

FILED  
Court of Appeals  
Division II  
State of Washington  
8/26/2019 11:19 AM

No. 53294-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Joshua Rouse,**

Appellant.

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Thurston County Superior Court Cause No. 18-1-02015-1

The Honorable Judge John C. Skinder

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Rouse was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence that prejudiced Mr. Rouse.
3. Defense counsel should have sought redaction of irrelevant and prejudicial portions of the no-contact order admitted as Exhibit 3.

**ISSUE 1:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Rouse denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to seek redaction of the no-contact order?

4. The trial court erred by summarily denying Mr. Rouse's request for a prison-based Drug Offender Sentencing Alternative (DOSA).
5. The trial court's decision denying Mr. Rouse's DOSA request violated due process.
6. 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.
7. The DOSA statute is so subjective that it violates due process.
8. The DOSA statute lacks basic procedural protections.

**ISSUE 2:** 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 3:** A statute violates due process if it allows arbitrary decisions that are unreviewable. Does the DOSA statute violate procedural due process because it permits arbitrary action that cannot be reviewed by an appellate court?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Joshua Rouse and Megan Hopson had an on-and-off relationship spanning six years. RP (1/28/19) 84-85. In November of 2018, a neighbor saw Mr. Rouse walking away from Hopson's house and called police. RP (1/28/19) 33-35. She didn't know Mr. Rouse, but later identified him. RP (1/28/19) 36, 43-44.

The police investigated, and the State soon charged, burglary or attempted burglary. CP 2, 17-18; RP (1/29/19) 112. But after hearing the State's circumstantial case, the jury did not convict on either of those offenses. RP (1/28/19) 33-90; RP (1/29/19) 107-157; CP 22-23.

The State also charged Mr. Rouse with felony violation of a no-contact order. CP 17-18. At trial, the order was admitted into evidence without objection or redaction. Ex. 3; RP 1/28/19) 85-86; CP 3-5.

Included in that order, which was given to the jury, was the judge's "Finding of Fact" that the order was necessary "to prevent possible recurrence of violence." Ex. 3. It also indicated that firearms must be surrendered. Ex. 3.

The jury convicted Mr. Rouse of the felony violation of the no-contact order charge. CP 24.

At sentencing, Mr. Rouse qualified for a DOSA sentence, and his attorney made the request. RP (2/20/19) 17. The trial judge denied it,

stating “The court is not going to impose a Drug Offender Sentencing Alternative.” RP (2/20/19) 24. The remainder of the court’s ruling on DOSA: “Based upon all of the factors that have been put forth to me, though, I don’t think the Drug Offender Sentencing Alternative is appropriate.” RP (2/20/19) 25.

Mr. Rouse timely appealed. CP 80-92.

### **ARGUMENT**

**I. MR. ROUSE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Defense counsel did not seek redaction of the no-contact order that was introduced as Exhibit 3. Among other prejudicial material, the order included a judicial finding that its entry was necessary “to prevent possible recurrence of violence.” Ex. 3, p. 2. Counsel’s failure to seek redaction of the order deprived Mr. Rouse of the effective assistance of counsel.

**A. Defense counsel’s failure to seek redaction of the no-contact order prejudiced Mr. Rouse.**

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Mr. Rouse was denied his constitutional right to the effective assistance of counsel by his attorney’s failure to seek redaction of the no-

contact order. Counsel should have ensured that inadmissible and prejudicial material did not go to the jury. The conviction must be reversed because counsel's error adversely impacted the verdict.

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Crow*, 8 Wn.App.2d 480, 508-509, 438 P.3d 541 (2019). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Here, defense counsel should have objected and sought redaction of the no-contact order that was admitted as Exhibit 3. The order contained inadmissible material that was highly prejudicial. Counsel had no strategic reason justifying a failure to object.

First, the order included a judicial finding that it was issued “to prevent possible recurrence of violence.” Ex. 3, p. 2. This reference to “possible recurrence of violence” established that Mr. Rouse had committed violent acts previously. Evidence of any prior violence was irrelevant and highly prejudicial. It should have been excluded under ER 402, ER 403, and ER 404(b).

Second, the order required Mr. Rouse to “immediately surrender all firearms and other dangerous weapons.” Ex. 3, p.1. This provision suggested that the judge who signed the order believed Mr. Rouse to be a dangerous person. The judge’s belief on this point was wholly irrelevant to any element of the charged crimes. It was also unduly prejudicial. Counsel should have objected under ER 402, ER 403, and ER 404(b), and the provision should have been redacted.

Third, the exhibit was captioned “Domestic Violence No-Contact Order,” and included other references to domestic violence. Ex. 3, pp. 1-2. These references suggested to jurors that Mr. Rouse had committed violent acts against an intimate partner.<sup>1</sup> As with the judicial finding on the need to prevent “recurrence of violence,” these references to prior

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<sup>1</sup> Although lawyers and judges know that the “domestic violence” label can attach to non-assaultive crimes, members of the jury would not have had that information.

violence should have been excluded under ER 402, ER 403, and ER 404(b).

Defense counsel should have objected and sought redaction of the no-contact order prior to its admission into evidence. The prejudicial provisions did not pertain to any element necessary for conviction. *See* RCW 26.50.110; CP 49.

No tactical reason justified the introduction of these irrelevant and prejudicial portions of the order. Indeed, by having Mr. Rouse stipulate to his prior convictions, defense counsel succeeded in keeping similar prejudicial and irrelevant information from being admitted. For example, one of the prior convictions involved an assault in violation of a no-contact order; both prior convictions were categorized as domestic violence offenses. CP 19; *see* Ex. 3 and Ex. 4.

The inadmissible material prejudiced jurors against Mr. Rouse. The information painted him as a repeat violent offender too dangerous to be allowed to possess any weapons. It also raised the specter of a “recurrence of violence.” Ex. 3, p. 2.

Presented with this evidence, a jury would be more likely to convict than if the inadmissible evidence had been excluded. Accordingly, there is a reasonable probability that defense counsel’s failure to object affected the outcome of the trial. *Kyllo*, 166 Wn.2d at 862. Mr. Rouse was

deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* His conviction must be reversed, and the case remanded for a new trial. *Id.*

B. The Court of Appeals should review this constitutional issue *de novo*.

Ineffective assistance is an issue of constitutional magnitude that can always be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5 (a)(3). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018). The Court of Appeals should review Mr. Rouse's ineffective assistance claim *de novo*.

**II. THE TRIAL JUDGE SHOULD NOT HAVE SUMMARILY DENIED MR. ROUSE'S REQUEST FOR A PRISON-BASED DOSA SENTENCE.**

Mr. Rouse is statutorily eligible for a prison-based DOSA sentence under RCW 9.94A.660. However, the statute provides no standards guiding a sentencing court's exercise of discretion. Here, the sentencing judge rejected Mr. Rouse's DOSA request but did not explain his decision. Because it lacks standards and does not require a sentencing judge to articulate the basis for denying DOSA, RCW 9.94A.660 is unconstitutionally vague and violates procedural due process.

A. Mr. Rouse 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 statute authorizing alternative sentences for drug-related offenses 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. Rouse meets the eligibility requirements for an alternative sentence under RCW 9.94A.660.<sup>2</sup> The court found that his chemical

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<sup>2</sup> His prior DOSA attempt is not a bar to eligibility, as the statute contemplates one prior DOSA sentence in the preceding ten years. RCW 9.94A.660(1)(g).

dependency contributed to the offense. CP 66. He should have had his DOSA request considered under standards prohibiting arbitrary decision-making.

The court denied Mr. Rouse 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 benefits<sup>3</sup> and unemployment compensation,<sup>4</sup> in a taxpayer's right to claim tax exemptions,<sup>5</sup> in a public employee's right to continued employment,<sup>6</sup> in an inmate's right to avoid transfer to a supermax prison or a psychiatric facility,<sup>7</sup> and in an inmate's right to receive good time credits.<sup>8</sup>

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

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<sup>3</sup> *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

<sup>4</sup> *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

<sup>5</sup> *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

<sup>6</sup> *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).

<sup>7</sup> *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).

<sup>8</sup> *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

have “an expectation or interest created by state laws or policies.”

*Wilkinson*, 545 U.S. at 221.

Here, Mr. Rouse had a protected liberty interest in having his DOSA request considered in a manner consistent with due process. This 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. Rouse’s case.<sup>9</sup>

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. The sentencing court need only communicate its reason for denying a DOSA sentence.

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.

Here, the court found that Mr. Rouse “has a chemical dependency that has contributed to the offense.” CP 66. The court noted that Mr. Rouse was eligible for DOSA,<sup>10</sup> but refused to impose a DOSA sentence: “Based upon all of the factors that have been put forth to me... I don't

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<sup>9</sup> The court determined his standard range to be 41-54 months. CP 67. A DOSA sentence would have included a prison term of approximately 24 months, rather than the 48-month term imposed by the court. CP 68; RCW 9.94A.662(1)(a).

<sup>10</sup> RP (2/20/19) 24.

think the Drug Offender Sentencing Alternative is appropriate.” RP (2/20/19) 25.

The court did not outline these “factors,” or explain why they made DOSA inappropriate. RP (2/20/19) 25. Absent such information, Mr. Rouse cannot determine if the refusal to authorize DOSA was an “arbitrary sentencing decision[ ].” *Jacobson*, 92 Wn. App. at 968–69.

Mr. Rouse 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. *Id.*

C. The Court of Appeals should review this constitutional issue *de novo*.

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences...”<sup>11</sup> *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, Mr. Rouse was denied DOSA under a statute that violates due process. Under RAP 2.5(a)(3), Mr. Rouse can challenge the statute’s constitutionality for the first time on review. *See, e.g., In re J.R.*, 156 Wn. App. 9, 18, 230 P.3d 1087 (2010) (“[C]onstitutional challenges to statutes may be raised for the first time on appeal.”)

The Court of Appeals should address Mr. Rouse’s constitutional challenge to RCW 9.94A.660.

### **CONCLUSION**

At Mr. Rouse’s trial, jurors learned that the no-contact order introduced into evidence was issued “to prevent possible recurrence of violence.” The order included a provision requiring Mr. Rouse to

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<sup>11</sup> The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

immediately surrender any dangerous weapons (including firearms). The order also referred more than once to “domestic violence.”

These provisions were irrelevant to the charges faced by Mr. Rouse. They should have been redacted before the order was introduced into evidence. Counsel’s failure to object and seek redaction deprived Mr. Rouse of his constitutional right to the effective assistance of counsel. His conviction must be reversed, and the charge remanded for a new trial.

In the alternative, Mr. Rouse’s sentence must be vacated. Although he is eligible for the Drug Offender Sentencing Alternative, he was denied DOSA under a statute that is unconstitutionally vague. The statute also violates procedural due process because it permits the sentencing judge to deny a DOSA request without articulating a basis for the decision. The case must be remanded for a new sentencing hearing.

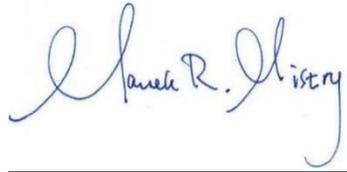
Respectfully submitted on August 26, 2019,

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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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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, 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 August 26, 2019.



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**August 26, 2019 - 11:19 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53294-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Joshua Dean Rouse, Appellant  
**Superior Court Case Number:** 18-1-02015-1

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