

62472-5

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NO. 62472-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VANNAK YUN,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLAS MCBROOM

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS.....	2
C. <u>ARGUMENT</u>	3
1. APPLICABLE LAW.....	3
2. THE SENTENCING COURT DID NOT CATEGORICALLY REFUSE TO EITHER CONSIDER OR IMPOSE A DOSA SENTENCE IN THIS MATTER, AND THEREFORE DID NOT ABUSE ITS DISCRETION.....	5
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Grayson 154 Wn.2d 333,
111 P.3d 1183 (2005).....3, 4, 6, 9

State v. Hays, 55 Wn. App. 13,
776 P.2d 718 (1989)..... 4, 8

State v. Smith, 142 Wn. App. 122,
173 P.3d 973 (2007)..... 3, 4

State v. White, 123 Wn. App. 106,
97 P.3d 34 (2004)..... 4, 7

Statutes

Washington State:

RCW 9.94A.120 8

RCW 9.94A.530 3

RCW 9.94A.6604, 7, 8

A. ISSUE PRESENTED

A sentencing court's denial of a Drug Offender Sentencing Alternative (DOSA) will be vacated and the matter remanded to sentencing when a trial court abuses its discretion by categorically refusing to consider the sentencing alternative. In this matter, the sentencing court denied Vannak Yun's request for a DOSA after inquiring into Yun's substantial criminal history and after confirming that Yun had already received a DOSA on a prior case. Based on the facts presented in this matter, did the court abuse its discretion by denying Yun's DOSA request?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 1, 2008, the State charged Yun with the crime of Taking A Motor Vehicle Without Permission in the Second Degree (hereinafter "TMV 2"). CP 1. On August 8, 2008, a jury found Yun guilty as charged. CP 13. At sentencing, the court denied Yun's request for a prison-based DOSA. RP 6¹. Based on his offender score of 21, Yun received a sentence of 25 months confinement. CP 17, 19.

¹ The proceedings in this matter occurred on multiple days, and the parties have been provided transcripts from multiple days. Because both parties are only citing to the Report of Proceedings from 9/12/08, the State will simply refer to the Report of Proceedings from that day as "RP."

2. SUBSTANTIVE FACTS

On September 12, 2008, the court sentenced Yun following a finding of guilt at trial on the charge of TMV 2. RP 1-7. The State recommended the maximum of the standard range, which was 29 months. RP 2. After the State's recommendation, the court noted that it had received Yun's pre-sentence report. RP 3. The court next focused on the number of "TMV" convictions in Yun's criminal history. RP 3. While looking at Yun's criminal history listed on his Appendix B, the court commented "there is so much repetition on here." RP 3. The State noted on the record that Yun had four TMV 2 convictions, including the instant matter. RP 3. The court then commented that "this offender score is one of the highest I have ever seen." RP 3.

Yun requested a prison-based DOSA. RP 4. The court noted its concern about wanting consistent sentences, stating that the co-defendant in this matter had been sentenced to 48 months confinement. RP 4. After Yun's request for the prison-based DOSA, the State informed the court that Yun had previously been granted a DOSA in 2006. RP 6. The court asked defense counsel if this was true, and counsel confirmed Yun's prior DOSA. RP 6. Lastly, the State argued that if Yun's extensive criminal history was any indicator, granting Yun's request for a DOSA would be setting him up for failure. RP 6. Having heard from both parties, the

court denied Yun's request for a DOSA and imposed 25 months confinement in jail. RP 6-7; CP 19.

C. ARGUMENT

Yun's appeal is not based on any trial or evidentiary issues. The sole issue on appeal is whether the court abused its discretion by categorically refusing to consider Yun's request for a DOSA. Yun argues that because the court made mention of a desire to have consistent sentences between the co-defendants, the court therefore refused to even consider his request for a DOSA. This claim is unsubstantiated.

1. APPLICABLE LAW

While a defendant is not entitled to an exceptional sentence below the standard range, a defendant is entitled to ask the sentencing court to consider such a sentence and to have the alternative sentence actually considered. State v. Grayson 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Under the SRA, a court may rely on facts that are admitted, proved, or acknowledged to determine any sentence, including whether to sentence a defendant to a DOSA. Id. at 338-39 (citing RCW 9.94A.530(2)). "Acknowledged" facts include all facts presented or considered during sentencing that are not objected to by the parties. Id. at 339.

Even if a defendant is eligible for a DOSA, the decision to impose a DOSA is left to the sentencing court's discretion. State v. Smith, 142

Wn. App. 122, 129, 173 P.3d 973 (2007). In utilizing its discretion, the sentencing court decides whether a DOSA will benefit both the defendant and the community. State v. White, 123 Wn. App. 106, 115, 97 P.3d 34 (2004) (citing RCW 9.94A.660(2)). A defendant's criminal history and the success of past drug treatment are appropriate factors for a sentencing court to consider when deciding whether a DOSA is appropriate. Grayson, 154 Wn. 2d 333 at 342-43; White, 123 Wn. App. 106 at 114-15.

Appellate review is proper for the correction of legal errors or abuses of discretion in the determination of what sentence applies. White, 123 Wn. App. 106 at 114. An appellate court reviews a claim of abuse of discretion to determine whether no reasonable person would adopt the trial court's view. State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). Stated another way, a trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Id. A trial court abuses its discretion when it refuses categorically to either consider or impose an exceptional sentence below the standard range under any circumstances. Grayson, 154 Wn.2d 333 at 342. The failure to consider an exceptional sentence is reversible error. Id.

2. THE SENTENCING COURT DID NOT CATEGORICALLY REFUSE TO EITHER CONSIDER OR IMPOSE A DOSA SENTENCE IN THIS MATTER, AND THEREFORE DID NOT ABUSE ITS DISCRETION

While the sentencing court did note a desire to have similar sentences for both co-defendants in this matter, the record shows that the court considered various appropriate factors in denying Yun's request for a DOSA. From the outset of the sentencing hearing, the court was aware that Yun was asking for a DOSA on a TMV 2 conviction, which is not a crime that necessarily involves illegal controlled substances. RP 2. After the State made preliminary remarks and its sentencing recommendation of 29 months, the court immediately focused on the number of "TMV" convictions in Yun's criminal history. RP 3. Clearly the court was unfavorably impressed with Yun's criminal history, as is shown by the court's comments that "there is just so much repetition on [the Appendix B]" and "this offender score is one of the highest I've ever seen." After Yun argued for why the DOSA would be appropriate as an alternative sentence, the State pointed out that Yun had received a DOSA in 2006. RP 8. This fact was not lost on the court. Immediately after the State provided this information, the court asked defense counsel to confirm the prior DOSA, which counsel confirmed. RP 6. Lastly, the State noted that if Yun's criminal history is any indication, granting the

DOSA request would simply be setting him up for failure. RP 6.

Immediately after these final remarks by the State, the court denied Yun's request for a DOSA and sentenced him to 25 months confinement. RP 6.

Yun incorrectly argues that the facts in this matter are the same as the facts in Grayson. In Grayson, the Supreme Court of Washington found that the sentencing court abused its discretion by not meaningfully considering the defendant's DOSA request. Grayson, 154 Wn.2d 333 at 343. The sentencing court in Grayson did not dwell on the specific facts of the case, but rather stated that the court's "main reason" in denying the DOSA request was because the State did not have sufficient funds for the DOSA program. Id. at 337. This comment was made after both parties had presented their sentencing recommendation. Id. at 336-37. The court's refusal to meaningfully consider the defendant's DOSA request was further highlighted by the fact that the court refused to let the State put on the record additional (and more appropriate) factors pertaining to why the DOSA request should be denied. Id. at 337.

The analysis and behavior of the court in the instant matter is far different from the court in Grayson. To begin with, the remark about consistency in sentencing between Yun and his co-defendant was made in the middle of the hearing. RP 4. The remark should be considered a rhetorical question, and it was not revisited. Beyond this issue, the court

noted that it had received Yun's presentence report. RP 3. The court also demonstrated a concern over Yun's criminal history and the fact that he had received a prior DOSA sentence approximately two years prior. RP 3, 6. Both of these concerns are factors a court can take into consideration in properly denying a DOSA request. In Grayson, the appellate court stated that an extensive criminal history was appropriate grounds for denying a DOSA. Grayson, 154 Wn.2d 333 at 342-43. In White, the appellate court stated that the defendant's unlawful conduct after having received treatment was grounds for denying a DOSA request. White, 123 Wn. App. 106 at 114-15.

With regards to the actual sentence imposed, if the court categorically refused to consider the alternative sentence request so that the two co-defendants could be given consistent sentences, the court would have sentenced Yun to the maximum of the standard sentencing range (29 months). The fact that the court instead sentenced Yun to 25 months undercuts Yun's argument that the court abused its discretion in not granting the DOSA.

The court in the instant case did not issue findings articulating why Yun's DOSA request was denied. However, the DOSA statute does not require that the court provide findings. RCW 9.94A.660. Under the statute, the court is simply required to determine if a DOSA sentence is

appropriate for an eligible defendant. RCW 9.94A.660(4). State v. Hays is analogous to the instant matter, except that in Hays the court was asked to consider whether a Special Sexual Offender Sentencing Alternative (SSOSA) was appropriate. Hays, 55 Wn. App. 13. The appellate court in Hays noted that the sentencing court was simply required to determine if the offender and the community would benefit from the sentencing alternative. Id. at 15 (citing RCW 9.94A.120(7)(a)). This is the same requirement imposed on the sentencing court when a DOSA is requested. The appellate court in Hays then noted that the sentencing court has no statutory obligation to state the reasons or make findings for its decision. Id. at 15-16. Due to the similarities between the DOSA and SSOSA statutes, and the fact that the DOSA statute does not require a sentencing court to make findings, the court in the instant matter did not err in not explaining its decision to deny Yun's DOSA request.

D. CONCLUSION

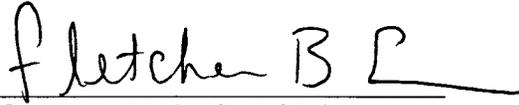
The court in the instant matter denied Yun's request for a DOSA after considering a number of factors, including Yun's pre-sentence report, his criminal history, and his prior DOSA. The court sentenced Yun to 25 months instead of the 29-month standard range maximum. While the sentencing court did not issue findings or an explanation as to why the DOSA was denied, the DOSA statute only requires a sentencing court to

determine whether a defendant and society would benefit from a DOSA sentence. The statute does not require an explanation or findings on the decision to deny a DOSA. Any additional investigation into why the court denied Yun's DOSA would be a futile exercise in mind reading. A court has broad discretion in deciding a sentence, and the court in the instant matter did not abuse its discretion. For the foregoing reasons, the State respectfully asks this Court to affirm the sentencing court's decision.

DATED this 21st day of September, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. YUN, Cause No. 62472-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Eileen Miyashiro

Eileen Miyashiro
Done in Seattle, Washington

9/21/09

Date 9/21/09

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