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Court of Appeals
Division III
State of Washington
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NO. 35440-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL JAMES EDENSO,

Appellant.

Appeal from Okanogan County Superior Court
Honorable Henry A. Rawson
No. 16-1-00388-3

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Defendant was sentenced to 33 months incarceration for selling stolen tires for \$10. Seven months before trial, Defendant submitted a two-page handwritten request for new counsel, articulating a complete breakdown in communication and irreconcilable conflict with his lawyer. The trial court abused its discretion in denying his request. At sentencing, the sentencing court denied Defendant his right to address his DOSA request and his right to allocution. This denial was in direct violation of *State v Grayson* which requires sentencing courts to “meaningfully consider” a defendant’s request for a sentencing alternative.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Defendant’s written request for new counsel.
2. The sentencing court failed to reasonably consider a DOSA alternative sentence by not allowing Defendant to speak.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Defendant’s written request to the presiding judge outlining an irreconcilable conflict and a breakdown in communication with his lawyer was sufficient to grant new counsel.
2. Whether the defendant was entitled to speak directly on the issue of his DOSA request.

IV. STATEMENT OF CASE

Defendant was found guilty by a jury in Okanagan County on July 5, 2017, for Trafficking in Stolen Property First Degree and Possessing

Stolen Property Third Degree, and was sentenced to 33 months incarceration. CP 2- 12. Defendant stole and then sold tires for \$10 that belonged to George Hill. VRP 59.

Seven months earlier, on December 14, 2016, defendant filed a hand-written request for new counsel. CP 109-110. Defendant wrote that his lawyer has “lied to me on more than one occasion.” “At my last conference he did not ask me my side of the story, all he did was tell me how much time I could get and to take the deal.” “He talks me in circles without explaining anything...” “I do not feel that Mr. Wargin has treated me fairly also I am not at all confident in his words being the truth.” “Mr. Culp [presiding Judge], I Nathaniel J. Edenso am requesting a new lawyer to help me with my cases please.” CP 109-110. The trial court failed to appoint new counsel.

After his conviction by the jury on July 5, 2017, the matter was set over for a sentencing hearing on July 7, 2017. VRP 123. The sentencing hearing was important due to Defendant’s extensive criminal history, which put his range at 33-43 months incarceration. VRP 125. Defense counsel made a brief request for a DOSA without articulating any specifics regarding Defendant’s drug addiction, if any. VRP 127-128. After finishing, the court then asked Defendant if he would like to speak:

Mr. Edenso? You have the right to address the Court. Anything you would like to say to the Court -- it’s called the right of allocution -- before I impose sentence in this matter?

See VRP 128.

Defendant then briefly apologized for his actions and his past. VRP 129. Defendant did not yet address the issue of his DOSA request.

Suddenly, without warning, the sentencing court began to issue its decision. When it became evident the court intended to deny his DOSA request, Defendant spoke:

DEFENDANT: Can I say something, Your Honor --

JUDGE: No.

DEFENDANT: Yes, Sir.

JUDGE: I don't have -- no. I'm -- you had your opportunity.

DEFENDANT: Yes, Sir.

See VRP 130.

Defendant was in no way informed that his brief statement was his only opportunity to speak. Defendant should have been afforded a “meaningful opportunity” to address his DOSA request as required by caselaw.

V. ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S WRITTEN REQUEST FOR NEW COUNSEL.

1. LAW

A defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. *State v. DeWeese*, 117 Wash.2d 369, 375–76, 816 P.2d 1 (1991) (citing *Wheat v. United States*, 486 U.S. 153, 159 n. 3, 108 S.Ct. 1692, 1697 n. 3, 100 L.Ed.2d 140 (1988)). Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious

and justifies the appointment of new counsel is a matter within the discretion of the trial court. *DeWeese*, at 376; *State v. Sinclair*, 46 Wash.App. 433, 730 P.2d 742 (1986). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283, 165 P.3d 1251 (2007). A defendant's loss of trust or confidence in his attorney is not alone sufficient to warrant a substitution of counsel. *State v. Stenson*, 132 Wn.2d 688; 940 P.2d 1239 (1997). Rather, "[a] criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Stenson*, at 734.

2. ANALYSIS

Here, Defendant's written statement clearly went beyond a mere "loss of trust" and unequivocally reached the level of irreconcilable conflict coupled with a complete breakdown in communication. In fact, Defendant *specifically* articulated that communication had broken down – that his counsel would not answer his questions and that he would not listen to his defense. Moreover, Defendant wrote that his attorney was "lying" to him. This is not a mere a lack of trust or suspicion, but irreconcilable conflict. The trial court abused its discretion by failing to appoint Defendant new counsel. The judgment and sentence should be vacated and the matter remanded for a new trial with instruction to appoint different defense counsel.

B. THE SENTENCING COURT FAILED TO REASONABLY CONSIDER A DOSA ALTERNATIVE SENTENCE BY NOT ALLOWING DEFENDANT TO SPEAK.

1. LAW

As a general rule, a trial judge's decision whether to grant a DOSA is not reviewable. RCW 9.94A.585(1); *State v. Bramme*, 115 Wash.App. 844, 850, 64 P.3d 60 (2003). However, an offender may always challenge the procedure by which a sentence was imposed. *State v. Herzog*, 112 Wash.2d 419, 423, 771 P.2d 739 (1989) (quoting *State v. Ammons*, 105 Wash.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). The Supreme Court of this state has held that a sentence will be reversed if "the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate." *State v. Grayson*, 154 Wash.2d 333, 343; 111 P.3d 1183 (2005). In *Grayson*, the sentencing court categorically refused to consider granting the defendant a DOSA. *Id* at 336.

In *State v. Crider*, 578 Wash.App. 849, 899 P.2d 24 (1995), the Court of Appeals sitting in Division III vacated a sentence where defendant was not afforded a right to speak at sentencing – the right of allocution. "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." *Id* at 856 (quoting *Green vs U.S.*, 365 U.S. at 304, 81 S.Ct. at 655.) "Moreover, this invitation to speak must be clear" and "unambiguous." *State v. Happy*, 94 Wash.2d 791, 793; 620 P.2d 97 (1980).

2. ANALYSIS

Here, the sentencing court clearly did not “meaningfully consider” a DOSA alternative because it denied Defendant the right to address his request, additionally violating his right of allocution. The court merely stated “You have the right to address the Court. Anything you would like to say to the Court -- it’s called the right of allocution -- before I impose sentence in this matter?” Defendant reasonably believed he was just to make a general statement about leniency. No warning was given to Defendant that after he stopped speaking he would not be allowed to speak further or more specifically about DOSA. The court was not clear and its words were ambiguous. The court had just been informed by defense counsel that Defendant was seeking a DOSA, yet the court refused to allow Defendant to address it. When Defendant interrupted the court as it began to issue its decision, the court obviously knew that Defendant wanted to say something about it. A “meaningful consideration” is clearly one where the court hears from defense or the defendant about the specifics of their drug addiction. Defense counsel gave no specifics; it was therefore the responsibility of the court to hear from the defendant as to the nature of his addictions. Instead, the sentencing court cut off Defendant, just as he was trying to give the court the information it needed. The court proceeded to look at his criminal history, noting that none were drug related. Without warning, the court then summarily decided a DOSA was not appropriate.

It is self-evident that a defendant may have a drug addiction without necessarily a recorded past of drug offenses. Defendant was facing upwards

of three years of incarceration simply for selling stolen tires for \$10; he was entitled to at least a few words about his DOSA request. A request for drug treatment is not a request for leniency, as the sentencing court apparently believed. The sentence should be vacated and remanded for re-sentencing.

VI. CONCLUSION

The judgment and sentence should be vacated based on the trial court's abuse of discretion in denying new counsel and the matter remanded for a new trial with new counsel. In the alternative, the sentence should be vacated and remanded for re-sentencing for a "meaningful consideration" of Defendant's DOSA request.

Respectfully submitted this 3rd day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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and mailed postage prepared to Defendant on January 4, 2018:

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DATED this 3rd day of January, 2018, South Bend, Washington.

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