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MAY 29, 2012
Court of Appeals
Division III
State of Washington

30252-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALISSA M. VEGA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF WALLA WALLA COUNTY

APPELLANT'S BRIEF

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STATUTES

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A. ASSIGNMENT OF ERROR

1. The court abused its discretion by failing to consider the residential treatment alternative sentence requested by the defendant.

B. ISSUES

1. The statutes governing the residential treatment alternative sentence, RCW 9.94A.660 and RCW 9.94A.664, contain inconsistent limitations on eligibility for the sentence. The trial court relied on the more restrictive provision and concluded the defendant was not eligible. Should the statutes be construed in the defendant's favor and the matter remanded for resentencing?

C. STATEMENT OF THE CASE

The State charged Alissa Vega with having delivered a controlled substance within 1000 feet of a school bus stop on April 30, 2011. (CP 6) Ms. Vega entered a guilty plea and the State agreed to recommend a prison-based sentence under the Drug Offender Sentencing Alternative (DOSA). (CP 16, 20) Ms. Vega's standard range sentence, including the school bus stop enhancement was 36-44 months. (CP 32-34)

Defense counsel asked the court to consider imposing a residential based DOSA sentence. (RP 21; CP 23-27) The State contended Ms. Vega was ineligible for the residential treatment program because this option is only available to offenders the mid-point of whose standard range sentence would be 24 months or less. (CP 33)

The court agreed that that Ms. Vega was not eligible for the residential-based DOSA treatment program. (RP 34) The court determined that Ms. Vega's standard range was 36 to 44 months, and imposed a prison-based DOSA sentence consisting of 20 months confinement, with credit for 45 days served, and twenty months community custody. (RP 42; CP 46)

D. ARGUMENT

1. THE COURT FAILED TO EXERCISE DISCRETION BY ERRONEOUSLY RULING MS. VEGA WAS NOT ELIGIBLE FOR THE RESIDENTIAL DOSA PROGRAM.

“Where a defendant has requested a sentencing alternative authorized by statute, a trial court's failure to consider that alternative is effectively a failure to exercise discretion and is subject to reversal.” *State v. Landsiedel*, 165 Wn. App. 886, 889, 269 P.3d 347 (2012) *citing State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Whether

the defendant is eligible for a sentencing alternative “is a question of statutory interpretation” and is reviewed *de novo*. *Id.*

The court ruled Ms. Vega was ineligible based on the provisions of RCW 9.94A.660(3):

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 midpoint of Ms. Vega’s standard range (hereafter the presumptive sentence), after adding the school bus stop enhancement, was 40 months.

Ms. Vega had pointed out an obvious inconsistency between RCW 9.94A.660 and the statute specifically governing residential treatment alternative sentencing, which provides in part:

(1) A sentence for a residential chemical dependency treatment-based *alternative shall include a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater*, conditioned on the offender entering and remaining in residential chemical dependency treatment

certified under chapter 70.96A RCW for a period set by the court between three and six months.

RCW 9.94A.664 (emphasis added). The residential treatment-based alternative sentence requires a minimum community custody term of two years but contemplates that one-half of the presumptive sentence may be longer than that. The two statutes are inconsistent because if 24 months is the maximum presumptive sentence permitted for residential treatment alternative, then one-half the midpoint of the standard range could never exceed two years, and the provision for community custody greater than two years would be superfluous.

“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them so as to give effect to each provision. *State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992), citing *In re King*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988); *In re Mayner*, 107 Wn.2d 512, 522, 730 P.2d 1321 (1986).

Ms. Vega suggested that these statutes could only be reconciled if the “mid-point of the standard range” in the context of RCW 9.94A.660

were construed to exclude statutory enhancements. Thus, if a conviction resulted in presumptive sentence of 24 months, the defendant would be eligible for the residential treatment alternative, but the court could impose the top of the standard range plus the enhancement, yielding a community custody term greater than two years. The trial court, however, rejected this construction of the statutes.

If the court cannot reconcile conflicting statutory provisions, other rules of statutory construction must be considered. “[W]hen two statutory provisions dealing with the same subject matter are in conflict, the latest enacted provision prevails when it is more specific than its predecessor.” *State v. Landrum*, 66 Wn. App. at 796-797, citing *Citizens For Clean Air v. Spokane*, 114 Wn.2d 20, 37, 785 P.2d 447 (1990); *State v. Becker*, 59 Wn. App. 848, 852-53, 801 P.2d 1015 (1990).

Both provisions at issue here were initially enacted simultaneously. *See Laws of 2008*, ch. 231, § 30. In such cases, the statutory provision that appears latest in order of position prevails unless the first provision is more clear and explicit than the last. *State ex rel. Graham v. San Juan Cy.*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984).

The 24-month maximum eligibility restriction in RCW 9.94A.660 is first in order of position. Moreover, the provision of RCW 9.94A.664 specifies the actual sentence that is required under the residential

alternative and is thus more explicit than the earlier provision. And the specification of the sentencing provisions is contained within the same section as the provision that affirmatively specifies the eligibility requirements for residential treatment alternative. *See* RCW 9.94A.664(1). The more detailed eligibility requirements should prevail over the generalized restriction contained in RCW 9.94A.660(3).

Finally, under the rule of lenity, “the court should not interpret a criminal statute so as to increase the penalty imposed absent clear evidence of legislative intent to do so. *State v. Sass*, 94 Wn.2d 721, 726, 620 P.2d 79 (1980); *State v. Wilson*, 25 Wn. App. 891, 894, 611 P.2d 1312 (1980); *State v. Workman*, 90 Wn.2d 443, 454, 584 P.2d 382 (1978). In a criminal case, statutory ambiguity is resolved against the State and in favor of the defendant. *State v. Arndt*, 87 Wn.2d 374, 385, 553 P.2d 1328 (1976).

The limitation on sentences for which a residential treatment alternative is available should either be construed as excluding sentence enhancements, or considered to be superceded by the more specific provisions of RCW 9.94A.664. Under either construction, Ms. Vega was eligible for the residential treatment alternative. In failing to consider that option, the court abused its discretion.

E. CONCLUSION

The prison-based DOSA sentence should be reversed and the matter remanded for prompt reconsideration and resentencing.

Dated this 29th day of May, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

| | | |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | No. 30252-1-III |
| |) | |
| vs. |) | CERTIFICATE |
| |) | OF MAILING |
| ALISSA M. VEGA, |) | |
| |) | |
| Appellant. |) | |

I certify under penalty of perjury under the laws of the State of Washington that on May 29, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on May 29, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on May 29, 2012.


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