

FILED

JAN 15, 2016

Court of Appeals
Division III
State of Washington

NO. 33605-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

RAVEN NEWMAN,

Appellant.

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

The Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	7
THE COURT ERRED IN DENYING NEWMAN'S REQUEST FOR A DOSA.	7
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State ex rel. Carroll v. Junker
79 Wn.2d 12, 482 P.2d 775 (1971)7

State v. Guerrero
163 Wn. App. 773, 261 P.3d 197 (2011)..... 10, 11

State v. Mohamed
187 Wn. App. 630, 350 P.3d 671 (2015)..... 8, 13

State v. Mulholland
161 Wn.2d 322, 166 P.3d 677 (2007)8

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.289

RCW 9.94A.500 9, 10

RCW 9.94A.660 4, 9, 10, 11, 12

RCW 9.94A.662 9

RCW 9.94A.664 9

RCW 69.50.....9

A. ASSIGNMENT OF ERROR

The court abused its discretion when it denied appellant's request for an alternative sentence under the drug offender sentencing alternative (DOSA).

Issue Pertaining to Assignment of Error

Where the court's denial of appellant's DOSA request was based on a misreading of the applicable statute and a misunderstanding of the court's sentencing authority, did the court abuse its discretion in denying the request? If so, should this Court remand to allow the court to properly exercise its discretion?

B. STATEMENT OF THE CASE¹

On September 2, 2014, the Grant county prosecutor charged appellant Raven Newman with delivering \$20.00 worth of methamphetamine on July 15, 2014.² CP 1-2, 5. The charge was the result of a controlled buy initiated by the Ephrata police using confidential informant William McLain, who offered to work with police in exchange for reduced charges in a pending case against him. CP 4; RP 132, 134, 264-66.

¹ "RP" refers to the transcripts for jury trial on June 10-12, 2015. "1RP" refers to a pretrial hearing held April 28, 2015, and sentencing on July 14, 2015.

At the time McLain proposed to become a confidential informant, he was charged with second degree burglary, first degree trafficking in stolen property and possessing methamphetamine. RP 19, 88-89, 132, 134, 264-66, 301-302. Ephrata police officer Jeff Wentworth arrested McLain on the pending charges. RP 88, 264-65, 301-302. Wentworth and McLain went to high school together. RP 263. The deal eventually struck between the state and McLain was that in exchange for setting up five controlled buys, the state would reduce McLain's charges to criminal trespassing and possession of drug paraphernalia. RP 267-68, 304.

McLain told police he could buy drugs from Raven Newman. RP 90, 207, 266-67. Reportedly, McLain had purchased small amounts from her in the past. RP 261, 263. Although Wentworth testified the purpose of initiating a controlled buy is to take down mid-to-upper level dealers, he admitted Newman was not a mid-to-upper level dealer. RP 81, 127.

Following the controlled buy at issue in this case, McLain was fired as an informant. CP 4; RP 136, 180, 282. Apparently, he

² The state also charged Newman with a school bus route stop enhancement, but the court dismissed it for insufficient evidence at the end of the state's case. CP 7-8; RP 375.

was still using drugs. RP 282, 306. Nonetheless, the state agreed to drop his pending burglary charge in exchange for his testimony against Newman. RP 140, 309.

Turning to the allegations at issue here, police decided they would do “a cold walk” on July 15, 2014, meaning McLain would just show up at Newman’s house and see if she was home. RP 92, 193, 269.

Police parked near Newman’s residence at 430 8th Avenue in Ephrata and McLain rode his bicycle over to the house she lived in, which he knew as “Mel’s house.” RP 271-72. McLain went to the front door and let himself in after no one answered. RP 274-75. McLain testified he went to Newman’s room, where he found Newman and her boyfriend. RP 276. According to McLain, he asked if Newman had any “shit.” RP 274. Newman reportedly said yes and McLain dropped the \$20.00 police gave him on the bed. RP 272, 276. According to McLain, Newman gave him a small bag of methamphetamine. RP 278-79.

McLain rode his bicycle back to Wentworth and another officer and reportedly gave them the bag. RP 280. The substance in the bag tested positive for methamphetamine. RP 216, 219, 247.

The jury convicted Newman of delivering a controlled substance.
CP 34.

In advance of sentencing, Newman submitted numerous letters attesting to her good character to support her request for a sentence under the residential drug offender sentencing alternative (DOSA). Supp. CP ___ (sub. no. 62, Letters of Support, 7/13/15); 1RP 15 (prosecutor acknowledges “reading these letters says that Ms. Newman is a very nice person – no doubt.”). Newman had one prior conviction for possessing methamphetamine in 2001 that had since “washed.” 1RP 16.

Also in advance of sentencing, the court entered an Order for Community Residential Screen and Pre-Sentence Examination per RCW 9.94A.660 to be conducted by a department of corrections contracted provider. Supp. CP ___ (sub. no. 61, Order for Community Residential DOSA Screen, 7/7/15).

The report filed was completed by chemical dependency provider Kathy Vertrees on DOC letterhead. Supp. CP ___ (sub. no. 64, Substance Abuse Screening Report Summary (DOSA), 7/14/15). The report indicated Newman “had a prior substance abuse assessment and was diagnosed with a Substance Use Disorder. Id. It indicated Newman had never before received a

DOSA. Id. Finally, it indicated she had a certified treatment provider on board “to meet the DOSA treatment for 90-180 days” – American Behavioral Health in Spokane – and a “bed date” of July 22, 2015. Id.

At sentencing on July 14, however, the state took issue with the report on grounds it was not more specific. 1RP 17. The state also opposed the DOSA on grounds it “attempted to – resolve this case with a residential DOSA some time ago,” but Newman “refused that.” 1RP 18.

Defense counsel explained the minimalist DOC report was standard issue:

Then the next question becomes, is it appropriate [a DOSA]. And that’s what it says here in the statute. And then, apparently the court has the authority to ask for the DOC to come and do this evaluation, this screening, which they did. And I think they usually do this in every case. And it’s usually a yea or a nay. And I think – Well, Mr. Owens brings up some great points. I think what happens is there’s probably a – a plethora of questions (inaudible), and I don’t know exactly – but eventually it gets reduced down to this piece of paper which I showed to you.

And they’re saying, “Hey listen, she has a drug addiction. We’re not going to go into great detail about it but we’re recommending – we think she’d be successful at this program.”

1RP 21.

Newman explained to the court she made a mistake but hoped for “something positive to come out of it.” 1RP 24. Rather than prison, Newman asserted: “I think drug treatment is what I need.” 1RP 24.

The court found the report inadequate:

This report indicates that she may suffer from a substance use disorder. And it says she will benefit from a substance abuse assessment. It doesn't state any reasons how that person who – prepared the report reached that conclusion, or how strong their opinion is – again, how or why they reached that conclusion. It just reaches the conclusion.

The report is supposed to indicate whether the addiction is such that there's a probability – that there's criminal behavior – that criminal behavior will occur in the future. – actually says – yeah – criminal behavior. So, I think what the legislature is getting at there is that – will treatment prevent this person from – committing this offense in the future. I don't see that conclusion here. Does anyone see that in the report?

...
And there's supposed to be also addressed whether the community and the offender would benefit from the use of the alternative. I don't see anything discussed in the report in that regard, either.

1RP 26.

The court found that because it was not convinced Newman would be less likely to commit a future crime if she received treatment, it would deny the DOSA:

We can look at whether someone is – for instance under a DOSA sentence, likely to be rehabilitated – they suffer from a drug abuse problem, are they less likely to commit a crime in the future if they receive treatment. I'm not convinced that that would be the case here, that treatment would solve the problem of – of selling or delivering drugs.

And so I will sentence within the standard range.

1RP 27.

The court imposed a sentence of 15 months and 12 months of community custody. 1RP 27-28. Based on Newman's statement she would benefit from treatment, the court imposed treatment as a requirement of community custody. 1RP 28. Newman's sentence was stayed pending this appeal. CP 53-54, 56-57.

C. ARGUMENT

THE COURT ERRED IN DENYING NEWMAN'S REQUEST FOR A DOSA.

The court abused its discretion in denying Newman's request for a DOSA because the court misunderstood the law and its sentencing authority when it denied the request. A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court necessarily abuses its discretion if its ruling is based on

an erroneous view of its sentencing options. State v. Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007); State v. Mohamed, 187 Wn. App. 630, 350 P.3d 671 (2015).

For instance, in Mulholland, the court abused its discretion because it sentenced Mulholland while it possessed “a mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [Mulholland] may have been eligible.” Mulholland, 161 Wn.2d at 333. In Mohamed, the court abused its discretion because it sentenced Mohamed while it had a mistaken belief it could not waive school zone enhancements in imposing an alternative sentence, such as a DOSA. Mohamed, 187 Wn. App. at 641.

Here, the court abused its discretion because it sentenced Newman while it possessed a mistaken belief it could not impose a DOSA without a report addressing certain considerations, such as whether the offender and the community would benefit by the alternative sentence and/or whether Newman would be less likely to commit future offenses if she received the alternative. Additionally, the court was mistaken about certain facts contained in the report it did have before it.

In relevant part, RCW 9.94A.660 provides:

(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.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.³

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

³ In relevant part, RCW 9.94A.500 provides:

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense.

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

RCW 9.94A.660 (emphasis added).

Significantly, this Court has held the court need not consider any type of report at all before imposing a DOSA:

RCW 9.94A.660 is clear: a trial court need not order or consider any report in deciding whether an offender is an appropriate candidate for an alternative sentence. RCW 9.94A.500, on the other hand, is not clear how a court “specifically waives” ordering a chemical dependency screening report. The most reasonable reading of the statutes together is that, following the 2009 amendment of the DOSA statute, a court waives the report by declining to order one. To the extent this reasoning can be criticized as distorting the concept of a specific waiver, then we agree with the State that the later-adopted and more specific language of RCW 9.94A.660 controls.

State v. Guerrero, 163 Wn. App. 773, 261 P.3d 197 (2011)

(emphasis added).

Thus, this Court held the lower court in Guerrero's case did not err in denying a DOSA without first ordering a chemical dependency screening report. Guerrero, 163 Wn. App. at 778.

In Newman's case, it's not entirely clear what kind of report the court ordered. The document signed by the court is titled: "Order for Community Residential Screen and Pre-Sentence Examination per RCW 9.94A.660 (ORDOSA)." Supp. CP __ (sub. no. 61, Order, 7/7/15). There's no indication the "screen" or "examination" was supposed to address the issues set forth in RCW 9.94A.660(5)(a). Rather, use of the word "screen" suggests something more minimal, which appears to present somewhat of a Catch-22.

But perhaps more importantly, the court appeared to be operating under the mistaken impression that a report addressing the criteria in RCW 9.94A.660(5)(a) was legally required for it to impose a DOSA:

The report is supposed to indicate whether the addiction is such that there's a probability – that there's criminal behavior – that criminal behavior will occur in the future. – actually says – yeah – criminal behavior. So, I think what the legislature is getting at there is that – will treatment prevent this person from – committing this offense in the future. I don't see that conclusion here. Does anyone see that in the report?

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benefit from the use of the alternative. I don't see
anything discussed in the report in that regard, either.

1RP 26 (emphasis added).

Because the statute does not in fact require the court to consider a report addressing such issues, the court abused its discretion in denying the DOSA; the court was under the mistaken impression the report before it was legally deficient.

And contrary to the court's characterization, the report did not state Newman "may suffer from a substance use disorder" or merely that "she will benefit from a substance abuse assessment." 1RP 26. Rather, the report indicated Newman "had a prior substance abuse assessment and was diagnosed with a Substance Use Disorder. Supp. CP __ (sub. no. 64, Substance Abuse Screening Report Summary (DOSAs), 7/14/15). Accordingly, the court abused its discretion for multiple reasons.

In short, the court's remarks make clear it did not understand its sentencing authority. First, it does not appear the court even understood the discretion it had in the type of report it ordered. Second, it affirmatively appears the court believed it needed a report addressing the criteria in RCW 9.94A.660(5)(a). Because it

is not clear the court would have imposed the same sentence had it known of its discretion to either order a more thorough evaluation or impose a DOSA without consideration of the factors in subsection (5)(a), this Court should reverse and remand for resentencing. Mohamed, 187 Wn. App. at 646-47.

D. CONCLUSION

Because the Court abused its discretion in denying Newman's request for a DOSA, this Court should reverse and remand for resentencing.

Dated this 15th day of January, 2016.

Respectfully submitted

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State v. Raven Newman

No. 33605-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 15th day of January, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 15th day of January, 2016.

X  _____