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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III
No. 35418-1-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TINA MARIE WEINMAN,

Defendant/Appellant

Respondent's Brief

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C. RESPONSE TO ISSUE AND ASSIGNMENTS OF ERROR

1. The sentencing court properly sentenced Ms. Weinman to a standard range sentence, at the low end of the sentencing range, and did not improperly deny her a Drug Offender Sentencing Alternative (DOSA) sentence.
2. Ms. Weinman was not denied the due process of law that she is entitled to under the Fourteenth Amendment to the United States Constitution.
3. Ms. Weinman was not penalized for exercising her right to a jury trial under the Sixth Amendment to the United States Constitution or the Washington State Constitution, Article I, §§ 21 and 22.

ISSUE: The sentencing judge did not improperly find that Ms. Weinman’s DOSA request was “incompatible” with her decision to go to trial. The sentencing judge did properly find that Ms. Weinman’s request for a DOSA sentence was “incompatible” with her trial testimony.

D. STATEMENT OF THE CASE

Ms. Weinman was charged with three (3) Counts of Delivery of a Controlled Substance occurring within 1,000 feet of a school bus route stop. CP 11. The jury acquitted her of the crime charged in count one¹ and returned guilty verdicts on the other two charges. CP 61-67. Jurors also found that the crimes occurred in a protected

¹ The Co-defendant was also found not guilty of this charge, most likely not because the jury felt he had delivered the drugs to the CI, but rather because the transaction took place within a private residence. But that is speculation – what is known is that neither defendant was found guilty of count 1 – the only count the co-defendant was charged with committing.

zone (near a school bus route stop). CP 64, 66. Ms. Weinman sought to avoid liability for her conduct by asserting an Entrapment Defense. CP 16-18. As a result, Ms. Weinman was forced to testify to attempt to support her defense.

Ms. Weinman commenced her testimony with a discussion of her favorite past-times and then jumped into a history of her drug addiction and sobriety. VRP 493 – 494. At trial, Ms. Weinman indicated that she has used methamphetamine in the past, and had periods of extended sobriety, including a period of 11 years which ended when her mother passed. VRP 494. Ms. Weinman indicated that she had been sober for approximately 6 months prior to commencement of the trial, and explained the steps she had taken on her own to become sober. VRP 494- 496. Ms. Weinman was asked if she was a user or a dealer, and she indicated that she **never sold methamphetamine to support herself**, but that she could find someone who did sell methamphetamine. VRP 496. Ms. Weinman discussed how she also had been offered an opportunity to work the charges off by assisting law enforcement. VRP 497 - 499. One of the reasons stated by Ms. Weinman as to why she could not “work her way out” was because she was not a drug dealer. VRP 497 The failure on Ms. Weinman’s part to understand the legal definition

applicable to “delivery of a controlled substance also appeared during the sentencing hearing where she again claimed that she was not a dealer. VRP 628. These claims were apparently not convincing to the jury (nor were her entrapment claims), nor did they appear persuasive upon the judge who sentenced her based upon convictions for two deliveries with enhancements for sales within 1,000 feet of a school bus route stop.

Most of Ms. Weinman’s testimony concerned making the CI out to be a ‘drug dealer’ and someone who she attempted to help to stay sober and to get her kids back. VRP 500 – 509. Ms. Weinman also attempted to build on her defense by indicating there were times she did not provide the CI with drugs. VRP 509. The interesting brief bit of testimony was that on cross examination, Ms. Weinman was asked if she ever helped the CI deal “at times” and she responded sure. VRP 510.

Ms. Weinman, on appeal in her brief uses the interesting tactic of claiming that: “She did not claim that she could achieve lifetime sobriety without assistance, and includes the span of her testimony to say, see – nothing there. But the reality is that she was never asked about that specific fact, or to express such an opinion. Given the same testimony, a deputy prosecutor and a trial judge

could conclude, given the lack of testimony that Ms. Weinman was claiming that she did not need judicial assistance to quit using drugs. VRP 493-518.

Following the guilty verdicts, the trial court addressed conditions of release and did not change direction, leaving her out of jail (a bit unusual based upon common practice). In addition, defense counsel was given two weeks to prepare for sentencing. Sentencing occurred on June 23, 2018. At that time, the State recommended a high end standard range sentence of 44 months and opposed a DOSA premised upon being told that Ms. Weinman had indicated at trial that she doesn't have a drug problem, which would make a DOSA inappropriate. VRP 624. The high end appears to have been recommended based upon an understanding that Ms. Weinman was claiming to be a past drug addict, but had gotten sober, and was in this case was an individual who had a friend who was not feeling good so Ms. Weinman helped her out by securing drugs. The deputy indicated that it was reprehensible to be encouraging somebody else to engage in that type of behavior. VRP 625.

Defense counsel then addressed the Court and opined that it was strange to hear it relayed that Ms. Weinman said that she didn't

have a drug problem, because she still has a drug problem and is fairly early in the stages of recovery. VRP 625. Counsel then explained his understanding of her status with sobriety. VRP 625-626. Counsel indicated his opinion that the convictions were very closely related to drug addiction, to her drug addiction at the time of deliveries. VRP 626. Counsel, in indicating that they were asking for a DOSA indicated that he was aware that they exercised their right to a trial and asserted the defense of entrapment (But why he referenced those facts is not discernible) VRP 626. Counsel indicated that the determining factor for the Court to consider (presumably for a DOSA) was whether such a sentence will benefit the community, and opined that if she was sober she was an asset to the community. VRP 626. The defendant then requested a DOSA sentence – prison based, and requested a sentence that was 20 months in prison and 20 months out of prison. VRP 626, 631.

Ms. Weinman utilized her opportunity to speak on her own behalf and indicated that she was clean for 11 years before relapsing to fill the hole left by the death of her mother 5 years prior. VRP 627. Ms. Weinman indicated that at the time she thought she was helping her friend but acknowledged that there were better ways she could have helped her. VRP 628. She then spoke a little to starting

or rebuild her life and claimed: I am a drug addict, not a drug dealer. I have never dealt drugs in my life, except for when I made the huge mistake of thinking I was helping someone. VRP 628.

The judge interjected to ask about their friendship and additional using/sharing of drugs and then opined that Weinman had helped the CI because she got her charge dropped, and opined that this was really foul. VRP 629. The State and the judge then discussed the “foulness” or not of such circumstances. VRP 629-630. The judge did indicate that his thoughts on this process were not going to impact the sentence (although that is a bit hard to swallow). VRP 630.

The judge heard some more from defense counsel, and Ms. Weinman indicated that she had nothing further to add. Rather than paraphrase the comments, I have included the judge’s comments that appear to be in issue in this case.

The Court: Yeah. The problem that your (indiscernible). I mean, you’re asserting here today that you have been an addict and you’ve been in treatment and that you need my help in getting that treatment. But when you did the trial, you were asserting that you had not committed a crime. Now that you’re saying you did, you were saying you didn’t commit a crime, okay? And you were asserting that you didn’t need the system’s help – the Court’s help in getting treatment because you were doing it on your own. They’re incompatible. They’re incompatible. You can’t do that.
Ms. Weinman: I don’t (indiscernible).

The Court: No. So, I'm going to deny the request for DOSA, but I will certainly take into account that you have a chemical dependency that contributed to this offense. And I will impose the low end of the standard range on both Counts. That would be 36 months on Count 2 and 36 months on Count 3. And that confinement includes the 24 month enhancement. So the actual number of months of total confinement is 46 months (J & S has 36 written in by judge). ... VRP 63-632; CP 80-91. Balance of the discussion pertained to concurrent versus consecutive and financial assessments.

E. ARGUMENT

1. Ms. WEINMAN DOES NOT HAVE A CONSTITUTIONAL RIGHT TO RECEIVE A DOSA SENTENCE:

The Sentencing Reform Act of 1981 (SRA) was imposed by the legislature and codified in chapter 9.94A Revised Code of Washington (RCW). The SRA provides a methodology of determining a standard range sentence based upon an offender's criminal history and the seriousness of the crime charged, as well as a mechanism for adding any enhancement time imposed to create a total standard sentence length for sentencing purposes. Neither party has challenged the methodology used by the court to calculate the total standard range, nor has either party challenged the notion that the sentence imposed was at the low end of the total standard range.

There are several sentencing alternatives found within the SRA, with the specific alternative at play here DOSA, being located in RCW 9.94A.660. In looking at the eligibility requirements found in sub (1) it is conceded that the trial court judge could have exercised his discretion and entered a DOSA sentence, although certainly it could have been argued more strenuously by the state that this crime did not involve a small quantity of the particular controlled substance – neither side argued this point. RCW 9.94A.660(1)(d). Both sides appear to have focused upon the criteria found in RCW 9.94A.660(5)(a) which are to be considered by the judge in exercising his/her discretion in entering either a prison-based DOSA or a Residential DOSA, from which defense counsel extrapolated that the most important consideration was whether Ms. Weinman was an asset to the community. Sub 5(a)(iv) actually directs the court to consider whether both the offender and the community will benefit from the use of the alternative.

There is no language within RCW 9.94A.660 mandating the imposition of a DOSA sentence. The vast majority of the language speaks to a trial court exercising discretion in imposing such a sentence. The case cited by counsel on appeal, *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 re-affirms this notion. The Court in

Grayson did overturn the trial court’s denial of a DOSA sentence – based upon the trial court denying the request without sufficient consideration of the alternative.

At issue in *Grayson* was the trial court’s categorical denial of a DOSA sentence of any type because of the trial court’s “belief” that the state had not adequately funded the program – a fact that had not been subject to the adjudicative process outlined within the SRA. *Grayson* at 341-344. The specific narrow holding was that in *Grayson*, the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate, although the Court indicated that trial court judges are allowed to consider funding if done properly. *Grayson* at 343.

We do not have a similar set of facts that were presented in the narrow holding of *Grayson*. In our case, counsel has extrapolated to argue that the reasons relied upon by the trial court judge were improper. But there is actually nothing in *Grayson* or RCW 9.94A.660 that indicates considering whether an individual has testified differently during trial about the need for assistance in treatment or having committed the crime cannot be considered by the court in determining whether a defendant is a good candidate for the sentencing alternative. It cannot be argued that considerations of

whether an individual has accepted responsibility for a crime is not a value in determining whether they will be amenable to treatment. Nor can it be argued that if a trial court judge determines that a defendant has expressed differing opinions as to their need for court ordered treatment that such consideration is not valuable for considering the appropriateness of a DOSA sentence. RCW 9.94A.660 gives the trial court discretion to determine if such a sentence alternative is appropriate for the community and the offender.

The general principle, articulated in prior case law, that a trial judge's decision to grant a DOSA is not reviewable was re-affirmed in *Grayson*. Id at 338. It was further noted that an offender, however, may always challenge the procedure by which a sentence was imposed. Id at 338. The defendant in *Grayson* was, in essence, claiming that the denial resulted from a failure of the trial court to exercise the discretion vested by the statute in the trial judge, because of considerations of facts outside of the record. Id at 338.

Here, the argument is not that the trial court did not exercise its discretion, rather the trial court exercised its discretion on an improper basis: She was denied a DOSA, it is claimed, because she had the audacity to go to trial and based upon a false belief that she

had indicated that she did not need the trial court's assistance in maintaining sobriety. The former basis – exercise of a constitutional right would fall into the category of “procedure” that a defendant can challenge, the latter – a finding of facts contested during trial, would fall into the category of not being reviewable.

2. Ms. WEINMAN WAS NOT PENALIZED FOR EXERCISING HER CONSTITUTIONAL RIGHT TO A TRIAL BY A JURY:

The only individual who discussed the defendant's “exercise” of her right to a trial in some fashion was defense counsel. VRP 626. While the trial court judge alluded to the trial, it was not in reference to the defendant's exercise of the right, but in reference to her testimony during trial compared to her testimony at sentencing. Contrary to the defendant's assertion, the trial court did not indicate that forcing the state to trial was incompatible with requesting a DOSA sentence. Rather, the trial court indicated that it was her testimony at trial that was incompatible with her testimony at sentencing, in two regards.

Taking full responsibility for committing a crime at sentencing versus not taking full responsibility at trial; and

Claiming that she is able to obtain and maintain sobriety without court intervention at trial and

indicating that she needs the court's assistance to obtain sobriety via the court's assistance through the vehicle of a DOSA sentence.

The State does not disagree with the basic statements of law pulled from the cases cited by appellant. The State does believe that the cases cited are not directly on point with the facts of this case, and therefore are of little value. And the state does contest the interpretation, by counsel, of the words used by the trial court to assert that the judge was penalizing the defendant for exercising her right to a jury trial.

U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) was appropriately relied upon for the general statement that the government may not penalize an accused person's exercise of a constitutional right. However, that case dealt with the exercise of discretion by a prosecutor relative to charging, and upheld the use of such discretion. The facts of that case shed little light upon the facts here, involving the discretion of a trial court relative to a sentence alternative. Nor does that case shed light on the twist that has been made to couple the judge's words with the right to trial.

Appellant most assuredly relied upon *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed. 2d 604 (1978) because

of the pronouncement that: it is “a due process violation of the most basic sort” when a person is punished “Because [she or] he has done what the law plainly allows. Casting the denial of the DOSA sentence as a “due process violation” would allow this court the ability to review the denial of the DOSA sentence, which otherwise would not be reviewable. But *Bordenkircher* also dealt with the discretion of a prosecutor in bringing charges against a defendant, and again, the Court upheld the exercise of discretion by the prosecutor. The facts and holding of that case also do not shed light on the issues presented herein.

Finally we have *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), which appellant cites for the proposition that an increased penalty may not be imposed based on an accused person’s exercise of the right to trial. Jackson was not a challenge to discretion exercised by a judge, or even necessarily that of a prosecutor. Rather, it was a challenge to the Federal Kidnapping Act that had a provision mandating the imposition of the death penalty for an offender convicted following a jury trial (provided that other conditions also existed related to victim injuries). The Court found the provision of the Act unconstitutional because it penalized a defendant for having the audacity to go to

trial, while others who pled guilty, even if under similarly situated circumstances, would not face the death penalty.

While the legal statement is correct, the facts and circumstances of Jackson are incompatible with the analysis of the present case. Here there is not a challenge to the constitutionality of a statute. Here there is not an increased penalty, rather there is an opportunity for a standard range sentence available to all similarly situated defendants based upon offender score and crime, or there is the possibility for a lesser sentence if the judge deems such a sentence to be appropriate. Here the defendant was not penalized for the exercise of a constitutional right, rather, the sentencing alternative was found not appropriate based upon incompatible statements made during trial and during sentencing.

Counsel for the appellant has provided no case law indicating that a trial court judge cannot consider the testimony of a defendant at trial in determining their amenability for treatment. Counsel has provided no case indicating that to consider conflicting statements by a defendant during trial and during a sentencing hearing impinges upon the exercise of a defendant's right to a jury trial. Clearly, there

are no cases that hold that a criminal defendant can take the stand and lie without potential recourse for such testimony.

A review of what the trial court actually said clearly indicates that he was not penalizing Ms. Weinman for going to trial. It is clear that the trial court judge was aware of the statements made during trial and the statements made during sentencing. And while the defense was free to reach an opinion as to what Ms. Weinman was or was not saying during trial about her need for court ordered treatment, it is clear that the trial judge and the deputy prosecutor who tried the case reached a different conclusion.

Because the trial court did not tie the denial of a DOSA sentence to the fact that Ms. Weinman chose to go to trial, there is no procedural deficiency rising to the level of a due process violation. Because the trial court judge has great discretion in determining whether a DOSA sentence is appropriate, the case law has made it clear, that absent a “procedural” issue, the imposition or denial of a DOSA sentence is not reviewable. Here, the trial court appropriately considered the testimony relevant to Ms. Weinman’s amenability to a DOSA sentence and the appropriateness of such a sentence surely includes the ability to consider that factor. Given the case law, such

considerations are not reviewable for an abuse of discretion of any sort.

3. Ms. WEINMAN RECEIVED A SENTENCE WITHIN THE STANDARD SENTENCE RANGE ESTABLISHED BY THE LEGISLATURE:

The sentencing court properly sentenced Ms. Weinman to a standard range sentence, at the low end of the sentencing range, and did not improperly deny her a DOSA sentence. While appellant has attempted to frame the issue as a due process of law violation to under the Fourteenth Amendment to the United States Constitution, the facts do not support such a finding. The judge did not fail to exercise his discretion, nor did the judge tie the denial of a DOSA to the fact that Ms. Weinman chose to go to trial. Therefore, Ms. Weinman was not penalized for exercising her right to a jury trial under the Sixth Amendment to the United States Constitution or the Washington State Constitution, Article I, §§ 21 and 22.

F. CONCLUSION

The trial court judge who presided in this case is not new to his job or unaccustomed to petitions for DOSA sentences. This trial court judge is not new to trials, and in fact it could be argued that he handles more cases per year than most Superior Court

Judges (He claims that but I have not confirmed it). In this case, the judge was able to listen to the defendant testify because that was the only method in which her Entrapment Defense could be made. The success rate of the defense is pretty low and the jury's verdict is thus not surprising.

Given that the defendant had to testify, it follows that she would make statements in an adjudicative proceeding that were used by the jury to determine guilt. But there is not case law indicating that those same statements could not be recalled by the judge at the time of sentencing and considered in determining whether a DOSA sentence was appropriate in this case. A passing reference by defense counsel at sentencing that his client exercised their right to a jury trial does not impute a negative motive to the trial court judge in passing sentence. Only the trial court's words and actions can bind him/her to inappropriate behavior. Here, it is clear that the trial court judge was not a fan of the facts presented at trial, at one time indicating that he thought it was foul that the friend of Ms. Weinman set her up to get off of her charge while still doing drugs with her. VRP 629. Given these statements and the low end sentence, it is clear that the judge was considering all of the facts of the case that came into play. It is equally clear that the judge exercised his

discretion in weighing whether he thought that Ms. Weinman was an appropriate candidate for a DOSA sentence.

Because there are no “procedural” issues that led to the lack of imposition of a DOSA sentence, because the trial court has great discretion in determining whether an alternative sentence should be imposed, and because the exercise of that discretion by a trial court is not reviewable but for “procedural issues”, the appellant’s request for a new sentencing hearing should be denied and her sentence should be affirmed. Finally, should this court remand the case for a new sentencing hearing, the state would concede the appropriateness of bringing a different judge on board for sentencing purposes.

Dated this 25th day of June, 2018.

/s/ Gregory L. Zempel
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PROOF OF SERVICE

I, Gregory L. Zempel, do hereby certify under penalty of perjury that on 25th day of June, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

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