

FILED
Court of Appeals
Division III
State of Washington
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NO. 35366-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CORY WARDLAW,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR.

The sentencing court improperly denied Cory Wardlaw a Drug Offender Sentencing Alternative (DOSA) by relying on nonstatutory and untenable factors.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

When an individual asks the sentencing court to impose a DOSA, the court must give due consideration to the request and may not deny the DOSA based on a misunderstanding of the law or by failing to consider the mandatory statutory criteria. There was no dispute that Mr. Wardlaw was statutorily eligible for a DOSA, he needed the structured drug treatment available in a DOSA, and the community would benefit from a DOSA's dual requirements of treatment and punishment. The court refused the DOSA because Mr. Wardlaw was not sufficiently remorseful for his offenses. Did the court deny Mr. Wardlaw a DOSA on an impermissible basis?

C. STATEMENT OF THE CASE.

Cory Wardlaw pled guilty to one count of trafficking in stolen property.¹ CP 20. He asked the court to impose a DOSA because he recognized his need for structured drug treatment. RP 21-23. He told the court how he received drug treatment many years earlier and, through it, he was able to maintain his sobriety for several years. RP 26-27. However, he relapsed and now struggled to find the tools he needed to keep himself away from drugs, even though he no longer wanted to keep using drugs. *Id.* His father concurred, explaining to the court that Mr. Wardlaw lacked the ability to resist drugs despite his best intentions and he pleaded with the court to impose a treatment-based sentence. RP 24-25.

Finally, his mother told the court that Mr. Wardlaw was born drug-addicted, due to medications she used for her physical ailments from lupus, which “doomed” him from birth and likely made him at

¹ He also pled guilty under a separate cause number to two counts of burglary and one count of possession of a stolen motor vehicle and received a concurrent sentence, COA 35367-2-III. RP 26.

higher risk for future addiction. Supp. CP __, sub. no. 28 (page 3, letter to court from mother).²

The prosecution did not contest the extent of Mr. Wardlaw's drug addiction or his need for treatment. RP 18-21. The prosecution told the court Mr. Wardlaw "deserves some credit" for his extensive cooperation with the police once arrested. RP 21. It was only able to prosecute Mr. Wardlaw for these burglary charges because he volunteered his involvement in these offenses to the police. RP 20-21.

Nevertheless, the prosecution told the court it needed to weigh the effect of Mr. Wardlaw's criminal behavior against the "mitigating factors" and asked the court to impose a straight prison sentence in the middle of the standard range. RP 21; CP 17.

Consistent with the prosecution's request, the court ordered a 40-month sentence, concurrent with sentences in the other cause number, including a 73-month sentence for residential burglary, which was the middle of the standard range for the offense with the highest seriousness level. RP 29; CP 17, 34. The court criticized Mr. Wardlaw for being insufficiently remorseful to the victims of his offenses and

² A supplemental designation was filed on October 13, 2017, but no CP number has been provided by the superior court.

told him he needed to seek “self-help” treatment to end his addiction and stop his criminal behavior. RP 30.

D. ARGUMENT.

The court denied Mr. Wardlaw a prison-based DOSA by relying on impermissible factors

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

A court’s sentencing authority stems from statute. *In re the Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). When asked to consider imposing a DOSA, the sentencing statutes structure a court’s authority. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). A court may never categorically refuse to consider a DOSA sentence for an eligible individual and may not deny this sentence for impermissible reasons. *Id.*

In *Grayson*, an eligible defendant asked the court to impose a DOSA sentence. *Id.* The prosecutor opposed the DOSA based on the defendant’s long history of drug selling and other pending charges. *Id.* The “main reason” the court gave for denying the DOSA was that the State does not have the money to treat people in the DOSA system, which would result in the defendant being released without adequate treatment. *Id.* at 337.

The Supreme Court noted that the judge was relying on his understanding of the DOSA system's funding, even though that information was not part of the record presented at sentencing. *Id.* at 340. But because the defendant had not objected, it considered any potential objection waived. *Id.* at 340-42.

Instead, the Supreme Court examined whether the court's refusal to impose a DOSA complied with its obligations under the sentencing statutes and principles of due process of law. *Id.* at 342. The refusal to consider a DOSA for anyone, or for a class of offenders, "is effectively a failure to exercise discretion and is subject to reversal." *Id.*

The DOSA 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. *Id.* at 337; *see generally* RCW 9.94A.660.

Under this program, the court imposes a prison sentence of one-half the midpoint of the standard range sentence. *Id.* While in prison, the individual receives chemical dependency treatment. RCW 9.94A.660(5)(a). Once the person completes the total confinement part of the sentence, he serves the rest of the sentence in closely monitored community supervision and treatment. RCW 9.94A.660(2). But if a

person fails to comply with the conditions of a DOSA, even while in prison, DOC may administratively revoke the drug-treatment program and require the person to serve the remainder of the sentence in prison. RCW 9.94A.660(8)(c); *Grayson*, 154 Wn.2d at 338.

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

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

2. *The court denied Mr. Wardlaw's DOSA request on untenable grounds.*

Mr. Wardlaw satisfied the DOSA eligibility requirements, which the prosecution did not dispute. The court found Mr. Wardlaw's substance abuse contributed to the offenses he committed and did not question his need for treatment or its root cause in propelling him to commit the property offenses for which he pled guilty. CP 33; RP 30.

The prosecution urged the court to deny the treatment-based sentence despite his eligibility because his offenses impacted very "nice people." RP 19. It told the court that "he should just get a straight prison sentence" and not a DOSA if the court "weighs the harm . . . he's done to the community and his criminal history, versus the – the mitigating factors." RP 21.

But this analysis is misplaced. A prison-based DOSA is a mechanism for addressing the causes of wrongful behavior but it is not a sentence imposed based on weighing mitigating factors or leniency akin to an exceptional sentence below the standard range. *See, e.g.,*

RCW 9.94A.535(1) (explaining mitigating circumstances for exceptional sentence).

A DOSA requires the court to impose a prison term of the middle of the standard range as the sentence. RCW 9.94A.662(1)(a). The offender must serve this term and engage in prison-based treatment before starting the strictly monitored community-based portion of the sentence. *Id.* The failure to comply with DOSA requirements at any point results in termination of treatment and the imposition of the entire prison term. RCW 9.94A.662(1), (3). Termination from the drug treatment program may occur long before the community-based portion of the program begins, if a person misbehaves or fails to follow rules while in prison. *See* DOC Policy 580.655, VI (Revocation of Prison DOSA Sentence).³

The court understood Mr. Wardlaw needed chemical dependency treatment and that without it, Mr. Wardlaw would likely continue his cycle of drug addiction and crime. RP 30-31. But the court refused to order a DOSA because Mr. Wardlaw had not expressed “remorse or regret for what you did to your victims.” RP 30. The court told Mr. Wardlaw he “could have had treatment” and still could through

“self-help” but it would not impose a DOSA sentence because his “remorse” was for himself and not the people he “terrorized.” *Id.*

The court’s analysis misapplied the DOSA criteria. It deemed the DOSA unavailable because Mr. Wardlaw had not overcome his chemical dependency or returned to treatment on his own, which turns the DOSA program’s purpose on its head. Mr. Wardlaw is not expected or required to obtain treatment before the DOSA to demonstrate his eligibility for it. And he is not ineligible or inappropriate as a DOSA candidate due to his inability to obtain treatment on his own.

Further, his remorse is not an appropriate factor in assessing whether he merits regimented, structured, and highly incentivized drug treatment. It had no logical connection to Mr. Wardlaw’s eligibility for a DOSA or his ability to succeed in a treatment-based program. The court denied the DOSA based on unreasonable, illogical, or inapplicable considerations untethered from the purpose of the DOSA sentence.

³ Available at: <http://www.doc.wa.gov/information/policies/default.aspx>.

3. *Because the trial court abused its discretion this Court should reverse Mr. Wardlaw 's sentence.*

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.

Mr. Wardlaw satisfied the DOSA statutory criteria. No one disputed that both he and the community would benefit from his engagement in structured drug treatment with significant punitive sanctions imposed should he fail to comply. But the court denied him a DOSA based on an undefined standard of failing to express adequate remorse. The court’s failure to limit its consideration of a DOSA to the statutory criteria requires reversal of Mr. Wardlaw’s sentence. He is

entitled to a resentencing hearing at which the court gives proper consideration to the guidelines for imposing a DOSA sentence.

E. CONCLUSION.

Mr. Wardlaw's sentence should be reversed and remanded for a new hearing and any further relief this Court deems appropriate.

DATED this 30th day of November 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", written in a cursive style.

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35366-4-III
)	
CODY WARDLAW,)	
)	
APPELLANT.)	

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2017.

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