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Division II
State of Washington
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COURT OF APPEALS NO. 51964-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARILYN REDD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull, Judge,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court abused its discretion when it denied appellant's request for an alternative sentence under the drug offender sentencing alternative (DOSA).

Issue Pertaining to Assignment of Error

Appellant requested a DOSA after pleading guilty as charged to 20 mostly theft-related offenses, as well as possession of methamphetamine. There was no dispute appellant has a drug problem and the offenses were drug-driven. The Department of Corrections recommended a DOSA as appellant had very little criminal history and had never received drug treatment. In denying the request, however, the court reasoned the legislature did not intend for DOSA to apply when so many convictions are at issue. Where the DOSA statute contains no such prohibition, did the court misunderstand its sentencing authority and thereby abuse its discretion?

B. STATEMENT OF THE CASE

Until the current charges, appellant Marilynn Redd (who is 34 years old) had only one prior felony. RP (sentencing 6/4/18) 78. Until 2017, Redd was doing well, supporting her two young daughters by working as a medical assistant after putting herself

through college. RP 58, 66, 73-75. Unfortunately, in 2017, after several deaths in the family, Redd got caught up with the wrong crowd, became addicted to drugs and made some bad decisions. RP 59, 65, 67, 69.

While police were investigating Jesse Woods for check fraud, police learned of numerous accomplices, including Redd, who waived her Miranda[1] rights and admitted to her involvement in a check-cashing scheme. RP 6-9, 15, 17, 33, 37-38 (Officer Derek Ejde).

On February 27, 2018, the Kitsap county prosecutor charged appellant Marilyn Redd with ten counts of various theft-related offenses. CP 37-42. The offenses were broken down into three separate time frames. Id.

The state alleged the following offenses occurred on February 22, 2018: (1) first degree possession of stolen property; (2) second degree identity theft; (3) second degree possession of stolen property; and (4) forgery. Counts (1) and (3) reportedly constituted major economic offenses. CP 37-42.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

The state alleged the following offenses occurred on January 20, 2018: (5) second degree identity theft; (6) second degree possession of stolen property; and (7) forgery.

The state alleged the following offenses occurred on February 8, 2018: (8) second degree theft; (9) second degree identity theft; and (10) second degree possession of stolen property. CP 37-42.

The February 22 offenses involved items found inside the residence where Redd reportedly lived. RP 7-9. The items allegedly included stolen mail, stolen checks, a printer and computers used to create, alter or forge checks. CP 47. While the state alleged many victims, it did not allege much monetary loss. CP 48. For instance, many of the checks had not been cashed. CP 48, 54, 100.

The January 20 offenses reportedly involved the checking account of an individual (S.S.) at Kitsap Bank. CP 78. Apparently, the bank returned a forged check to S.S. that was written on his account to Redd for $300.00 on January 20. CP 78.

The February 8 offenses reportedly involved check fraud at the Kitsap Credit Union. RP 44-45.

On April 30, 2018, the state filed an amended information adding ten charges (for a total of 20). CP 107-17. The first ten charges remained the same, with one exception; the state added the major-economic-offense aggravator to count (2). CP 107-112. The new charges consisted of four more counts of forgery, three more counts of second degree identity theft, one count each of driving while license suspended, operating a vehicle without an ignition interlock device and possessing methamphetamine. CP 112-117.

Redd pled to the offenses as charged. CP 118-138. The standard range for the most serious offense was 43-57 months. CP 128. However, the state indicated its intent to seek an exceptional sentence of 100 months plus one day. CP 121.

For the counts alleged to be major economic offenses, Redd acknowledged the following:

> **Counts 1 & 4 (Possession of Stolen Property in the First Degree and Forgery):** On February 22, 2018, in Kitsap County, Washington, I possessed a check I knew to be stolen that was issued by the State of Washington to Grace Pajimula in the amount of $13,316.80 and withheld the check from the payee.[2] I also altered said check by removing the payee's name. Also, I possessed a check I knew to be stolen that was made payable to

[2] The $13,316.80 check was never cashed but was among the documents obtained when the warrant was executed. RP 40, 48.

> Namtredt MN Firm LP in the amount of $54,000. The amount included was a monetary loss greater than what is typical to a significant degree.[3]
>
> Counts 2-3 (Identity Theft in the Second Degree & Possessing Stolen Property in the Second Degree): On February 22, 2018, I possessed a check I knew to be stolen belonging to American Northwest Recycling and made the check payable to myself for $1,011.33 without the owner's permission and attempted to cash said check at the US Bank located in Poulsbo, Washington. It also involved a high degree of sophistication on count 2 and on count 3 involved multiple victims.

CP 136.

In advance of sentencing, Redd was evaluated for a sentence under the Drug Offender Sentencing Alternative. The evaluating community corrections officer recommended the alternative sentence, writing:

> Redd appeared to be honest and forthcoming when answering my questions regarding the DOSA PSI. Redd has minimal criminal history but her current charges all revolve around her drug addiction and things she did to obtain money for drugs. Redd reports she is asking for a DOSA so she can get the treatment she needs. She understands she has to go to prison for what she did but would like the opportunity to also get drug treatment to address her addiction. Redd has never been offered help and she feels she deserves a chance. She wants to be a mother to her children. Redd reports she is not a bad person, but she has had a lot of bad things happen to

[3] The $54,000 check was never cashed but was among the documents obtained when the search warrant was executed. CP 48.

> her. She felt a relief when she was arrested because she feels she was given a second chance.
>
> Redd is a 34 year old mother of three who is looking at 0-100 months in prison, and is requesting her first DOSA sentence. After reviewing Redd's history it appears she does qualify for the DOSA sentence and she has a severe drug addiction. Redd has a lot of emotional trauma she tries to escape by using drugs and alcohol. Redd's current case has 319 victims. I believe Redd would benefit from the DOSA sentence as well as chemical dependency treatment. Redd also needs to obtain mental health treatment to address her past trauma of sexual assault.

CP 142-43.

At sentencing, the prosecutor agreed Redd needed and would benefit by drug treatment. However, he maintained the state's request for 100 months plus one day on grounds the legislature did not intend a DOSA under these circumstances because it would ameliorate the aggravators. RP 48-50.

In defense of Redd's DOSA request, defense counsel reminded the court that the most Redd had ever served was 40 days in jail. 25 months, half the midpoint of the standard range, therefore would be no slap on the wrist. RP 81-82. Moreover, Redd took responsibility for her offenses by cooperating with police and pleading guilty. RP 82.

In the end, the court agreed with the state, reasoning: "I don't believe that the legislature intended for this quantity of criminal activity to support a DOSA recommendation." RP 94. Nonetheless, the court opted to impose 72 months, rather than the 100+ months the state sought. RP 94. This appeal follows. RP 160-73.

C. ARGUMENT

THE COURT ERRED IN DENYING REDD'S REQUEST FOR A DOSA.

The court abused its discretion in denying Redd's request for a DOSA because the court misunderstood the law and its sentencing authority when it denied the request. A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of its sentencing options. State v. Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007); State v. Mohamed, 187 Wn. App. 630, 350 P.3d 671 (2015).

For instance, in Mulholland, the court abused its discretion because it sentenced Mulholland while it possessed "a mistaken

belief that it did not have the discretion to impose a mitigated exceptional sentence for which [Mulholland] may have been eligible." Mulholland, 161 Wn.2d at 333. In Mohamed, the court abused its discretion because it sentenced Mohamed while it had a mistaken belief it could not waive school zone enhancements in imposing an alternative sentence, such as a DOSA. Mohamed, 187 Wn. App. at 641.

Here, the court abused its discretion because it sentenced Redd while it possessed a mistaken belief the legislature did not intend imposition of a DOSA "for this quantity of criminal activity." RP 93. Contrary to the court's reasoning, however, the legislature imposed no such prohibition on the sentencing alternative when multiple offenses are charged:

> In relevant part, RCW 9.94A.660 provides:
>
> (1) An offender is eligible for the special drug offender sentencing alternative if:
>
> (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);
>
> (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence

> of intoxicating liquor or any drug under RCW 46.61.504(6);
>
> (c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;
>
> (d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;
>
> (e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;
>
> (f) The end of the standard sentence range for the current offense is greater than one year; and
>
> (g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9.94A.660 (emphasis added).

As indicated above, none of the prohibitions set forth by the legislature have anything to do with the number of counts of conviction. Under subsection (1)(a) and offender facing sentencing for a sex or violent offense or someone who is subject to a firearm or deadly weapon enhancement is ineligible. Under subsection

(1)(b) an offender facing sentencing for felony physical control or driving under the influence is ineligible. Under subsection (1)(c) and offender with prior sex or violent offenses is ineligible. Under subsection (1)(d) an offender facing a standard range sentence of less than one year is ineligible. Under (1)(e) and offender who is subject to deportation while serving his or her sentence is ineligible. And finally, an offender who has received a DOSA within the last ten years of sentencing is ineligible.

The plain language of the statute is clear. The goal of statutory interpretation is to discern and implement the legislature's intent. State v. Armendariz, 160 Wash. 2d 106, 110, 156 P.3d 201, 203 (2007). In interpreting a statute, this Court looks first to its plain language. If the plain language of the statute is unambiguous, then this Court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning. Id.

Here, the court wrongly added a prohibition the legislature did not intend. As a result, the court abused its discretion in denying Redd's DOSA request. See e.g. State v. Guerrero, 163 Wn. App. 773, 778, 261 P.3d 197 (2011) (RCW 9.94A.660 clear that no screening report is required to order a DOSA).

In response, the state may argue the court's written findings make it clear the court declined to order a DOSA "based on the facts and circumstances in this case, which evidence the appropriateness of an exceptionally high sentence." CP 159. While a court's oral ruling may not be used to impeach a court's written ruling, the court's oral ruling may be used to interpret or clarify its written findings and conclusions. State v. Martinez, 76 Wn. App. 1, 3–4 n. 3, 884 P.2d 3 (1994) (citing Sweeten v. Kauzlarich, 38 Wn. App. 163, 169, 684 P.2d 789 (1984)). Here, the court's oral ruling is not inconsistent with its subsequent written findings but informs this Court of its meaning. The lower court's oral ruling clarifies that by "the facts and circumstances of this case," the court meant the number of convictions of which Redd stood convicted. As indicated above, however, the legislature did not intend to prohibit the court's grant of a DOSA for offenders facing multiple convictions. The statute is clear. Accordingly, this Court should reject any argument that the court's written findings somehow ameliorate the court's abuse of discretion in denying Redd's DOSA request.

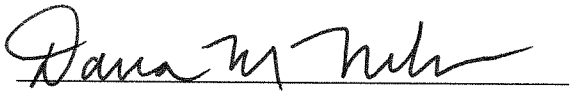
D. CONCLUSION

This Court should reverse Redd's sentence and remand to allow the court to reconsider Redd's DOSA request based on a proper understanding of the law.

Dated this 16th day of January, 2019

Respectfully submitted

NIELSEN, BROMAN & KOCH



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