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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW STEVEN MCNEIL, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. When the trial court explicitly rejected the parties' joint recommended sentence, imposed an exceptional sentence upward based on the "free crimes" aggravator, and sentenced Mr. McNeil to consecutive maximum sentences for his current offenses, but the judgment and sentence does not contain written findings, is remand required?
2. Because the trial court's decision whether to grant a DOSA sentence is not reviewable, and the trial court made an individualized ruling specifying multiple factors when denying Mr. McNeil's request, may this Court reach this alleged error?

III. STATEMENT OF THE CASE¹

Matthew McNeil appeals from his three convictions, by guilty plea, for two counts of attempting to elude a police vehicle, and one count of conspiracy to commit delivery of a controlled substance.

¹ The State anticipates this case will be consolidated with Mr. McNeil's other cause numbers on appeal, as they share a common consecutive sentence issue and substantially the same record. The citations to the record will refer to all three cause numbers as follows: "CP" and "RP" will refer to the record in this case number; "2CP" will refer to Case No. 36944-7 clerk's papers; "3CP" will refer to Case No. 36946-3 clerk's papers. The arguments in this brief address one count of eluding.

On June 12, 2017, Mr. McNeil fled from a traffic stop, after a law enforcement officer witnessed him committing a traffic infraction and discovered he had a felony arrest warrant. 2CP 2-3. Mr. McNeil fled at over 100 miles per hour on a motorcycle, passed several marked patrol vehicles and other traffic going 35 miles per hour on a residential arterial, and ran several stop signs. 2CP 2. Mr. McNeil crashed, and law enforcement arrested him; they also discovered a dangerous weapon. 2CP 2-3.

Six months later, Mr. McNeil again fled a traffic stop. CP 1-4. Law enforcement discovered Mr. McNeil had a Department of Corrections community custody warrant, as well as an outstanding arrest warrant for his previous, but still pending, eluding charge. CP 3. On the same residential street, Mr. McNeil fled, almost struck a sheriff's deputy, and then pulled into a yard. CP 2-3. Law enforcement took him into custody again. CP 2-3.

The parties reached an agreement for Mr. McNeil to plead guilty to two counts of attempting to elude a police vehicle. CP 10-14. The State agreed to recommend a prison-based DOSA sentence: serving 12.75 months in custody and 12.75 months on community custody on each charge, with both sentences to run concurrently. CP 14. The State also agreed to dismiss all other charges, and to refrain from filing any other charges associated with the operative police reports. CP 14.

On September 5, 2018, the court accepted Mr. McNeil's guilty plea for both counts. RP 4-8. Mr. McNeil requested the court to continue his sentencing hearing for at least 12 weeks, so that he could have an opportunity to participate in a parenting skills class, relationship skills class, and drug and alcohol treatment offered at a local county facility. RP 9. Mr. McNeil represented to the court that, "he knows he'll be getting treatment while at prison, but he'd also like to take advantage of every opportunity to change his ways." RP 9. The court granted his request, scheduling the sentencing hearing on January 2, 2019. RP 10. For reasons unclear in the record, the court continued the hearing past that date to February 27, 2019. *See CP at passim.*

On February 26, 2019, Spokane County Detention Services discovered that Mr. McNeil and Emily Hammond, a cohort who he had encountered in custody a month prior, had conspired to create a scheme to smuggle controlled substances into a correctional facility. 3CP 2-5. Communications indicated Mr. McNeil asked his coconspirator to mail him controlled substances, after which the property custodian discovered Suboxone, a controlled substance, in his mail. 3CP 3-4. Additional communications indicated Mr. McNeil was asking for additional controlled substances, and after he received and distributed those substances, Mr. McNeil anticipated mailing the proceeds to Ms. Hammond. 3CP 4.

Yet another communication revealed a scheme where Mr. McNeil instructed Ms. Hammond to arrive early to court the next day, February 27, 2019, to attend Mr. McNeil's sentencing hearing from his previous pleas. 3CP 4 ("McNeil advise[d] Hammond to bring contraband into court with her prior to his sentencing hearing on 02/27/2019"). He directed her to hide controlled substances in the bench cushion on which he would be seated, and to mark the area with a ketchup packet, so that he could locate the substances, conceal them within his body, and then smuggle them into the correctional facility. 3CP 4. After law enforcement discovered the plot, the sentencing hearing was again continued, and the State charged Mr. McNeil with possession of a controlled substance with intent to deliver, and delivery of a controlled substance. 3CP 1.

The court set a hearing to sentence Mr. McNeil for the original two pleas on May 30, 2019. RP 13. At that hearing, the State indicated that although these two matters had been continued a number of times, the parties were attempting to reach a global resolution for all three cause numbers and the State was simply waiting on confirmation that one of the controlled substances tested positive as Suboxone. RP 14-15. The court continued the hearing to July 3, 2019, but indicated that if the parties could not reach a global resolution it would impose a sentence on the two counts

of eluding on that date. RP 19-20. At some point, the parties reached an agreement. RP 22; 3CP 11.

The global resolution included Mr. McNeil pleading guilty to one count of “conspiracy to deliver a controlled substance” to resolve the new charges. RP 22. The parties agreed on the sentencing recommendation: for the two eluding charges, the parties would jointly recommend the original agreement: a prison-based DOSA sentence, resulting in 12.75 months of incarceration followed by 12.75 months of community custody. RP 27. For conspiracy to deliver a controlled substance, the parties would recommend six months of confinement, consecutive to the DOSA sentence, and the State would agree not to file any other charges associated with that police report. RP 27.

Pertaining to the new criminal conduct, the court: (1) permitted the State to amend the information to charge one count of conspiracy to commit delivery of a controlled substance, (2) verified orally that Mr. McNeil received a copy of the information, and (3) verified orally that Mr. McNeil waived a formal reading of the information. RP 22-23. The amended information alleged Mr. McNeil committed:

CONSPIRACY TO COMMIT DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, MATTHEW S. MCNEIL, in the State of Washington, on or about February 26, 2019, with intent that conduct constituting the crime of DELIVERY OF A

CONTROLLED SUBSTANCE, as set out in RCW 69.50.401, be performed, did agree with one or more persons to engage in and cause the performance of such conduct, and one of the parties so agreeing did take a substantial step in the pursuance of such agreement.

3CP 6.

The court reviewed the plea agreement with Mr. McNeil, including that his standard range was 0-to-12 months confinement. RP 24. The physical “statement of defendant on plea of guilty” document contains scrivener’s errors; it states Mr. McNeil is charged with conspiracy to possess a controlled substance; and states that he is pleading guilty to “conspiracy PCS.” 3CP 7, 16. The court also verified that Mr. McNeil knew the court did not have to follow the recommendation. RP 24. The court accepted Mr. McNeil’s plea:

THE COURT: *To the charge of conspiracy to commit delivery of a controlled substance on the case number ending in 8532, what is your plea?*

THE DEFENDANT: Guilty.

THE COURT: It indicates in the statement that the Court can rely on the Affidavit of Facts for a factual basis. I’ve had a chance to review the Affidavit of Facts, and based on that the affidavit find that there is a factual basis for your plea. I find that your plea was made knowingly, voluntarily, intelligently, and with the advice of counsel and, therefore, *find you guilty of the charge of conspiracy to commit delivery of a controlled substance.*

RP 26 (emphasis added).

The parties both advocated for the jointly recommended sentences. RP 27-28. The court asked Mr. McNeil after allocution whether he had done DOSA before, and if he had successfully completed it. RP 29. Mr. McNeil equivocated, and appeared to blame the counselor and the facility. RP 29.

The court weighed the joint recommendation, Mr. McNeil's criminal history, the purposes of rehabilitation, and the facts of Mr. McNeil's convictions on the record in a detail ruling. RP 30-32. The court did not follow the joint recommendation. RP 32. The court sentenced Mr. McNeil to 29 months for each count of eluding and 12 months for the conspiracy charge. CP 28; 2CP 24; 3CP 25. It ordered that Mr. McNeil would serve each sentence consecutive to the others for a total of 70 months confinement. CP 28; 2CP 24; 3CP 25. The court rejected Mr. McNeil's request for a DOSA after reasoning it did not believe that Mr. McNeil could be treated or would be rehabilitated by the program as demonstrated by his lengthy criminal history. RP 30-32. It also noted the conspiracy charge was not eligible for a DOSA sentence. RP 25.

The court reasoned that it had the authority to impose an exceptional sentence: "based upon your offender score, the Court can also go above that and impose an exceptional sentence because your offender score is so far beyond the maximum of nine and a crime would be unpunished if the Court were to run these concurrent." RP 31-32. When imposing the sentence, the

court expressly stated the aggravating factor applied: “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.” RP 32.

The judgment and sentence documents for each cause number reflect the court’s oral ruling in its entirety, but the box on these preprinted forms indicating the court imposed an exceptional sentence is not checked. CP 26; 2CP 22; 3CP 24. That same section also indicates the court will attach “Appendix 2.4” with the findings of fact and conclusions of law in support of the exceptional sentence. CP 27; 2CP 23; 3CP 24. The court did not do so for any of Mr. McNeil’s convictions. *See CP at passim*. Mr. McNeil did not move to withdraw his conspiracy plea pursuant to CrR 4.2. *See 3CP at passim*. Mr. McNeil timely appeals. CP 37.

IV. ARGUMENT

A. MR. MCNEIL’S ELUDING CONVICTIONS CONSTITUTED CURRENT OFFENSES AND REMAND IS REQUIRED FOR THE ENTRY OF WRITTEN FINDINGS

Mr. McNeil first requests this Court vacate his sentence and remand for a resentencing hearing because the trial court did not enter written findings of fact and conclusions of law in support of its exceptional sentence

as required by statute. The State concedes remand is appropriate for the entry of written findings concerning Mr. McNeil's sentences for eluding.²

Rules of law.

Ordinarily, convictions entered or sentenced on the same day as the convictions currently before the court are considered "other current offenses." RCW 9.94A.525(1). The order of sentences under the Sentencing Reform Act of 1981 (SRA) is controlled by RCW 9.94A.589. Subsection (1) of that statute directs that sentences imposed on the same day be served concurrently.

RCW 9.94A.589(1)(a) authorizes the trial court to order the consecutive sentencing, but only under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.535 provides that in imposing an exceptional sentence, "the court shall set forth the reasons for its decision in written findings of fact and conclusions of law." The state Supreme Court has held the entry of written findings to be "essential." *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

Mr. McNeil's convictions are current offenses. The free crimes aggravator applies when the defendant's high offender score combines with multiple current offenses to leave "some of the current offenses going

² This concession does not extend to Mr. McNeil's conspiracy conviction and sentence.

unpunished.” RCW 9.94A.535(2)(c). Mr. McNeil specifically agreed to serve a consecutive sentence only on his conspiracy offense. RCW 9.94A.535(2)(a). Mr. McNeil entered the sentencing hearing with an offender score of 20+ points, and the court orally ruled it had the authority to—and was in fact going to—impose exceptional consecutive sentences under the “free crimes” aggravator provided by RCW 9.94A.535(2)(c). It did not merely recognize that it could do so, but when imposing the actual sentence stated: “as much as I respect the recommendation here, it seems that, first, ***one charge will go unpunished.***” RP 32 (emphasis added). This is plainly the free crimes aggravator. The CrR 4.2-approved stock plea document advised Mr. McNeil that this was a possibility. CP 14.

Although an adequate oral ruling usually permits appellate review, the Court was quite clear that its holding requiring written findings derived from the plain language of the SRA. *Friedlund*, 182 Wn.2d at 388-89. If this Court determines RCW 9.94A.589(1)(a) applies, it must remand for the entry of written findings. *Id.* at 397.³ “The remedy for a trial court’s failure to enter written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions.” *Id.* at 395 (citing *In re*

³ Mr. McNeil relies on *State v. Rasmussen*, 109 Wn. App. 279, 286, 34 P.3d 1235 (2001), a Division Two opinion, to request this Court vacate his sentence and remand for resentencing. His request is contrary to the remedy the Washington Supreme Court outlined in *Friedlund*.

Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417, 417 (1999)). This Court should remand for the entry of written findings of fact and conclusions of law in support of Mr. McNeil’s exceptional sentences.

B. THE COURT PROPERLY DENIED THE JOINT RECOMMENDATION FOR A DOSA SENTENCE AFTER WEIGHING MR. MCNEIL’S CIRCUMSTANCES, AND THIS DECISION IS NOT REVIEWABLE

Mr. McNeil contends that the trial court categorically refused to consider his DOSA request, evinced by the court’s referral to DOSA program resources. The record belies this claim. The court weighed whether treatment was appropriate for Mr. McNeil and determined it was not. Mr. McNeil’s authority is distinguishable.

A trial court’s decision whether to grant a DOSA is not reviewable. *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1)). But a categorical refusal to consider granting a defendant’s DOSA request is a failure to exercise discretion, and subject to reversal. *Id.* at 342. Courts have considerable discretion to determine whether an offender is eligible for an alternative sentence. *State v. Hender*, 180 Wn. App. 895, 900-01, 324 P.3d 780 (2014). Eligibility for DOSA “does not automatically lead to a DOSA sentence.” *Id.* at 900. The sentencing court must first determine whether the alternative sentence is appropriate. *Id.* A defendant may only challenge the procedure by which a

sentence was imposed. *Id.* at 901. “The legislature entrusted sentencing courts with considerable discretion under the SRA, including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate.” *Id.* at 900-01; *see also* RCW 9.94A.660(3).

In *Grayson*, the defendant requested a DOSA sentence, but the State objected and “the record support[ed]” the prosecutor’s argument. *Grayson*, 154 Wn.2d at 336. The trial court denied the defendant’s DOSA request. *Id.* However, the trial court did not base its decision on the facts of the case, but instead opined that the “main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people.” *Id.* at 337. The prosecutor asked the court to clarify if it considered the other factors, and the court stated, “I’m not going to give a DOSA, so that’s it.” *Id.* The Supreme Court reversed, reasoning that:

Although the trial judge declined to give a DOSA “mainly” because he believed there was inadequate funding to support the program, we recognize that the judge did not state that this was his “sole” reason. But he did not articulate any other reasons for denying the DOSA, and he specifically rejected the prosecution’s suggestion that more reasons be placed on the record. Further, it is clear that the judge’s belief that the DOSA program was underfunded was the primary reason the DOSA was denied. Considering all of the circumstances, the trial court categorically refused to

consider a statutorily authorized sentencing alternative, and that is reversible error.

Id. at 342.⁴

Unlike in *Grayson*, the trial court here did not categorically deny Mr. McNeil's request and it in no way based its decision on whether it believed the program lacked funding. Instead, it reasoned that Mr. McNeil's complete failure at rehabilitation rendered him unsuitable for the program. It heard his request, weighed factors it deemed appropriate, and determined the sentencing alternative was not appropriate for Mr. McNeil. RP 30-33. The court agreed that the record and Mr. McNeil's 24 prior felony convictions fairly demonstrated Mr. McNeil had a drug problem. The court also considered that Mr. McNeil did not have violent offenses. The court noted one purpose of the criminal justice system was to rehabilitate offenders. But, the court stated that Mr. McNeil had failed rehabilitation for 27 years, including prior sentencing alternatives. Critically, the court stated that while it believed in rehabilitation:

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

⁴ Interestingly, the court concluded by approving in dicta the trial judge's familiarity with the "background knowledge" of DOSA; it simply determined the record did not demonstrate the judge meaningfully considered whether DOSA was appropriate. *Id.* at 343. This suggests there is nothing wrong with considering the resources of the program, so long as the court performs an individualized inquiry for the request.

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*. I 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. So with all that said, sir, what I am going to do is not follow the recommendation and, instead, impose 29 months on the case from 2017, 29 months on the case from 2018, and 12 months on the 2019 case and run all those sentences consecutive to one another. *I think at this point that's all we can do with you because once you do get out, you're just going to commit more crimes. And I'd rather have someone in a position that's going to be rehabilitated take your spot in the DOSA program.*

RP 32-33 (emphasis added). The court did not categorically deny Mr. McNeil's request for DOSA based on what it perceived as an underfunded treatment program. Instead, the court performed an individualized inquiry, determined that for 27 years and through prior alternatives Mr. McNeil had never been rehabilitated, and that treatment would be futile again this time. It simply acknowledged the reality that other defendants are better candidates for rehabilitative programming. Thus, the trial court considered whether the alternative was appropriate for Mr. McNeil. It heard argument from Mr. McNeil in support of his request,

despite its ultimate denial of the request. The court mainly made this determination based on its conclusion that it did not believe the sentence was appropriate for Mr. McNeil because he had demonstrated rehabilitation was not working, for nearly three decades. Mr. McNeil could not give an earnest answer to the court when asked if he had completed DOSA before and, instead, blamed his instructor.

The facts of this case are also pertinent: Mr. McNeil was in this position only because he asked the court for an opportunity to continue his original sentencing for his first two charges in order to engage in rehabilitative classes in custody, and then was caught conspiring to deliver controlled substances to people also in custody. Corrections staff intercepted a phone call in which Mr. McNeil directed his coconspirator to secrete drugs in court for him to find, on the very date he was going before the judge in hopes of receiving a DOSA sentence. The court here properly exercised its discretion, and because it did so that decision is not reviewable.

V. CONCLUSION

The State concedes this Court should remand Mr. McNeil's eluding convictions for the trial court to enter written findings in support of its oral ruling imposing the free crimes aggravator and consecutive sentences. This Court should apply the remedy outlined in *Friedlund*. The trial court

properly exercised its discretion when it denied Mr. McNeil's request for a DOSA sentence after weighing his criminal history.

Dated this 6 day of February, 2020.

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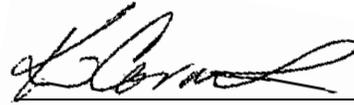
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SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on February 6, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
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2/6/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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