

FILED

MAR 29, 2012

Court of Appeals
Division III
State of Washington

No. 30168-I-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Appellant,

v.

CHARLES R. TUCKER,

Respondent.

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

BRIEF OF RESPONDENT

LINDSAY CALKINS
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A. STATEMENT OF THE ISSUES

1. Is the State barred from appealing a standard-range sentence when it has alleged no legal error?

2. Was there sufficient evidence that chemical dependency “contributed” to an offense when the defendant testified that he was a drug user and had committed the offense in order to obtain drugs, and another witness testified about the defendant’s long-term drug abuse?

B. STATEMENT OF THE CASE

Mr. Tucker pled guilty to Failure to Remain at the Scene of an Accident-Injured Person, in violation of RCW § 46.52.020(3). At sentencing, Mr. Tucker testified that he had left the scene after the accident because he was “going after drugs.” RP 26. His girlfriend testified that Mr. Tucker had “struggles with addiction,” had relapsed multiple times, and was “definitely on his way to get drugs.” RP 25.

After he was arrested but before sentencing, Mr. Tucker completed an alcohol and drug assessment that indicated past amphetamine, alcohol, and cocaine dependence. RP 16. During his assessment, Mr. Tucker indicated that he had a substance abuse problem. RP 20. He received a recommendation of inpatient alcohol and drug treatment followed by outpatient after care. RP 16. Mr.

Tucker had two prior convictions for drug-related offenses. RP 20–21.

At sentencing, the trial judge imposed a sentence under the Drug Offender Sentencing Alternative (DOSA). See RCW § 9.9A.660(1). The State did not argue that Mr. Tucker was not statutorily eligible for a DOSA. The court made a finding of chemical dependency, and explained that he was going to impose a DOSA in order to correct Mr. Tucker’s “despicable” behavior, which included leaving the scene of an accident to buy drugs. RP 28– 29. Mr. Tucker was sentenced to 12.75 months in jail and 12.75 months in community custody, the standard range with DOSA applied. CP 18–20; RCW § 9.94A.662(1); State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003) (noting that a DOSA is an alternative form of a standard-range sentence).

C. ARGUMENT

1. THE STATE MAY NOT APPEAL A STANDARD RANGE SENTENCE WHERE, AS HERE, THERE WAS NO LEGAL ERROR.

Generally, a standard-range sentence, including a DOSA, is not subject to appellate review. See, e.g., RAP 2.2(b)(6); RCW § 9.94A.585(1); State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). This is because a sentence properly set within the range established by the Legislature cannot be an abuse of discretion as a

matter of law. Williams, 149 Wn.2d at 146–47 (citing State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719 (1986)).

But a party may challenge underlying legal conclusions that determine which sentencing provision applies, and may contest the procedure by which a court arrives at a sentence. Williams, 149 Wn.2d at 146–47. In Williams, for example, the court had improperly applied a DOSA statute retroactively; the Supreme Court explained that this was a legal error subject to appellate review. Id. at 147. In State v. Grayson, the Supreme Court reviewed a trial judge’s categorical denial of a DOSA sentence, ruling that such a practice was a failure to exercise statutory discretion and was reversible error. 152 Wn.2d 333, 342–43, 111 P.3d 1183 (2005).

Here, however, the State makes no claim of legal error. Rather, the State claims that the trial court erred in its factual determination of whether chemical dependency contributed to Mr. Tucker’s offense. AOB 4. The State has not claimed that the trial court improperly concluded that Mr. Tucker satisfied the criteria for DOSA eligibility under RCW § 9.9A.660(1), nor does it claim that Mr. Tucker’s standard range was erroneously calculated. See State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004) (“But a challenge to a standard range

sentence is permitted if the court erred as to the *eligibility* for a sentencing alternative, where the ‘central issue’ is a matter of statutory construction.”) (emphasis in original) (citing State v. Onefrey, 119 Wn.2d 572, 574 n. 1, 835 P.2d 213 (1992)). The only claim of error is that the trial court’s factual finding was incorrect—a finding made after listening to the testimony of Mr. Tucker and a witness, and after reviewing documentary evidence of Mr. Tucker’s history of drug abuse. See RP 16, 20–21, 25–26. In a bench proceeding, the trial judge evaluates witness credibility and his findings will not be disturbed on appeal. In re Davis, 152 Wn.2d 647, 682–83, 101 P.3d 1 (2004); see State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

In this case, the trial judge reviewed the evidence, determined that the witnesses were credible, and found that chemical dependency had contributed to Mr. Tucker’s leaving the scene of the accident. See RP 28–29. This is a factual determination. See Armenta, 134 Wn.2d at 14. Because there is no claim of *legal* error, the State may not appeal the imposition of this standard-range sentence. RAP 2.2(b)(6); RCW § 9.94A.585(1); Williams, 149 Wn.2d at 146.

2. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT CHEMICAL DEPENDENCY CONTRIBUTED TO MR. TUCKER'S OFFENSE.

The State's argument at the sentencing hearing and on appeal is that Mr. Tucker was not under the influence of drugs at the time the offense was committed. RP 3, 15; AOB 6. The State also argues that "going after drugs" had nothing to do with the "nature of the offense." AOB 6. But neither of these things is required by the plain language of the statute. The statute requires a court to find only that "a chemical dependency . . . contributed to . . . [the] offense." RCW § 9.94A.607(1).

Here, the court heard testimony that Mr. Tucker left the scene of the accident because he was "going after drugs." RP 26. His girlfriend also testified that Mr. Tucker was "definitely on his way to get drugs," and that Mr. Tucker had a history of chemical dependency. RP 25. The court heard that Mr. Tucker had a drug and alcohol assessment that revealed a long history of substance abuse and indicated that Mr. Tucker had a problem. RP 16, 20. Mr. Tucker had received a recommendation for inpatient treatment. RP 16. In addition, Mr. Tucker had two previous convictions for drug offenses. RP 20–21. This was more than enough evidence from which the court could make a factual determination that Mr. Tucker's chemical dependency "contributed" to

his decision to leave the scene of the accident. See RCW § 9.94A.607(1); c.f. State v. Jones, 119 Wn. App. 199, 208, 76 P.3d 258 (2003) (no evidence that alcohol contributed to an offense where there was no presentence report or evaluation and no testimony that alcohol motivated the crime).

D. CONCLUSION

The State may not appeal Mr. Tucker's standard-range DOSA sentence because there is no claim of legal error. If the Court reaches the merits, the trial judge followed the statute and appropriately exercised his discretion in finding that chemical dependency contributed to Mr. Tucker's offense. The DOSA sentence should be affirmed.

DATED this 29th day of March, 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
APPELLANT,)	
)	
v.)	NO. 30168-1-III
)	
CHARLES TUCKER,)	
)	
RESPONDENT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF MARCH, 2012.

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