

No. 95992-7

35216-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

JAMES AUSTIN YANCEY,

Respondent.

STATE'S DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

BRIEF OF APPELLANT

Respectfully submitted:



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I. IDENTITY OF APPELLANT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Appellant herein.

II. ASSIGNMENT OF ERRORS

Assignment of Errors

The judgment and sentence contains an error as to the seriousness level. CP 66. (This is possibly a scrivener's error, because the court ultimately calculated the correct total standard range.)

The superior court erred in granting a residential DOSA where the midpoint of the total standard range is greater than 24 months, such that the Defendant is ineligible for a residential DOSA by law.

Issues Pertaining to Assignments of Error

1. Whether the seriousness level is incorrectly recorded as a I?
2. Whether the defendant's standard sentence range is properly calculated as 36+-44 months?
3. Whether the defendant's midpoint is 40 months?
4. Whether the defendant is ineligible for a residential DOSA

where the midpoint of the standard range is greater than 24 months?

5. Whether the sentence is unlawful and must be reversed?

III. STATEMENT OF THE CASE

The State appeals from the court's order sentencing the Defendant James Yancey to a residential DOSA. CP 78-79.

The Defendant/Respondent Yancey was charged with two counts of delivering buprenorphine; each count included a school zone enhancement. CP 4-6. The evidence came from controlled buys utilizing a confidential informant. CP 1-3. Mr. Yancey was selling his VA prescription of suboxone strips. CP 1.

In pretrial negotiations, the State had offered to dismiss one count and recommend a 20 month prison DOSA if the Defendant would not seek to learn the identity of the confidential informant. CP 41. In recent years, there have been three murders and various assaults related to the identification of confidential informants in Walla Walla County. CP 39. The Defendant lost the State's generous offer by insisting on unmasking the informant "despite substantial physical and technological evidence supporting his guilt." CP 39.

Eventually, the Defendant pled guilty as charged. CP 9-19. This was an “Open Plea” in which the prosecutor was free to make any recommendation. CP 13. However, at his change of plea, the Defendant informed the court that he intended to seek a First Time Offender Waiver (FTOW). CP 13, 21. Under a FTOW, the Defendant would serve only ninety days – significantly less time than the State’s original offer for a 20 month prison DOSA made prior to the unmasking of the informant. CP 41; RCW 9.94A.650(2).

The prosecutor filed a memorandum objecting to a FTOW. CP 37-60. The prosecutor noted that the Defendant’s offender score belied his true, documented criminal history. In 2008, prior to any military service, he sold cocaine to a police informant. CP 38. He avoided a felony conviction then by contracting to work as an informant. CP 38-39. The prosecutor further noted that a FTOW sentence would result in no incentive against or repercussions for the unmasking of informants and, therefore, would undercut the State’s ability both to negotiate and to protect informants. CP 39-40.

The Defendant then gave notice that he would be requesting the court consider sentencing him under the FTOW or “alternatively to residential DOSA.” CP 34.

The prosecutor filed an additional memorandum explaining the Defendant was ineligible for a residential DOSA by reason of his high standard range. CP 61-63. The judgment and sentence reflects that:

- the base range for each count is 12+ - 20 months;
- the enhancements are for 24 months;
- thus the final standard range is 36+ - 44 months.

CP 66.

Notwithstanding the State's memorandum or the acknowledged standard range, the court granted the Defendant a residential DOSA.

CP 69. The State appeals. CP 78-79.

IV. SUMMARY OF ARGUMENT

This appeal regards a pure question of law. Having pled guilty to the information as charged, which includes the enhancements, the Defendant has a standard sentence range of 36+-44 months. CP 66; *State v. Mohamed*, 187 Wn. App. 630, 640, 350 P.3d 671 (2015); *Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 188 P.3d 546 (2008). A criminal defendant is only eligible for a residential DOSA if the midpoint of his standard range is twenty-four months or less. RCW 9.94A.660(3). The midpoint of this Defendant's standard range is 40 months. He was ineligible for the residential DOSA imposed. The

sentence must be reversed and remanded.

V. APPLICABLE STANDARDS

A court's fundamental objective in reading a statute is to ascertain and carry out the legislature's intent. If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. A court should not adopt an interpretation that renders any portion of the statute meaningless or superfluous. The meaning of a statute is a question of law that the court reviews de novo.

State v. Mohamed, 187 Wn. App. 630, 637, 350 P.3d 671 (2015).

“Standard sentence range’ means the sentencing court’s discretionary range in imposing a nonappealable sentence.” RCW 9.94A.030(49). In determining the “standard sentence range” where there is a sentencing enhancement, “the enhancement is *added* to the range rather than treated as a separate sentencing provision.” *Gutierrez v. Dep’t of Corr.*, 146 Wn. App. 151, 155, 188 P.3d 546 (2008).

Where the base range for a delivery conviction is 12-20 months and there is a school zone enhancement of 24 months, the standard sentence range is correctly determined to be 36 to 44 months.

Gutierrez v. Dep't of Corr., 146 Wn. App. at 153. And the midpoint is correctly determined to be 40 months. *Id.*

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.***

RCW 9.94A.660(3) (emphasis added).

VI. ARGUMENT

THE TRIAL COURT ERRED IN GRANTING A RESIDENTIAL DOSA.

Despite a scrivener's error regarding the seriousness level of each count, the sentence range in the judgment and sentence is correctly calculated at 36+-44 months. CP 66.

The Defendant pled guilty as charged in the information to delivery of a Schedule III non-narcotic controlled substance under RCW 69.50.401(2)(c). Accordingly, the seriousness level for each count should be a II, not a I. RCW 9.94A.518 (delivery non-narcotics from Schedule I-V (RCW 69.50.401(2)(c) through (e))).

The judgment and sentence observes an offender score of I. CP 66. Because the Defendant pled guilty to two counts, this is correct. RCW 9.94A.525(1) (convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A.589); RCW 9.94A.589(1)(a) (the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score); RCW 9.94A.525(7) (a nonviolent adult felony counts as one point).

With an offender score of I and a seriousness level of II, the base sentence range would be 12+ - 20 months. RCW 9.94A.517. The final sentence range must (and does) also incorporate the 24 month enhancement. The Defendant's sentence range is 36+ - 44 months on each count. CP 66.

This calculation is confirmed in a decision of this Court where the defendant's range was similarly calculated. *Gutierrez v. Dep't of Corr.*, 146 Wn. App. 151, 188 P.3d 546 (2008). Gutierrez pled guilty to delivery of oxycodone within 1000 feet of a school bus route. *Gutierrez v. Dep't of Corr.*, 146 Wn. App. at 152-53. As in this case,

the offense had a seriousness level of II. RCW 9.94A.518 (delivery of a schedule II narcotic under RCW 69.50.401(2)(a)); RCW 69.50.206(b)(1)(xvi) (oxycodone is a Schedule II drug). An offender with a score between 0 and 2 and a seriousness level of II has a base range of 12+ - 20 months. RCW 9.94A.517. The sentencing court found this base range. *Gutierrez*, 146 Wn. App. at 153. *Gutierrez* also admitted the 24 month school zone enhancement. *Gutierrez*, 146 Wn. App. at 153. Therefore, the sentencing court recognized a range of 36 to 44 month range with a 40 month midpoint. *Id.*

Gutierrez received a prison DOSA, i.e. half the midpoint (20 months) in prison and the remaining half the midpoint (20 months) on community custody. *Id.* The Department of Corrections (DOC) filed a post-sentence petition, arguing that the entire 24 month enhancement must be served in confinement. *Id.* This Court disagreed. Under the statute, the defendant was to serve “one-half the midpoint of *the standard sentencing range.*” RCW 9.94A.660(5) (emphasis added).

The “standard sentencing range” included the enhancement.

... Courts have many times dealt with exceptional sentence appeals involving “enhanced” sentences. Uniformly, the enhanced range is considered a standard range term and a departure from that range is an exceptional sentence. *E.g.*, *State v. Silva–Baltazar*,

125 Wash.2d 472, 475, 886 P.2d 138 (1994) (“An enhanced sentence is not an exceptional sentence, which allows the court to sentence outside the presumptive or standard sentencing range.”); *State v. Williams*, 70 Wash.App. 567, 571–573, 853 P.2d 1388 (1993), *review denied*, 123 Wash.2d 1011, 869 P.2d 1085 (1994).

This approach is also consistent with the command of the first sentence of RCW 9.94A.533(6)¹ that **the enhancement be added to the range rather than treated as a separate sentencing provision. Courts have routinely interpreted this command, as in the case of other enhancements, as increasing each end of the initial base range by the length specified for the enhancement.**

The structure of the SRA is that a sentencing court calculates a standard range sentence by applying the defendant’s offender score with the seriousness level of a crime. The court then adds any enhancements to a given base sentence.

In re Post Sentencing Review of Charles, 135 Wash.2d 239, 254, 955 P.2d 798 (1998). *Accord, Silva–Baltazar, supra; Williams, supra. A sentence range increased by an enhancement is still a standard range sentence.*

Gutierrez, 146 Wn. App. at 155 (emphasis added). *Gutierrez’s* reasoning has been followed in *State v. Mohamed*, 187 Wn. App. 630, 637, 350 P.3d 671 (2015).

¹ “An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827.” RCW 9.94A.533(6).

Applying *Gutierrez* here, the Defendant Yancey's sentence range is the base range of 12+ - 20 plus 24, for a range of 36+ - 44 months.

For residential DOSA purposes, the court needs to know whether the midpoint is 24 months or less. RCW 9.94A.660(3). The midpoint between 36 and 44 is 40. Forty months is not "24 months or less." The Defendant is not eligible for a residential DOSA. The sentence must be reversed.

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court reverse the DOSA sentence and remand for resentencing.

DATED: June 17, 2017.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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