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No. 35366-4-III

IN THE COURT OF APPEALS, DIVISION III,

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

CODY WARDLAW

Appellant

BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion when denying the defendant a DOSA sentence and imposing a standard range sentence?

II.

ISSUES PRESENTED

1. Did the court manfully consider the request for a DOSA sentence?
2. Was considering the lack of remorse and the effect on the victim impermissible?

III.

STATEMENT OF THE CASE

On January 9, 2017, the defendant committed a burglary at 203 N. 2nd St. W. The victims, the Albys' garage and outbuilding were burglarized. The defendant admitted to stealing a set of Carhart overalls, snow boots, and snow shoes. Shoe tracks from the scene led to the defendant's residence, but he would not come out when Officer's knocked on the door. CP 4 – 13 (35367-2-III).

On February 15, 2017, a burglary was committed at 206 N. Ridge. The defendant and his co-defendant entered that home, admitting that the home was a mess and smelled like cat urine. During that burglary, the defendant stole an Ibanez

guitar, a pair of Nike shoes, and admitted his co-defendant was just dumping items in bags, including a tablet and an Xbox 360 and games. CP 4 – 13 (35367-2-III).

On February 20, 2017, the Parker's called to report that their home had been broken into at 1161 W. King Ave. The Parker's lived in Arizona during the winter, and were only made aware of the burglary from their neighbors. Upon investigation, it was discovered that their residence and garage had been broken into. Every room in the home had been gone through, and the home had been ransacked, with every drawer being gone through. The garage had also been broken into, and the Parker's 2011 Subaru Legacy had been stolen. The defendant admitted in statements to the police that he and his co-defendant committed this burglary, stating they entered a utility trailer that was parked outside the residence; then moved into the main residence. He stated that his co-defendant went through all the dresser drawers and filled up pillow cases with items. They also stole foreign currency, and a WII. They then went into the garage and stole the 2011 Subaru Legacy. CP 4 – 13 (35367-2-III).

On February 22, 2017, a 2011 Subaru Legacy was stolen during a residential burglary. The vehicle was abandoned on Heine Road. The vehicle had left the roadway, hit a barbed wire fence and took out a couple of fence posts. The driver had been unable to exit the vehicle on the driver's side; instead exiting through the passenger side and leaving the door open, leaving the scene on foot. The defendant was found about a mile from the scene wearing boots that matched the boot prints in the snow leaving the wrecked Subaru. The defendant admitted to driving the

vehicle, crashing it, abandoning it, and throwing the keys in a field by the vehicle. He admitted that the boots he wore from the scene of the accident were the same ones he stole from the Alby's residence. CP 4 – 13 (35367-2-III).

On April 23, 2017, Chewelah Police Department responded to 203 N. 2nd St E, the Abundant Life Fellowship Church. The Church office had been ransacked, and stole sound equipment, a TV, and the church debit card. The defendant pawned items stolen from the church at Pawn 1. Pawn 1 had video of the transaction. The defendant also attempted to cash a check from Abundant Life Fellowship Church at MoneyTree. CP 3 – 13 (35366-4-III).

On May 30, 2017, the Defendant entered a plea of guilty to the charges of Residential Burglary, Burglary in the Second Degree, and Possession of a Stolen Motor Vehicle. CP 22 – 32 (35367-2-III). He also entered a plea of guilty to Trafficking in Stolen Property in the First Degree. CP 20 – 30 (35366-4-III).

The defendant has been previously convicted of Taking a Motor Vehicle Without Permission First Degree on 06-18-2013, and two counts of Burglary in the Second Degree on 10-19-2010. CP 31 – 46 (35366-4-III); CP 33 – 48 (35367-2-III). His offender score is 6 for the count of Trafficking in Stolen Property with a standard range sentence of 33 – 43 months. VRP 10. The defendant's offender score for the count of Residential Burglary is 9 with a standard range of 63 – 84 months; for Burglary in the Second Degree it is 9 with a standard range of 51 – 68 months; and for Possession of a Stolen Motor Vehicle it is a 7 with a standard range of 22 – 29 months. VRP 14.

The defendant was sentenced on May 30, 2017. CP 31 – 46 (35366-4-III); CP 33 – 48 (35367-2-III). At sentencing, the prosecutor gave a mid-range recommendation of 73 months. VRP 18 – 21. The defendant, through his attorney, asked for a DOSA sentence. VRP 21 – 23. The defendant's father was also allowed to speak at sentencing. VRP 23 – 25. The defendant addressed the court. VRP 25 – 27. Finally, a victim, Bonnie Parker, also spoke. VRP 27 – 28.

The trial court sentenced the defendant to 40 months on the Trafficking in Stolen Property, 73 months on the Residential Burglary, 59 months on the Burglary in the Second Degree, and 25 months on the Possession of A Stolen Motor Vehicle. VRP 29.

The defendant timely filed his notice of appeal. CP 49 (35367-2-III); CP 47 (35366-4-III).

IV.

ARGUMENT

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING A DOSA SENTENCE AND IMPOSING A STANDARD RANGE SENTENCE.

1. The Court meaningfully considered whether imposing a DOSA was appropriate.

A decision on whether or not to impose a sentencing alternative is reviewed for an abuse of discretion. *State v. Frazier*, 84 Wn. App. 752, 930 P.2d 345 (1997). A categorical denial of imposition of a DOSA sentence is a failure to exercise any discretion and requires reversal. *State v. Grayson*, 154 Wn. 2d 333, 111 P. 3d 1183

(2005). However, a court's decision, after consideration, not to apply DOSA and impose a standard sentence range is not reviewable. *State v. Conners,* 90 Wn.App. 48, 53, 950 P.2d 519 (1998).

This is not a case similar to *Grayson*, in which the Court even failed to meaningfully consider whether the sentencing alternative was appropriate.

Instead, the Court listened to and considered many factors when reaching a decision on the sentence. The court listened to the Prosecutor. The Prosecutor did talk about the Parkers, and how they were extremely nice people. Whether the appellant want to recognize that or not, it is an important factor. It is important to recognize that this defendant chose to burglarize someone's home because it was easy. Those victims did not deserve to have their life turned upside down. They lost their sense of security, and they had a huge interruption in being able to live their life the way they wanted to. Further, the Prosecutor spoke about how, while out on bail, he committed yet another burglary – at a church no less. Whether the appellant wants to admit it or not, the impact that his crimes have on all his victim's play a role in sentencing.

The Court also listened to the defendant's father. The defendant's father spoke about how his son's drug addiction made the whole family a victim. Something worth noting, his father was advocating for treatment – not less time. "I'm not asking for time off. I'm asking for him to get the help he needs when he's in there." VRP 24. This father isn't saying that the defendant deserves to be out in the community any sooner, he isn't saying that a DOSA is appropriate – he is simply asking for his son to get treatment.

The sentencing court listened to the defendant himself. And in his statement to the Court, it became clear that the defendant didn't care about anything but himself. He showed zero remorse for what he had done. He lacked any compassion towards the victims, any of them. He didn't seem to care that he wrecked a retired couple's ability to leave for Arizona in the winter with peace of mind. He didn't seem to care that he stole from a church. He didn't seem to care that he wrecked someone's car – he just left it in the road and threw the keys in a field. He couldn't even take the time to apologize. He simply was only worried about himself. He spoke about his drug addiction; but he didn't talk about how it affected anyone but himself. Maybe even more telling, he spoke about how he wanted less time, because " I don't need to sit in prison for 73 months straight learning how to get comfortable doing time because – if I get that then I'm just going to come out not caring. My dad will die, my mom might be dead, my grandma's going to be dead. My brother's moving away. I'm going to have no family. I'm going to be angry." VRP 26. The defendant made it clear that it was less about treatment and more about getting a shorter sentence.

Lastly, the sentencing court listened to the victim speak. It was clear that the victim didn't intend to speak until after listening to the defendant speak. VRP 27. It was clear that the victim did not support a DOSA sentence. It was quite telling that the victim hit on the fact that drug addicted individuals have to decide for themselves if they want to get treatment – "it can't be – just be one-sided." VRP 28. The victim went on to discuss how the defendant was a burden to the community: "Because when he was out on bail, I (inaudible) and everybody said to me, -- 'he's been stealing since he's got

out on bail.' And that – that was true. And the community has just had it with him. They – just feel like he's – he's done so much in the community that it's been really hard on people." VRP 28.

The court also reviewed letters from the defendant's other family members. VRP 29.

The appellant states that there was no dispute that the community would benefit from his engagement in receiving a DOSA sentence. *Appellant's Opening Brief* 9 – 10. The State disagrees. There was evidence presented at sentencing that would show the community would not benefit from the defendant returning to the community sooner than 72 months.

2. *The court may consider more than just statutory criteria when imposing a sentence; and did not base its decision on untenable grounds.*

The appellant would have this court believe that a sentencing court may only consider the statutory requirements for eligibility when imposing a sentence. This is misplaced. Just because a defendant is eligible for a sentencing alternative, does not mean that the sentencing alternative is appropriate.

RCW 9.94A.660 provides requirements for which a defendant must meet before a DOSA sentence can even be imposed. That statute does not provide guidance on whether such a sentence is an appropriate sentence – that decision is left to the sentencing Court. RCW 9.94A.660(5)(a) provides:

> 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; (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 department of social and health services; and (iv) whether the offender and the community will benefit from the use of the alternative.

This specifically addresses specific requirements to be considered when considering a Residential DOSA. The statue is silent when it comes to a Prison based DOSA. The statue does not limit the court to only those factors, much like the SSOSA statute does not limit a sentencing court to only the factors in SSOSA statute. *State v. Frazier* at 754 quoting *State v. Hays*, 55 Wn. App. 13, 15-16, 776 P. 2d 718 (1989). If the court was limited to only the statutory requirements for eligibility, than any defendant who was eligible for a DOSA would be sentenced to a DOSA.

There is no denial that the defendant was eligible for a prison-based DOSA sentence. That does not automatically mean that a DOSA sentence was appropriate.

A sentencing Court may consider a wide variety of factors when deciding what sentence to impose. The effect on the victim is surely one of those factors. RCW 7.69.303 provides a statutory requirement that victims may present a victim impact statement or speak at sentencing, if they choose. The lack of remorse that the defendant showed had a direct impact on the victim. In fact, it was only after listening to everyone speak at sentencing that the victim felt the need to speak. Part of issuing a sentence is providing justice to the victim.

The fact that the defendant showed absolutely zero remorse for his crime is not a non-factor in sentencing. The defendant showed that he didn't care about how his

actions impacted the victim or the community. To say that the effect that the sentencing would have on the victim is an "impermissible factor" is misplaced.

3. *There was no abuse of discretion in determining an appropriate sentence.*

The Court reviews a decision to deny a sentencing alternative and impose a sentencing alternative for an abuse of discretion. *State v. Hays* at 16. "An abuse of discretion occurs only when the decision or order of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id* quoting *State v. Blight*, 89 Wn. 2d 38, 41, 569 P.2d 1129 (1977). "It exists 'only where it can be said no reasonable man would take the view adopted by the trial court." *Id.* Further, an abuse of discretion occurs when the court applies the wrong legal standard or relies on facts unsupported by the record. *State v. Quismundo*, 164 Wn. 2d 499, 504, 192 P.3d 342 (2008).

The decision of the sentencing court was not unreasonable; nor was the decision made based on untenable reasons. The appellant may disagree that his lack of remorse had no logical connection to a denial of a DOSA; however, it does not reach the level that no reasonable person could reach the same conclusion that the court did.

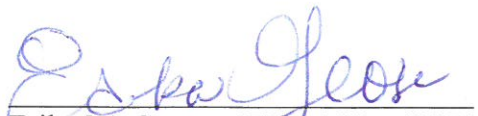
The Court didn't simply just consider the lack of remorse. The court also commented on the fact that the defendant only felt sorry for himself, and would be angry if he didn't receive a DOSA. VRP 30. It was quite telling that the defendant didn't even indicate what treatment would do for him, rather discussed how he didn't want to sit in prison for 73 months. The court did not base these decisions on facts unsupported by the record, nor did they apply any incorrect legal standard.

The court took all this into consideration. A DOSA is a sentencing alternative, and it isn't required to be imposed for anyone who is eligible. In this case, the court meaningfully considered all the factors available to it, and made the decision that a DOSA sentence isn't appropriate.

CONCLUSION

The court made a decision on sentencing after considering all the factors presented. There was no abuse of discretion; there was no categorical denial of the imposition of a DOSA sentence. Just because the defendant was eligible and very well may have benefited from drug treatment does not mean that a DOSA sentence was appropriate. Absent an abuse of discretion, the decision to deny a DOSA is not reviewable and should be upheld.

Dated this 12 day of December, 2017.



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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronic filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and to Nancy P. Collins, #28806, Attorney for Appellant, to nancy@washapp.org and mailed to Cody Wardlaw, DOC # 344422, Airway Heights Correctional Center, PO Box 2049, Airway Heights, WA 99001 on December 12, 2017.

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STEVENS COUNTY PROSECUTOR'S OFFICE

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