old with no prior criminal history and a drug use problem would have received a DOSA—indeed, the trial court told Brown that it would consider a sentencing alternative, but counsel did not raise the issue at sentencing. RP 224-25 (trial court instructing that Brown had “a lot to be discussed with your attorney about whether or not you want any sentencing alternatives . . .”).

Courts have “applied *Cronic*’s presumption of prejudice to cases involving defense counsel’s silence or lack of advocacy at sentencing.” *Davis v. Commissioner of Correction*, 319 Conn. 548, 558, 126 A.3d 538, 545 (2015), cert. denied sub nom. *Semple v. Davis*, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016).

The Seventh Circuit presumed prejudice where a defense attorney told the court at sentencing, “I have nothing.” *Patrasso v. Nelson*, 121 F.3d

297, 303 (7th Cir. 1997). The court wrote that counsel “must make a significant effort, based on reasonable investigation and logical argument, to mitigate his client’s punishment.” *Id.* at 303-04. Compare RP 231 (Brown’s counsel telling the court that “there is no basis” to go under the guidelines and the court had a duty to impose at least a 36-month sentence).

The Fifth Circuit similarly reversed a district court, which had found that the defendant was not prejudiced “by the failure of his appointed counsel ‘to allocute at sentencing’ because the sentencing judge was familiar with the case and based his resentencing entirely upon the first sentencing hearing at which Tucker’s counsel performed effectively.” *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992). On appeal, the court held that a defendant must have effective assistance at each hearing. Ruling otherwise “would permit the state to deny counsel to Tucker at the resentencing hearing.” *Id.* Similarly here, even if we assume the trial court knew about a DOSA, it is counsel’s duty to argue for an advantageous sentence. Counsel must advocate, not hope that the trial court does its work for him or her.

As another federal court wrote, even “assuming that [defense counsel’s] decision not to speak on his client’s behalf at sentencing was

such a [strategic] choice, the Court need not defer in cases such as this one where the decision in effect deprives a defendant of counsel at a critical stage of the proceeding.” *Gardiner v. United States*, 679 F. Supp. 1143, 1145–46 (D. Me. 1988).

The Connecticut Supreme Court recently held that prejudice is presumed where “defense counsel . . . not only did nothing to advocate for the petitioner at the sentencing hearing, but he also went a step further by agreeing with the state’s recommendation of the maximum sentence.” *Davis*, 126 A.3d at 546. Here, too, counsel failed to offer mitigation and failed to argue against imposition of the guideline sentence, despite having an elderly first time offender. All that distinguishes this case from *Davis* is four months—the difference between the 36 month sentence that counsel requested for Brown and the State’s request for 40 months. And that four-month distinction did not matter here, because the 36-month sentence was, in counsel’s view, what the court *had* to impose, while his client clearly believed that a lesser sentence, or a DOSA, was appropriate.

Upholding this sentencing would sanction, and promote, sentencing hearings where counsel is unprepared and fails to advocate. Brown, like all criminal defendants, was entitled to advocacy at every critical stage. By remanding for resentencing, this Court has the power to

do justice for Brown and to make clear that the law requires that counsel take their advocacy seriously at every hearing in every case.

Even if this Court does not assume prejudice, Brown can show prejudice. The trial court told Brown it would consider a sentencing alternative. RP 224-25 (trial court instructing that Brown had “a lot to be discussed with your attorney about whether or not you want any sentencing alternatives . . .”). Since the trial court signaled that it would consider an alternative, Brown shows that there is a reasonable probability that effective assistance would have resulted in a different sentence.

A DOSA sentence would have been favorable for Brown. RCW 9.94A.660, known as DOSA, provides meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes that the sentence would serve the best interests of the individual and the community. *State v. Grayson*, 154 Wn.2d at 343 (2005); *State v. Waldenberg*, 174 Wn. App. 163, 166 n.2, 301 P.3d 41 (2013). It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from addictions. *Grayson*, 154 Wn.2d at 337.

A DOSA may have meant no prison time at all if Brown had gotten community treatment. 13B Wash. Prac., Criminal Law § 3709 (2017-2018

ed.). And even with a prison-based alternative, Brown would have had 20, rather than 36, months in prison. *Id.* (explaining prison time as half of the midrange guideline sentence, which was 40 months here). The failure to advocate for a DOSA prejudiced Brown.

A 59-year-old person with no criminal history deserves to be considered a candidate for treatment rather than simply punished. He deserved to have a lawyer who would point out the reasons that an exceptional downward departure would be appropriate. A minimally competent lawyer would have cited *Mohamed* and requested a DOSA; counsel should have explained that a DOSA sentence was possible under the case law, despite the school zone enhancement. A DOSA would have meant less time in prison—or even no time in prison—and more resources to deal with drug addiction issues. The outcome would have been better for Brown, and the failure to advocate at sentencing prejudiced Brown.

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CONCLUSION

This Court should remand for a new sentencing, with instructions to consider a DOSA with community placement.

RESPECTFULLY SUBMITTED August 27, 2018.

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DECLARATION OF SERVICE

I declare that on August 27, 2018, I filed Appellant's reply brief with the Court of Appeals for Division II via Electronic Filing for the Court of Appeals (Division II), which served counsel for Clark County.

I further declare that on August 27, 2018, I served by U.S. mail a copy of the brief on David Brown at:

David W. Brown DOC # 405275
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated August 27, 2018, in Seattle, Washington

s/ Harry Williams IV

Harry Williams IV, WSBA # 41020

LAW OFFICE OF HARRY WILLIAMS LLC

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