

FILED
Court of Appeals
Division II
State of Washington
10/22/2019 11:04 AM

No. 53294-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA D. ROUSE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder
Cause No. 18-1-02015-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT..... 4

 1. Rouse fails to demonstrate that his counsel’s performance was deficient or that his counsel’s performance prejudiced the outcome of the trial * 4

 2. The Constitutional vagueness doctrine does not apply to Sentencing guidelines, therefore RCW 9.94A.660 cannot be void due to a constitutional vagueness * 11

 3. This Court should not consider Rouse’s Due Process argument raised for the first time on appeal because there is no constitutionally protected liberty interest in a DOSA sentence, therefore, Rouse cannot demonstrate manifest constitutional error* 15

 4. The trial court properly followed the procedures of RCW 9.94A.660, therefore no due process violation occurred and Rouse cannot appeal his sentence within the standard range* 19

D. CONCLUSION..... 22

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Cashaw,</u> 123 Wn.2d 138, 866 P.2d 8 (1994)	15
<u>In re Pers. Restraint of Fleming,</u> 142 Wn.2d 853, 16 P.3d 610 (2001)	5
<u>In re Pers. Restraint of Pirtle,</u> 136 Wn.2d 467, 965 P.2d 593 (1996)	9
<u>State v. Baldwin,</u> 150 Wn.2d 448, 45 P.3d 1005 (2003)	12-13, 15-16
<u>State v. Barnes,</u> 117 Wn.2d 701, 818 P.2d 1088 (1991)	20
<u>State v. Grayson,</u> 154 Wn.2d 333, 111 P.3d 1183 (2005)	20-21
<u>State v. Hendrickson,</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	5-6
<u>State v. Herzog,</u> 112 Wn.2d 419, 771 P.2d 739 (1989)	20
<u>State v. Jordan,</u> 180 Wn.2d 456, 325 P.3d 181 (2014)	21
<u>State v. Linville,</u> 191 Wn.2d 513, 423 P.3d 842 (2018)	9
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995)	5-6, 17-18
<u>State v. O'Hara,</u> 167 Wn.2d 91, 217 P.3d 756 (2009)	17-18

<u>State v. Onefrey,</u> 119 Wn.2d 572, 835 P.2d 213 (1992)	19-20
<u>State v. Taylor,</u> 193 Wn.2d 691, 700, 444 P.3d 1194 (2019)	6-8
<u>State v. Thorne,</u> 129 Wn.2d 736, 767, 921 P.2d 514 (1996)	20-21

Decisions Of The Court Of Appeals

<u>In re Pers. Restraint of Troupe,</u> 4 Wn. App.2d 715, 423 P.3d 878 (2018)	11-12
<u>State v. Hancock,</u> 190 Wn. App. 847, 360 P.3d 992 (2015)	15
<u>State v. Hrycenko,</u> 85 Wn. App. 543, 933 P.2d 435 (1997)	14
<u>State v. Jacobson,</u> 92 Wn. App. 958, 965 P.2d 1140 (1998)	12-14
<u>State v. Jones,</u> 171 Wn. App. 52, 286 P.3d 83 (2012)	21
<u>State v. Rousseau,</u> 78 Wn. App. 774, 898 P.2d 870 (1995), <i>review denied</i> , 128 Wn.2d 1011, 910 P.2d 482 (1996)	14
<u>State v. Saunders,</u> 91 Wn. App. 575, 958 P.2d 364 (1998)	6

U.S. Supreme Court Decisions

<u>Ky. Dept of Corr. V. Thompson</u> , 490 U.S. 454, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)	15
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5, 9
<u>United States v. Wivell</u> , 893 F.2d 156, (8 th Cir. 1990)	12-13

Statutes and Rules

RCW 9.94A.120(2)	14, 16
RCW 9.94A.390	14, 16
RCW 9.94A.510	19
RCW 9.94A.517	20
RCW 9.94A.585	20
RCW 9.94A.660	<i>passim</i>
ER 402	6
ER 403	6-7
ER 404(b)	6
RAP 2.5(a)	17

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Rouse can demonstrate deficient performance and prejudice caused by his trial counsel failing to request redactions to exhibits, where tactical reasons existed for not making such a request, Rouse cannot demonstrate that a request to redact would have been granted, and Rouse admitted the conduct that resulted in his conviction to law enforcement.

2. Whether the Drug Offender Sentencing Alternative Statute, which grants discretion to the trial court to consider a sentence outside of the standard range, is rendered void pursuant to a constitutional vagueness analysis.

3. Whether the Drug Offender Sentencing Alternative creates a constitutionally protected liberty interest such that a denial of the alternative constitutes manifest error that can be raised for the first time on appeal.

4. Whether Rouse's sentence within the standard range is appealable where the trial court properly followed the procedures of the Drug Offender Sentencing Alternative statute and exercised its discretion granted by the Legislature in denying the request for an alternative sentence.

B. STATEMENT OF THE CASE.

The appellant, Joshua D. Rouse, was seen outside the residence of M.H. by a neighbor, Dawn Collier, who reported the behavior to law enforcement. RP 33-35, 74.1 Rouse was the ex-boyfriend of M.H. and a protection order was in place which prohibited Rouse from coming within 500 feet of M.H.'s residence. RP 75, 84, 85-86, 88, Ex. 3.

Collier saw a male walking through the yard with Khaki pants, a T-shirt or tank top and a red backpack. RP 36. He walked in the yard at a quick pace toward the road and out of sight. RP 37. In her call to 911, Collier indicated that he had come from the side of the neighbors and was walking pretty fast. RP 39. She also mentioned that the neighbor's window was wide open. RP 39.

M.H.'s father, David Hopson went to the farmer's market with his grandson on that day. RP 76. When he returned, he noticed that the window and blinds were open in M.H.'s room. RP 77. He indicated that the window had been closed with the blinds down when he left the residence. RP 78. M.H. indicated that Rouse

¹ The verbatim report of proceedings of the trial which occurred January 28-30, 2019 occurred in two volumes consecutively paginated. For purposes of this brief the trial will collectively be referred to as RP. The verbatim report of proceedings of the sentencing hearing that occurred February 20, 2019, is referred to as 2 RP.

knew where she lived and had been at the residence previously.
RP 107.

Law enforcement located Rouse near the Hands-on Children's Museum. RP 117. Collier was brought to the location and positively identified Rouse as the person she saw next to M.H.'s residence. RP 61, 118. Rouse admitted to law enforcement that he was in the area, that he was working on a relationship with M.H. and that they had a court order that they hadn't taken the time to get dismissed in the court system. RP 156.

Rouse was charged with residential burglary/domestic violence and felony violation of a post-conviction no contact order/domestic violence. CP 2. Prior to trial, the State amended the charge to allege residential burglary or in the alternative attempted residential burglary in count 1. CP 17-18. During trial, Rouse stipulated that he had two prior convictions as predicate offenses for felony violation of a no contact order. CP 19-21; RP 134, 157. The jury acquitted Rouse on the alternative counts of residential burglary or attempted residential burglary in count 1 of the amended information and found Rouse guilty of felony violation of a protection order. RP 255-256; CP 22-26.

Prior to sentencing, the State filed a sentencing memorandum arguing that a drug offender sentencing alternative was not appropriate. CP 53-65. The State's sentencing memorandum, considered by the trial court, included a "Report of Alleged Violation" regarding Rouse's previous DOSA sentence, which noted, "Mr. Rouse has been on supervision since 06/27/2018. His adjustment to supervision has been poor." CP 62-65, CP 64.

The trial court's decision focused on Rouse's criminal history and paid specific attention to the prior assault in violation of a no contact order that Rouse was serving a DOSA sentence on at the time of this offense. 2 RP 23. The trial court then stated, "Based on all of the factors that have been put forth to me, though, I don't think the Drug Offender Sentencing Alternative is appropriate." 2 RP 25. The trial court imposed a standard range sentence of 48 months. CP 68, 2 RP 25. This appeal follows.

Additional facts are included in the argument section as necessary below.

C. ARGUMENT.

1. Rouse fails to demonstrate that his counsel's performance was deficient or that his counsel's performance prejudiced the outcome of the trial.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). When claiming ineffective assistance of counsel, a defendant bears the burden of satisfying the two-pronged test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). First, the appellant must show that counsel's performance was deficient. Fleming, 142 Wn.2d at 865. Second, the appellant must show that the deficient performance prejudiced the defendant's case. Id. A failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. Strickland, 466 U.S. at 687.

When determining whether counsel's performance was deficient, a reviewing court begins with a strong presumption of counsel's effectiveness. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness under all of the circumstances. Fleming, 142 Wn.2d at 865-866. Rouse argues that his counsel was ineffective for failing to move to redact portions of the no contact order. Brief of Appellant at 5-6. Rouse fails to

overcome the presumption of effectiveness when his claim is considered along with all of the facts and circumstances of this case.

In order to demonstrate deficient performance based on a failure to challenge the admissibility of evidence, the appellant must demonstrate an absence of legitimate strategic or tactical reasons supporting the challenged conduct and that an objection to the evidence would likely have been sustained. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); *citing* McFarland, 127 Wn.2d at 336-337; Hendrickson, 129 Wn.2d at 80. Rouse contends that certain provisions of the no contact order were inadmissible pursuant to ER 402, 403 and 404(b). Brief of Appellant, at 5; EX. 3.

“In a felony violation of no-contact order case, the defendant is charged with violating the very no contact order sought to be admitted.” State v. Taylor, 193 Wn.2d 691, 700, 444 P.3d 1194 (2019) In Taylor, our State Supreme Court recognized that a no contact order in the context of a charge of violation of a no contact order has greater probative value in its introduction than the probative value of a general felony in an unlawful possession of a firearm case. Id. at 701. In rejecting a claim that the admission of

the domestic violence no contact order violated ER 403, the Taylor court stated the order

. . . was admissible under ER 403 because the probative value of the no contact order far outweighed any danger of unfair prejudice. The no-contact order had significant probative value as to Taylor's felony violation of a no-contact order charge. The no-contact order provided the specific restrictions imposed on Taylor, was closely related to the charged offense, and offered evidence of multiple elements of the offense. In addition, there was nothing particularly inflammatory or unfairly prejudicial about the no-contact order. The no-contact order did not describe the nature of Taylor's prior domestic violence offense and was not more likely to stimulate an emotional, rather than a rational, decision from the jury.

Id. at 702-703.

In this case, the no contact order admitted as Exhibit 3 likewise did not contain details as to the nature of the prior offense and the portions that Rouse assigns error to were not more likely to stimulate an emotional, rather than rational decision of the jury. This is especially true where the no contact order was related to one of the prior convictions that Rouse stipulated existed, had the same cause number as the stipulated to conviction, and the stipulation included that the offense was a protection order violation. EX. 3, CP 19-21.

In Taylor, the Court noted that there had not been an objection to the specific terms included in the no contact order, therefore objections to the terms of the no contact order were not preserved for review. Taylor, at 702. However, the Court noted “a trial court may redact any portion of a no-contact order that poses a risk of unfair prejudice.” Id. Despite, that notation, the Court found that the admission of the un-redacted no-contact order did not create a risk of unfair prejudice. Id. at 703. In this case, there was no allegation of violence or use of weapons. The stipulation to prior convictions included the conviction that the no contact order was issued under and indicated that it was simply a no contact order violation. CP 19-21. There is no indication in the record that the trial court would have granted a request to redact the exhibit, and more importantly, there is no indication that redactions were necessary to protect Rouse's right to a fair trial.

Rouse also cannot show that his attorney was not acting strategically by not asking for redactions. Given that the underlying conviction for the no contact was noted as violation of a no contact order in the stipulation, there was no risk that the jury would equate the information contained as evidence of additional prior bad acts. Redacting the no-contact order could just as easily cause the jury

to wonder what wasn't included and possibly have led to a greater prejudice than not redacting the no contact order. It is impossible on the record to say that counsel's decision not to request redactions was not strategic. See, State v. Linville, 191 Wn.2d 513, 524-525, 423 P.3d 842 (2018).

There are conceivable legitimate strategic reasons why Rouse's counsel did not propose redactions. Rouse cannot demonstrate that the trial court would have granted requested redactions or that his trial counsel did not have a strategic and tactical reason for not proposing redactions. His claim of ineffective assistance of counsel must fail on the deficiency prong.

A reviewing court need not address both prongs of the Strickland test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697. In this case, Rouse cannot demonstrate prejudice based on his attorney not requesting redactions to EX. 3.

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). Rouse complains of

inclusion of the term “Domestic Violence” on the no-contact order, a finding that “the order was necessary to reduce recurrence of violence,” and a finding that Rouse was prohibited from possessing firearms. Brief of Appellant at 5-6. However, even if these provisions had been redacted from Exhibit 3, the outcome of the trial would have been no different.

After being seen near the protected party’s window by a neighbor and positively identified as the person who had been there, Rouse admitted to law enforcement that he was in the area, that he was working on a relationship with the protected party and that they had a court order that they hadn’t taken the time to get dismissed in the court system. RP 33-35, 43-44, 156. When the no-contact order was admitted, the State focused the jury’s attention on identifiers, and the provision that Rouse “not knowingly enter, remain or come within 500 feet of the protected person, residence, school, workplace.” RP 86-88. None of the complained of portions of Exhibit 3 were emphasized to the jury. Likewise, the prosecutor did not emphasize or discuss any of the portions of the no-contact order to which Rouse assigns error during her closing argument. RP 205, 212.

Members of the community understand that no-contact orders are issued to prevent violence and harassment. Not redacting the no-contact order in this case did not have any affect on how the jury viewed the evidence. There was no indication of violence alleged at trial and no reason to believe that the complained of sections of the no-contact order would elicit an emotional response from the jury. Rouse's contention that the information prejudiced him by painting him as a violent and dangerous offender is belied by the fact that the jury acquitted him of the burglary and alternative attempted burglary charge. CP 22-23.

The jury only convicted Rouse of conduct that his own admissions to law enforcement established. RP 156. There was no probability that failing to redact exhibit 3 affected the outcome of this case. Rouse's claim of ineffective assistance of counsel must fail.

2. The Constitutional vagueness doctrine does not apply to sentencing guidelines, therefore RCW 9.94A.660 cannot be void due to a constitutional vagueness.

The reviewing court applies a de novo standard to questions of constitutional law, including a statute's constitutionality. In re Pers. Restraint of Troupe, 4 Wn. App.2d 715, 721, 423 P.3d 878

(2018). The court presumes a statute is constitutional. In re Troupe, 4 Wn. App.2d at 721. It is the burden of the party challenging the constitutionality of a statute to prove it is unconstitutional beyond a reasonable doubt. Id. Rouse argues that the sentencing alternative included in RCW 9.94A.660 is unconstitutionally vague; however, he cannot meet the burden of so demonstrating.

There are two due process concerns encompassed within a vagueness analysis. State v. Baldwin, 150 Wn.2d 448, 458-59, 45 P.3d 1005 (2003). “First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution.” Id. (citations omitted). Therefore, “[b]oth prongs of the vagueness doctrine focus on laws that prohibit or require conduct.” Id.

In State v. Jacobson, 92 Wn. App. 958, 966, 965 P.2d 1140 (1998), Division I of this Court discussed why applying the vagueness doctrine is analytically and theoretically unsound to sentencing guidelines., *citing*, United States v. Wivell, 893 F.2d 156, 159-60 (8th Cir. 1990). The statutes that govern sentencing, such as RCW 9.94A.660, provide the directives for the sentencing courts rather than define what conduct is illegal. RCW 9.94A.660;

Jacobson, 92 Wn. App. at 966 (citation omitted). The Eighth Circuit Court of Appeals, while discussing the federal Sentencing Guidelines, noted there was no constitutional right to sentencing guidelines and the limitation placed upon a judge's discretion by the Guidelines could not violate the due process rights of a defendant due to the Guidelines being vague. Wivell, 893 F.2d at 160. The Court in Jacobson adopted the Eighth Circuit's reasoning, stating, "[f]or the same reason, it is difficult to imagine a case in which a Sentencing Reform Act provision that grants limited discretion to sentencing courts could be found unconstitutionally vague." Jacobson, 92 Wn. App. at 966.

Applying the test from Baldwin to the Drug Offender Sentencing Alternative (DOSA), the statute neither defines conduct that is forbidden and subject to criminal prosecution, nor does the statute set the penalties for the crime charged by the State. Baldwin, 150 Wn.2d at 459; RCW 9.94A.660. RCW 9.94A.660 simply grants the trial court discretion to consider imposing an alternative sentence if the defendant is eligible and the trial court determines that the alternative sentence is appropriate. Following the analysis of Jacobson and the test of Baldwin such a statute is not subject to a vagueness challenge.

Similar to the argument made in Jacobson, Rouse argues that the DOSA statute allows arbitrary application. Brief of Appellant at 8; Jacobson, 92 Wn. App. 958 (“Jacobson maintains that RCW 9.94A.120(2) and RCW 9.94A.390(2) lack ascertainable standards for adjudication, permitting sentencing judges to arbitrarily impose exceptional sentences”). However, the Jacobson Court stated, “the fact that there is a discretionary element to sentencing does not mean that the statute is vague.” Jacobson, 92 Wn. App. at 968; *citing*, State v. Hrycenko, 85 Wn. App. 543, 933 P.2d 435 (1997). “Offenders do not have a right to a particular result that lies within the courts’ discretion.” State v. Rousseau, 78 Wn. App. 774, 777, 898 P.2d 870 (1995), *review denied*, 128 Wn.2d 1011, 910 P.2d 482 (1996).

Rouse cannot meet his burden of demonstrating that RCW 9.94A.660 is void for vagueness. The statute properly grants the trial court discretion in considering an alternative to the standard range. Even if this Court were to agree with Rouse’s conclusion that the statute is vague, the remedy that Rouse seeks would not be correct. If the statute that governs granting or denying a DOSA is vague, then the trial court could neither grant nor deny a DOSA. All that would remain is the standard range, which is the sentence

that Rouse received. Rouse's contention that he is somehow entitled to remand for DOSA sentencing, if adopted by this Court, would lead to the absurd result of nearly every offender being entitled to a DOSA regardless of whether the alternative is appropriate. This Court should avoid such an interpretation. State v. Hancock, 190 Wn. App. 847, 851, 360 P.3d 992 (2015).

3. This Court should not consider Rouse's Due Process argument raised for the first time on appeal because there is no constitutionally protected liberty interest in a DOSA sentence, therefore, Rouse cannot demonstrate manifest constitutional error.

The DOSA statute, RCW 9.94A.660, does not create a constitutionally protected liberty interest. The basic principle of the creation of a protected liberty interest is when a statute or law dictates a particular decision that must occur given particular facts. Baldwin, 150 Wn.2d at 460. There must be a limitation on the decision maker's discretion, not simply procedural limitations, but substantive limitations. Id. (citations omitted). "[B]efore a state law can create a liberty interest, it must contain 'substantive predicates' to the exercise of discretion and the 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" Id., citing In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)

(quoting Ky. Dept of Corr. V. Thompson, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

Rouse's argument defeats itself. Rouse acknowledges that there is no constitutional right for a person to be sentenced under the drug offender sentencing alternative. Brief of Appellant at 9. In Baldwin, the Supreme Court considered if the statutes, former RCW 9.94A.120(2) and former RCW 9.94A.390, governing imposition of standard range sentences unless a sentencing court finds substantial and compelling reasons justifying an exceptional sentence, created a protected liberty interest. Baldwin, 150 Wn.2d at 459-61. The Supreme Court held the sentencing guidelines did not require the trial court to sentence an offender to a specific outcome. Id. at 460-61. The guidelines were intended "only to structure discretionary decisions affecting sentences[.]" Id. at 461. "Since nothing in these guidelines requires a certain outcome, the statutes create no constitutionally protected liberty interest." Id.

Like the statutes at issue in Baldwin, RCW 9.94A.660 are intended to structure the discretionary decision of the trial court. Nothing in RCW 9.94A.660 requires a certain outcome, therefore, the statute does not create a protected liberty interest. Because the DOSA statute does not create a protected liberty interest,

Rouse cannot demonstrate a manifest constitutional error that can be raised on for the first time on appeal.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. O'Hara, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." Id., *citing* RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." Id. (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. Id. The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. Id. If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. Id. at 99; McFarland, 127 Wn.2d at 333.

An error is manifest if the appellant can show actual prejudice. O'Hara, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. Id. There must be a sufficient record for the reviewing court to determine the merits of the alleged error. Id. (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. McFarland, 127 Wn.2d at 333. Without prejudice, the error is not manifest. Id.

Because no constitutionally protected liberty interest is created by RCW 9.94A.660, Rouse cannot demonstrate manifest error. This Court should deny Rouse's attempt to raise this argument for the first time on appeal. Even if this Court were to agree that RCW 9.94A.660 creates a constitutionally protected liberty interest, Rouse would still need to demonstrate prejudice in order to meet the requirement of showing manifest error.

At sentencing, it is clear that the trial court considered many factors in making its decision that a DOSA sentence was not appropriate. The trial court considered Rouse's criminal history, the fact that he was on a DOSA sentence at the time of the offense in this case, and input relayed by the prosecutor from Rouse's community corrections officer. 2 RP 6, 7, 9, CP 53-65. The State's

sentencing memorandum, considered by the trial court, included a "Report of Alleged Violation" regarding Rouse's previous DOSA sentence, which noted, "Mr. Rouse has been on supervision since 06/27/2018. His adjustment to supervision has been poor." CP 62-65, CP 64.

The trial court's decision focused on Rouse's criminal history and paid specific attention to the prior assault in violation of a no contact order that Rouse was serving a DOSA sentence on at the time of this offense. 2 RP 23. The trial court then stated, "Based on all of the factors that have been put forth to me, though, I don't think the Drug Offender Sentencing Alternative is appropriate." 2 RP 25. There are many reasons in the record to demonstrate that a DOSA sentence was not appropriate in this case. As such, Rouse can demonstrate neither prejudice nor the existence of manifest error.

4. The trial court properly followed the procedures of RCW 9.94A.660, therefore no due process violation occurred and Rouse cannot appeal his sentence within the standard range.

Standard range sentences are not appealable as a matter of right, except under limited circumstances. RCW 9.94A.585; State v. Onefrey, 119 Wn.2d 572, 574 n.1, 835 P.2d 213 (1992). "A sentence within the standard range, under RCW 9.94A.510 or

9.94A.517, for an offense shall not be appealed.” RCW 9.94A.585(1). Then the statute plainly states a sentence outside the standard range may be appealed and sets forth the procedure and what the reviewing court must find to reverse an exceptional sentence. RCW 9.94A.585.

A trial court judge’s discretionary decision whether to grant an offender a DOSA sentence falls into the category of standard range sentences generally not appealable. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). However, an offender may challenge the procedure by which a sentence was imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). A challenge to a standard range sentence may only be brought upon a claim that the trial court erred by misapplying the statute, thereby employing improper procedure during the sentencing of the offender. Grayson, 154 Wn.2d at 338; Onefrey, 119 Wn.2d at 574 n.1.

Establishing the penalties for crimes in the State of Washington is a legislative function. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). The legislature may grant the trial court discretion in sentencing. State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991). The trial court exercises whatever

discretion is granted by the legislature. Thorne, 129 Wn.2d at 768. A trial court only fails to exercise its discretion in regard to a DOSA request when it fails to actually consider the request. Grayson, 154 Wn.2d at 342; State v. Jones, 171 Wn. App. 52, 55, 286 P.3d 83 (2012).

Here the record demonstrates that the trial court considered several factors when it found that a DOSA sentence was not appropriate. 2 RP 6, 7, 9, 23-25; CP 53-65. Like the trial court in Jones, the trial court “did not refuse to consider him for a prison-based DOSA, it did not abuse its discretion.” Jones, 171 Wn. App. at 56. The trial court followed the procedures set forth by the legislature for considering a DOSA sentence and gave the request actual consideration. As such, Rouse “may not appeal” the trial court’s decision to impose a standard range sentence instead of a DOSA. Id. at 55.

As noted above, RCW 9.94A.660 does not create a liberty interest. The law recognizes that the sentencing process is “less exacting than the process of establishing guilt.” State v. Jordan, 180 Wn.2d 456, 462, 325 P.3d 181 (2014). The trial court properly utilized the procedures set forth by the legislature. Nothing more was required. There was no due process violation.

D. CONCLUSION.

Rouse's defense counsel did not render ineffective assistance of counsel by not requesting redactions to Exhibit 3. Further, Rouse can demonstrate no prejudice caused by not having redactions to Exhibit 3, as the conviction referenced in Exhibit 3 was the same as that which he stipulated to in his stipulation to prior exhibits, no party emphasized the portions of Exhibit 3 that Rouse assigns error to, and the jury only convicted Rouse of the conduct that he admitted to when questioned by law enforcement. The Drug Offender Sentencing Alternative Statute legislatively grants discretion to the trial court to act outside the standard range. The statute is not vague, nor is it subject to constitutional vagueness analysis. The statute does not create a constitutionally protected liberty interest and the procedures included in the statute do not violate due process. Because the statute does not create a liberty interest, Rouse cannot demonstrate manifest error such that his due process claim should be considered for the first time on appeal.

The trial court correctly followed the procedures of RCW 9.94A.660, and properly exercised the discretion granted to it by the legislature. As such, Rouse's sentence within the standard

range is not appealable. The State respectfully requests that this Court affirm Rouse's conviction and sentence.

Respectfully submitted this 22nd day of October, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 22, 2019

Signature: Linda Olsen

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

October 22, 2019 - 11:04 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

The following documents have been uploaded:

- 532948_Briefs_20191022110419D2366436_0018.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Rouse FINAL.pdf

A copy of the uploaded files will be sent to:

- backlundmistry@gmail.com

Comments:

Sender Name: Linda Olsen - Email: olsenl@co.thurston.wa.us

Filing on Behalf of: Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:
2000 Lakedrige Dr SW
Olympia, WA, 98502
Phone: (360) 786-5540

Note: The Filing Id is 20191022110419D2366436