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Division III
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No. 36945-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Matthew McNeil,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's imposition of consecutive sentences violated the requirements of the Sentencing Reform Act (SRA).

2. The sentencing court denied Matthew McNeil a Drug Offender Sentencing Alternative (DOSA) on a nonstatutory, impermissible basis.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a person is sentenced on more than one felony offense on the same day, RCW 9.94A.589(1)(a) requires the sentences to run concurrently unless the court makes findings in support of an exceptional sentence under RCW 9.94A.535. Here, the court sentenced Mr. McNeil in the same sentencing hearing, imposed consecutive sentences, but not as an exceptional sentence. Does this sentence violate the SRA?

2. The sentencing court must give due consideration to an individual's request for a DOSA sentence, and the court may not deny the request based on a misunderstanding of the law or by failing to consider the mandatory statutory criteria.

The State and Mr. McNeil jointly requested the court impose a DOSA sentence pursuant to Mr. McNeil's guilty pleas to attempting to

elude and conspiracy to possess a controlled substance. The court recognized Mr. McNeil's need for treatment. However, the court denied the joint recommendation, because the court preferred to use the resources of the DOSA program on someone else who the court believed would benefit more from the program, and partially based on Mr. McNeil's high offender score. Did the trial court deny Mr. McNeil a DOSA on an impermissible basis?

C. STATEMENT OF THE CASE

Mr. McNeil was charged with, and plead to, attempting to elude a police vehicle. CP 3; 6-16. On the same day he plead guilty to a second charge of attempting to elude a police vehicle.[1] 9/5/18 RP 3. The parties jointly recommended imposition of a prison-based, concurrent DOSA sentence in exchange for his plea. 9/5/18 RP 3.

Mr. McNeil waived speedy sentencing so that he could participate in three 12-week classes while in custody: parenting skills, relationship skills, and drug and alcohol treatment. 9/5/18 RP 9-10.

While in custody awaiting sentencing, Mr. McNeil was charged with a new offense related to his attempt to obtain the medication used to treat opiate addiction, Suboxone. 5/30/19 RP 14; 7/3/19 RP 27. The

[1] Superior Court Case Number 17-01-02238-2; COA 36944-7-III.

parties continued sentencing based on a global resolution of all three matters. 5/30/19 RP 14. Mr. McNeil subsequently plead guilty to the Suboxone offense, and was sentenced on all three guilty pleas in the same sentencing hearing. 7/3/19 RP 22; CP 25.

Mr. McNeil had a 9+ offender score, and faced a standard range sentence of 22-29 months for each of the attempting to elude offenses, and 0-12 months for the Suboxone offense. 9/5/18 RP 5; 7/3/19 RP 23-24; CP 26. The State informed the court of the joint recommendation, in which the State and Mr. McNeil had agreed to request a prison-based, concurrent DOSA sentence of 12.75 months in custody, and another 12.75 months on community supervision for the attempting to elude offenses. 7/3/19 RP 27. The parties recommended a consecutive six-month sentence for the Suboxone offense. 7/3/19 RP 27.

Mr. McNeil proactively pursued treatment while in custody. 7/3/19 RP 28. By the time of sentencing, he had obtained certificates for classes and treatment he obtained while in jail. 7/3/19 RP 28. He looked forward to completing his treatment through the DOSA program. 7/3/19 RP 28.

Mr. McNeil acknowledged to the court, “this has been a long road for me.” 7/3/19 RP 29. He recognized, that “every very time I

come to jail I end up losing something, like as for my family." 7/3/19 RP 29. However, he described his renewed motivation to obtain sobriety after so many years:

> And right now I just— I got a 21-year-old daughter came into my life and I'm just—and she's really the only immediate family I have. And so I'm just—at 21, she's—she graduated high school just a couple years ago and she got right into addiction. And right now she's—she's clean and she kind of is like my little—my inspiration, my hope. I just ask for some type of consideration for this classes, this DOSA.

7/3/19 RP 29.

The court recognized "that if you were to get your drug addiction under control it would probably help everything." 7/3/19 RP 32. However, the trial court rejected the joint recommendation for a DOSA, in part based on the underlying allegations of the eluding offense and Mr. McNeil's high offender score, but primarily based on the court's belief about the limited resources of the DOSA program, or that the court would rather "use our resources of the DOSA program on someone who might benefit from that." 7/3/19 RP 32; *see also* 7/3/19 RP 33.

The court imposed the very top of the standard range sentence, 29 months, which it ran consecutive to the top of the standard range

sentences for Mr. McNeil's other two offenses. CP 28. However, the court did not impose an exceptional sentence. CP 26-27.

D. ARGUMENT

1. The court's imposition of consecutive sentences under RCW 9.94A.589(3) is not authorized by the SRA.

The court did not have authority to sentence Mr. McNeil to consecutive sentences under RCW 9.94A.589(3).

a. Mr. McNeil was sentenced for "current offenses."

Felony offenses sentenced on the same day are "current offenses" and must be sentenced concurrently, unless sentenced under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a); *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001) ("RCW 9.94A.400(1)(a)[2] controls and requires that a court make finding of aggravating circumstances warranting imposition of an exceptional sentence before sentences imposed on the same day may be served consecutively if appropriate.")).

"While the SRA does not formally define 'current offense,' the term is defined functionally as convictions entered or sentenced on the same day." *In re Finstad*, 177 Wn.2d 501, 507, 301 P.3d 450 (2013).

[2] Recodified as § 9.94A.589 by Laws of 2001, ch. 10, § 6.

Mr. McNeil was sentenced on the same day, in the same sentencing hearing, for this matter, along with Superior Court # 17-01-02238-2 (attempt to elude),[3] and Superior Court # 19-1-10385-1 (conspiracy to PCS).[4] CP 25; 7/3/19 RP 22, 27. Because Mr. McNeil's offenses in these cases were sentenced on the same day, in the same hearing they were "current offenses." His sentencing falls squarely under RCW 9.94A.589(1)(a).

b. The court's consecutive sentence is not authorized by the SRA.

The trial court ordered consecutive sentences in violation of the requirements of the SRA.

The trial court sentenced Mr. McNeil to consecutive sentences under RCW 9.94A.589(3). CP 28. However, the trial court did not order an exceptional sentence in the Judgment and Sentence. CP 26-27. And the court entered no written findings in support of an exceptional sentence.

RCW 9.94A.589(3) expressly states that sentencing under this provision is "subject to" RCW 9.94A.589(1), which applies to the sentencing of current offenses. Because Mr. McNeil was sentenced for

[3] Court of Appeals no. 36944-7-III.
[4] Court of Appeals no. 36946-3-III.

"current offenses," RCW 9.94A.589(1) applies, and the court was required to either sentence him to concurrent sentences or impose an exceptional sentence under RCW 9.94A.535. Under RCW 9.94A.535, the trial court must find "substantial and compelling reasons justifying an exceptional sentence" and "set forth the reasons for its decision in written findings of fact and conclusions of law." The trial court did not make any such findings here. The entry of written findings is "essential" when a court imposes an exceptional sentence. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

The trial court noted that Mr. McNeil's high offender score could result in an offense going unpunished, and that the court had authority to impose an exceptional sentence. 7/3/19 RP 31-32. However, it cannot be argued that the court's statement about its ability to impose an exceptional sentence satisfies the SRA's requirements: "an oral colloquy, even if on the record, cannot satisfy the SRA's requirement that findings justifying an exceptional sentence must be in writing." *Friedlund*, 182 Wn.2d at 393.

Because the trial court imposed Mr. McNeil's sentences in all causes on the same date, the provisions of RCW 9.94A.589(3) permitting a court to impose consecutive sentences was subject

to RCW 9.94A.589(1), which allows consecutive sentences for current offenses only under the exceptional sentence provisions of RCW 9.94A.535. The trial court's order of a consecutive sentence without imposing an exceptional sentence, and absent written findings, violates the SRA.

The trial court's imposition of a consecutive sentence was not authorized by the SRA, requiring his sentence be vacated and remanded for resentencing. *Rasmussen*, 109 Wn. App. at 286.

2. The court denied Mr. McNeil a prison-based DOSA on an impermissible basis.

a. <u>The court must consider the mandatory sentencing criteria when imposing a DOSA.</u>

A DOSA sentencing alternative is intended to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community. *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014) (citing *State v. Grayson*, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005)).

A court may not categorically refuse to consider an alternative sentence for an eligible person based on impermissible reasons. *Grayson*, 154 Wn.2d at 342. In *Grayson*, the State argued against a

DOSA sentence because of Grayson's criminal history. The trial court denied the DOSA request, while stating its "main reason" was the State's lack of funding for the DOSA program. *Grayson,* 154 Wn.2d at 336-37. This information about the DOSA funding was not part of the record at sentencing. *Id.* at 340-41. Grayson failed to object and the Supreme Court considered any potential objection to reliance on facts outside the record waived. *Id.* at 340-42.

The Court instead examined whether the court's refusal to impose a DOSA sentence complied with its obligations under sentencing statutes and principles of due process of law. *Id.* at 342. The Court concluded that where the court's primary reason for denying the DOSA was its belief the program was underfunded, the court categorically refused to consider a statutorily authorized sentencing alternative, which was reversible error. *Id*. at 342.

RCW 9.94A.660 provides the court's authority to impose a DOSA sentence. Under this statute, a trial judge may give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision to help them overcome their addiction. *Grayson,* 154 Wn.2d at 337; *see generally* RCW 9.94A.660. If the sentencing court determines the defendant is eligible for the program, and that the

alternative is appropriate, the court may impose a prison-based DOSA, as was requested by Mr. McNeil and recommended by the State here. *Id.* at 337-38; RP 7/3/19 RP 27.

For a prison-based DOSA, the court can impose a sentence of one-half the midpoint of the standard range sentence; while in prison, the person will receive in-patient drug treatment. RCW 9.94A.662(1)(a). He will then serve the remainder of his sentence on community custody where he will continue to receive chemical dependency treatment. RCW 9.94A.662(1)(a), (b), and (2). If the person fails to comply with the DOSA conditions, either in prison or on community custody, the DOC may administratively revoke the DOSA, and the person will serve the remainder of their sentence in prison. RCW 9.9A.662(3).

The mandatory criteria a court must consider in determining a person's eligibility for the program is listed in, which requires

- The person's conviction cannot be a violent felony, a sex offense, involve a sentencing enhancement, or a felony driving under the influence;

- The person must have no current or prior sex offenses or a violent felony offense within the past 10 years;

- If convicted under the Uniform Controlled Substances Act (chapter 69.50 RCW), or criminal solicitation to

commit a violation under that chapter, the offense can involve only a small quantity of the controlled substance; and

- The end of the standard range for the offense is greater than one year;
- The person has not received a DOSA in the last ten years; and
- The person cannot be subject to deportation during the sentence.

RCW 9.94A.660(1)(a)-(g).

b. The trial court denied Mr. McNeil the jointly recommended prison-based DOSA sentence on untenable grounds.

Mr. McNeil's entire criminal history consisted of nonviolent and drug offenses. CP 25-26. Still, the court noted, "as you sit here today, you have now 24 felony convictions." RP 7/3/19 RP 30. The court then voiced the public's general concern about crime, including people "all the time," asking, "where the three strikes law is" for someone like Mr. McNeil, with 24 convictions. 7/3/19 RP 30-31.

The court recognized Mr. McNeil and society would benefit from his drug addiction being treated, but rejected the DOSA for various reasons, the primary basis being the court's concern about the limited resources of the DOSA program:

> With all that said, I firmly believe in rehabilitation. I think that if you were to get your drug addiction under control it would probably help everything. But at the same time, for 27 years people have been trying to assist you in resolving your problem. And it's one thing to get a possession charge. It's another thing to be going a hundred miles an hour down Country Homes while running from the police and then run from the police a second time and almost strike a patrol vehicle. So as much as I respect the recommendation here, it seems that, first, one charge will go unpunished, at least one if the Court follows the recommendation.
>
> Secondly, I'd rather use our resources of the DOSA program on someone who might benefit from that. It think after 27 years, I hate to say it, but I'm more or less giving up and thinking maybe just incarceration will resolve the problem. In addition to that, I looked at the restitution that you owe. You have $464,000 in restitution that's unpaid for the crimes that you've committed, and I assume that will never ever get paid.

7/3/19 RP 32.

The court again emphasized, "I'd rather have someone in a position that's going to be rehabilitated take your spot in the DOSA program." 7/3/19 RP 33.

c. <u>Because the court denied consideration of a DOSA sentence on an impermissible basis, this court should reverse and remand for resentencing.</u>

A court abuses its discretion when it applies the wrong legal standard or bases its decision on facts that are not supported by the record. *State v. Gentry,* 183 Wn.2d 749, 764, 356 P.3d 714 (2015). Though trial judges have considerable discretion under the SRA, they

are still required to act within its strictures and principles of due process of law. *Grayson*, 154 Wn.2d at 342 (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). Where, as here, a sentencing alternative is authorized by statute, a court's categorical refusal to consider the sentence for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. *Grayson*, 154 Wn.2d at 342.

The prosecutor and Mr. McNeil agreed that a DOSA sentence was the appropriate for the charged offenses. 7/3/19 RP 27. The court recognized Mr. McNeil's problems would be solved if his drug addiction were taken care of. RP 7/3/19 RP 32. But the court denied the DOSA sentence for reasons other than the statutory criteria for DOSA eligibility.

The court's primary basis for denying Mr. McNeil a DOSA, in which the court twice emphasized that the resources of the DOSA program would be better used on others, was almost identical to the impermissible basis in *Grayson*, which was the "judge's belief that the DOSA program was underfunded." 7/3/19 RP 32-33; *Grayson*, 154 Wn.2d at 342.

The trial court also mentioned Mr. McNeil's high offender score, despite the fact that his crimes were not disqualifying. 7/3/19 RP 31-32. This basis effectively denies access to this program to "class of offenders" not contemplated by the SRA—those with nonviolent offense history whom the program is intended to serve. *See Grayson*, 154 Wn.2d at 342. Moreover, the court's desire to impose a consecutive sentence is an untenable basis for refusing to consider a prison-based DOSA, because the court was free to impose an exceptional, consecutive sentence on one offense, and also impose a standard range DOSA for any of the other two offenses. *See State v. Smith*, 142 Wn. App. 122, 129, 173 P.3d 973 (2007) (so long as it does not constitute a "hybrid sentence," a trial court may impose a DOSA on any of the defendant's sentences).

The court also considered the amount of restitution Mr. McNeil owed, which cannot be a basis for denying a DOSA, because if would deny DOSA treatment to the poor, who are unable to pay their financial obligations. *See e.g. United States v. Flowers*, 946 F. Supp. 2d 1295, 1302 (M.D. Ala. 2013) (poverty is an impermissible sentencing factor).

Like in *Grayson*, these bases for denial of the DOSA resulted in the "trial court categorically refus[ing] to consider a statutorily

authorized sentencing alternative" on impermissible bases, requiring reversal and remand for resentencing for proper consideration of Mr. McNeil's DOSA request. *Grayson*, 154 Wn.2d at 342.

E. CONCLUSION

Mr. McNeil is entitled to remand and reversal for resentencing because of the court's error in imposing a consecutive sentence for current offenses. On remand, he is entitled to consideration of a DOSA sentence based on permissible factors.

DATED this 22nd day of November 2019.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36945-5-III
	)	
MATTHEW MCNEIL,	)	
	)	
APPELLANT.	)	

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