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NO. 959927

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

JAMES AUSTIN YANCEY,
Respondent.

ANSWER TO STATE'S PETITION FOR REVIEW

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Revised Code of Washington

<u>RCW 9.94A.660</u>	1, 2, 4
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I. RESPONDENT'S IDENTITY

James Austin Yancey (Mr. Yancey) is the respondent in this matter. I represented Mr. Yancey, as the respondent before Division Three Court of Appeals (Division Three), and I represent him here.

II. COURT OF APPEALS' DECISION

The State of Washington (State) petitions this court to review State v. Yancey, 418 P.3d 157 (2018), a Division Three decision, published on May 24, 2018.¹ *See* State's Pet. at A-1 through A-16. In that case, the State appealed the sentencing court's decision to grant Mr. Yancey's request for a residential drug offender alternative sentence or residential DOSA. The prosecutor argued the sentencing court lacked authority under RCW 9.94A.660 to grant the residential DOSA because it could not waive Mr. Yancey's sentencing enhancements to "create" a sentence within the twenty-four months standard range restriction. She maintained the court had to include the sentence enhancements in the calculation of the midpoint. A-5.

Division Three could not determine for certain whether the trial court expressly waived the sentence enhancements to grant the residential DOSA because State did not provide a transcript of Mr. Yancey's sentencing hearing. Nevertheless, relying on the statute's plain language and on Division One's analysis in State v. Mohamed, 187 Wn. App. 630, 634, 350 P.3d 671 (2015), Division Three clarified the court held authority to waive Mr. Yancey's enhancements in order to impose the residential DOSA and

¹ The State attached a copy of Yancey to its petition at pages A-1 through A-16. So, we did not attach a copy here. However, when we cite relevant sections in Yancey, we correspond our citations with the State's pages A-1 through A-16. We also cite relevant sections in the State's petition as Pet. at the appropriate page number, i.e., Pet. at 6.

remanded the matter so the sentencing court could exercise that authority, if that was what it intended to do.

III. ISSUE

The overarching issue here is whether Yancey misperceives sentencing courts' authority under the DOSA statute to waive sentence enhancements in order to impose a residential DOSA and whether that misperception conflicts with State v. Mohamed?

III. STATEMENT OF THE CASE

We adopt the State's rendition of the facts in its petition.

IV. ARGUMENT WHY THIS COURT SHOULD DENY REVIEW

The criteria for which this court will accept review are constrained by the very specific and limited circumstances described in our rule of appellate procedure or RAP 13.4(b). According to RAP 13.4(b), this court will only grant a petitioner's request for review if the court of appeals' decision conflicts with a decision of this court or with another court of appeals' decision; involves a significant question of law under the Constitution of the State of Washington or of the United States; or involves an issue of substantial public interest. RAP 13.4(b)(1)-(4).

We do not believe the State's petition meets any of these criteria and in the three subsections below, we explain why.

A. DIVISION THREE CORRECTLY INTERPRETS THE PLAIN LANGUAGE OF THE DOSA STATUTE.

The State argues Mr. Yancey was not eligible for a residential DOSA because the mid-point of his standard range sentence exceeded twenty-four months. The prosecutor insists Division Three's interpretation of RCW 9.94A.660 renders superfluous, the portion of the statute that pertains to the residential chemical dependency treatment-based

alternative, namely the last sentence in paragraph (3), which reads, “The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.” RCW 9.94A.660(3).

The prosecutor seems to interpret this sentence as a stand-alone provision. But, Yancey analyzes the twenty-four months or less standard range the legislature circumscribed for those being considered for the residential DOSA, in context with the rest of RCW 9.94A.660(3) which in its entirety, reads:

If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(Emphasis added.)

Division Three’s approach to decide Yancey takes all of the plain language in RCW 9.94A.660(3) into consideration. The trial court had already correctly calculated Mr. Yancey’s standard range sentence at 36 +- 44 months. The midpoint of which is 40 months. Pet. at 3. Division Three acknowledges that with a midpoint of 40, Mr. Yancey could not qualify for a residential DOSA. “...The offender cannot serve his or her time in a residence if the midpoint of the standard range exceeds two years.” A-5. So, it looks to the rest of RCW 9.94A.660(3) to consider whether Mr. Yancey’s sentence would fall within twenty-four months or less, if the court exercises its authority to waive imposition of a sentence within the standard range, by excluding enhancements. “If we exclude James Yancey’s sentence enhancements, the midpoint of his standard range is sixteen

months. If we include the sentence enhancements, the midpoint raises to forty months.”

A-5.

This approach considers the last sentence in paragraph (3), contextually and is consistent with the statute’s plain language.

B. YANCEY ALIGNS WITH DIVISION ONE’S ANALYSIS IN STATE V. MOHAMED BECAUSE IT CLARIFIES SENTENCING COURTS’ AUTHORITY TO WAIVE ENHANCEMENTS TO IMPOSE THE RESIDENTIAL DOSA.

The State maintains the way Division Three interprets the trial courts’ authority under the DOSA statute in Yancey effectively sanctions the “jury-rig” of standard range sentences. The prosecutor argues Division Three’s analysis creates hybrid alternative/exceptional sentences that conflict with Division One’s analysis in State v. Mohamed, 187 Wn. App. 630, 634, 350 P.3d 671 (2015). Pet. at 1, 10. She insists because “the word ‘residential’ is used exactly once in Mohamed and only in quoting the full subsection” 187 Wn. App. at 637, Division One only remanded the case, so the trial court could consider a DOSA, not a residential DOSA. “The statute conveys authority to choose an alternative sentence in lieu of a standard range sentence, not to tinker with portions of the standard range.” Pet. at 12. “It is not within a court’s discretion to choose where the DOSA will be served (whether in the community or in prison), but only *if* a DOSA will be granted.” Pet. at 13.

As Yancey points out, Mohammed examines whether the trial court, in that case, had the authority to waive a 24-month school zone enhancement in favor of either the parenting sentencing alternative under RCW 9.94A.655 *or* the DOSA under RCW 9.94A.660. State v. Mohamed, 187 Wn. App. at 636. (Emphasis added). Division One found the trial court in Mohamed mistakenly concluded that it did not have the authority

to waive school zone enhancements to impose a DOSA. So, it clarified trial courts' authority to do so. It determined trial courts could waive school zone enhancements to impose a DOSA or a PSA, because both of the governing statutes permit the waiver of "a sentence within the *standard sentence range*," (emphasis added) if the court believes an offender is eligible for such an alternative sentence. Because "standard sentence range" means the base sentence range plus enhancement of such range, a sentencing court may waive the enhancements as part of the standard sentence range under a DOSA or PSA. (Emphasis added) A-6; State v. Mohamed, 187 Wn. App. at 641. Despite the fact that Mohamed's midpoint range with the sentence enhancements exceeded twenty-four months, the court remanded the case for re-sentencing, so the trial court could explore a DOSA. A-6.

Although Mohamed only mentions the word "residential" once, its analysis does not differentiate between either a prison or a residential DOSA. In fact, Division One uses the operative phrase "a DOSA," which renders Mohamed's analysis open to either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. A-6.

C. YANCEY NEITHER INTERFERES WITH NOR THREATENS THE INDEPENDENCE OR INTEGRITY OF THE LEGISLATURE'S STATUTORY PEROGATIVE.

The State maintains insofar as Yancey authorizes a waiver of an admitted enhancement in order to craft a new standard range, it encroaches on the legislature's authority, and therefore violates the doctrine of separation of powers. "The law does not authorize either exclusion of the admitted enhancement or hybrid exemptions." Pet. at 16.

The purpose of the separation of powers doctrine is "to prevent one branch of government from aggrandizing itself or encroaching upon the 'fundamental functions' of

another.” State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003) (*citing Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). In considering an argument that judicial action violates the separation of powers doctrine, one concern is that the judicial branch not be allowed tasks that are more properly accomplished by the other branches. State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000).

While it is well-settled in Washington that setting criminal penalties is a function of the legislature, *see* State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996), the legislature may grant the trial court discretion in sentencing matters. *See* State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991); State v. Barton, 121 Wn. App. 792, 797, 90 P.3d 1138, 1140 (2004). And that is precisely what the legislature does in RCW 9.94A.660(3).

Our legislature “authorizes trial judges to give eligible non-violent offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from addictions,” by allowing them to waive imposition of the standard range sentence to impose the residential DOSA. A-4 *citing* State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). Yancey simply clarifies this authority and by doing so, in no way infringes on the legislature’s function to set criminal penalties.

V. CONCLUSION

Based on our argument above, we believe the State has not met one of the criteria in RAP 13.4(b). Therefore, we respectfully ask this court to deny its petition for review.

Respectfully submitted this 23rd day of July, 2018.

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DECLARATION OF SERVICE

July 23, 2018

Case Name: **State of Washington v. James Austin Yancey**

Supreme Court Case Number: **959927**

I declare under penalty and perjury of Washington State laws that on July 23, 2018, I filed this **ANSWER TO STATE'S PETITION FOR REVIEW** with this court and served copies to:

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