

FILED

JUL 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29681-4-III

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

TERRIL JAMES WALLACE, Appellant

BRIEF OF RESPONDENT

Attorney for Respondent

Daniel F. Le Beau
Deputy Prosecuting Attorney
Whitman County
WSBA No. 38717

PO Box 30
Colfax, WA 99111-0030
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RESTATEMENT OF THE ISSUES

1. Did the Sentencing Court properly exercise its discretion in denying Mr. Wallace's request for a prison-based Drug Offender Sentence Alternative (DOSA)?
2. Did the Sentencing Court properly make a case-specific decision when it denied Mr. Wallace's DOSA request because of the fact that he injected Methamphetamine into a minor's arm?

BRIEF ANSWER

1. Yes. RCW 9.94A.660 requires the court to consider a defendant's eligibility for a DOSA and that the alternative sentence is appropriate.
2. Yes. The Sentencing Court focused exclusively on the facts of the case at bar when making the decision to deny the DOSA request.

STATEMENT OF THE CASE

On September 29, 2010, Mr. Wallace was arrested in Colfax, Washington for his involvement in a controlled buy operation for methamphetamine which was being conducted by the Quad Cities Drug Task Force. CP 3-4. The CI had contacted a Holly Herne about purchasing methamphetamine. CP 3. Holly Herne stated she didn't have any of the drug, but that she could contact her 17-year old sister, L.H. CP 3. The CI learned that L.H.

was with the appellant Mr. Wallace, who was in possession of the methamphetamine. CP 3.

The minor L.H. was contacted by the CI, and together they arranged the time and place to meet with Mr. Wallace. CP 3. The detectives observed the CI make contact with L.H. and Mr. Wallace. CP 3. The detectives learned in the debrief that Mr. Wallace provided the methamphetamine and also took the money for the transaction. CP 3.

Mr. Wallace was subsequently arrested for the delivery and involvement of the minor. CP 3. The officers had learned from L.H. that Mr. Wallace had injected L.H. with methamphetamine earlier in the day, and observed a needle mark (track) near the underside of L.H.'s right elbow. CP 3-4. Mr. Wallace, in a subsequent interview, admitted to injecting the minor in a crook of her arm with a syringe of methamphetamine "because he wanted her to have it done right." CP 3-4.

Mr. Wallace was charged on October 4, 2010, in the Whitman County Superior Court with three felony counts: Count I was Delivery of a Controlled Substance-Methamphetamine; Count II was for Involving a Minor in the Delivery of a Controlled

Substance-Methamphetamine; and County III was for Distribution of a Controlled Substance to a Minor. CP 5-8. On November 29, 2010, Mr. Wallace pled guilty to counts I and II, and the State dismissed count III pursuant to plea agreement. CP 12-18, 21. The State clearly stated in the plea form its opposition to Mr. Wallace's request for a Drug Offender Sentence Alternative (DOSA), and the State recommended the top of the standard range. CP 15, RP 19. The court then ordered a pre-sentence examination of Mr. Wallace to see if he was eligible for the requested DOSA, and scheduled the sentencing for January 7, 2011. CP 19-20.

The court addressed both issues required in a DOSA analysis, whether Mr. Wallace was eligible, and whether it was appropriate to grant the DOSA in this case. RP 29-37. The court clearly stated that Mr. Wallace was legally eligible, a fact stipulated to by the parties. RP 29. The court then discussed Mr. Wallace's case in particular regarding the injection of a minor with methamphetamine, and why it was not appropriate to grant the DOSA request in this case. RP 30-33. The Court sentenced Mr. Wallace to the top of the range on both counts. RP 33.

ARGUMENT

A Drug Offender Sentence Alternative (DOSA) is an option available in sentencing certain qualified offenders per statute. RCW 9.94A.660. A motion for this alternative sentence can be raised by the offender, the state, or the court. RCW 9.94A.660(2). There is a two part analysis as to whether or not an offender may be granted the motion for a DOSA. First, the offender has to be eligible for the DOSA, and second, the court has to find that a DOSA is appropriate. RCW 9.94A.660(1) and (3). The first prong, eligibility, is not an issue in this appeal, and therefore this brief is focused on the court's finding that a DOSA was not appropriate in this case.

Standard of Review. Review of a court's ruling on imposition of a DOSA is not automatic because "a standard range sentence, of which a DOSA is an alternative form, may not be appealed." *State v. White*, 123 Wn.App. 106, 113 (2004). However, "it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." *State v. Williams*, 149 Wn.2d 143, 147 (2003). "An abuse of discretion occurs if the sentencing court's decision is manifestly unreasonable or based upon untenable grounds or

reasons," *State v. Williams*, 112 Wn.App. 171, 178 (2002).

I. The Sentencing Court properly exercised its discretion in denying Mr. Wallace's request for a prison-based (DOSA).

Mr. Wallace correctly states that the issue in this case is whether the DOSA was appropriate as the court found that Mr. Wallace was eligible. Mr. Wallace's first issue then essentially states that it was inappropriate for the court to base that determination on Mr. Wallace's risk to the community. Appellant's Brief (AB) 10-12. Mr. Wallace further states that because he was only eligible for a prison based DOSA, that the court's consideration of the effects on the community was inappropriate.

The DOSA statute states:

If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

RCW 9.94A.660(3), emphasis added. The statute later

delineates that a court may order an evaluation by the department of corrections (DOC) if it is considering a residential DOSA. RCW 9.94A.660(5). This is a variation from the 2008 version of RCW 9.94A.660 because this used to be an option for both versions. RCW 9.94A.660 (2008), *amended by* RCW 9.94A.660 (2009). In the 2008 version, the residential and prison options were both listed under RCW 9.94A.660, whereas now they are broken down into the added sections of RCW 9.94A.662 for the prison-based alternative, and RCW 9.94A.664 for the residential alternative. *Id.* Under the 2008 version, after the statement that the court *may* order the examination by DOC in subsections (2) and (3), subsection (4) gave the court the option of determining whether, after receipt of the report, it was appropriate to grant a DOSA. *Id.*

The 2008 version could be read that the court is not given the option of appropriateness unless an examination by DOC is ordered, but in 2007 Division I of the Washington State Court of Appeals found that the sentencing court clearly has discretion to impose a DOSA sentence if the court determined that a sentence under that (DOSA) section was

appropriate. *State v. Smith*, 142 Wn.App 122, 129 (2007); *citing* RCW 9.94A.660(4), emphasis added. The determination made in *Smith* is consistent with the latest version of RCW 9.94A.660, where the statute combines those elements for the court in subsection (3) of the new version rather than separating the eligibility and appropriateness prongs between sections (1) and (4) as in the older version,. RCW 9.94A.660 (2008), *amended by* RCW 9.94A.660 (2009). Though the primary affect seems to be removal of the option of a DOC exam unless the court is considering a residential DOSA, the new version clearly states the court has discretion as to whether a DOSA is appropriate. At no juncture does any statute or case law appear to state that the appropriateness applies strictly to the defendant, the community, or anyone else.

To the contrary, even if eligible for a DOSA, the decision as to whether it is appropriate to grant a DOSA is within the discretion of the sentencing court. *State v. Smith*, 142 Wn.App. at 129. Even when the sentencing court expressed contempt for the DOSA program, because the

court found that DOSA would not benefit the offender or the community in that defendant's case, the reviewing court felt the sentencing court had properly exercised its discretion. *State v. Gronnert*, 122 Wn.App. 214, 225-226 (2004).

In the case at bar, the sentencing court merely exercised its discretion in denying Mr. Wallace's DOSA request. The reasons are more clearly discussed below, but Mr. Wallace claims that the sentencing court was inappropriate to consider Mr. Wallace's risk to the community, Mr. Wallace is wrong. It was very appropriate for the court to consider Mr. Wallace's risk to the community, as the court noted when referring to the DOSA statute and which crimes were precluded. RP 30. In addition, the court stated that it did not see the correlation between Mr. Wallace's intentional act of distributing the substance via a syringe and his addiction to substances, but rather that it was a moral issue. RP 32, ¶ 1, RP 33. The court clearly recognized that Mr. Wallace had a problem, and acknowledged how that problem could lead to selling drugs to feed his habit, maybe even steal or rob to provide for the habit, but this didn't explain injecting a minor

via syringe, and therefore was inappropriate in this case. RP

32.

II. The Sentencing Court properly made a case-specific decision when it denied Mr. Wallace's DOSA request.

Mr. Wallace correctly states the law when noting that a sentencing court's refusal to consider an entire class of offenders is effectively a failure to exercise discretion. *State v. Grayson*, 154 Wn.2d 333, 341-342 (2005). However, even if a court is opposed to the entire DOSA alternative and has contempt for it, as long as the court specifically states why it does not apply in a specific case, there is not an abuse of discretion. *State v. Gronnert*, 122 Wn.App. 214, 225-226 (2004). The sentencing in the case at bar clearly stated the sentencing judge's determination of appropriateness in this specific case, and not to a class of offenders.

During the sentencing hearing on January 7, 2011, the court heard from Defense Counsel Hart, Deputy Prosecutor Le Beau, Mr. Wallace, Mrs. Wallace, and thoroughly reviewed the letters supplied to the court by Mr. Wallace. RP 18-33. The court took a long break after hearing argument to review the matter, and further studied the applicable statute, letters from many vouching for Mr.

Wallace, the basis for the charges, and even Mr. Wallace's art work. RP 29. Defense counsel pointed out that had Mr. Wallace been convicted of the third count, distribution to a minor, he would not have been eligible for DOSA in any way. RP 19, CP 5-8. The court specifically read the statute and noted which types of crimes precluded a DOSA, and included that analysis "specifically in this particular case here." RP 30, ¶ 1.

Mr. Wallace states that the sentencing court issued a categorical decision, but the record indicates quite the opposite. It is clear from the record that the court took Mr. Wallace's request for a DOSA seriously, thoughtfully, and rendered a decision that did not abuse discretion. The court stated that had this been a delivery case only, not much time would have been needed to consider the request, and the court would likely have granted the DOSA. The court goes on to state that "it's necessary in making the decision here, for [the court] to take a look at what did you do here that led to this conviction." RP 30, ¶ 2. The court went on to state that in other cases involving minors in deliveries, in cases where a mother involved her own child actively, he might go along and grant a DOSA request. RP 30-31. However, though the sentencing judge

read the letters on Mr. Wallace's behalf carefully, the judge noted that none of them mentioned the nature of the circumstances, namely distribution of methamphetamine via syringe to a minor. RP 31-32. The court seriously questioned whether those vouching for Mr. Wallace would have written those letters had they known of that particular circumstance. *Id.* The court goes on to stress Mr. Wallace's specific age and that the minor was 17 years old, on several different occasions. RP 31-32. Finally, as stated above, the court goes on to note that while Mr. Wallace was clearly addicted, and that may have had an effect on his other criminal activity, the judge saw no correlation between the addiction and ingesting a dangerous addictive substance into a 17-year old girl. RP 31-33. The court even specifically addresses how the glaucoma diagnosis didn't make sense as the cause of the addiction. RP 32-33. Finally, the court specifically states one more time there is no relation between Mr. Wallace's addiction and the actions he took, but was rather a reflection of his own moral turpitude. RP 33.

The court does use the word "type" of crime a couple of times when wrapping up in the final portion of the colloquy on RP 33, but it is clear from the context of the rest of the colloquy that he

is referring to this particular defendant and the crime committed. RP 28-33. Even if it could be found that the court is going into a category, and type of crime at the end, there is sufficient analysis, such as in *State v. Gronnert*, that the discretion used was specifically applied to the facts of Mr. Wallace's case.

There was no categorical denial, no class of crime was precluded. The sentencing court focused on many specific aspects of the case at bar: Mr. Wallace's age and the minor's age, his glaucoma, the letters written on his behalf, his ADHD, and injecting a controlled substance via syringe. The court notes other cases and scenarios where a DOSA grant could occur even under the same charges Mr. Wallace faced. The decision rendered by the sentencing court was particular to this case, and far from an abuse of discretion.

CONCLUSION

The State respectfully requests that this court deny the Appellant's request to find that the sentencing court abused its discretion and affirm the sentence determined by the trial court.

Dated this 21st day of July, 2011.

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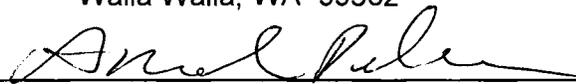
STATE OF WASHINGTON)
COUNTY OF SPOKANE)

AMANDA PELISSIER, being first duly sworn, deposes and says as follows: That on **July 21, 2011** I caused to be mailed in the United States Post Office at Colfax, Washington, with postage fully prepaid thereon, a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) at the following address(es):

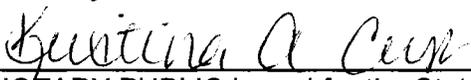
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DATED this July 21, 2011.


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SIGNED before me this 21st day of July, 2011, by KRISTINA COOPER


NOTARY PUBLIC in and for the State of
Washington, residing at: Oakesdale, WA
My Appointment Expires: 03-09-2015

