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Court of Appeals
Division II
State of Washington
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NO. 53937-3-II

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

STATE OF WASHINGTON, Respondent

v.

SHAITAYA MARIE JUSTICE MCCOOL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NOS. 19-1-00042-06,
19-1-01609-06, 19-1-01645-06, 19-1-01746-06 and 19-1-01892-06

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The Trial Court Properly Exercised its Discretion in Denying McCool’s Request for a DOSA Sentence. 1
- II. The State agrees the Judgment and Sentence should be amended to strike the portion which indicates the defendant’s LFOs shall bear interest..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT 2

- I. The Trial Court Properly Exercised its Discretion in Denying McCool’s Request for a DOSA Sentence. 2
- II. The State agrees the Judgment and Sentence should be amended to strike the portion which indicates the defendant’s LFOs shall bear interest..... 8

CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases

<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	5
<i>State v. Barton</i> , 121 Wash.App. 792, 90 P.3d 1138 (2004).....	3
<i>State v. Conners</i> , 90 Wash.App. 48, 950 P.2d 519 (1998)	3
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	5
<i>State v. Garcia–Martinez</i> , 88 Wn.App. 322, 944 P.2d 1104 (1997)	3, 4
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	3, 4, 5, 6
<i>State v. Hender</i> , 180 Wash.App. 895, 324 P.3d 780 (2014).....	3, 5
<i>State v. Jones</i> , 171 Wn.App. 52, 286 P.3d 83 (2012)	7

Statutes

RCW 10.82.090(1).....	8
RCW 9.94A.660.....	3
RCW 9.94A.660(1).....	5
RCW 9.94A.660(3).....	3

Rules

GR 14.1	5
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Unpublished Opinions

<i>State v. Nettles</i> , 196 Wn.App. 1059 (2016)	5, 6, 8
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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The Trial Court Properly Exercised its Discretion in Denying McCool's Request for a DOSA Sentence.**
- II. The State agrees the Judgment and Sentence should be amended to strike the portion which indicates the defendant's LFOs shall bear interest**

STATEMENT OF THE CASE

The State agrees with McCool's statement of the case with the following addition:

In rendering its decision, the trial court discussed, that the "...first question is whether somebody is statutorily qualified for a sentencing alternative, and that's the start of the Court's analysis is that this is a sentencing alternative." RP 42. The court went on to discuss in its ruling that:

It is, if you will, a gift or a variation from the standing sentencing regiment that the State has set up on these things.

And, you know, there are criteria in order to be able to qualify for it statutorily, but then there's some – a certain amount of discretion because we have limited resources. And so there are certain things that we look for, certain characteristics that are more prone to make this program a success or less likely to make this program a success.

And I don't have any doubt that drug use here is a major concern. I don't even have any doubt of the defendant's sincerity as she stands here today before the court.

My concern is that it's perhaps – perhaps too little too late vis-à-vis the whole pattern and constellation of information that I have in front of me including the report here and the DOC statement.

Again it's just – it's one that doesn't seem to fit and from my standpoint is a good use of resources and risks to try to squeeze into this program given the history, which we see a fairly consistent pattern of non-compliance, which is not a good sign for chances of success.

So there may be resources there in prison. I'm sure there are. I hope you take advantage of them, but I'm not going to grant the DOSA alternative.

RP 42-43.

ARGUMENT

I. The Trial Court Properly Exercised its Discretion in Denying McCool's Request for a DOSA Sentence.

McCool argues the trial court abused its discretion in failing to grant her a DOSA alternative sentence. Generally, an imposition of a standard range sentence is not reviewable on appeal, and this is not a situation in which the trial court has categorically refused to exercise its discretion which would render its decision reviewable by this court.

McCool cannot therefore seek review of the trial court's imposition of her standard range sentence. But even if this Court were to review the trial court's decision, the trial court did not abuse its discretion and properly

exercised its discretion in denying McCool's request for DOSA. McCool's claim fails.

The decision to authorize a DOSA sentence rests solely in the trial court's discretion. *State v. Hender*, 180 Wash.App. 895, 900, 324 P.3d 780 (2014) (holding "eligibility does not automatically lead to a DOSA sentence. Instead, under RCW 9.94A.660(3), the sentencing court must still determine that the 'alternative sentence is appropriate.' ") (quoting *State v. Barton*, 121 Wash.App. 792, 795, 90 P.3d 1138 (2004)); *see also State v. Conners*, 90 Wash.App. 48, 53, 950 P.2d 519 (1998). A sentencing court's decision of whether to grant a DOSA is ordinarily not reviewable on appeal. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005); RCW 9.94A.660. Review of such a decision is limited to circumstances where the trial court has categorically refused to exercise its discretion to impose a DOSA, *Grayson*, 154 Wn.2d at 342, or has relied on an impermissible basis for refusing to impose a DOSA. *See State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997). Where a trial court has considered the facts and has concluded that there is no basis for an exceptional sentence, it has exercised discretion, and a defendant may not appeal such a ruling. *Garcia-Martinez*, 88 Wn.App. at 330.

Here, the trial court did not categorically refuse to impose a DOSA sentence and instead considered McCool, individually, and whether she and her cases were appropriate for DOSA. The trial court also did not rely on an impermissible basis for refusing to allow McCool a DOSA sentence. Instead, the trial court found that McCool's history of non-compliance meant that success on DOSA was unlikely and therefore not appropriate for her. This is the very definition of exercising discretion available to the court. Because the trial court appropriately exercised its discretion, did not categorically deny a DOSA sentence, and considered the facts of the cases, McCool may not appeal the trial court's decision to impose a standard range sentence. *Garcia-Martinez*, 88 Wn.App. at 330. The trial court herein—unlike the trial court in *Grayson*—considered the facts and concluded that there was no basis for an exceptional sentence; thus, it exercised its discretion. Accordingly, McCool may not appeal from that ruling. *Garcia-Martinez*, 88 Wn.App. at 330. McCool's claim should be denied as she cannot appeal the trial court's valid exercise of its discretion in denying her a DOSA sentence.

However, if this Court reaches the merits of McCool's claim, it should find the trial court properly exercised its discretion in denying McCool's request for a DOSA sentence. A DOSA is intended to provide treatment to offenders judged likely to benefit from treatment. *Grayson*,

154 Wash.2d at 337. The DOSA program authorizes trial judges to sentence eligible, non-violent offenders to a reduced sentence, substance abuse treatment, and increased supervision in an attempt to help the offender recover from addiction. *Grayson*, 154 Wn.2d at 337–38. Whether to give a DOSA sentence is a decision left to the trial judge's discretion. *Grayson*, 154 Wn.2d at 335. The trial court's decision will not be disturbed on appeal unless the court's decision is “manifestly unreasonable or based on untenable grounds or untenable reasons.” *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997)).

In determining whether to order a DOSA, the trial court engages in a two-part inquiry. *Hender*, 180 Wn.App. at 900. First, the court determines whether the defendant is eligible for a DOSA based on meeting seven eligibility requirements under RCW 9.94A.660(1). Second, the court determines if a DOSA is appropriate for the particular defendant. *Id.* McCool appears to argue she was DOSA eligible and therefore the trial court abused its discretion in failing to grant her DOSA request. In the unpublished case of *State v. Nettles*, 196 Wn.App. 1059 (2016),¹ the Court on appeal addressed such an argument. The Court therein stated, “she

¹ GR 14.1 permits citation to unpublished cases of the Court of Appeals issued on or after March 1, 2013. This case is not binding on this court and may be given as much precedential value as this Court chooses.

appears to argue that eligibility for a DOSA necessarily means that a DOSA is appropriate. She is mistaken.” *Nettles*, slip op. at 2. The Court in *Nettles* noted that the case was nothing like the facts of *Grayson, supra*, in that in *Nettles*, the trial court did consider her request for DOSA and looked at her particular circumstances and from there decided that a DOSA sentence was not appropriate. *Nettles*, slip op. at 2. The same is true in McCool’s case. The trial court did not, as in *Grayson, supra*, categorically deny the defendant’s DOSA request, but rather considered her particular situation and decided that DOSA was not an appropriate sentence given McCool’s long history of non-compliance. *See* RP 42-43.

Further in *Nettles*, the Court on appeal noted that the trial court heard argument from both parties, noted that the defendant had committed numerous offenses, had previously been on DOSA and violated conditions of the sentence, considered a letter that the defendant wrote explaining her circumstances, and asked her questions. *Nettles*, slip op. at 2. In reviewing this procedure for determining whether a DOSA sentence was appropriate, the Court noted “there is nothing to show any improper procedure in the court exercising its discretion on the question whether a DOSA was appropriate.” *Id.* The same is true in McCool’s case: the procedure the Court followed was appropriate and shows the court exercised its discretion in a proper way. The Court listened to argument from both

parties, considered the DOC report, questioned the letter written by the officer, and listened to McCool explain her circumstances and her desire for a DOSA sentence. There is nothing to show any improper procedure; the court properly considered whether a DOSA sentence was appropriate for McCool given all the attendant circumstances.

Where a trial court considers valid factors in its denial of a DOSA sentence, its sentencing decision is not an abuse of discretion. *State v. Jones*, 171 Wn.App. 52, 55, 286 P.3d 83 (2012). In *Jones*, this Court found the trial court did not abuse its discretion in denying the defendant's request for a DOSA sentence. *Jones*, 171 Wn.App. at 55-56. The Court noted, "Because the trial court did not refuse to consider [Jones] for a prison-based DOSA, it did not abuse its discretion." *Id.* In McCool's case, the trial court enunciated its reason for not giving McCool a DOSA sentence. RP 42-43. The trial court in particular noted,

My concern is that it's perhaps – perhaps too little too late vis-à-vis the whole pattern and constellation of information that I have in front of me including the report here and the DOC statement.

Again it's just – it's one that doesn't seem to fit and from my standpoint is a good use of resources and risks to try to squeeze into this program given the history, which we see a fairly consistent pattern of non-compliance, which is not a good sign for chances of success.

RP 42-43. The trial court considered McCool for a DOSA sentence and determined that her long history of non-compliance was not an indicator that she would be successful in DOSA. The trial court did not decide to give a DOSA sentence because it felt that McCool would not be successful in it. Like in *Nettles* above, the history of non-compliance is a legitimate factor the court can consider in making its determination. The trial court's denial of McCool's request for a DOSA sentence was based on specific, tenable grounds and was therefore not an abuse of discretion. Accordingly, McCool's claim should be denied.

II. The State agrees the Judgment and Sentence should be amended to strike the portion which indicates the defendant's LFOs shall bear interest.

The judgment and sentence in each cause number indicates that the LFOs imposed shall bear interest. CP 51, 92, 141, 208, 254. This is clearly in error because the law in place at the time of McCool's sentencing states that LFOs shall not accrue interest. RCW 10.82.090(1). The State agrees that each of the judgment and sentences shall be amended to reflect that no interest shall accrue. The State also agrees the supervision fees should be stricken.

CONCLUSION

The trial court properly exercised its discretion in denying McCool's request for a DOSA sentence. The trial court's sentence should be affirmed, but the matter should be remanded to strike the provision that the LFOs imposed should bear interest and the supervision fee should also be stricken.

DATED this 17th day of April, 2020.

Respectfully submitted:

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