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NO. 63927-7-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEITH BERRY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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2009 DEC 01 PM 4:56
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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A. SUMMARY OF ARGUMENT.

Keith Berry asked the court to impose a drug-treatment sentence (DOSA) following his guilty plea because of his life-long untreated drug addiction coupled with his commission of various non-violent offenses. Without referring to the specific factors the governing statute directs a judge to consider when deciding whether Berry was eligible for a DOSA, the court refused to give Berry a DOSA. Because the court did not properly evaluate Berry's eligibility for a DOSA, a new sentencing proceeding is required.

B. ASSIGNMENT OF ERROR.

The trial court improperly denied Berry a DOSA sentence without considering the necessary factors as mandated by statute.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The sentencing court must consider a request for a DOSA sentence and may not deny such a request based on a misunderstanding of the law or by failing to consider mandatory statutory criteria. Here, the court refused to impose a DOSA sentence without considering the statutory criteria. Did the court deny Berry a DOSA on an impermissible basis?

D. STATEMENT OF THE CASE.

Keith Berry was arrested after his friend told police that he was a drug seller. 7/31/09RP 10. The police found Berry and saw one baggie of methamphetamine visible in his car. CP 2. They field tested the baggie and claimed it weighed about 26 grams. Id. Berry pleaded guilty to one count of possession of methamphetamine with intent to deliver and a separate count of forgery from another cause number. CP 4-23; 5/18/09RP 8-9.

Berry obtained a DOSA evaluation showing that effective treatment would be available for his substance abuse addiction. CP 40-51. He had no violent offenses in his criminal history but because of his drug addiction, there was a reasonable probability that he would engage in future criminal behavior without treatment. Berry sought a residential, prison-based, DOSA. CP 27-32.

Berry and his mother spoke at sentencing in an appeal for drug treatment. Berry's mother explained the origins of Berry's drug addiction, the seeds of which began when doctors administered potent anti-epilepsy drugs to him starting when he was two years old. 7/31/09RP 8. When Berry was a teenager, his doctor abruptly ended his medications but withdrawal issues arose and were never treated. At the same time, Berry's mother was

unaware that Berry was being victimized by a family friend and he was molested for a number of years. Id. at 9.

Berry also explained that his childhood exposure to epilepsy drugs left him with a far stronger tolerance to controlled substances than other people. Id. at 10-12. Berry said he is now 51 years old and for the first time, he understands he desperately needs residential treatment for his drug abuse.

The sentencing court did not question Berry's eligibility for a DOSA based on his amenability to available treatment. The court rejected Berry's request for a DOSA solely based on the weight of the methamphetamine he possessed at the time of his arrest, finding that it was not a "small quantity" as required for a DOSA. 7/31/09RP 15-16. The court imposed a standard range sentence. CP 59-62. Berry timely appeals.

E. ARGUMENT.

BY FINDING BERRY INELIGIBLE FOR A DOSA SENTENCE WITHOUT CONSIDERING THE STATUTORY CRITERIA, THE COURT ABUSED ITS DISCRETION AND A NEW SENTENCING HEARING IS REQUIRED

Keith Berry is a long-time drug addict who has not received inpatient treatment and now, in his 50s, he asked the court for treatment as part of his sentence. The court agreed Berry had a

drug addiction and was amenable to treatment, but felt it could not impose a DOSA because the amount of drugs he possessed did not qualify as a small quantity. Because the court refused to impose a DOSA without appropriately determining whether the amount of drugs was a small quantity under the mandatory statutory factors, the court abused its discretion and the case must be remanded for resentencing.

1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA. The DOSA statute structures a court's authority when considering a DOSA. State v. Grayson, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. See generally RCW 9.94A.660; Department of Corrections, Drug Offender Sentencing Alternative Fact Sheet.¹ The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660.

¹ Available at:
<http://www.doc.wa.gov/aboutdoc/docs/p351ddosafactsheetsinglesheet.pdf>
(explaining DOSA program administered by DOC).

One of the criteria for DOSA eligibility that the court must consider is whether the individual had a small quantity of drugs when the underlying criminal offense is an offense under RCW 69. RCW 9.94A.660. A DOSA is intended for people with long-term drug addictions, as evidenced by possession of drugs in an amount that would be in keeping with personal use. However, a person is eligible for a DOSA even if he or she had drugs that were not simply for personal use – eligibility exists for people convicted of possession with the intent to deliver, so long as the amount is determined to be a small quantity. Grayson, 154 Wn.2d at 342 (categorical rejection of a DOSA for delivery of cocaine found to be an abuse of discretion); RCW 9.94A.660(1)(c).

The DOSA statute does not leave the determination of “small quantity” to the unbridled discretion of the individual judge. Rather, it explains what factors a court must consider when determining the relative quantity of the drug. It directs the court to consider “weight, purity, packaging, sale price and street value of the controlled substance.” RCW 9.94A.660(1)(c).

If the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence in

prison receiving chemical dependency treatment. RCW 9.94A.660(5)(a). Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.660(2). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(8)(c); Grayson, 154 Wn.2d at 338.

Generally, a trial court's decision to deny a DOSA is not reviewable. Grayson, 154 Wn.2d at 338. But every defendant is entitled to ask the trial court for meaningful consideration of a DOSA request. Id. at 342. A party may challenge a trial court's failure to exercise discretion where the trial court categorically or unreasonably denies a DOSA sentence. Id.; State v. White, 123 Wn.App. 106, 114, 97 P.3d 34 (2004).

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); see also State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)

(failure to follow statutory procedure is legal error reviewable on appeal). “[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law.” Grayson, 154 Wn.2d at 338.

2. By ignoring the statutory factors for DOSA eligibility for a plainly drug-addicted person in need of treatment, the court abused its discretion. In the case at bar, Berry and his mother both explained to the trial court that the origins of Berry's drug addiction began with the onset of epilepsy in Berry's early childhood, when doctors prescribed him significant doses of strong medication throughout his younger years. 7/31/09RP 8. Berry's doctor abruptly ended his medication in his late teens but without any help for his withdrawal symptoms and Berry experienced troubling side effects. 7/31/09RP 9. This medical issue coincided with a difficult time in Berry's life in which he was the victim of molestation, and these factors caused him to begin his as-yet-unconquered and untreated drug addiction.

Berry explained that his long ingestion of strong medication to treat his epilepsy caused an unusually high drug tolerance in his body and made a small quantity of drugs far different for him than for other people. 7/31/09RP 10-11. He said he consumed “far

bigger amounts” than most other people. 7/31/09RP 12. Berry said that at 51 years old, he finally understood he needed drug treatment to save his life. 7/31/09RP 13.

The trial court did not doubt Berry’s explanation but it concluded that the amount of drugs Berry possessed based on its weight could not qualify as a small quantity. 7/31/09RP 15-16. In reaching its determination that the quantity of drugs precluded Berry from DOSA eligibility, the court did not consider the remaining statutory criteria defining small quantity by purity, packaging, sale price or street value. RCW 9.94A.660(1)(c).

Additionally the “weight” on which the court solely relied was premised on the allegations in the probable cause certification which was based on field testing done upon Berry’s arrest. CP 3. There was no laboratory report assessing the percentage of purity. There was no explanation of the drug’s packaging, sale price, or street value.

The statutory criteria defining quantity of a controlled substance are proper guidelines for considering the nature of a person’s possession of drugs. In federal courts, where the presumptive sentence and mandatory minimum largely depends on drug weight, the sentencing guidelines are based on purity of the

substance in assessing its weight. See United States v. Villegas, 554 F.3d 894, 900 (10th Cir. 2009) (discussing sentencing rules premised on whether drug weight is pure or found in a mixture). Here, defense counsel explained that there was no evidence of the substance's purity. 7/31/09RP 6. The court gave no consideration to the purity of the methamphetamine, which should have directly impacted its assessment of the drug's weight in deciding whether it could be a small quantity.

Additionally, a drug's packaging may indicate whether a person intended to sell the drugs. Its price and street value similarly describe the seriousness of the individual's possession in terms of its potential impact on society if it were sold. But the prosecution did not allege what the drugs were worth or claim they had a significant street value. 7/31/09RP 6.

The court had no evidence explaining the purity of the drugs, and the prosecution did not allege it had a significant street value or sale price. Nor did the prosecution allege the drugs were packaged for individual sale. While the police claimed Berry had a scale in his car, his attorney explained there was no indication the scale was used, as it was tested and not even any residue existed on them. 7/31/09RP 6. Furthermore, small quantity varies based

on a person's experience, and as Berry explained, his childhood exposure to prescribed medications gave him an unusual tolerance for drugs and a far different measure of what constituted a small quantity.

While Berry pled guilty to possession with intent to deliver, he explained that he intended to share his drugs with a friend, not sell them on the street to strangers. 7/31/09RP 10. Sharing drugs with another is included in the definition of "deliver," which simply means "to transfer," and does not require the exchange of money or actually "selling drugs." RCW 69.50.101(f).

3. Berry is entitled to proper and reasonable consideration of his request for a DOSA. The court refused Berry's plea for drug treatment solely on the basis of the weight of the drugs he possessed, which was 24 or 26 grams, according to the court. 7/31/09RP 15. The court did not consider or discuss any of the factors pertinent to assessing the quantity of the drugs other than weight, even though the statute expressly guides the court to consider a variety of factors relevant to a drug's weight and despite the misleading nature of "weight" when evaluating the actual amount of a controlled substance possessed.

By ignoring the mandatory criteria for assessing a small quantity of drugs, the court abused its discretion. Berry and his mother explained his need for treatment, his failure to seek or obtain treatment before, his lengthy history of using prescribed and unprescribed drugs, and his troubled childhood and adult life. The court did not doubt his sincerity or eligibility for a DOSA but rejected his request based on its failure to consider the necessary criteria for assessing the amount of drugs he possessed. Berry is entitled to resentencing at which a court gives proper consideration to the guideline for imposing a DOSA sentence.

F. CONCLUSION.

For the foregoing reasons, Mr. Berry respectfully requests this Court remand his case for a new sentencing hearing.

DATED this 21st day of December 2009.

Respectfully submitted,



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DIVISION ONE**

2009 DEC 21 PM 4:55
COURT OF APPEALS
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 KEITH BERRY,)
)
 Appellant.)

NO. 63927-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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