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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

OPENING BRIEF OF DAVID BROWN

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

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Assignments of error

1. Counsel failed to present argument at sentencing, depriving Brown of the right to counsel.
2. Counsel was ineffective for failing to ask for a sentencing alternative.

Issues Pertaining to Assignments of Error

1. Brown is almost 60 years old and his only prior conviction was a 2001 DUI. At sentencing, counsel failed to file anything—such as argument, letters of support, or information about recidivism and age. At the sentencing hearing, rather than advocating for Brown, counsel described his sentencing proposal as Brown's request. The failure to present argument denied Brown counsel at a critical stage.
2. Counsel was ineffective when he failed to advocate for his client at sentencing.
3. Brown had user amounts of drugs and admitted to using drugs. A Drug Offender Sentencing Alternative would have reduced his time in prison and increased the resources available to help him with his drug problem. Counsel ineffective for failing to request a DOSA.

4. Counsel was ineffective for failing to provide the court with the proper standard to determine if Brown was eligible for a DOSA.

Introduction

When he was arrested, Brown readily cooperated. He told the police that they would find personal use amounts of methamphetamine in his house. The police found the drugs just where he said they would. In a small baggie, the police found 1 gram of methamphetamine. RP 138-39. In addition, police found “less than a tenth of a gram” that was captured on coffee filters. RP 140. The filters were used to filter Brown’s urine and capture any usable methamphetamine. RP 155-56.

Brown also told the police that they would find some empty baggies and a scale, and that he had helped friends get drugs. RP 154-55. Brown went to trial and lost. He was sentenced to 36 months in prison. CP 71.

At sentencing, 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.

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. Counsel did not request a DOSA. The failure to advocate for Brown, and the failure to request a DOSA, was ineffective. The case should be remanded for a new sentencing.

Statement of the Case

David William Brown is 59 years old and has no relevant criminal history.

Brown was charged by an amended information of one count of possession of a controlled substance with intent to deliver (methamphetamine). RCW 69.50.401(1), (2)(b). CP 8. It was alleged the offense occurred within 1000 feet of a school bus route stop, in violation of RCW 69.50.435(1)(c) and RCW 9.94A.533(6). CP 8.

Brown talked to an officer after his arrest. Brown told him that officers would find “scales, methamphetamine in baggies . . .” in specific locations in his house. RP 154. Brown told the officer that he was “only middle-manning or dealing to some of his friends to help them out.” RP 154. One gram of methamphetamine was found in one place in Brown’s house, and a tenth of a gram in another location. RP 175. The tenth of a gram consisted of drugs collected from Brown’s urine. RP 155-56. There was less than \$100 in the house. RP 175.

A jury found Brown guilty on January 11, 2018. CP 53. The jury also found the offense occurred within 1000 feet of a school bus stop by special verdict. CP 54.

Less than two weeks after the jury verdict, sentencing was held on January 24, 2018. RP 229. The State asked for 40 months based, apparently, on Brown's admissions. RP 229. Brown's counsel did not file a sentencing memo.

Brown's counsel correctly told the court—and the State did not contest—that Brown had no relevant criminal history. RP 230. Brown is 59 years old, and, prior to the current case, his only involvement with the criminal justice system was a DUI in 2001. Counsel stated that the “first offender option” was not available to Brown, however, because he was convicted of possession with intent to deliver. RP 230. 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 arguing to 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.

Brown was sentenced to 36 months in custody, 12 months of community supervision, and \$1150 of fees and fines. CP 64; 68-77

(Judgment and Sentence). Brown timely filed a notice of appeal on January 24, 2018. CP 82.

Argument

A. Brown was eligible for a DOSA and counsel was ineffective for failing to ask 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).

Under the DOSA statute:

If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664.

RCW 9.94A.660(3).

In *Mohamed*, the defendant was convicted of four counts of delivery of cocaine and the jury found that three of the counts occurred within 1,000 feet of a school zone. 187 Wn. App. at 640. Each delivery was for about \$150 of drugs. *Id.* at 634. Testimony at Brown's trial indicated that a gram of methamphetamine is worth less than \$16.00. RP 169-71 (one ounce sold for \$440, and there are about 28 grams in an ounce).

Although Mohamed repeatedly sold significant quantities of drugs to an undercover agent in a school zone, the court of appeals ruled that the trial court erred when it determined that Mohammed could not be considered for a DOSA sentence. *Id.* at 634.

Similarly, in *State v. Yancey*, an offender was convicted of two counts of delivering a controlled substance, with a school zone enhancement. *State v. Yancey*, 35216-1-III, 2018 WL 2348475, at *1 (Wn. App. May 24, 2018). The standard range was 36-44 months. *Id.* The State appealed the trial court's imposition of a residential DOSA. *Id.* The *Yancey* court could "discern no reason to reject the ruling in *State v. Mohamed*" and affirmed the residential DOSA. *Id.*

When reviewing a claim of ineffective assistance of counsel on direct appeal, the court of appeals is limited to the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption that trial counsel's representation was effective. *Id.* To show ineffective assistance, Brown must show: (1) defense counsel's representation fell below an objective standard of reasonableness under the circumstances, and (2) the deficient representation prejudiced him, i.e., a reasonable probability exists the outcome would have been different without the deficient representation. *Id.* at 334-35. Failure to meet either

prong of this test is dispositive of an ineffective assistance claim. *State v. Berg*, 147 Wn. App. 923, 937, 198 P.3d 529 (2008).

Plainly, Brown's counsel's performance was deficient. Counsel did not advocate for Brown at sentencing. Counsel did not ask for a DOSA. Counsel did not tell the court the correct standard to judge eligibility for a DOSA. Counsel did not file a sentencing memorandum. At the hearing, which took place just two weeks after trial, he presented no mitigation. He did not reference what anyone who searches "age and recidivism" can determine: people over 60 are very unlikely to reoffend.¹

Instead, counsel distanced himself from his client, telling the court that Brown wanted an exceptional sentence although there was, in counsel's view, no basis for it. RP 231. After the verdict, while still on the record and before the judge, counsel complained to Brown that "You never listen to anything that [cuts off]." RP 227.

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

¹ The search turns up a wealth of federal information on age and recidivism.
<https://www.google.com/search?q=recidivism+andage&oq=recidivism+andage&aqs=chrome..69i57j0.3007j1j7&sourceid=chrome&ie=UTF-8>

for meeting the accused's needs." ABA Criminal Justice Standards, 4-8.1.² Counsel must also "present to the court any ground which will assist in reaching a proper disposition favorable to the accused." *Id.* This imperative was reinforced by the trial court; the court told Brown after the verdict that there might be sentencing alternatives available. RP 225.

The absence of advocacy counsel at a critical stage is prejudicial because there is a reasonable probability that a 60 year old with no prior criminal history and a drug use problem would have received a DOSA.

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.

² Available at https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#8.1

With a DOSA, a trial court “may impose either of two alternatives: a prison-based alternative or a residential chemical dependency treatment-based alternative.” 13B Wash. Prac., Criminal Law § 3709 (2017-2018 ed.). With the “prison-based alternative, the court sentences the defendant to prison for a period of confinement equal to either one-half the midpoint of the standard range or 12 months, whichever is greater.” *Id.* Thus, even with a prison-based alternative, Brown would have had 20, rather than 36, months in prison. And, as in *Yancey*, the trial court could have imposed a residential DOSA, and Brown could have avoided prison altogether, while also getting him help with his drug problem. Clearly, the failure to advocate for a DOSA prejudiced Brown.

A person who filters their own urine to “recycle” drugs has a drug problem. A 59 year-old person with no criminal history deserves to be considered a candidate for treatment rather than simply punished. 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.

B. There should be no costs assessed against Brown.

The trial court found Brown indigent. CP 86-87. He is therefore presumed indigent throughout the appeal. RAP 14.2; RAP 15.2. He requests that the Court not assess costs against him.

CONCLUSION

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

RESPECTFULLY SUBMITTED June 18, 2018.

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DECLARATION OF SERVICE

I declare that on June 18, 2018, I filed Appellant's open 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 June 18, 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 June 18, 2018, in Seattle, Washington

s/ Harry Williams IV

Harry Williams IV, WSBA # 41020

LAW OFFICE OF HARRY WILLIAMS LLC

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