

FILED

OCT 25 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B.

No. 28971-1-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

CESAR BRIBIESCA GUERRERO,
Defendant/Appellant.

BRIEF OF RESPONDENT

Gary A. Riesen WSBA #7195
Chelan County Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
P.O. Box 2596
Wenatchee, Washington 98807-2596
(509) 667-6204

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I. FACTS

The State adopts the appellant's statement of facts.

II. ARGUMENT

A. THE SENTENCING COURT DID NOT COMMIT ERROR IN NOT GRANTING THE DEFENDANT'S REQUEST FOR A DOSA SENTENCE.

Here, the sentencing court declined to impose the DOSA sentencing option pursuant to RCW 9.94A.660. Ordinarily, a sentencing court's decision not to apply DOSA is unreviewable. State v. Connors, 90 Wn. App. 48 (1998); State v. Bramme, 115 Wn. App. 844 (2003). A defendant may not appeal a standard range sentence. A DOSA sentence is an alternative form of standard range sentence. State v. Williams, 112 Wn. App. 171 (2002).

Sentencing decisions made by the trial court are reviewed for abuse of discretion. State v. Warren, 165 Wn.2d 17 (2008). An abuse of discretion occurs only when the decision of the court is

manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. McCormick, 166 Wn.2d 689 (2009).

Here, the appellant asserts that the trial court failed to somehow grant due consideration to the appellant's request for DOSA. In asserting that argument, the appellant suggests that the court was required to follow a procedure wherein the trial court is required to order a chemical dependency screening report prior to sentencing in every drug case. The State challenges that assertion.

Under the Sentencing Reform Act, the original provision relating to sentencing under RCW 9.94A.500 was adopted in 1981. Section 1 of that statute did provide, as cited by the appellant, that unless there was a specific waiver by the court, the court shall order the Department of Corrections to complete a screening report before sentencing a defendant on a drug offense. That statute has been amended several times since its inception in 1981, but that specific provision has not been addressed.

However, in 2009 the Washington State Legislature amended RCW 9.94A.660 dealing with the Special Drug Offender Sentencing Alternative at (4) to provide as follows:

To assist the court in making its determination, the court may order the Department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

The permissive language “may” of this section was effective August 1, 2009. This statute clearly evidences the intent of the legislature to provide the court discretion as to whether or not such a report is ordered.

Under the rules of statutory construction, particularly the general-specific rule, a specific statute will prevail over a general statute. Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275 (2008), citing Work v. Washington National Guard, 87 Wn.2d 864 (1976).

The appellant’s argument that the court failed to follow the proper procedure required by the Sentencing Reform Act is incorrect. The court was not required to order either the risk assessment or a chemical dependency screening report. Specific statute dealing with DOSA applies and provides the court with discretion.

B. THE COURT DID NOT FAIL TO MEANINGFULLY CONSIDER THE DOSA OPTION AS ALLEGED BY THE APPELLANT.

This matter was tried before a jury and presided over by the sentencing judge. The sentencing judge had the benefit of hearing all of the evidence in the case. The sentencing judge heard the defendant's comments at sentencing.

The court did ask relevant questions of counsel and the defendant about his applicability for the program. The court asked about the potential immigration consequences of the defendant's conviction. RP 143, In. 10-13. Defense counsel advised of his status but was unsure what would occur. The court also stated at RP 144, In. 9-12, "As far as I can tell, there isn't any evidence before the court that Mr. Bribiesca is himself a drug user?"

The defendant didn't make any response to the court's question except to say he was on probation, but his probation appeared to be for a trespass conviction in District Court. RP 144, In. 12-21. The court again followed up discussing whether or not drugs were involved with the District Court matter and at that point

the defense counsel made a statement that his client was involved with using substances.

In short, the court did make an inquiry and did base her decision upon the information she had heard in trial relating to the offense itself and the comments that were made at sentencing.

It is important to note that the defendant's statements related not to an admission that he had drug issues and a request for treatment, but instead his request concerned all of the documents in the case, including communications between the prosecutor and his attorney, for the purpose of pursuing an appeal.

Treatment may be more beneficial for persons who are looking for treatment. That treatment is not guaranteed to every person who might seek out the DOSA program for the purpose of reducing a sentence rather than for the purpose of actually seeking treatment.

The court made a determination based upon all of the facts. RP 146, In. 25-RP 147, In. 7. The court further suggested that if the defendant had a drug problem, he could seek out treatment in prison but not necessarily under the DOSA program. RP 147, In. 9-19.

There was no abuse of discretion by the court in rejecting the DOSA option.

C. THE COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING A METHAMPHETAMINE LAB CLEAN UP FINE.

The appellant argues that the court wrongfully imposed a \$3,000 methamphetamine clean up fine in this case. As cited by the appellant, the statute provides that a person convicted of delivery of methamphetamine is guilty of a class B felony and the maximum imprisonment is not more than 10 years or more than a \$20,000 fine with regard to a delivery of less than 2 kilograms. The court under that statute has discretion to impose both imprisonment and a fine. If the fine is imposed, \$3,000 may not be suspended. (RCW 69.50.401(2)(b)). Here, the court imposed a \$3,000 fine. The defense made no objection to the imposition of that fine. The court did not indicate in the record that the imposition of the fine was mandatory, the court merely imposed the fine. Such action was within the discretion of the court and there is no showing of an abuse of discretion.

III. CONCLUSION

The State submits that the court should affirm the conviction and affirm the sentence as imposed by the trial court in this matter.

DATED this 22 day of October, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary A. Riesen", written over a horizontal line.

Gary A. Riesen WSBA #7195
Chelan County Prosecuting Attorney

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No. 28971-1-III

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
)ss
County of Chelan)

Cindy Dietz, being first duly sworn on oath deposes and says: that affiant is a citizen of the United States of America and of the State of Washington over the age of 21 years, not a party to the above-entitled proceedings and competent to be a witness therein; that on the 22nd day of October, 2010, affiant deposited in the United States

Mail, a properly stamped and addressed envelope directed to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

Marie Jean Trombley
Attorney at Law
PO Box 28459
Spokane, WA 99228-8459

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Cesar Bribiesca Guerrero
#339761
P.O. Box 769
Connell, WA 99326

said envelope containing Brief of Respondent.

Cindy Sief

SUBSCRIBED AND SWORN TO BEFORE ME THIS 22nd day of October, 2010.



Angela S. Reese
Notary Public in and for the State of Washington
residing in Wenatchee.
My commission expires 8-29-12.