

FILED

APR 26, 2012

Court of Appeals
Division III
State of Washington

No. 30277-6-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TINA TAYLOR

Appellant.

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

The Honorable Judge Donald W. Schacht

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 280-1207
Fax (509) 299-2701
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT1

B. ASSIGNMENTS OF ERROR2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....7

Issue 1: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was misinformed about her eligibility for DOSA or erroneously referred for residential-based DOSA instead of prison-based DOSA.....7

Issue 2: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was not informed that she was giving up her right to raise certain issues on appeal, particularly where the defendant made it clear that she intended to pursue her arguments via new counsel appointed on appeal.....12

Issue 3: Whether the court erred, and defense counsel was ineffective, when Ms. Taylor was deemed ineligible for any DOSA, particularly the prison-based alternative, based on her ineligibility for only residential-based DOSA.....16

F. CONCLUSION.....20

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Elmore, 139 Wn.2d 250, 985 P.2d 289 (1999).....13

State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976).....14, 15

State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992).....18

State v. Smith, 134 Wn.2d 849, 953 P.2d 810 (1998).....13, 14

Young v. Konz, 91 Wn.2d 532, , 588 P.2d 1360 (1979).....7

Washington Courts of Appeals

In re Fonseca, 132 Wn. App. 464, 132 P.3d 154 (2006).....9

In re Pers. Rest. of Ness, 70 Wn. App. 817, 855 P.2d 1191 (1993).....7, 13

State v. Butler, 17 Wn. App. 666, 564 P.2d 828 (1977).....9

State v. Harkness, 145 Wn. App. 678, 186 P.3d 1182 (2008).....18

State v. Kisse, 88 Wn.App. 817, 947 P.2d 262 (1997).....8

State v. Knotek, 136 Wn. App. 412, 149 P.3d 676 (2006).....8, 9, 14

State v. Smith, 118 Wn. App. 288, 75 P.3d 986 (2003).....18

State v. Watson, 120 Wn. App. 521, 86 P.3d 158 (2004),
affirmed, 155 Wn.2d 574 (2005).....17, 18

State v. White, 123 Wn. App. 106, 97 P.3d 34 (2004).....17, 18

Federal Authorities

Cuthrell v. Director, 475 F.2d 1364, 1366 (4th Cir.1973).....8

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160,
27 L.Ed.2d 162 (1970).....13

Washington Constitution, Statutes & Court Rules

CrR 4.2.....7, 8
RCW 9.94A.660.....10, 17
RCW 9.94A.662.....11, 17

A. SUMMARY OF ARGUMENT

Tina Taylor submitted an Alford plea of guilty as charged on the second day of trial for two counts of delivery of hydrocodone, both with school bus stop enhancements, both made to a confidential informant who died prior to trial. Ms. Taylor now seeks to withdraw her guilty plea because it was not knowingly, intelligently and voluntarily made.

To wit, Ms. Taylor was told at the plea hearing that she would be eligible for a Drug Offender Sentencing Alternative. But Ms. Taylor was never informed that she was ineligible for residential-based DOSA due to the midpoint of her standard range exceeding 24 months. Moreover, the court only referred Ms. Taylor for residential-based DOSA rather than the anticipated prison-based DOSA option, so Ms. Taylor should be permitted to withdraw her plea to correct the manifest injustice that occurred. Furthermore, Ms. Taylor pleaded guilty with the intent of pursuing her legal arguments on appeal with new counsel, apparently due to a breakdown in her relationship with trial counsel. Yet, the court failed to ensure that Ms. Taylor understood that, by pleading guilty, she was forfeiting her right to appeal these substantive arguments.

Finally, Ms. Taylor has been encouraged by this undersigned counselor to file a motion to withdraw her guilty plea at the trial court based on numerous disturbing matters outside the record. (For purposes of

this direct appeal, the arguments herein are limited to the existing record.) Regardless, if this Court or the trial court does not permit Ms. Taylor to withdraw her guilty plea, the matter should still be remanded for resentencing. The trial court misconstrued the statutory eligibility requirements for prison-based DOSA and, with the ineffective concession of defense counsel, erroneously found Ms. Taylor ineligible for prison-based DOSA based on her sentence length being over 24 months.

Accordingly, Ms. Taylor respectfully requests that this Court reverse and remand so that she can withdraw her guilty plea, or, at a minimum, remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred by accepting Ms. Taylor's guilty plea that was not knowingly, voluntarily and intelligently made.
2. The court erred by not informing Ms. Taylor that she was ineligible for the residential-based DOSA for which the court referred her.
3. The court erred by failing to refer Ms. Taylor for prison-based DOSA screening, the manifest injustice of which rendered Ms. Taylor's plea involuntary.
4. The court erred by failing to ensure Ms. Taylor knowingly, intelligently and voluntarily forfeited her rights to appeal substantive issues.
5. Defense counsel was ineffective for failing to advise Ms. Taylor that she was ineligible for residential-based DOSA.
6. Defense counsel was ineffective for failing to protect Ms. Taylor and ensure that she was referred for the appropriate prison-based DOSA.

7. The court erred by deeming Ms. Taylor ineligible for any DOSA based on DOC's letter of ineligibility regarding only residential-based DOSA.

8. Defense counsel was ineffective for conceding that Ms. Taylor did not qualify for prison-based DOSA because the midpoint of Ms. Taylor's standard range exceeded 24 months.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was misinformed about her eligibility for DOSA or erroneously referred for residential-based DOSA instead of prison-based DOSA.

Issue 2: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was not informed that she was giving up her right to raise certain issues on appeal, particularly where the defendant made it clear that she intended to pursue her arguments via new counsel appointed on appeal.

Issue 3: Whether the court erred, and defense counsel was ineffective, when Ms. Taylor was deemed ineligible for any DOSA, particularly the prison-based alternative, based on her ineligibility for only residential-based DOSA.

D. STATEMENT OF THE CASE

Two controlled buys were conducted between a now deceased confidential informant and purportedly Tina Taylor. The confidential informant died approximately two weeks before Ms. Taylor submitted an *Alford* plea of guilty on June 28, 2011, to two counts of delivery of a controlled substance with two school bus stop enhancements. Ms. Taylor now appeals, asking this Court to reverse and allow her to withdraw her guilty plea.

Law enforcement conducted surveillance of two hydrocodone buys to a confidential informant, the first of which occurred on November 16, 2010, within a home located in Walla Walla, WA. (2RP¹ 27-30, 101-02, 110, 13, 141-43) The second buy occurred on December 14, 2010, in the backyard of the same property. (2RP 32-33, 38) Ms. Taylor was charged with two counts of delivery of hydrocodone, which was amended just prior to trial to allege that the buys had also occurred within 1000 feet of a school bus stop. (2RP16, 39; CP 1-3, 8-9, 41-42, 44-51)

During the months preceding trial, Ms. Taylor sent numerous letters to the trial court, requesting that her court-appointed defense attorney, Gail Siemers, be replaced. (CP 21, 35, 36, 37, 54, 63) Specifically, Ms. Taylor indicated that she and Ms. Siemers were not able to communicate effectively (CP 21), Ms. Siemers had misinformed the court regarding Ms. Taylor's wishes to plead (CP 35), defense counsel refused to advance Ms. Taylor's argument regarding her denied right to confront her accuser (CP 35-36; 2RP 3-9), Ms. Taylor did not believe she could obtain a fair trial with Ms. Siemers representing her (CP 37), and the two women could not be "in the same room" together (CP 37). The court engaged in a brief colloquy with Ms. Taylor just before trial began on June

¹ "2RP" refers to the transcript of trial on June 27 and 28, 2011. "1RP" refers to the transcript of the other pretrial, plea and sentencing hearings.

27, 2011. Ms. Taylor said “Yeah,” okay,” that she was satisfied with Ms. Siemers representing her. (2RP 2-3, 9)

However, two days later, after pleading guilty during the middle of trial, the defendant informed the court that her attorney had convinced her to plead guilty, telling her that if she did not plead than Ms. Taylor’s own mother would not be arrested. (CP 54) Ms. Taylor stated she was afraid to tell the court this information during the plea hearing. (CP 54) Ms. Taylor essentially moved to withdraw her plea, though no post-conviction hearing was ever set.²

As to the plea itself, Ms. Taylor pleaded guilty on June 28, 2011, as charged in the amended information to both delivery counts and both school bus stop enhancements. (1RP 13, 21) No charges or enhancements were dismissed pursuant to the plea bargaining process. (See *id.*)

During the plea colloquy, the court and State acknowledged that Ms. Taylor may be eligible for a prison-based DOSA sentence. (1RP 18, 21; see also CP 59-60) The court then informed Ms. Taylor that her

² Ms. Taylor has alleged many issues relating to a complete breakdown of her relationship with defense counsel. These allegations include a conflict of interest due to counsel firing Ms. Taylor’s sister who was also charged, threats resulting in Ms. Taylor’s decision to plead, misinformation regarding Ms. Taylor’s legal rights, promises about extraneous matters including sentencing results, animosity from counsel that rose to the level of complete denial of counsel, etc. Ms. Taylor has been advised by the undersigned appellate counselor that she will need to file a CrR 7.8 motion to withdraw her guilty plea at the trial court within a year of her judgment so that the court can act as “fact-finder” on these additional matters. She has been advised to then appeal any denial thereafter. For purposes of this brief, the arguments raised are limited to those supported by the exiting record.

standard range sentence was 44 to 84 months plus 24 months for the consecutive enhancement, or a total of 68 to 108 months, and the State indicated it would recommend the mid-point of 88 months. (1RP 22-23) On July 8, 2011, the court made a referral for a residential-based DOSA screening. (CP 62) But Ms. Taylor was found ineligible for residential DOSA by DOC because this alternative is only available if the mid-point of her standard range was 24 months or less. (CP 62; 1RP 24, 28)

On July 27, 2011, Ms. Taylor sent the trial court another letter, asking to “appeal” due to misrepresentation by Ms. Siemers, reiterating that Ms. Taylor felt forced to sign the plea agreement even though she did not want to. (CP 63)

On August 1, 2011, the court imposed a mid-to-high-end standard range sentence of 98 months total confinement. (1RP 30, 34) The court noted that Ms. Taylor had been found ineligible for DOSA and did not qualify for the Family Leave sentencing option (FOSA) that she had requested. (1RP 28) At the conclusion of the hearing, Ms. Taylor asked the court to make sure her defense attorney would not have “anything to do with” the appeal. (1RP 32) Defense counsel remarked, “the feeling is mutual...,” to which the defendant answered, “yeah, yeah, no love loss there.” (1RP 32-33)

This appeal followed.

E. ARGUMENT

Issue 1: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was misinformed about her eligibility for DOSA or erroneously referred for residential-based DOSA instead of prison-based DOSA.

Ms. Taylor was misinformed or misled regarding the direct sentencing consequences of pleading guilty. Ms. Taylor was told at the plea hearing that she was eligible for a prison-based DOSA sentence, but the court erroneously referred her for a residential-based DOSA instead. To the extent Ms. Taylor was led to believe she qualified for a residential-based DOSA even though the midpoint of her standard range exceeded the 24-months maximum, this misinformation as to a direct sentencing consequence should result in remand and plea withdrawal. To the extent the court failed to refer Ms. Taylor for the anticipated prison-based DOSA that she did qualify for, Ms. Taylor's plea should be withdrawn to correct the manifest injustice that occurred.

This Court reviews the circumstances surrounding entry of a guilty plea de novo. *Young v. Konz*, 91 Wn.2d 532, 535-36, 588 P.2d 1360 (1979). Due process requires that a trial court not accept a guilty plea without first determining that it is made voluntarily, competently and with an understanding of the nature of the charges and consequences of the plea. CrR 4.2(d); *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993). This requires that defendants also understand the direct

consequences of pleading guilty, or those that have a “definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Ness*, 70 Wn. App. at 822 (quoting *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir.1973)).

A defendant may be allowed to withdraw her guilty plea whenever necessary to correct a manifest injustice. CrR 4.2(f). Manifest injustice may be established, among other ways, based on ineffective assistance of counsel or where the plea was involuntary. *State v. Kissee*, 88 Wn.App. 817, 947 P.2d 262 (1997) (defendant did not understand that he was ineligible for SSOSA, rendering guilty plea involuntary so that defendant was allowed to withdraw guilty plea).

Generally, a defendant claiming she was not effectively represented has the burden of proving that her attorney’s representation fell below an objective standard of reasonableness and the error deprived the defendant of a fair trial. *State v. Knotek*, 136 Wn. App. 412, 431, 149 P.3d 676 (2006). The latter element is established by showing that, “but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different.” *Id.* In the plea bargaining context, “effectiveness of counsel” requires that counsel “actually and substantially assist [her] client in deciding whether to plead guilty.” *Id.* “[T]he duty to protect the defendant lies first and foremost

with his attorney.” *State v. Butler*, 17 Wn. App. 666, 675, 564 P.2d 828 (1977).

If a guilty plea is “based on misinformation about sentencing consequences, a guilty plea is not entered knowingly.” *Knotek*, 136 Wn. App. at 423. DOSA ineligibility is a direct consequence of pleading guilty. *In re Fonseca*, 132 Wn. App. 464, 132 P.3d 154 (2006); *see also Kisse*, 88 Wn. App. at 822 (SSOSA ineligibility is a direct consequence of pleading guilty). In *Fonseca*, the Court held that the defendant’s guilty plea was involuntary because the defendant and the court made a mutual mistake about his eligibility for DOSA. 132 Wn. App. at 467-70. The defendant was never informed prior to pleading guilty that his particular prior convictions made him ineligible for DOSA. *Id.* Thus, the matter was remanded so the defendant could withdraw his involuntary guilty plea. *Id.*

Here, Ms. Taylor should be permitted to withdraw her guilty plea based on ineffective assistance of counsel, the fact that she was not informed about her ineligibility for residential-based DOSA prior to pleading guilty, and/or the fact that the court erroneously referred her for residential-based rather than prison- based DOSA screening. Ms. Taylor’s plea should be withdrawn to correct the manifest injustice that occurred when the court told her she was eligible for prison-based DOSA during the

plea hearing but then erroneously referred her for residential-based DOSA instead. Defense counsel was ineffective to the extent that she failed to protect Ms. Taylor and seek the appropriate prison-based DOSA option that was anticipated at the plea hearing.

Ms. Taylor was denied DOSA when DOC deemed her ineligible because the mid-point of her standard range sentence was greater than 24 months. CP 62; RCW 9.94A.660(3) (defendant is not eligible for *residential-based* DOSA when midpoint of standard range exceeds 24 months) (emphasis added). When Ms. Taylor pleaded guilty, she did so with the expectation that the court could impose a DOSA sentence. The court and State acknowledged that Ms. Taylor may be eligible for DOSA, and the court referred Ms. Taylor for residential DOSA screening a week after the plea hearing. Yet no one informed Ms. Taylor at the plea hearing, including Ms. Taylor's own attorney or the court, that Ms. Taylor would not qualify for the referred residential-based DOSA sentence since the mid-point of her standard range was greater than 24 months. To the extent Ms. Taylor pleaded guilty without being correctly informed that she would not qualify for the referred residential DOSA sentence, her plea was involuntary.

Alternatively, a manifest injustice occurred, rendering Ms. Taylor's plea involuntary, when Ms. Taylor was led to believe that the

court would refer her for a prison-based DOSA sentence (which is not limited to sentences under 24 months, RCW 9.94A.660) and the court failed to actually do so. Unfortunately, the court instead referred Ms. Taylor for a residential-based DOSA, which she could not qualify for due to the mid-point length of her sentence being over 24 months.³ From Ms. Taylor's perspective, the consequences of pleading guilty were that she faced the standard range that was set forth by the court, but she also could qualify for a prison-based DOSA sentence. A prison-based DOSA sentence would effectively reduce Ms. Taylor's prison time in half from the mid-point of the standard range, followed by the other half of the standard range being served on community custody. RCW 9.94A.662(1), (2).

Ms. Taylor's ineligibility for a residential-based DOSA option, or the court's decision or mistake in not referring her for a prison-based DOSA option, were both significant consequences of pleading guilty. And, without being correctly informed of these consequences, Ms. Taylor's guilty plea was involuntary. Since Ms. Taylor's plea was not voluntary with an understanding of the direct sentencing consequences, or since a manifest injustice occurred when the court referred Ms. Taylor for

³ The court appeared to contemplate a prison-based DOSA sentence during the plea hearing under RCW 9.94A.662, but it referred Ms. Taylor for the residential-based DOSA screening option instead, which she was clearly unqualified to receive due to sentence length. (IRP 18; CP 62)

the wrong DOSA option, Ms. Taylor now seeks to withdraw that plea to correct the injustice.

Ultimately, the duty to protect Ms. Taylor fell to her attorney. Defense counsel should have correctly informed Ms. Taylor that she was not eligible for a residential-based DOSA option. Furthermore, counsel should have made certain Ms. Taylor was referred for the correct prison-based DOSA option, rather than merely accepting DOC's complete rejection of Ms. Taylor for DOSA just because she did not qualify for the residential-based option. Ms. Taylor's sentence length only affected her eligibility for residential-based DOSA, and counsel should have corrected the trial court's erroneous referral for residential-based instead of prison-based DOSA.

Under the circumstances here, Ms. Taylor's plea was involuntarily made without the benefit of effective assistance of counsel. The matter should be remanded so that Ms. Taylor can withdraw her plea in order to correct the manifest injustice that occurred.

Issue 2: Whether Ms. Taylor should be permitted to withdraw her guilty plea where she was not informed that she was giving up her right to raise certain issues on appeal, particularly where the defendant made it clear that she intended to pursue her arguments via new counsel appointed on appeal.

Ms. Taylor attempted to present arguments on her own behalf at and before trial (see e.g. 2RP 3-9; CP 36), she attempted to secure new

trial counsel before and after pleading, and she ultimately pleaded guilty while intending to appeal with the assistance of new counsel. Under these circumstances, Ms. Taylor's plea was not valid where it was not clear that she understood she was giving up the rights to contest the evidentiary, confrontation clause, and other constitutional challenges she sought to have reviewed on appeal with the aid of new counsel.

As set forth above, a plea must generally be knowingly, intelligently and voluntarily made, and it can be withdrawn to correct a manifest injustice. CrR 4.2; *Ness*, 70 Wn. App. at 821. Before pleading, defendants must understand the rights they give up by pleading, including the right to confront witnesses or appeal evidentiary or suppression rulings. *See State v. Elmore*, 139 Wn.2d 250, 985 P.2d 289 (1999) (plea colloquy adequate where, among other things, defendant was advised that he was forfeiting right to confront witnesses); *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998) (defendant pleaded guilty with impression that suppression order could still be appealed, akin to appeal from stipulated facts trial, which rendered plea involuntary and unknowing so as to permit plea withdrawal).

When the defendant enters an *Alford*⁴ plea, “the trial court must exercise extreme care to ensure that the plea satisfies constitutional

⁴ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (U.S. Supreme Court held, “An individual accused of a crime may voluntarily, knowingly, and

requirements.” *Knotek*, 136 Wn. App. at 429-30. The plea must be “a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

Generally, “a voluntary guilty plea acts as a waiver of the right to appeal.” *Smith*, 134 Wn.2d at 852. Ordinarily, a defendant’s statement on plea of guilt indicating a knowing waiver of his or her appellate rights would be sufficient evidence of a knowing plea. *Id.* at 853. However, where there is evidence inconsistent with the defendant’s written waiver, such as where the defendant pleaded with the intent to still appeal otherwise waived issues, a valid plea waiver may not exist. *Id.* (defense counsel indicated that the defendant would be appealing suppression issues after the plea, rendering plea involuntary and invalid).

Here, Ms. Taylor did not plead guilty with an understanding of the effect it would have on her right to appeal. Ms. Taylor attempted to raise certain confrontation clause issues at trial on her own, but defense counsel made it clear that she did not think Ms. Taylor had a right to confront the accuser in this case. And the trial court refused to suppress evidence obtained through the since-deceased informant. Ms. Taylor also repeatedly requested that she receive a new trial attorney, albeit she did

understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”)

answer she was “okay” with her attorney just prior to trial. Ultimately, Ms. Taylor appears to have pleaded guilty, though unwisely, in order to pursue this matter with new counsel. Ms. Taylor was adamant at the sentencing hearing that she would be pursuing an appeal, and she wanted to make sure her defense attorney would have nothing to do with the appeal. The breakdown in the relationship was clear when defense counsel retorted, “the feeling is mutual.” (IRP 32)

Given the nature of Ms. Taylor’s relationship with trial counsel, her attempts to litigate legal issues on her own, and her intention to pursue her arguments with new counsel on appeal, the court should have engaged in a more complete colloquy with Ms. Taylor to ensure a valid waiver of the defendant’s appeal rights. The court should have made certain that Ms. Taylor knew she was waiving her right to appeal, including confrontation issues. The circumstances in this case do not show a knowing, intelligent and voluntary waiver of Ms. Taylor’s right to appeal. Ms. Taylor should be permitted to withdraw her plea.

Furthermore, in reviewing an *Alford* plea, this Court determines whether it was an “intelligent choice among the alternative courses of action open to the defendant.” *Newton*, 87 Wn.2d 363. Here, Ms. Taylor’s plea was not an intelligent choice among alternatives. The State never sought to impose an exceptional upward sentence, and Ms. Taylor

did not receive any reduction in either charges or enhancements in exchange for the plea. The State recommended and Ms. Taylor received a standard range sentence, which is exactly what would have happened had a jury convicted Ms. Taylor as charged. The alternative to pleading guilty was to have the jury reach a verdict, which would have resulted in no greater penalty and would still have preserved Ms. Taylor's substantive appeal issues.

It is unclear why Ms. Taylor's attorney would have advised Ms. Taylor to enter a plea to every charge and enhancement, therein also giving up the right to appeal substantive issues. Given that Ms. Taylor's *Alford* plea was certainly not an "intelligent choice among the alternative courses of action," Ms. Taylor should be permitted to withdraw the plea. The logical conclusion in this case is that Ms. Taylor pleaded guilty while under the mistaken impression that she could still pursue her substantive arguments on appeal, akin to an appeal following a stipulated facts trial. This mistaken and uncorrected impression rendered Ms. Taylor's guilty plea involuntary.

Issue 3: Whether the court erred, and defense counsel was ineffective, when Ms. Taylor was deemed ineligible for any DOSA, particularly the prison-based alternative, based on her ineligibility for only residential-based DOSA.

The court anticipated a prison-based DOSA according to its colloquy at the plea hearing. Unfortunately, the court then erroneously

referred Ms. Taylor for a residential-based DOSA screening, and DOC rejected her because the midpoint of her standard range exceeded 24 months. At sentencing, defense counsel and the court acknowledged that Ms. Taylor had been rejected as ineligible for DOSA, but neither the court nor defense counsel apparently noticed that Ms. Taylor was only deemed ineligible for *residential-based* as opposed to the intended *prison-based* DOSA. Did the court err by finding Ms. Taylor ineligible for prison-based DOSA, or failing to make a finding regarding prison-based DOSA, based on a sentence length that only applied to residential-based DOSAs? Moreover, was defense counsel ineffective for failing to object or attempt to correct the court's erroneous assumptions regarding eligibility?

“Under the SRA, the sentencing court has discretion to impose DOSA if the offender meets certain eligibility requirements and if the court determines that the offender and the community will benefit from use of the sentencing alternative.” *State v. Watson*, 120 Wn. App. 521, 529, 86 P.3d 158 (2004), *affirmed*, 155 Wn.2d 574 (2005); RCW 9.94A.660. “DOSA is a form of a standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision.” *State v. White*, 123 Wn. App. 106, 113, 97 P.3d 34 (2004); RCW 9.94A.660 (DOSA generally); RCW 9.94A.662 (prison-based DOSA). A DOSA is only imposed after a court considers DOC's

written evaluation and determines the offender's eligibility and amenability. *State v. Harkness*, 145 Wn. App. 678, 684, 186 P.3d 1182 (2008).

“Generally, a standard-range sentence, of which DOSA is an alternative form, may not be appealed.” *White*, 123 Wn. App. at 113 (quoting *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003)). “However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision.” *Id.* at 113-14 (internal citations omitted). Thus, “a challenge to a standard range sentence is permitted if the court erred as to *eligibility* for a sentencing alternative, where the “central issue” is a matter of statutory construction and not a claim that the trial court abused its discretion.” *Watson*, 120 Wn. App. at 529 (citing *State v. Onefrey*, 119 Wash.2d 572, 574 n. 1, 835 P.2d 213 (1992)).

Here, Ms. Taylor was deemed ineligible for a prison-based DOSA because the midpoint of her standard range exceeded 24 months. See 1RP 24, 28; CP 62. But prison-based DOSAs can exceed 24 months. The court erred as to Ms. Taylor's eligibility, and its error was as to statutory construction. The court relied on DOC's report of ineligibility for DOSA, but the court should have limited this reliance to its consideration for residential-based DOSA, not prison-based DOSA.

Finally, to the extent defense counsel failed to object and actually contributed to the court's erroneous eligibility determination, counsel's performance was ineffective. As set forth above, Ms. Taylor must establish that counsel's performance fell below an objective standard of reasonableness and that, but for the error, the outcome of the proceeding would have been different. Here, defense counsel should have alerted the court to the inapplicable residential-based screening upon which the court erroneously relied for its prison-based DOSA determination. Counsel certainly should not have relied upon the residential-based screening herself in conceding that Ms. Taylor was ineligible for DOSA.

Last, there is a great likelihood the outcome would have been different but for counsel's errors. The State and court agreed at the plea hearing that Ms. Taylor should qualify for a prison-based DOSA, the court noted in Ms. Taylor's sentence that the defendant had a chemical dependency that contributed to the offense (CP 74), family members testified at and sent letters prior to sentencing regarding Ms. Taylor's amenability and need for treatment, and defense counsel presented facts at the plea and sentencing hearings that would have factually supported a DOSA.

Ms. Taylor was prejudiced by counsel's errors and the court's misconstruction of the statutory guidelines for prison-based verses

residential-based DOSAs. If Ms. Taylor is not permitted to withdraw her guilty plea as set forth in the first two issues above, the matter at least needs to be remanded for an appropriate DOSA screening and evidentiary hearing to determine if resentencing with a prison-based DOSA is proper.

F. **CONCLUSION**

Ms. Taylor's guilty plea was involuntary and should be withdrawn to correct the manifest injustice that occurred below. Ms. Taylor pleaded guilty with the understanding that she was eligible for a DOSA sentence. Yet, she was never informed that she did not qualify for the residential-based DOSA that the court referred her for, and the court erroneously neglected to refer Ms. Taylor for screening for the appropriate prison-based DOSA. Counsel was ineffective to the extent she failed to protect Ms. Taylor in this regard and ensure a knowing, voluntary and intelligent *Alford* plea.

Furthermore, Ms. Taylor did not make an "intelligent choice among alternatives" in deciding to submit an *Alford* plea. Indeed, it appears Ms. Taylor pleaded guilty with the hopes of pursuing her substantive legal arguments with the aid of new counsel on appeal. Ms. Taylor should be permitted to withdraw her guilty plea where she did not clearly waive her right to appeal.

Finally, Ms. Taylor has also been advised to submit a motion to withdraw her guilty plea with the trial court in order to raise the additional, extraneous matters she has brought to the undersigned counselor's attention. In the event this Court does not direct the plea to be withdrawn based on the arguments herein, or if the trial court does not grant Ms. Taylor's motion to withdraw her guilty plea on the bases currently outside this record, this matter should still be remanded for resentencing. The trial court erred in determining that Ms. Taylor was ineligible for prison-based DOSA based on guidelines applicable only to residential-based DOSA.

Wherefore, Ms. Taylor respectfully requests that the matter be remanded in order to withdraw her guilty plea or, alternatively, remanded for resentencing.

Respectfully submitted this 26th day of April, 2012.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 30277-6-III
vs.)
)
TINA TAYLOR) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 26, 2012, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Tina Taylor, DOC #329061
Washington Corrections Center for Women
9601 Bujacich Rd NW
Gig Harbor, WA 98332-8300

Having obtained prior permission, I also served Teresa Chen at tchen@wapa-sep.wa.gov by the e-service feature in conjunction with electronic filing.

Dated this 26th day of April, 2012.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
PO Box 19203
Spokane, WA 99219
Phone: (509) 280-1207
Fax: (509) 299-2701
Wa.Appeals@gmail.com