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Court of Appeals
Division III
State of Washington
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NO. 35235-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO AYALA PINEDA,

Appellant.

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

The Honorable Joe Burrowes

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in refusing to impose a Family and Offender Sentencing Alternative (FOSA).

B. ISSUE RELATED TO THE ASSIGNMENT OF ERROR

Did the trial court abuse its discretion when it refused to grant Mr. Pineda a FOSA? (Assignment of Error 1).

C. STATEMENT OF FACTS

On May 31, 2016, Benton County prosecutors charged Santiago Ayala Pineda with one count of residential burglary. CP 1.

Following a jury trial before the Honorable Joe Burrowes, Mr. Pineda was convicted of residential burglary. CP 78-87. The court imposed a standard range sentence of 25 months. CP 79, 81.

At sentencing, Mr. Pineda requested the court impose a FOSA.¹ RP 256-76. A risk assessment report from the Department of Corrections was prepared and provided to the court before sentencing, this assessment did not recommend Pineda as a good candidate for FOSA.² CP 53-77; RP 256.

Mr. Pineda has three children from his marriage to his ex-wife. CP 59-60. As noted in the assessment, they had an informal custody arrangement, and Mr. Pineda's children did not reside with him,

¹ At sentencing, as an alternative to his FOSA request, Pineda requested a prison based DOSA (Drug Offender Sentencing Alternative). RP 256-58, 275.

² The assessment concluded: "Mr. Ayala-Pineda's legal eligibility for a FOSA sentence could be up for debate, depending upon how the court interprets "physical custody" in relation to this case. Regardless, the Department DOES NOT recommend a FOSA sentence for Mr. Ayala-Pineda based upon a review of the available investigative information detailed above." CP 63.

however he usually saw them in his home every other weekend. *Id.*; RP 257. In addition to the weekends the children spent with their father, Mr. Pineda could visit the children whenever he wanted and his ex-wife reported that he would come over to visit quite often, sometimes every other day. CP 60. His ex-wife reported to the assessment provider that it would be a hardship on the children and family visitation to have Mr. Pineda removed from their lives for an extended period of time. *Id.*

The defense argued for FOSA, noting that Mr. Pineda's criminal history would not exclude him from a FOSA, since he had no violent offenses or sex offenses. RP 260-66. At sentencing, Mr. Pineda asserted that he had physical custody of his children at the time that this offense was committed, although not full-time. RP 261-62.

The court denied the request for a FOSA, ruling that its determination regarding the FOSA is:

The defendant must have physical custody of his or her child or be the legal guardian of a child with physical custody at the time of the current offense; the high end of the defendant sentence range is more than one year; the defendant may not have current or prior convictions of felony sex or violent offense; defendant may not be subject to a deportation order; defendant must sign a release of the information waiver, regarding current and other prior welfare cases.

Court will find that there's been no evidence to support that the defendant has physical or actual custody of the said child pursuant to Title 26.27. There's been no evidence to support the defendant is eligible, based on the standard criteria. The Court will consider the report provided by the Department of Corrections in making its

decision not to enforce or allow the FOSA based on the Court's ... considering the report and the information regarding his custody issues.

RP 270, 273-75. Thus, the court found that Pineda was not eligible for FOSA, because he did not have physical custody of his child. RP 269-75. After the determination above, the court noted its concern regarding the defendant being a danger to the community and stated that was a factor in not allowing a FOSA. RP 274-75. The court clarified that it was finding that Mr. Pineda did not even qualify for a FOSA. RP 275. This appeal followed. CP 88-89.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW A FOSA IN THIS CASE ON THE BASIS THAT MR. PINEDA DID NOT HAVE PHYSICAL CUSTODY OF HIS CHILDREN.

The Legislature enacted the Family & Offender Sentencing Alternative statute, RCW 9.94A.655, in 2010. Laws 2010, ch. 224, § 2. The statute provides a sentencing alternative for certain nonviolent offenders who have minor children. A parenting sentencing alternative, such as FOSA, is an exception to the general rule that a sentencing court must impose a sentence within a defendant's standard sentencing range. *State v. Mendoza*, 63 Wn. App. 373, 375, 819 P.2d 387 (1991); *see also* RCW 9.94A.510,.530. If the defendant is eligible and the court determines this alternative is appropriate, the court will waive imposition of the standard range sentence and instead

impose a sentence of 12 months of community custody. RCW 9.94A.655(4).

The statute provides:

(1) An offender is eligible for the parenting sentencing alternative if:

(a) The high end of the standard sentence range for the current offense is greater than one year;

(b) The offender has no prior or current conviction for a felony that is a sex offense or a violent offense;

(c) 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;

(d) The offender signs any release of information waivers required to allow information regarding current or prior child welfare cases to be shared with the department and the court; and

(e) The offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense.

RCW 9.94A.655.³ On its face, the statute does not limit application of the sentencing alternative only to offenders who are the sole guardian or custodian of the child.

Generally, a party cannot appeal the trial court's refusal to impose a sentencing alternative. *See State v. Frazier*, 84 Wn. App. 752, 753, 930 P.2d 345, *rev. denied*, 132 Wn.2d 1007 (1997). But appellate review is allowed when the court either relies on an

³ If the sentencing court determines that the offender is eligible for a FOSA, during the term of community custody, in addition to standard conditions, the court may impose several special conditions including: requiring the parent to attend parenting classes, engage in chemical dependency or mental health treatment, and engage in vocational training or life skills classes. RCW 9.94A.655(5). If the offender violates any of the conditions imposed, or fails to make satisfactory progress in treatment, the court may order the offender to serve a term of total confinement within the standard range. RCW 9.94A.655(7).

impermissible basis for refusing to impose a sentencing alternative or refuses to exercise discretion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *rev. denied*, 136 Wn.2d 1002 (1998). A court abuses its discretion if its decision was reached by applying the wrong legal standard and was thus made "for untenable reasons." *State v. Sisouvanh*, 175 Wn.2d 617, 623, 290 P.3d 942 (2012). A sentencing court abuses its discretion in refusing to consider a sentencing alternative if its refusal is based on a belief that the alternative is unavailable for a class of offenders who are otherwise eligible. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

The question here is what is meant by "physical custody" or, put another way, whether partial physical custody would prevent a defendant from qualifying for a FOSA. Questions of statutory interpretation are reviewed de novo on appeal. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). When interpreting a statute, "the court's objective is to determine the legislature's intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the meaning of the statute is plain on its face, the Court gives effect to that plain meaning. *Id.* If, after examining the plain language of the statute, it is susceptible to more than one reasonable interpretation, it is ambiguous and the Court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

A penal statute that is subject to more than one reasonable interpretation must be strictly construed in favor of the defendant. *State v. Evans*, 177 Wn.2d 186, 193,298 P.3d 724 (2013). This means the Court will interpret an ambiguous penal statute adversely to the defendant only if statutory construction "clearly establishes" that the Legislature intended such an interpretation. *Id.* If the indications of legislative intent are insufficient to clarify the ambiguity, the Court interprets the statute in favor of the defendant. *Id.*

A report issued in February 2013 on the implementation and outcomes of the FOSA program to date demonstrates that sentencing courts impose FOSAs in cases such as Mr. Pineda's, where the offender is not the only person responsible for parenting the child. See Susie Leavell, "Promising Outcomes for a Parenting Sentencing Alternative," <http://www.reclaimingfutures.org/blog/parenting-sentencing-alternative> (Feb. 4, 2013). There are offenders who receive a FOSA who are not the sole caregivers of their children. *Id.* As of February 2013, 67 percent of offenders who received a FOSA were parenting with another support person in the home, 30 percent were on their own in the home, and 3 percent participated in some sort of parenting plan. *Id.* "The Parenting Sentencing Alternative helps provide very good outcomes for participants: sustained employment, continued education, improved parenting skills, and better readiness

for life in general. It helps equip offenders with skills to balance life's responsibilities with parenting." *Id.*

The plain language of the FOSA statute demonstrates that the Legislature did not intend for FOSA to be disallowed in cases where the defendant lacks full physical custody of the minor children. Instead, the purpose and benefits of the program are much broader: to protect the public by stopping the cycle of criminality within families; to prevent recidivism among parents themselves; and to "meet[] the goals of protecting public safety while giving both the incarcerated parent and child an opportunity for better outcomes." S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010).

Because the court's interpretation of the law is contrary to the plain language of the statute and legislative intent, it applied the wrong legal standard. Its decision was therefore an abuse of discretion. *Sisouvanh*, 175 Wn.2d at 623. Here, under the plain language of the statute, Mr. Pineda was eligible for a FOSA. The high end of the standard sentence range for his residential burglary conviction was greater than one year; he had no prior or current conviction for a felony that was a sex offense or a violent offense; and because he had partial physical custody of his minor children at the time of the current offense. RCW 9.94A.655(1). However, the sentencing court refused to impose a FOSA, finding that Pineda did not meet the statutory

FOSA requirements because he did not have physical custody of his minor children. RP 269-75

The court's reasoning is an improper basis to not allow a FOSA. Regarding the minor children to which FOSA would apply, the assessment establishes that Mr. Pineda spent every other weekend with these minor children at his residence, in addition to other regular visitations with them at the children's primary residence (at the home of his ex-wife). CP 59-60. Thus, Mr. Pineda had some form of physical custody, even if limited or partial, and even if he was not the primary custodial parent.⁴

At sentencing, Mr. Pineda argued that he did have physical custody of his children at the time that this offense was committed. RP 262. "Physical custody" is required under the FOSA statute and that term is not defined by the applicable statute. RCW 9.94A.655. The defense argued that the definition of "physical custody" found in RCW 26.27.021(14) (the definition section of the Uniform Child Custody Jurisdiction and Enforcement Act) would be instructive, which defines "physical custody" as the "physical care and supervision of a child." RP 261.

Likewise, the plain meaning of "physical custody" of a child, as opposed to "primary custody" for example, would simply be for a child to spend some time in the care of a parent who is tasked with providing

⁴ Mr. Pineda has another child, who was born after commission of this crime, and so not relevant when considering FOSA here. RCW 9.94A.655. CP 60; RP 257.

for the child's needs while the child is in that parent's care. The court's ruling goes beyond the plain meaning as well as the definition provided in RCW 26.27.021(14), seeming to bar any parent who lacks full-time physical custody from being considered for a FOSA.

The risk assessment established that Mr. Pineda has minor children who spend some time in his physical custody. CP 53-77. As such, Mr. Pineda and his children would have been able to benefit from a FOSA. Mr. Pineda met the other eligibility criteria for a FOSA. RCW 9.94A.655. Thus, the trial court abused its discretion by improperly denying a FOSA because Mr. Pineda did not have physical custody when he had at least some physical custody, enough to not be excluded from FOSA on the basis of physical custody.

Nothing in the plain language of the statute or the legislative history suggests the Legislature intended to exclude offenders like Mr. Pineda from receiving a FOSA. The FOSA program could still provide appreciable benefits for Mr. Pineda and his family and ultimately help to protect the public. If Mr. Pineda were to receive a FOSA, he would not only be able to maintain his relationships with his children, but he would also be less likely to reoffend. Leavell, "Promising Outcomes for a Parenting Sentencing Alternative," *supra*. That would be more consistent with legislative intent than the court's refusal to apply a FOSA in this case.

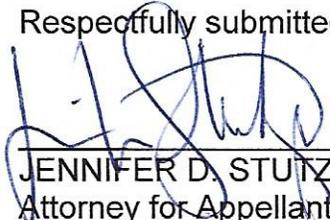
When a sentencing court categorically refuses to consider a sentencing alternative for a group of offenders who are otherwise eligible, the court commits reversible error. *Grayson*, 154 Wn.2d at 342. The remedy is to reverse the sentence and remand for a new sentencing hearing at which the court meaningfully considers the sentencing alternative. *Id.* at 343.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Pineda respectfully asks this Court to remand for resentencing under the parenting sentencing alternative.

DATED this 14th day of December, 2017.

Respectfully submitted,



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

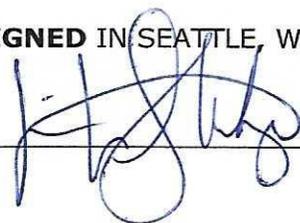
STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 35235-8-III
)	
SANTIAGO AYALA PINEDA,)	
)	
APPELLANT.)	

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STUTZER LAW PLLC

December 14, 2017 - 12:12 PM

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