

FILED
June 24, 2013
Court of Appeals
Division III
State of Washington

NO. 31356-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RONALD HENDER,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 2

By relying on nonstatutory factors to deny Mr. Hender’s request for a DOSA the court abused its discretion and a new sentencing hearing is required..... 2

 1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA 2

 2. Because the trial court abused its discretion, this Court should reverse Mr. Hender’s sentence 5

E. CONCLUSION..... 7

TABLE OF AUTHORITIES

Washington Supreme Court

In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604
P.2d 1293 (1980) 2
State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 2, 3, 5, 6
State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008) 6
Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d
299, 858 P.2d 1054 (1993) 6

Washington Court of Appeals

State v. Murray, 128 Wn. App. 718, 116 P.3d 1072 (2005)..... 5
State v. White, 123 Wn. App. 106, 97 P.3d 34 (2004)..... 6

Statutes

RCW 9.94A.660 2, 3, 5
RCW 9.94A.662 2

A. ASSIGNMENT OF ERROR.

The trial court improperly denied Ronald Hender a Drug Offender Sentence Alternative (DOSA).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A sentencing court must consider a request for a DOSA sentence and may not deny such a request based on a misunderstanding of the law or by failing to consider mandatory statutory criteria. Here, although Mr. Hender met the statutory eligibility requirements, the trial court refused to impose a DOSA. Did the court deny Mr. Hender a DOSA on an impermissible basis?

C. STATEMENT OF THE CASE.

Mr. Hender was convicted following guilty pleas to two counts of delivering methamphetamine. CP 12-21. Because of his drug addiction, Mr. Hender requested the court impose a DOSA. RP 15-17. Although Mr. Hender met the statutory eligibility requirements, the trial court denied his request for a DOSA. RP 23.

D. ARGUMENT.

By relying on nonstatutory factors to deny Mr. Hender's request for a DOSA the court abused its discretion and a new sentencing hearing is required.

1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA.

“A trial court only possesses the power to impose sentences provided by law.” *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Consistent with this general limitation on a court's sentencing authority, the DOSA statute structures a court's authority when considering a DOSA. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. *See* RCW 9.94A.660.

If the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence in prison receiving chemical dependency treatment. RCW 9.94.660(3); RCW 9.94A.662(1)(a). Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community

supervision and treatment for the balance of the sentence. RCW 9.94A.662(1)(b). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.662(3); Grayson, 154 Wn.2d at 338.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660.

(1) An offender is eligible for the special drug offender sentencing alternative 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.

Mr. Hender satisfied these eligibility requirements. The State never argued Mr. Hender failed to meet these statutory criteria. Nor did the trial court conclude he was ineligible. Nonetheless, the court denied the request for a DOSA. RP 23. The court explained saying “it is important that we have accountability and that you be held responsible for your conduct.” *Id.*

RCW 9.94A.010 sets out the purposes of the Sentencing Reform Act (SRA) as:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve himself or herself;

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

Every provision of the SRA necessarily seeks to hold the person accountable and responsible and reflects the Legislature's reasoned judgment as to how best achieve those purposes. *See State v. Murray*, 128 Wn. App. 718, 724, 116 P.3d 1072 (2005).

In crafting RCW 9.94A.660, the Legislature has already determined a DOSA properly holds eligible persons accountable and responsible for their acts. The trial court cannot substitute its judgment for the Legislature's.

Mr. Hender met the statutory eligibility requirements for a DOSA. The decision to deny his request rested upon considerations already taken into account by the Legislature. Thus, the court erred in denying Mr. Hender's request.

2. Because the trial court abused its discretion, this Court should reverse Mr. Hender's sentence.

Generally, a trial court's decision to deny a DOSA is not reviewable. Grayson, 154 Wn.2d at 338. But every defendant is entitled to ask the trial court for meaningful consideration of a DOSA request. Id. at 342. A party may challenge a trial court's failure to exercise discretion where the trial court categorically or unreasonably denies a

DOSA sentence. *Id.*; *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); *see also State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal). “[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law.” *Grayson*, 154 Wn.2d at 338.

In this case, court did not find Mr. Hender failed to satisfy the statutory criteria for a DOSA. Instead, the court relied upon its own assessment of what best achieved the purposes of the SRA. Mr. Hender is entitled to resentencing at which a court gives proper consideration to the guidelines for imposing a DOSA sentence.

E. CONCLUSION.

For the foregoing reasons, Mr. Hender respectfully requests this Court remand his case for a new sentencing hearing.

Respectfully submitted this 24th day of June 2013.

A handwritten signature in black ink, appearing to read "Gregory C. Link", is written over a horizontal line.

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