

FILED

MAY 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29681-4-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

vs.

TERRIL JAMES WALLACE
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

In November 2010, Appellant Terril James Wallace pled guilty in Whitman County Superior Court to Delivery of a Controlled Substance (Methamphetamine) and Involving a Minor in the Delivery of a Controlled Substance (Methamphetamine). During Sentencing, Wallace requested a prison-based drug offender sentencing alternative (“DOSA”).

A presentence examination of Wallace found that he suffers from a drug/alcohol addiction and that, due to his addiction, there is a probability that he will engage in future criminal behavior. Although the sentencing court found from a legal standpoint that Wallace was eligible for DOSA, particularly given the small amount of methamphetamine involved in the matter, the court denied his DOSA request, reasoning that distribution of methamphetamine to a minor is a “particularly dangerous crime” and one that “requires severe punishment.” RP 33.

The sentencing court’s denial of Wallace’s DOSA request constituted reversible error. First, the court did not properly consider the issue of whether DOSA was appropriate in Wallace’s case, as directed by statute. Instead, the court focused on the broader, judicial policy consideration of whether, in a case involving

a conviction of distribution of methamphetamine to a minor, DOSA is appropriate. This focus exceeded the scope of the court's authority under the statute and constitutes reversible error.

Second, in determining that DOSA is not appropriate for defendants convicted of distribution of methamphetamine to a minor, the court effectively refused to categorically consider a DOSA request for a class of offenders. For this reason, the sentencing court abused its discretion in denying Wallace's request and the sentence ought to be reversed and remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Wallace's request for DOSA. RP 33.

2. The trial court erred in finding that the crime of distribution of methamphetamine to a minor is "not directly related to drugs or any need for treatment." RP 33.

3. The trial court erred in finding that the crime of distribution of methamphetamine to a minor is the type of crime that "requires severe punishment" and is not appropriate for DOSA. RP 33.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Wallace's request for DOSA when:

- (a) Wallace was found to be eligible for prison-based DOSA;
- (b) The presentence examination found that Wallace suffered from a drug/alcohol addiction;
- (c) The presentence examination found that Wallace was likely to engage in criminal behaviors in the future as a result of his addiction; and
- (d) The sentencing court's reason for denying Wallace's request was that distribution of methamphetamine to a minor is "a particularly dangerous crime [...] that's not directly related to drugs or any need for treatment," and it is a crime that "requires severe punishment" and "shows the need for incarceration as a means of protecting the community." RP 33.

IV. STATEMENT OF THE CASE

Appellant Terril James Wallace was adopted when he was six months old. CP 24. After serving in the National Guard as a tank driver, Wallace returned home to Minnesota and discovered that he was half Lakota Indian on his mother's side. CP 24. For a time, Wallace lived on the Red Lake Indian Reservation in

Minnesota, where he studied the traditions and art crafts of the Lakota Indians. CP 25. During this period in his life, Wallace was also diagnosed with several mental health issues—Attention Deficit Hyperactivity Disorder (ADHD), Bipolar Disorder, and Post Traumatic Stress Disorder (PTSD). CP 25, 56.

Several years ago, Wallace and his wife, Quinna Wallace, moved to Idaho. CP 26. Wallace volunteered in the community and taught art classes to children. CP 26. In 2008, Wallace won several awards in a statewide art contest, and earned the respect of his community as a talented artist and kind person. CP 26, 28-54.

Tragically, in 2009, Wallace's optometrist diagnosed him with Glaucoma, indicating that Wallace would eventually lose his eyesight, and consequently, his ability to continue practicing his artwork. CP 26-27, 35. Wallace fell into a deep depression, and started using drugs, including methamphetamine. CP 27.

On September 29, 2010, Wallace was arrested in connection with a controlled buy operation for methamphetamine conducted by the Quad Cities Drug Task Force in Colfax, Washington. CP 3-4. Wallace was charged by information in Whitman County Superior Court on October 4, 2010, with (1) Delivery of a Controlled

Substance – Methamphetamine, RCW 69.50.401(1); (2) Involving a Minor in the Delivery of a Controlled Substance – Methamphetamine, RCW 69.50.4015(1); and (3) Distribution of a Controlled Substance to a Minor, RCW 69.50.401(1). CP 5-8.

On November 29, 2010, pursuant to a plea agreement with the State, Wallace pled guilty to Counts 1 and 2—Delivery of a Controlled Substance (Methamphetamine), and Involving a Minor in the Delivery of a Controlled Substance (Methamphetamine). CP 12-18. The parties stipulated to an offender score of 2, and the State agreed to recommend the top of the standard range for both counts—20 months on Count 1 and 68 months on Count 2.¹ Although the State did not support a DOSA for Wallace, Wallace requested a prison-based DOSA upon entering his plea of guilty. CP 15; RP 19. Accordingly, the court ordered a presentence examination by Palouse River Counseling. CP 19-20.

The presentence examination, conducted on December 3, 2010, found that Wallace suffers from a drug/alcohol addiction and that, due to his addiction, there is a probability of future criminal behavior because he sells drugs to supply his addiction. CP 55.

¹ Due to the discrepancy between the standard range for Count 2 (51 – 68 months) and the maximum term available (60 months), the State ultimately recommended only 60 months on Count 2. RP 18.

The examination also found that Wallace used alcohol, marijuana, and methamphetamine on a daily basis in the preceding 12 months. CP 60.

At sentencing on January 7, 2011, the Court heard argument on the issue of DOSA. RP 19-28. The court also reviewed many letters submitted in support of Wallace by friends, family, and community members, and then announced that it was denying Wallace's request for DOSA. RP 24-51; RP 33.

The sentencing court found that from a legal standpoint Wallace was eligible for DOSA, particularly given the small amount of methamphetamine that had been involved. RP 29-30.

Notwithstanding Wallace's eligibility, the sentencing court stated that it was denying the request because distribution of methamphetamine to a minor is a "particularly dangerous crime" and one that "requires severe punishment." RP 33. The Court reasoned:

The bottom line here, this is a crime that's [...] involved an immediate and a direct and a substantial serious threat to the safety of a juvenile and it is also a, as I see it, particularly dangerous type of a crime that a particularly vulnerable victim of the crime here and it's the type of crime as I see it that's not directly related to drugs or any need for treatment [...] Just flat out an extremely bad serious crime involving bad serious criminal behavior and I cannot with good

conscience go along with the request to give you the benefit of a DOSA sentence here even though that would involve the substantial period of incarceration here. This is a crime that requires severe punishment, strict punishment that's been designated by the legislature and I think this is also the type of a crime here that shows the need for incarceration as a means of protecting the community.

RP 33.

Ultimately, the Court followed the State's recommendation and sentenced Wallace to the top of the standard range—20 months on Count 1 and 60 months on Count 2—with total fines and costs of \$1,800.00. CP 64-73. Wallace now timely appeals the sentencing court's denial of his request for DOSA.

V. ARGUMENT

A. THE SENTENCING COURT ERRED IN DENYING WALLACE'S REQUEST FOR A PRISON-BASED DRUG OFFENDER SENTENCING ALTERNATIVE

The Sentencing Reform Act of 1981 (hereinafter "SRA") was enacted to, among other reasons, offer offenders an opportunity to improve themselves, make frugal use of the state's and local governments' resources, and reduce the risk that offenders will reoffend in the community. RCW 9.94A.010 (5), (6), (7). To these ends, the legislature created the Drug Offender Sentencing

Alternative (hereinafter “DOSAs”), which offers offenders and communities an opportunity to address drug and alcohol addictions that lead to recidivism and to conserve public resources. See RCW 9.94A.660.

In determining whether to impose DOSA, a sentencing court engages in a two-part analysis: (1) Is the offender eligible for an alternative sentence?² and (2) Is the alternative sentence

-
- ² An offender is eligible for an alternative sentence under RCW 9.94A.660(1) if:
- (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);
 - (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);
 - (c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;
 - (d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;
 - (e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;
 - (f) The end of the standard sentence range for the current offense is greater than one year; and
 - (g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

appropriate? RCW 9.94A.660(3). To assist the court in making its determination, the court may order the department of corrections to complete a risk assessment report and/or a chemical dependency screening report. RCW 9.94A.660(4).

There are two types of DOSA—a prison-based alternative and a residential chemical dependency treatment-based alternative. RCW 9.94A.662, RCW 9.94A.664. If a court is considering a request for a residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department of corrections, which examination must address several statutory issues, including whether the offender and the community will benefit from the use of the alternative. RCW 9.94A.660(5)(a). Under the 2009 amendment to RCW 9.94A.660(5)(a), this provision no longer applies to offenders seeking the prison-based alternative. In other words, for prison-based DOSA, the statute no longer provides the court with the option of ordering an examination of the defendant that addresses whether the offender and the community will benefit from the use of the alternative. Simply put, the only issues before the court for the prison-based alternative are whether the defendant is eligible for DOSA and whether DOSA is appropriate.

- a. The Sentencing Court improperly considered the issue of whether the community would benefit from the use of a prison-based DOSA

The decision of whether to grant a DOSA is within the sentencing court's discretion. RCW 9.94A.660(2); State v. Barton, 121 Wn. App. 792, 797, 90 P.3d 1138 (2004). Although a sentencing judge's decision of whether to grant a DOSA is not generally reviewable, an offender may always challenge the procedure by which a sentence was imposed. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). An offender may challenge legal errors in the determination of his eligibility for a sentencing alternative, as well as challenge his sentence for an abuse of discretion. Grayson, 154 Wn.2d at 342; State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004), aff'd, 155 Wn.2d 574, 122 P.3d 903 (2005).

In the present case, the sentencing court found that Wallace was legally eligible for DOSA and all parties acknowledged that he was only eligible for prison-based DOSA. Accordingly, the only issue before the court was whether the alternative sentence was appropriate. In denying the request for DOSA, the sentencing court's primary stated reason was that the charge for distribution of

methamphetamine to a minor is a “particularly dangerous type of crime” and Wallace needed to be incarcerated “as a means of protecting the community.” RP 33. In other words, the Court did not explicitly find that DOSA was not appropriate for Wallace, but rather it found that the community would not benefit from an alternative sentence in a case such as this where distribution of methamphetamine to a minor was at issue.

Not only did the sentencing court improperly consider an issue that is proper to a determination of the residential chemical dependency treatment-based alternative—not the prison-based alternative—but also the court’s reasoning went against the very purposes underlying DOSA. First, the only issue before the court was whether DOSA was appropriate. The sentencing court’s consideration should have been constrained to the particular circumstances in Wallace’s case—*i.e.*, whether DOSA was appropriate for Wallace. Instead, the court focused on the broader, policy consideration of whether, in a case involving a conviction of distribution of methamphetamine to a minor, DOSA is appropriate. This focus exceeded the scope of the court’s authority under the statute. In effect, the sentencing court did not properly consider

consider whether DOSA was appropriate for Wallace as required by RCW 9.94A.660(3).

Second, the purposes underlying DOSA—offering the defendant an opportunity to improve himself, making frugal use of the governments’ resources, and reducing the risk that the defendant will reoffend in the community—were not furthered by the sentencing court’s decision. The pre-sentence screening report for Wallace found that he suffered from an addiction that, if left unaddressed, would lead to future criminal behavior. In denying Wallace’s request, the sentencing court deprived both Wallace and the state of the benefits that DOSA could provide—personal growth and recovery for Wallace, prevention of recidivism, and financial savings to the community.

b. The Sentencing Court abused its discretion when it categorically refused to impose DOSA to defendants convicted of distributing methamphetamine to minors

A defendant who is eligible to receive DOSA has a right to have the sentencing court fairly consider his request for DOSA. Watson, 120 Wn. App. at 529. It is an abuse of discretion for a sentencing court to categorically refuse to seriously consider whether a DOSA sentence is appropriate. Grayson, 154 Wn.2d at

342. A sentencing court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. See, e.g., State v. Riley, 121 Wash.2d 22, 37, 846 P.2d 1365 (1993).

A sentencing court's refusal to consider a DOSA request for a class of offenders is effectively a failure to exercise discretion and is subject to reversal. Grayson, 154 Wn.2d at 342. In Grayson, the trial judge declined to give DOSA mainly because he believed there was inadequate funding to support the program. Id. Although this may not have been his sole reason, the trial judge did not articulate any other reasons for denying the DOSA. Id. Because this was the trial court's primary and only stated reason for denying the DOSA, the appellate court held that the trial court categorically refused to consider a statutorily authorized sentencing alternative, which constituted reversible error. Id. at 342.

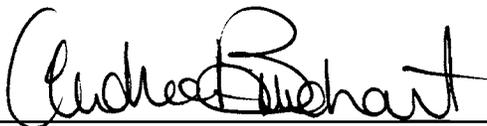
As discussed above, the sentencing court's primary stated reason for denying Wallace's request for DOSA was the fact that he was convicted of distribution of methamphetamine to a minor. The court's reasoning essentially amounted to a general sentencing policy that such crimes, across the board, require "severe

punishment, strict punishment," and are not appropriate for DOSA. RP 33. This announcement was not framed in terms of Wallace's particular needs or circumstances; rather the sentencing court focused on the type of crime Wallace was convicted of and found that such a crime does not warrant DOSA. In short, the court articulated a policy of denying DOSA requests for a class of offenders, and not merely Wallace. See Grayson, 154 Wn.2d at 342. For this reason, the court's denial of Wallace's request for DOSA was an abuse of discretion and requires reversal.

VI. CONCLUSION

Wallace respectfully requests that the court find that the sentencing court abused its discretion in denying his request for DOSA. His sentence ought to be reversed and his case remanded for further proceedings.

Respectfully submitted this 23rd day of May, 2011.


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CERTIFICATE OF MAILING

I certify that on May 23, 2011, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

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