

FILED
Court of Appeals
Division II
State of Washington
10/12/2018 3:47 PM
No. 51728-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JESSICA A. DENYS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 15-1-00555-3

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>STATE’S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
C. <u>FACTS AND STATEMENT OF CASE</u>	2
D. <u>ARGUMENT</u>	5
1. A trial court’s decision whether to grant or deny a first-time offender waiver alternative sentence is reviewed for an abuse of discretion. In the instant case the sentencing court specified that it was aware that the defendant was statutorily eligible for the alternative sentence, but the court nevertheless refused to grant the waiver and instead imposed a standard range sentence because it reasoned that a first-time offender waiver sentence would be disproportionate to the crime. <i>On these facts, did the trial court abuse its discretion when it denied the waiver?</i>	5
2. The record does not support Denys’s assertion that the trial court gave any weight to the statements of victim-survivors when refusing to grant a first-time offender waiver alternative sentence in this case. Instead, the record shows that the trial court properly exercised its lawful discretion when rejecting the alternative sentence and imposed a standard range sentence. <i>Where the standard of review is for an abuse of discretion, did the trial court commit reversible error where it properly exercised its lawful discretion and refused to grant a first-time offender waiver?</i>	7
E. <u>CONCLUSION</u>	9

State’s Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>State v. Adamy</i> , 151 Wn. App. 583, 213 P.3d 627 (2009).....	6, 7
<i>State v. Boze</i> , 47 Wn. App. 477, 735 P.2d 696 (1987).....	6
<i>State v. Johnson</i> , 97 Wn. App. 679, 988 P.2d 460 (1999).....	6, 8, 9
<i>State v. Stately</i> , 152 Wn. App. 604, 216 P.3d 1102 (2009).....	4
<i>State v. Welty</i> , 44 Wn. App. 281 (1986)	6
 <u>Statutes</u>	
RCW 9.94A.650.....	1, 3, 6

State’s Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. INTRODUCTION

This appeal arises out of the trial court's imposition of a standard range sentence after the appellant, Jessica Denys, pled guilty to one count of vehicular homicide (under the disregard for the safety of others prong) and one count of bail jumping. At sentencing, Denys requested a first-time offender waiver under RCW 9.94A.650. The trial court judge was aware that she had authority to grant the alternative sentence, but she exercised her discretion and chose not to grant it. On appeal, however, Denys erroneously contends that the trial court found her ineligible for a first-time offender waiver and erroneously contends that the trial court gave inappropriate weight to the victim-survivors' statements. However, the record does not support Denys's contentions; instead, the record shows that the trial court judge correctly exercised her lawful discretion to deny the first-time offender waiver and to impose a standard range sentence.

B. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. A trial court's decision whether to grant or deny a first-time offender waiver alternative sentence is reviewed for an abuse of discretion. In the instant case the sentencing court specified that it was aware that the defendant was statutorily eligible for the alternative sentence, but the court nevertheless refused to grant the waiver and instead imposed a standard range sentence

State's Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

because it reasoned that a first-time offender waiver sentence would be disproportionate to the crime. *On these facts, did the trial court abuse its discretion when it denied the waiver?*

2. The record does not support Denys's assertion that the trial court gave any weight to the statements of victim-survivors when refusing to grant a first-time offender waiver alternative sentence in this case. Instead, the record shows that the trial court properly exercised its lawful discretion when rejecting the alternative sentence and imposed a standard range sentence. *Where the standard of review is for an abuse of discretion, did the trial court commit reversible error where it properly exercised its lawful discretion and refused to grant a first-time offender waiver?*

C. FACTS AND STATEMENT OF THE CASE

In this case, the appellant, Jessica Denys, pled guilty to one count of vehicular homicide under the operation of a motor vehicle with disregard of the safety of others prong and one count of bail jumping. RP 35-43; CP 154-62; CP 192-94. After errors were discovered in Denys's original statement of defendant on plea of guilty, Denys appeared in court, filed an amended statement of defendant on plea of guilty, and ratified her previous guilty plea. RP 48-59; CP 168-78.

In her amended statement of defendant on plea of guilty, Denys stated the basis for her plea to vehicular homicide as follows:

On October 26, 2014, in Mason County, [Washington], I operated a motor vehicle with disregard for the safety of others.

State's Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

The steering was faulty. I continued to drive it, and it veered to the side, and struck a vehicle driven by Crystal [Allmendinger], killing her.

CP 177. At sentencing, Denys requested a first-time offender waiver under RCW 9.94A.650. RP 70-71, 84-88.

The trial court judge declined to grant the first-time offender waiver. RP 92. The trial court judge provided the following explanation for its decision:

One of the things that is extremely important in sentencing an individual is to look at the proportionateness of a sentence to the criminal act. Also, the Court would, in a first-time offender waiver, be looking at what issues a person has that can be assisted through the Department of Corrections, because there is only a period of six months of community custody if there are no treatment obligations to do, and then it's twelve months. And I did not hear anything that would relate to a specific issue of chemical dependency or a mental health issue that's been diagnosed or even thought to be present.

RP 92-93. The trial court chose to impose a standard range sentence rather than grant the first-time offender waiver. RP 93. In summary, the court said it was "imposing a sentence... that is proportionate to the crime that was committed." RP 94.

The parties appeared in court again 20 days later on the defendant's motion to reconsider the trial court's sentencing order. RP 97,

State's Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

99. At the motion hearing, Denys, through counsel, argued that at the sentencing hearing the trial court judge had “made a comment that Ms. Denys... would not benefit from the first [sic] offender waiver because she did not meet the criteria, which the Court indicated would be a mental health issue or a substance abuse issue, and then sentenced to the range that was of course the standard range and outside of the first [sic] offender waiver.” RP 100. Denys asserted that under *State v. Stately*, 152 Wn. App. 604, 216 P.3d 1102 (2009), the trial “court had the authority to impose the first-time offender waiver.” RP 101. Denys alleged that the trial court judge “erred in not considering the first [sic] offender waiver.”

Id.

The trial court judge denied Denys’s motion for reconsideration.

CP 242. The court gave the following oral explanation for its ruling:

The Court was aware at sentencing that Ms. Stymacks, then Denys at the time this was filed, was eligible to be sentenced as a first-time offender. The Court chose not to do that. The primary reason the Court chose not to do that is that the punishment available under a first-time offender waiver, which is limited to zero to ninety days' confinement, was not in any way proportional to the crime that was committed in that the driving pattern of this case. Looking only at the circumstances that she pled to, as opposed to what was alleged, which was not part of the real facts doctrine, but looking only at the driving pattern that she pled to, and that someone died, was – that punishment of zero to ninety days was not proportional to the events that occurred. And so the Court did impose a standard range sentence, and that was twenty-one months out of a standard range of

State’s Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

twenty-one to twenty-seven months. The Court's comment with respect to not benefiting with regard to a first-time offender was primarily looking at the use of the State's resources. With regard to the first-time offender, where there is an individual that is placed on first-time offender and is getting the benefit of a period of supervision where there isn't anything essentially to supervise, other than law-abiding behavior and not driving unless properly licensed and insured, is not the best use of the Court's – or the State's resources. It's not the primary reason the Court made the discretionary ruling it did, but it is a element of whether we are appropriately using resources. The Court will deny the motion for reconsideration.

RP 102-03. On appeal, Denys now contends that the trial court erred by finding that she was *not eligible* for a first-time offender waiver and that the court erred by “giving greater weight, not ‘great weight’ to the victim’s family’s opinion....” Br. of Appellant at 1 (Assignments of Error).

D. ARGUMENT

1. A trial court’s decision whether to grant or deny a first-time offender waiver alternative sentence is reviewed for an abuse of discretion. In the instant case the sentencing court specified that it was aware that the defendant was statutorily eligible for the alternative sentence, but the court nevertheless refused to grant the waiver and instead imposed a standard range sentence because it reasoned that a first-time offender waiver sentence would be disproportionate to the crime. *On these facts, did the trial court abuse its discretion when it denied the waiver?*

State’s Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Trial courts have broad discretion about whether to sentence a defendant to a first-time offender waiver under RCW 9.94A.650. *State v. Johnson*, 97 Wn. App. 679, 988 P.2d 460 (1999) (citing *State v. Welty*, 44 Wn. App. 281 (1986)). Trial courts also have broad discretion about whether to refuse to grant a first-time offender waiver. *Id.* (citing *State v. Boze*, 47 Wn. App. 477, 735 P.2d 696 (1987)). The first-time offender waiver, at RCW 9.94A.650, plainly and unambiguously states that the trial court “*may*” grant a first-time offender waiver to an offender who statutorily qualifies for the waiver. *Id.* (at subsection (2)) (emphasis added). RCW 9.94A.650 therefore gives the trial court discretion to grant a first-time offender waiver – but, even if the defendant statutorily qualifies for the waiver, the court retains its discretion and is not required to grant it. *State v. Johnson*, 97 Wn. App. 679, 988 P.2d 460 (1999). A trial court abuses its discretion only if “its decision is manifestly unreasonable or is based upon untenable grounds or reasons.” *State v. Adamy*, 151 Wn. App. 583, 587, 213 P.3d 627 (2009).

Here, as outlined in the facts section, above, the trial court judge was aware that Denys statutorily qualified for the first-time offender waiver. RP 92-92, 102-03. However, the trial court exercised its

discretion and declined to grant the waiver. *Id.* The trial court's decision was well within its discretion, and its exercise of discretion was not "manifestly unreasonable or... based on untenable grounds or reasons."

State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009).

Accordingly, the State contends that the trial court's action should be sustained.

2. The record does not support Denys's assertion that the trial court gave any weight to the statements of victim-survivors when refusing to grant a first-time offender waiver alternative sentence in this case. Instead, the record shows that the trial court properly exercised its lawful discretion when rejecting the alternative sentence and imposed a standard range sentence. *Where the standard of review is for an abuse of discretion, did the trial court commit reversible error where it properly exercised its lawful discretion and refused to grant a first-time offender waiver?*

The record shows that prior to imposing sentence the trial court judge read some letters of support for the defendant. RP 92. The record also shows that several victim-survivors spoke to the court in support of the deceased victim. RP 72-79. At sentencing, the trial court commented that it was "able to look at a situation, hear from people, hear that they have lost a loved one, and look at the circumstances regarding an offense and the circumstances regarding the defendant." RP 92. But otherwise,

State's Response Brief
Case No. 51728-1-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

there is no citation to the record to support Denys's contention that the trial court "gave greater weight, not 'great weight' to the victim's family's opinions[,] as alleged by Denys on appeal. Br. of Appellant at 12. Nor is there is citation to any authority to explain why the contention would constitute error even if the record supported it.

As argued previously in response to appellant's first assignment of error, even where a defendant meets the statutory restrictions for the availability of a first-time offender waiver, the trial court nevertheless has very broad discretion whether to grant or deny the waiver. *State v. Johnson*, 97 Wn. App. 679, 988 P.2d 460 (1999). The trial court judge made no reference to the statements of the victim-survivors as a basis for its discretionary decision to deny the first-time offender waiver or as a basis for the sentence that the court ultimately imposed. RP 92-93, 102-03. Instead, the trial court judge specified that "[t]he primary reason" that the court denied the first-time offender waiver and instead imposed a standard range sentence was that the 0-90 day sentence that would have been available under the waiver "was not in any way proportional to the crime that was committed" in this case. RP 103. On these facts, the trial

court did not abuse its discretion. *State v. Johnson*, 97 Wn. App. 679, 988 P.2d 460 (1999).

E. CONCLUSION

The trial court was fully aware that Denys was statutorily qualified to receive a first-time offender waiver if the court were inclined to grant it. Nevertheless, the trial court appropriately exercised its lawful discretion and declined to grant the waiver. The trial court did not abuse its discretion, and the trial court's action, therefore, should be sustained on appeal.

DATED: October 12, 2018.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON CO PROS ATY OFFICE

October 12, 2018 - 3:47 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51728-1
Appellate Court Case Title: State of Washington, Respondent v. Jessica Denys, Appellant
Superior Court Case Number: 15-1-00555-3

The following documents have been uploaded:

- 517281_Briefs_20181012154645D2592493_6178.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 51728-1-II --- State v. Denys --- Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- burnssf@msn.com
- jeanetteboothe@msn.com
- timw@co.mason.wa.us

Comments:

Sender Name: Timothy Higgs - Email: timh@co.mason.wa.us
Address:
PO BOX 639
SHELTON, WA, 98584-0639
Phone: 360-427-9670 - Extension 417

Note: The Filing Id is 20181012154645D2592493