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State of Washington  
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NO. 51448-6-II

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

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STATE OF WASHINGTON, Respondent

v.

DAVID WILLIAM BROWN, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02475-9

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BRIEF OF RESPONDENT

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**RESPONSE TO ASSIGNMENTS OF ERROR**

- I. COUNSEL PRESENTED ARGUMENT AT SENTENCING AND DID NOT DEPRIVE BROWN OF THE RIGHT TO COUNSEL**
- II. FAILURE TO REQUEST A SENTENCING ALTERNATIVE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL**
- III. THE STATE WILL NOT SEEK APPELLATE COSTS**

**STATEMENT OF THE CASE**

On January 11, 2018 David Brown (hereafter 'Brown') was convicted at trial of one count of possession of a controlled substance with intent to deliver (methamphetamine) in Clark County case number 17-1-02475-9. CP 53. The jury found by special verdict that the crime was committed within 1,000 feet of a school bus route stop designated by a school district. CP 54. At the conclusion of the trial the Court set sentencing for January 24, 2018. RP 224.

On January 24, 2018 the Court sentenced Brown to a standard range sentence of 36 months confinement with Department of Corrections and 12 months of community custody. CP 71. This sentence included a 24 month enhancement for a Violation of the Uniform Controlled Substance Act in a protected zone. CP 71.

## ARGUMENT

### I. COUNSEL PRESENTED ARGUMENT AT SENTENCING AND DID NOT DEPRIVE BROWN OF THE RIGHT TO COUNSEL

Brown first alleges that he was deprived of the right to counsel at sentencing. A defendant is entitled to a right to counsel at all critical stages of the criminal proceedings. U.S. CONST. amend VI; WASH. CONST. art. I, §22. Sentencing is a critical stage of the proceeding to which the right to counsel attaches. *State v. Robinson*, 153 Wn.2d 689 at 694, 107 P.3d 90 (2005). CrR 3.1(b)(2).

Brown conflates the issue of right to counsel with the claim of ineffective assistance of counsel at sentencing which will be addressed at length below. What is clear from the record is that defense counsel appeared for Brown at sentencing, RP at 229; counsel requested the Court find an exceptional downward departure from the standard range citing Brown's lack of criminal history and being a person of "mature years," RP at 231; and counsel further argued against the State's mid-range sentencing recommendation instead requesting the low end of the standard sentencing range, RP at 231. Because Brown was clearly represented by counsel at his sentencing, the first assignment of error

fails. The court must look only at the second assigned error, the effectiveness of that representation.

## **II. FAILURE TO REQUEST A SENTENCING ALTERNATIVE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL**

Brown claims he received ineffective assistance of counsel because his attorney did not ask the trial court to impose a Drug Offender Sentencing Alternative (hereafter 'DOSA'). Brown cannot show that his attorney's performance, by asking for a realistic sentence lower than the State's recommendation, was not a reasonable tactic to take in making his sentencing recommendation in this case, and further, Brown cannot show that had his attorney requested DOSA that the trial court would have imposed it. He therefore has not shown either defective performance or prejudice. Brown's claim of ineffective assistance of counsel fails.

A sentence within the standard range for an offense is generally not appealable when the Sentencing Rights Act is procedurally followed. RCW 9.94A.210(1); *see State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (citing *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719(1986)). A defendant may challenge a standard range sentence if he alleges a violation of a constitutionally protected right. *State v. Goldberg*, 123 Wn.App. 848, 852, 99 P.3d 924 (2004) (citing *State v. Bramme*, 115 Wn.App. 844, 850, 64 P.3d 60 (2005)); *see also State v. McNeair*, 88

Wn.App. 331, 944 P.2d 1099 (1997) for historical discussion of this right. A claim of ineffective assistance of counsel is one of constitutional magnitude. *Goldberg*, 123 Wn.App. at 852 (citing *State v. Soonalole*, 99 Wn.App. 207, 215, 992 P.2d 541 (2000)).

In order to succeed on appeal on a constitutional claim of ineffective assistance of counsel, a defendant must make a two-prong showing: establish ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing *State v. Rosborough*, 62 Wn.App. 341, 348, 814 P.2d 679, *review denied*, 118 Wn.2d 1003, 822 P.2d 287 (1991)). Failure to meet either prong of the test results in a failure of the claim of error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this case, Brown fails to make an adequate showing under either prong.

The burden is on the defendant to make a showing of deficient representation based on the record. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987)). Defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362 (citing *Strickland*, 466 U.S. at 693). Brown's claim that defense counsel's performance was deficient rests in large part on his failure to request a DOSA sentence. Brown also makes the claim that counsel

presented no evidence of mitigating circumstances to the sentencing court. The record does not support this claim.

The Court presumes that trial counsel's performance was adequate and exceptional deference is given to trial counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362 (citing *Strickland*, 466 U.S. at 689). There are legitimate tactical reasons for requesting a low-end sentence rather than a sentencing alternative. Based on the facts presented at trial, defense counsel could reasonably have believed that requesting a sentencing alternative was likely to result in not only a denial of the alternative, but also imposition of the State's requested sentence. Further, a DOSA sentence is not always a more advantageous sentence. It includes significantly heightened post-prison supervision compared to a standard range sentence, and the possibility of revocation, which would result in a longer term of imprisonment than Brown received.

Brown further claims that counsel's argument at sentencing sought to distance himself from his client and failed to adequately represent him because he stated that he believed there was no basis for an exceptional sentence. Br of App.at 7. A defense attorney is an officer of the court and cannot make an argument which he does not believe is supported by the law. RPC 3.1. What defense counsel stated in sentencing made it clear that they were asking for an exceptional sentence downward departure, even

though he did not believe the client qualified for an exceptional downward departure as described by the illustrative list in RCW 9.94A.535. RP 230-31.

The second prong that must be met to be successful in an ineffective assistance of counsel claim is to show resulting prejudice from the deficient performance. *McNeal*, 145 Wn.2d at 362 (citing *Rosborough*, 62 Wn.App. at 348). “To establish prejudice, a defendant must show that but for counsel’s performance, the result would have been different.” *Goldberg*, 123 Wn.App. at 852 (quoting *McNeal*, 145 Wn.2d at 362 (citing *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993))). Brown claims that 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.” Br. of App. at 8. Brown cannot make this showing.<sup>1</sup>

The DOSA statute is not just available to defense; the trial court can sentence the defendant to an alternative on their own motion. RCW 9.94A.660(2). Here the Court was clearly aware of sentencing alternatives that may be considered appropriate for the defendant. At the conclusion of

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<sup>1</sup> Brown further argues that a Google search for age and recidivism would show that individuals over the age of 60 are unlikely to reoffend. Br. of App. at 7. This is evidence outside the record on review. On direct appeal for a claim of ineffective assistance of counsel, only matters within the trial record should be considered. *State v. McFarland*, 127 Wash.2d at 335 (citing *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991)). “If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.” *McFarland*, 127 Wn.2d at 335.

trial, when Brown questioned why he could not be sentenced at that time, the Court stated the following:

In order to sentence you, I have to have a judgment and sentence, it's a [sic] 11-page document that we have to go over and then the Prosecutor will make a recommendation of what the sentence will be. You and your attorney are entitled to ask for a different type of sentence. There's a lot to be discussed with your attorney about whether or not you want any sentencing alternatives.

RP at 224 and 225. This discussion by the Court about alternatives that may be available stands in stark contrast to the cases relied on in Brown's brief.

In *Mohamed*, the Court of Appeals remanded for resentencing because the trial court did not understand that the standard sentence for purposes of DOSA included the school bus enhancement. *State v. Mohamed*, 187 Wn.App. 630, 641, 350 P.3d 971 (2015). The trial court did not believe it had the discretion to waive the enhancements and order a DOSA sentence. *Mohamed*, 187 Wn.App. at 636.

What the Court of Appeals addressed in *Mohamed* was the trial court's misconception of the role of 24 month enhancements in VUCSA cases and how they are applied in sentencing. The Court of Appeals reversed that case, holding that the enhancement increases the standard sentencing range of the case and that the court could then apply the

alternative to that new standard sentencing range. *Id.* at 637. *Mohamed* addressed the trial court's mistaken impression of how to calculate a standard range when a sentencing enhancement is involved; it did not involve a claim of ineffective assistance of counsel for failing to request a sentencing alternative. Accordingly, Brown's reliance on *Mohamed* is misplaced. In *Grayson*, the matter was remanded because the trial judge categorically denied a DOSA request without proper consideration. *State v. Grayson*, 154 Wn.2d 333, 336, 111 P.3d 1183 (2005). Neither *Grayson* nor *Mohamed* affirmed a DOSA sentence; rather both cases were remanded back to the sentencing court for sentencing considering the full range of sentencing options. *Mohamed*, 187 Wn.App at 646;. *Grayson*, 154 Wn.2d at 336.<sup>2</sup>

The trial court had no such misconception in the instant case. All parties agreed that Brown had no felony criminal history and that the standard sentencing range in Brown's case was 36 plus to 44 months (including the 24 month enhancement). RP at 229-30. Had the Court felt that Brown was an appropriate candidate for a DOSA sentence, the Court

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<sup>2</sup> Brown cites to *State v. Yancey* as a case where residential DOSA was affirmed, but he misidentifies the ruling in that case. In *Yancey*, decided in May 2018, the Court of Appeals held that the trial court did have the discretion to waive sentence enhancements and impose a lower standard sentence but did not affirm a Residential DOSA sentence. Instead, the Court remanded it to the sentencing court to determine whether the court had expressly waived these sentencing enhancements. *State v. Yancey*, 3 Wn.App.2d 735, 741, 418 P.3d 157 (2018).

could have sentenced him to it. Instead, the Court made specific findings before sentencing that are indicative of the fact that he did not believe the defendant was appropriate for such a sentence, stating:

You know, what struck me...is that you're highly sophisticated in the language and the art of methamphetamine dealing. From the testimony that I heard listening to some of the different transactions that were occurring around you, with you, talking about gas, talking about full tanks, talking about all sorts of – and – and I think one of your comments to one of the people that was looking for some dope is an eight – something about an eight ball is what I remember and you said don't talk any more like that to me. I mean so you were very sophisticated in the evidence that I heard about that – the art of – of methamphetamine dealing.

RP 233-34.

Brown believes DOSA would have been appropriate because he clearly has a drug problem. Br. of App. at 9. But he is not just a drug offender, he was convicted of intent to distribute. CP 53. He also presented as an individual who was unwilling to accept responsibility or admit that he had a drug problem. *See* RP 231-34. The DOSA statute does not just rest on eligibility but also on whether the alternative sentence is appropriate. RCW 9.94A.660(3). DOSA is intended to provide treatment to those who are judged likely to benefit from treatment. *Grayson*, 154 Wn.2d at 337. Because the trial court put on the record its comments regarding Brown's familiarity with the language of drug-trafficking as

well as his awareness of the risks (by cautioning his counterparts to avoid drug dealing language), there is insufficient evidence to show that Brown was likely to be given a DOSA sentence had defense counsel requested it. “We must be persuaded that the result would have been different” *Goldberg*, 123 Wn.App. at 853 (citing *McNeal*, 145 Wn.2d at 362).

Defense counsel’s choice not to request DOSA was reasonably strategic. Counsel likely made the accurate assumption that the sentencing court would not have been inclined to impose a DOSA sentence on an individual unwilling to accept responsibility for his actions, and who was such a sophisticated drug dealer. It was more effective for defense counsel to seek a low end sentence – a strategy which paid off, as Brown received the low end of the standard range. Because Brown fails to make a showing of prejudice, the second assignment of error fails.

### **III. THE STATE WILL NOT SEEK APPELLATE COSTS**

If the State substantially prevails on appeal it will not seek appellate costs.

### **CONCLUSION**

Brown was represented by counsel at sentencing. Defense counsel’s representation of Brown was reasonable and Brown fails to

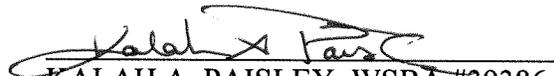
make a showing of ineffective assistance of counsel. The State respectfully asks this Court to affirm the sentencing court in all respects.

DATED this 15<sup>th</sup> day of August, 2018.

Respectfully submitted:

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## Transmittal Information

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