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Court of Appeals  
Division III  
State of Washington  
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No. 36944-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW STEVEN MCNEIL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF SPOKANE

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REPLY BRIEF OF APPELLANT

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KATE BENWARD  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

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## **A. INTRODUCTION**

The trial court sentenced Mr. McNeil to consecutive sentences for current offenses, but did not order an exceptional sentence, in plain violation of the SRA's requirement that concurrent terms must be imposed for current offenses unless the court orders an exceptional sentence under RCW 9.94A.535. This Court should accept the State's concession that the trial court erred, but reject the State's contention that this Court need only remand for entry of findings of fact because this will not remedy the illegality of the underlying sentence.

The trial court's categorical refusal of a DOSA sentence provides a separate, independent basis for reversal and remand for resentencing.

## **B. ARGUMENT IN REPLY**

### **1. Because the trial court's sentence is not authorized by the SRA, remand for resentencing is required.**

The State's concession that remand is necessary, but only for the court to enter findings of fact and conclusions of law, fails to account for the critical fact that the court did not order an exceptional sentence in Mr. McNeil's judgment and sentence.

If the court had ordered an exceptional sentence in Mr. McNeil's judgment and sentence, but simply failed to enter findings of fact in support of the exceptional sentence, then the State would be correct that under *Friedlund*, remand for entry of findings would be the appropriate remedy. *State v. Friedlund*, 182 Wn.2d 388, 395, 341 P.3d 280 (2015); Brief of Respondent at 10. But unlike in *Friedlund*, the trial court did not order an exceptional sentence in Mr. McNeil's judgment and sentence. CP 22-23 (no exceptional sentence imposed in judgment and sentence). Instead, the court sentenced Mr. McNeil to consecutive terms for current offense pursuant to RCW 9.94A.589(3). CP 24.

*Friedlund* made clear that an "oral colloquy, even if on the record, cannot satisfy the SRA's requirement that findings justifying an exceptional sentence must be in writing." 182 Wn.2d at 393. If an oral colloquy does not suffice for written findings, it certainly cannot be used to infer the court ordered an exceptional sentence when it did not, as the State appears to argue can be inferred here. BOR at 9-10.

Contrary to the State's claim, *State v. Rasmussen* is directly on point, because in *Rasmussen*, the trial court imposed consecutive sentences for offenses sentenced on the same day, but the court did not

impose an exceptional sentence. *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001). Reversal and remand for a new sentencing hearing is required here, just as in *Rasmussen*, because the court's sentence violates the SRA. *Id.*

The trial court did not impose an exceptional sentence, but rather sentenced Mr. McNeil to consecutive terms for current offenses in violation of RCW 9.94A.589(1)(a). Remand for resentencing is required because the court's sentence violates the SRA. *Rasmussen*, 109 Wn. App. at 286.

**2. The trial court's categorical denial of the jointly recommended DOSA sentence provides an independent basis for remand and reversal for resentencing.**

The trial court considered impermissible factors in denying the jointly recommended DOSA sentence. This error provides a separate grounds for reversal and remand for a new sentencing hearing.

The State fails to meaningfully distinguish *State v. Grayson*, in which a trial court improperly considered DOSA's inadequate funding as the primary basis for denying the defendant's DOSA request. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005); Brief of Respondent at 11-14. Here, the trial court recognized that drug treatment would likely be beneficial in addressing Mr. McNeil's history

of non-violent property criminal offenses: “I think that if you were to get your drug addiction under control it would probably help everything.” RP 32. However, based on a limited number of available DOSA treatment spaces, the court concluded: “I’d rather have someone in a position that’s going to be rehabilitated take your spot in the DOSA program. *Id.*”

The court also considered other factors not provided for by statute as basis for denying the jointly-recommended DOSA sentence, such as the public’s concern about recidivism, the facts alleged in the officer’s probable cause statement, and the unsupported conclusion that “for 27 years people have been trying to assist you in resolving your problem.” RP 32. Contrary to the State’s claim, these factors do not support the court’s denial of a DOSA sentence they establish that Mr. McNeil’s criminal history is the result of his addiction, which, if left untreated, makes him more likely to reoffend, all of which are the intended reasons a court should impose a DOSA sentence, not deny it. *See e.g.* RCW 9.94A.660(1) and (5) (criteria for imposing prison-based DOSA include non-violent criminal history, likelihood that criminal behavior will occur in the future because of addiction).

The trial court's reference to DOSA's limited resources was precisely the sort of categorical refusal based on reasons not provided for by statute that required the judgment and sentence be reversed and remanded for a new sentencing hearing in *Grayson*. 154 Wn.2d at 343.

Finally, the State argues that the facts of this case are also “pertinent,” specifically that the State alleged that Mr. McNeil sought to bring Suboxone into the jail while trying to gain access to treatment as an inmate. Brief of Respondent at 15. Suboxone is a medication used to treat opiate addiction. Jails have been sued for not providing this form of medical treatment for opiate addicts. *See e.g.* American Civil Liberties Union (ACLU), <https://www.aclu.org/press-releases/aclu-wa-lawsuit-settled-federal-prison-system-agrees-provide-medication-assisted> (last visited March 9, 2020) (reporting another ACLU lawsuit against prison for failing to provide inmates medication-assisted treatment for opioid-use disorder). Far from providing additional grounds to deny Mr. McNeil access to prison-based treatment, the “facts of this case” establish that Mr. McNeil's treatment needs were likely not met while he was detained in the county jail, which only supports Mr. McNeil's request for a prison-based DOSA sentence.

The trial court's categorical refusal of a DOSA sentence based on impermissible factors provides a separate grounds for reversal and remand for a new sentencing hearing.

### **C. CONCLUSION**

The trial court's consecutive sentences imposed in violation of RCW 9.94A.589(1)'s plain command violates the SRA, requiring reversal and remand for a new sentencing hearing. The court's categorical denial of the joint request for a DOSA sentence provides a separate, independent basis for reversal and remand for resentencing.

DATED this 19th day of March, 2020.

Respectfully submitted,

s/ Kate Benward  
Washington State Bar Number 43651  
Washington Appellate Project  
1511 Third Ave, Suite 610  
Seattle, WA 98101  
Telephone: (206) 587-2711  
Fax: (206) 587-2711  
E-mail: [katebenward@washapp.org](mailto:katebenward@washapp.org)

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RESPONDENT,	)	
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v.	)	NO. 36944-7-III
	)	
MATTHEW MCNEIL,	)	
	)	
APPELLANT.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF MARCH, 2020.

x 

**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

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## Transmittal Information

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SEATTLE, WA, 98101  
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