

FILED
Court of Appeals
Division III
State of Washington
2/9/2018 3:29 PM

No. 35235-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

SANTIAGO AYALA PINEDA,

Appellant

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

NO. 16-1-00526-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Kristin M. McRoberts, Deputy
Prosecuting Attorney
BAR NO. 39752
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF FACTS1

III. ARGUMENT7

 A. The trial court declined to sentence the defendant to a parenting sentence alternative because he was inappropriate for the program based on community safety concerns and a history of not complying with Department of Corrections.....7

 B. The defendant did not have physical custody of his children at the time he committed the crime of Residential Burglary and was therefore ineligible for FOSA.....10

 C. If the trial court denied the defendant’s request for a FOSA based only on an incorrect interpretation of “physical custody,” the remedy is to remand for a new sentencing hearing.....13

IV. CONCLUSION.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

Dep't of Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 43 P.3d 4
(2002).....10, 11
In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 10 P.3d 1034 (2000)10
State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007)11
State v. Christian, 200 Wn. App. 861, 403 P.3d 925 (2017)10
State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005)8, 9, 13
State v. Hender, 180 Wn. App. 895, 324 P.3d 780 (2014)8
State v. Keller, 143 Wn.2d 267, 19 P.3d 1030 (2001)10
State v. Pascal, 108 Wn.2d 125, 736 P.2d 1065 (1987)8

WASHINGTON STATUTES

RCW 9.94A.655.....1, 11, 13
RCW 9.94A.655(1)(e)11
RCW 9.94A.660.....1, 4, 10
RCW 26.27.021(14).....7

LEGISLATIVE MATERIALS

S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess.
(Wash. 2010).....11, 12

OTHER AUTHORITIES

SUSIE LEAVELL, PROMISING OUTCOMES FOR A PARENTING SENTENCING
ALTERNATIVE (Feb. 4, 2013),
[https://www.reclaimingfutures.org/news/promising-outcomes-
parenting-sentencing-alternative](https://www.reclaimingfutures.org/news/promising-outcomes-parenting-sentencing-alternative) (last visited Feb. 9, 2018)....11, 12

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not abuse its discretion by denying a Family and Offender Sentencing Alternative.

II. STATEMENT OF FACTS

The defendant was convicted of Residential Burglary on March 24, 2017, after a jury trial. Report of Proceedings (hereinafter “RP”)¹ 245-46. With three prior adult felony convictions and four juvenile felony adjudications, the defendant faced a standard range sentence of 22-29 months in prison. CP 79, 85. The defendant requested the trial court sentence him to one of two sentencing alternatives—a parenting sentencing alternative pursuant to RCW 9.94A.655 (hereinafter referred to as a FOSA) or a drug offender sentencing alternative pursuant to RCW 9.94A.660 (hereinafter referred to as a DOSA). CP 52; RP 256. Prior to the April 21, 2017, sentencing in this matter, a Department of Corrections (hereinafter referred to as DOC) community corrections officer completed a screening for a FOSA and a general risk assessment. CP 53-64. The sentencing judge reviewed the 12-page report DOC submitted to the court prior to the sentencing hearing. RP 256.

In the report, DOC detailed the defendant’s extensive criminal

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings reported by Katie Devoir, volumes I and II.

history, gang involvement, and prior noncompliance while on community custody. CP 54-57, 61, 63. DOC also documented the defendant's mental health and substance abuse history, CP 62-63, lack of recent employment, CP 57-58, and living arrangements, CP 59-60. In preparing the report, DOC spoke with multiple people including the defendant, the two women he had children with, and officers from the Kennewick Police Department. CP 55, 57-63. DOC examined police reports, their own records from the defendant's previous incarceration and supervision on community custody, as well as records from the Benton County Jail, Department of Social and Health Services, and Children's Administration. CP 53-57, 60-62, 66-68.

In examining the defendant's criminal history, DOC noted "a reoccurring pattern of violent behavior, gang involvement, alleged possession of firearms, and non-compliance with officers." CP 56. DOC detailed the defendant's involvement in a drive-by shooting at a park that resulted in the defendant's conviction for Rendering Criminal Assistance in the First Degree, as well as a conviction for Assault in the Third Degree where the defendant used a board and a rock to assault a male who was dating the mother of the defendant's children. CP 56.

The report noted the defendant's poor compliance when previously on community custody, which culminated in the defendant being

convicted of Escape from Community Custody in 2015. CP 57. The defendant took nearly two years to complete 12 months of community custody, as he repeatedly absconded from supervision and went through a total of nine violation processes. *Id.* DOC worked with local law enforcement to locate and arrest the defendant on his numerous warrants while on community custody, as he had a history of resisting arrest and had been flagged as an officer safety risk. *Id.*

The DOC report also included information provided by Kennewick Police Department officers about the defendant's gang involvement and current living arrangements. CP 59-60. Two officers contacted were unequivocal in their belief that the defendant should not be sentenced to a prison alternative like a FOSA or a DOSA based on concerns regarding community safety. CP 57, 59-60. Kennewick police had repeatedly been at the residence where the defendant was residing with his girlfriend, her mother, and her brother. CP 60. Three weeks before sentencing in this matter, police were at the location and found the shed where the defendant and his girlfriend resided on the property covered in gang graffiti. CP 59-60. On April 18, 2017, three days before the sentencing hearing in this matter, police contacted the defendant's girlfriend's brother at the same location, where he was yelling obscenities at the police and had written "fuck KPD" on the front door and side of the house. CP 60. An officer

who had previously been at the same residence described it as “filthy,” “a problem house,” and “closely associated with several other drug and gang houses in the area.” *Id.*

With information garnered from both the defendant and Amanda Hankel, the mother of three of his four children, the DOC report summarized the custody arrangements of the defendant’s three children who were born prior to the residential burglary occurring. CP 58-59. (The fourth child, whose mother is the defendant’s current girlfriend, was born after the residential burglary occurred. CP 59.) The three children resided with Ms. Hankel, but stayed with the defendant every other weekend when he was not incarcerated. CP 59. The defendant indicated that in an average month, his three children stayed with him five to six days per month. CP 59. DOC noted that, “Depending on how stringently the court does, or doesn’t, interpret ‘physical custody’, Mr. Ayala-Pineda’s eligibility [for a FOSA] could be up for debate.” CP 59. With the exception of DOC’s comments in the recommendation section of the 12-page report, which is included below, this single sentence was the only reference in the entire report questioning whether the defendant actually had physical custody of his children pursuant to RCW 9.94A.660. CP 53-64.

DOC's concern throughout their report was not with the defendant's eligibility for a FOSA, but whether he was an appropriate candidate for the sentencing alternative.

Although Mr. Ayala-Pineda verbalized a strong interest in the FOSA program, it appears questionable whether or not it would be in his children's best interest for him to remain in the community instead of going to prison. Mr. Ayala-Pineda has a significant history of serious criminal involvement, gang activity, violence, and substance abuse. One would have to question whether remaining in the home would set the children up for further chaos, disappointment, and risk if Mr. Ayala-Pineda continues along this path. Unfortunately he has not been able to demonstrate stable prosocial behavior in the community for any meaningful length of time prior to his current incarceration. Additionally, his mental health status and history of suicidal behavior is a serious concern, as is his risk to the community at large. Further, local law enforcement have serious concerns about Mr. Ayala-Pineda remaining in the community instead of going to prison.

CP 63.

DOC also expressed concern in the report over the defendant's perceived lack of responsibility for his criminal conduct.

Regarding his criminal history, he characterized himself as a "follower" who has often been in the wrong places at the wrong time. He neglected to take personal responsibility for much of his past criminal conduct and blames it on others.

CP 63.

In the final section of the DOC report, titled "Recommendation,"

DOC stated that:

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 investigation information detailed above.**

CP 63.

At sentencing, the State addressed whether the defendant was eligible for a FOSA based on his children only staying with him several days a month, including noting that the FOSA statute did not define "physical custody." RP 256-57. After briefly commenting on the issue of eligibility, however, the State indicated, "But even setting that issue aside --- that's really --- that's a small point." RP 257. The State went on in much lengthier comments to characterize the defendant as "completely inappropriate" for either a FOSA or a DOSA based on his history of noncompliance with DOC and the danger he presented to the community. RP 257-60.

The trial court declined to sentence the defendant to a FOSA or a DOSA, stating that it was persuaded by the State's arguments based on the DOC report regarding the defendant's criminal history and prior noncompliance with DOC. RP 269-70. The court sentenced the defendant to 25 months in prison. RP 270. The court did not initially make a ruling

on whether the defendant had physical custody of his children. *See* RP 267-72.

At the conclusion of the court's remarks, the defendant's attorney asked the court to clarify whether it was ruling on the issue of the defendant's eligibility for a FOSA: "Is Your Honor finding that he qualified for the FOSA, but --- due to the risk assessment --- was not imposing it? Or is Your Honor finding that he did not qualify for it because of the physical custody of the children?" RP 273. At that point, the court indicated that it did not believe that the defendant had physical custody of his children pursuant to the definition in Title 26.27 [RCW 26.27.021(14)]. RP 273-74. At that point, both the State and the defendant's attorney asked the court to clarify its comments for purposes of appeal. RP 274-76. The court repeated that it believed the defendant was a danger to the community, the DOC report was persuasive in not granting a FOSA or a DOSA, and that the defendant was not eligible for a FOSA based on the issue of physical custody. RP 274-76.

The defendant now appeals his denial of a FOSA.

III. ARGUMENT

- A. The trial court declined to sentence the defendant to a parenting sentence alternative because he was inappropriate for the program based on community safety concerns and a history of not complying with Department of Corrections.**

“The legislature entrusted sentencing courts with considerable discretion under the SRA [Sentencing Reform Act], including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate.” *State v. Hender*, 180 Wn. App. 895, 900-01, 324 P.3d 780 (2014) (citing *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987)). A trial court’s categorical refusal to consider a defendant’s request for a sentencing alternative is a failure to exercise discretion and is subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005).

In *Grayson*, the defendant petitioned the trial court for a DOSA. *Id.* at 336. The judge denied the defendant’s motion, stating that due to insufficient funding the defendant would not get any treatment if sentenced to a DOSA and would still get out of prison after serving only half his sentence. *Id.* at 337. The prosecutor requested the judge make a record indicating other factors that the court was relying on in its denial of the defendant’s motion, but the judge responded, “I’m not going to give a DOSA, so that’s it.” *Id.* The Washington Supreme Court remanded the case for a new sentencing hearing, holding that the defendant was entitled to actual consideration of his request for a DOSA, not categorical denial as had occurred. *Id.* at 336. In remanding the matter, the court noted:

We recognize that there were ample other grounds to find that Grayson was not a good candidate for DOSA. . . . While we reverse the sentence on procedural grounds, we leave it in the able hands of the trial judge on remand to consider whether Grayson is a suitable candidate.

Id. at 342-43.

In the instant matter, the trial court did not categorically deny the defendant's request for a FOSA because the defendant's three children lived with their mother the majority of the time. Rather, the trial court adopted DOC's reasoning from their risk assessment and the argument of the State that the defendant was a danger to the community and unlikely to succeed at a sentencing alternative based on his history of poor DOC compliance. RP 269-70.

Only after sentencing was completed did the defendant's attorney ask the court to clarify whether the court was making a finding that the defendant was ineligible for a FOSA because he did not have physical custody of his children. RP 273. At that point, the court ruled that the defendant did not have physical custody of his children as required for FOSA eligibility but also reiterated that the court believed the defendant presented a "substantial danger to the community" based on DOC's report. RP 273-75. Assuming for the sake of argument that the defendant has physical custody of his children and is eligible for a FOSA, the facts in this case differ from *Grayson* in that here, the trial judge repeatedly

articulated other reasons besides lack of eligibility that formed the basis of the court's denial of the sentencing alternative.

That other stated reasons existed for the court's denial of a FOSA besides eligibility is further underscored by the trial court's denial of the defendant's motion for a DOSA. DOSA eligibility does not include the defendant having any children, let alone having physical custody of them. RCW 9.94A.660. The trial court, however, denied that sentencing alternative as well, also finding it inappropriate based on DOC's report. RP 270, 275.

B. The defendant did not have physical custody of his children at the time he committed the crime of Residential Burglary and was therefore ineligible for FOSA.

The interpretation and meaning of a statute is a question of law subject to de novo review. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). Each word within a statute must be given meaning. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000). Undefined words should be given their plain and ordinary meaning unless a contrary legislative intent is indicated. *State v. Christian*, 200 Wn. App. 861, 865, 403 P.3d 925 (2017). Absent ambiguity, a statute's meaning is derived from the language of the statute and effect should be given to that plain meaning. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9-

10, 43 P.3d 4 (2002). If the meaning of a statute is plain on its face, the inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Eligibility for the parenting sentencing alternative, which DOC refers to as the Family and Offender Sentencing Alternative or FOSA, is set out in RCW 9.94A.655. A defendant is eligible for this sentencing alternative if, among other criteria not in dispute, “[t]he 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(1)(e). “Physical custody” is not defined in this statute or chapter.

Neither the legislative history nor an article on the website ReclaimingFutures.org, both cited in the defendant’s brief, provide guidance as to the meaning of the phrase “physical custody.” *See* S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010); SUSIE LEAVELL, PROMISING OUTCOMES FOR A PARENTING SENTENCING ALTERNATIVE (Feb. 4, 2013), <https://www.reclaimingfutures.org/news/promising-outcomes-parenting-sentencing-alternative> (last visited Feb. 9, 2018). Cited in the same legislative history are the increased risk factors for children being in foster care, something that would not occur unless the parent who provided

primary care for the child or children in question was the one being incarcerated. S.B. Rep. on Substitute S.B. 6639, 61st Leg., Reg. Sess. (Wash. 2010). Similarly, that three percent of the FOSA participants (as of data available in 2013) “participate in some sort of parenting plan” does not show whether the legislature intended parents similarly situated to the defendant be eligible for a FOSA; it simply reflects that in three percent of the FOSA cases sentenced by trial judges, offenders participated in some sort of parenting plan. LEAVELL, *supra*. The article offers no further details about those defendants, such as the number of days per month children are in the defendants’ physical custody. In the instant case, the record does not indicate whether the defendant even has a current parenting plan with Ms. Hankel, the mother of his three children.

If the intent of the legislature was for any defendant who had some contact with his or her children to be eligible for a FOSA, the legislature would not have used the phrase “physical custody” in the statute in question. In the instant matter, the trial judge, using the discretion contemplated by the SRA to determine eligibility, determined that the defendant having his children stay at his residence five to six days a month on average did not amount to “physical custody” of them. Perhaps the trial court’s opinion would have been different if the defendant mentioned having a parenting plan, or if the defendant’s children stayed with him

more frequently. Regardless, the trial court did not base its denial of a FOSA solely, or even initially, on the issue of “physical custody.” The meaning of this phrase may be an issue more appropriately reserved for another day given that it was not determinative in the instant matter.

C. If the trial court denied the defendant’s request for a FOSA based only on an incorrect interpretation of “physical custody,” the remedy is to remand for a new sentencing hearing.

The defendant requests this court “remand for resentencing under the parenting sentencing alternative.” Br. of Appellant at 10. If the court finds not only that the defendant had “physical custody” of his children as described in RCW 9.94A.655 but also that the trial court articulated no other permissible rationale for denying the defendant’s motion for a FOSA, the remedy is a new sentencing hearing to determine the defendant’s suitability for a FOSA, not to automatically sentence him to a FOSA. *Grayson*, 154 Wn.2d at 343.

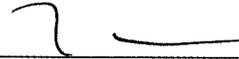
IV. CONCLUSION

The trial court refused to sentence the defendant to a FOSA because he was a poor candidate for the program based on his prior criminal history, potential dangerousness to the community, and lack of prior cooperation with community custody requirements. Even if the trial court’s conclusion that the defendant did not have “physical custody” of

his children at the time of the current offense was incorrect, other permissible rationale for denying the FOSA were clearly articulated by the judge. The State therefore requests that the trial court's ruling be affirmed given that it exercised and did not abuse its discretion.

RESPECTFULLY SUBMITTED on February 9, 2018.

ANDY MILLER
Prosecutor



Kristin M. McRoberts
Deputy Prosecuting Attorney
Bar No. 39752
OFC ID NO. 91004

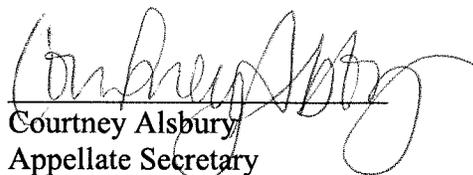
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Jennifer Stutzer
Attorney at Law
P.O. Box 28896
Seattle, WA 98118-8896

E-mail service by agreement
was made to the following
parties:
Jennifer@stutzerlaw.com

Signed at Kennewick, Washington on February 9, 2018.


Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

February 09, 2018 - 3:29 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35235-8
Appellate Court Case Title: State of Washington v. Santiago Ayala Pineda
Superior Court Case Number: 16-1-00526-1

The following documents have been uploaded:

- 352358_Briefs_20180209152903D3947920_9716.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 35235-8 Ayala Pineda - Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- jennifer@stutzerlaw.com
- jenstutzer@yahoo.com
- prosecuting@co.benton.wa.us

Comments:

Sender Name: Courtney Alsbury - Email: courtney.alsbury@co.benton.wa.us

Filing on Behalf of: Kristin Marie Mcroberts - Email: kristin.mcroberts@co.benton.wa.us (Alternate Email:)

Address:
7122 W. Okanogan Place
Kennewick, WA, 99336
Phone: (509) 735-3591

Note: The Filing Id is 20180209152903D3947920