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No. 52713-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sebastian Haller,

Appellant.

Lewis County Superior Court Cause No. 14-1-00638-6

The Honorable Judge James W. Lawler

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by summarily denying Mr. Haller's request for a prison-based Drug Offender Sentencing Alternative (DOSA).
2. The trial court's decision denying Mr. Haller's DOSA request violated due process.
3. The statute authorizing a sentencing judge to grant or deny DOSA is unconstitutionally vague because it fails to provide sufficient standards to prevent arbitrary application.
4. The statute authorizing a sentencing judge to grant or deny DOSA is so subjective that it violates due process.

ISSUE 1: A statute is unconstitutionally vague if it lacks standards and invites arbitrary application. Does the DOSA statute violate due process because it allows the trial judge to determine if DOSA is "appropriate" for an eligible offender without providing any standards governing that determination?

ISSUE 2: A statute violates due process if it allows arbitrary decisions that are unreviewable. Does the DOSA statute violate substantive and procedural due process because it permits arbitrary action that cannot be reviewed by an appellate court?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sebastian Haller was convicted of multiple drug offenses in 2015. CP 1. He appealed, and the Court of Appeals remanded for resentencing. CP 14.

By the time of resentencing, Mr. Haller had been in custody almost four years. CP 50. He had time to consider his life choices and had taken advantage of multiple programs at the Department of Corrections. These included Thinking for Change, Roots of Success, moral reconnection therapy, victim awareness, anger and stress management, ToastMasters and self-help support groups. Risk Assessment Report filed 10/15/18, Supp. CP.

The court ordered the Department of Corrections to screen Mr. Haller for DOSA eligibility. Order for Prison DOSA Screen filed 10/4/18, Supp. CP. A report prepared by DOC indicated that Mr. Haller is eligible for DOSA. Risk Assessment Report filed 10/15/18, Supp. CP. The report's author noted that Mr. Haller's time in prison "has appeared to [have] grabbed his attention." Risk Assessment Report filed 10/15/18, Supp. CP.

The report also shows that Mr. Haller has not received any treatment for his drug addiction since being terminated from inpatient treatment in 1997. Risk Assessment Report filed 10/15/18, Supp. CP.

The trial court resentenced Mr. Haller, running the school zone enhancements concurrently instead of consecutively this time. CP 27, 37, 45. Without discussion or any findings, the court denied Mr. Haller's request for prison-based DOSA. RP (11/14/18) 7-11. Mr. Haller timely appealed. CP 52.

ARGUMENT

MR. HALLER SHOULD HAVE BEEN GRANTED DOSA BECAUSE HE MEETS THE STATUTORY ELIGIBILITY REQUIREMENTS AND IS AN "APPROPRIATE" CANDIDATE FOR AN ALTERNATIVE SENTENCE.

A. Although he is eligible for the prison-based drug offender sentencing alternative, Mr. Haller was denied DOSA under a statute that is unconstitutionally vague.

A statute violates due process if it is vague. U.S. Const. Amend. XIV; Wash. Const. art. I, §3; *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). A statute is vague if it is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, --- U.S. ---, ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

A law invites arbitrary application if it "impermissibly delegates basic policy matters to... judges... for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

The drug offender sentencing alternative provides no standards governing a sentencing court's decision on a DOSA request. *See* RCW 9.94A.660. It impermissibly delegates to the judge "basic policy matters." *Id.* This permits the court to grant or deny DOSA "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*

Mr. Haller meets the eligibility requirements for an alternative sentence under RCW 9.94A.660. He has been screened by the Department of Corrections and determined to be eligible for DOSA. Risk Assessment Report filed 10/15/18, Supp. CP.

The evaluator pointed out Mr. Haller's long history of drug addiction. Risk Assessment Report filed 10/15/18, Supp. CP. The report also notes that Mr. Haller has never received treatment, apart from a single failed attempt at inpatient treatment in 1997. Risk Assessment Report filed 10/15/18, Supp. CP.

Mr. Haller should have been granted a DOSA sentence. He meets the statutory criteria for eligibility. He is also an "appropriate" candidate for DOSA, given his history of drug addiction and the lack of prior treatment attempts. He should have been granted an alternative sentence.

The court denied Mr. Haller a DOSA sentence under a statute that is unconstitutionally vague. *Id.* The sentence must be vacated, and the case remanded with instructions to impose a prison-based DOSA sentence.

- B. The DOSA statute violates procedural due process because it does not require the sentencing court to articulate any basis for its decision to deny a DOSA request.

Although there is no constitutional right to be sentenced under the drug offender sentencing alternative, a protected liberty interest may arise from “an expectation or interest created by state laws or policies.” *In re Lain*, 179 Wn.2d 1, 14, 315 P.3d 455 (2013). Such an expectation or interest “must rise to more than ‘an abstract need or desire,’ and must be based on more than ‘a unilateral hope.’” *Id.* (citations omitted).

The DOSA statute, RCW 9.94A.660, creates a constitutionally protected liberty interest. This interest is similar to those recognized by the U.S. Supreme Court in other contexts. For example, the Supreme Court has found a protected liberty interest in a person’s right to receive public assistance benefits¹ and unemployment compensation,² in a taxpayer’s right to claim tax exemptions,³ in a public employee’s right to continued

¹ *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

² *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

³ *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

employment,⁴ in an inmate's right to avoid transfer to a supermax prison or a psychiatric facility,⁵ and in an inmate's right to receive good time credits.⁶

Addressing this last interest (regarding good time credits), the Supreme Court indicated that “the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the due process clause to insure that the state-created right is not arbitrarily abrogated.” *Wolff*, 418 U.S. at 557.

Like the inmates facing loss of good time credits in *Wolff*, offenders seeking a DOSA sentence have an interest with “real substance.” *Id.* Their interest in the sentencing alternative is more than an “abstract need” or “unilateral hope.” *Lain*, 179 Wn.2d at 14. Instead, they have “an expectation or interest created by state laws or policies.” *Wilkinson*, 545 U.S. at 221.

Here, Mr. Haller had a protected liberty interest in having his DOSA request considered in a manner consistent with due process. This

⁴ *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

⁵ *Wilkinson v. Austin*, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980).

⁶ *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

required the sentencing judge to make a fair decision that was not arbitrary or based on improper considerations such as race or gender.

But the statute imposes no such requirement. Instead, the sentencing judge has plenary authority to determine if a DOSA sentence is “appropriate” for an offender who meets the eligibility criteria. RCW 9.94A.660(3).

The statute provides no standards guiding the court’s decision. Nor is there any requirement that the court articulate the basis for granting or denying a DOSA request. *Cf. State v. Jacobson*, 92 Wn. App. 958, 968–69, 965 P.2d 1140 (1998).

In *Jacobson*, the Court of Appeals upheld provisions granting judges the discretion to impose exceptional sentences. *Id.* The *Jacobson* court noted that “the procedural safeguard requiring sentencing courts to state their reasons for imposing exceptional sentences on the record—subject to appellate review—prevents arbitrary sentencing decisions.” *Id.*

There is no such procedural safeguard when it comes to DOSA. The sentencing court need not state any reason for its decision. RCW 9.94A.660. This insulates the court’s decision from appellate review and allows for “arbitrary sentencing decisions.” *Id.*

The problem is compounded by the fact that the statute provides no standards governing the sentencing court’s decision. This allows judges to

deny DOSA requests “on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108-109.

Both the federal and state constitutions prohibit the deprivation of liberty or property without due process. U.S. Const. Amend. XIV; Wash. Const. art. I §3. Courts determine the constitutional requirements of procedural due process by balancing three factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Here, all three factors weigh in favor of greater procedural protections. First, the private interest is significant. The difference between a standard sentence and a DOSA sentence can mean years in prison, as it does in Mr. Haller’s case.

Second, requiring sentencing courts to state the basis for denying DOSA will “prevent[] arbitrary sentencing decisions,” in part because any denial will be “subject to appellate review.” *Jacobson*, 92 Wn. App. at

968–69. Third, the additional requirement will place no burden on the State.

For all these reasons, sentencing judges must be required to state the basis for denying a DOSA request. At a minimum, the court should make a finding on statutory eligibility, consider factors favoring DOSA, and articulate reasons why DOSA is not “appropriate” under the statute. RCW 9.94A.660.

Mr. Haller was denied DOSA under a statute that violates procedural due process. His sentence must be vacated, and the case remanded for a new sentencing hearing. If the court refuses to impose a DOSA sentence, it must make a record adequately outlining the basis for that decision. This will allow appellate review, to ensure that the decision is not arbitrary.

CONCLUSION

Mr. Haller is eligible for DOSA. He is an appropriate candidate for the sentencing alternative, given his drug history and the lack of prior treatment attempts. The trial court should have imposed a DOSA sentence.

Furthermore, the DOSA statute violates due process because it is unconstitutionally vague and permits the sentencing judge to deny a DOSA request without articulating a sufficient basis for the decision.

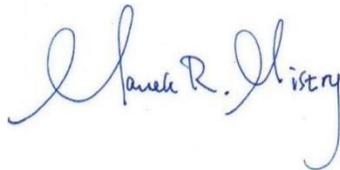
Mr. Haller's sentence must be vacated, and the case remanded for imposition of a DOSA sentence.

Respectfully submitted on July 8, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 8, 2019.



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