

63927-7

63927-7

NO. 63927-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KEITH BERRY,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. RCW 9.94A.660(d) indicates the sentencing court determines whether the offense involved a small quantity of drugs “upon consideration of such factors as” weight, purity, packaging, sale price, and street value. The defense only argued one factor that is not listed in the statute. Neither party presented information relevant to some of the listed factors. Was the trial court permitted to make its determination only upon relevant information without analyzing factors upon which it had no information to consider?

2. The defendant possessed 24.4 grams of methamphetamine. The defense admitted the amount of drugs appeared to be a large amount, and the defendant gave inconsistent information to the court in his allocution. Did the trial court properly exercise its discretion in finding the amount of drugs involved was not a “small quantity”?

3. The defendant received a hearing at which the court considered information presented by his attorney, his social worker, his mother, and himself. His attorney made a novel argument and presented the court with information and cases to support it. Did the defendant receive constitutionally adequate due process and effective assistance of counsel?

**B. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS**

As part of the plea agreement, the parties stipulated to the facts set forth in the Certification for Determination of Probable Cause. CP 16 and 18. On February 22, 2007, a confidential informant contacted Detective Burns from the King County Sheriff's Office and informed him that the defendant was sold methamphetamine. CP 16. The confidential informant told Det. Burns that the defendant would be at a 76 gas station in Federal Way. CP 16. Det. Burns, Detective Martin, and DOC Officer Rongen arrived at the gas station where they found the defendant. CP 16. Officer Rongen arrested the defendant on a warrant for violations of his community custody. CP 16. As Det. Martin walked past the open trunk of the defendant's vehicle, he saw 26 grams of methamphetamine inside the trunk. CP 16. Det. Martin also found a bag in the trunk that contained a scale and baggies for packaging narcotics. CP 16.

The defendant gave a statement to the police that he intended to sell the methamphetamine that was in his car. CP 16. He also stated that he used the scale and the baggies for selling the drugs. CP 16. When the methamphetamine was tested by the

lab, presumably without the packaging, it weighed 24.4 grams.

7/31/09RP 5.

## **2. PROCEDURAL FACTS**

On December 11, 2007, the State charged the defendant with Violation of the Uniform Controlled Substances Act, possession with intent to deliver methamphetamine. CP 1-3. On May 18, 2009, the defendant pled guilty as charged. CP 4-14. On July 31, 2009, the State recommended a 65-month sentence. CP 23 and 7/31/09RP 3. The defendant requested a prison-based DOSA. 7/31/09RP 4. The State argued to the court that the defendant was ineligible for a DOSA because he possessed more than a small amount of drugs. 7/31/09RP 3-4. The defendant argued that in the context of his tolerance and heavy use of methamphetamine it was actually a small amount. CP 26-51; 7/31/09RP 5-15. The court considered the arguments of both counsel, the defendant, the defendant's mother, and the defendant's social worker. 7/31/09RP 5-15. The court found that 24 grams of methamphetamine was not a small amount, and the defendant was not eligible for a DOSA sentence. 7/31/09RP 15-16.

The court sentenced the defendant to 65 months. CP 54-62. The defendant timely filed this appeal of his sentence. CP 52-53.

**C. ARGUMENT**

The defendant argues that the trial court improperly rejected the DOSA sentence by failing to find that the amount of drugs involved was a “small quantity.” The defendant argues that the trial court was required to consider each factor listed in the DOSA statute. The defendant is wrong. The court is not required to consider each listed factor, nor is the court limited by the listed factors. Even if the trial court was required to consider each factor, the error was harmless, as the court considered the relevant information presented and ruled within its discretion.

**1. THE TRIAL COURT IS NOT REQUIRED TO CONSIDER EACH FACTOR LISTED IN THE STATUTE.**

Although the defendant attempts to frame his argument as a procedural appeal, he fails. He alleges that the DOSA statute requires the court to consider multiple factors in deciding whether the amount of drugs was a “small quantity.” At the same time, he and his counsel only argued “tolerance,” which is not a factor listed

in the statute. Also, the defendant does not allege how a consideration of the remaining factors would have affected the court's decision. The defendant presents an equitable argument that the defendant needs treatment. However, it is masked as a procedural argument that is without support, because the court is not required to consider irrelevant information.

The defendant's argument relies upon a misreading of the statute. RCW 9.94A.660, the Drug Offender Sentencing Alternative (DOSA), states:

- (1) An offender is eligible for the special drug offender sentencing alternative if:
  - (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.510 (3) or (4);
  - (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6).
  - (c) The offender has no current or prior convictions for a sex offense or violent offense in this state, another state, or the United States;
  - (d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation

under chapter 9A.28 RCW, *the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance*; and

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) *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). The only cases in Washington addressing the question of whether the court must consider all the listed factors are unpublished; however, the plain language of the statute indicates that the court is not required to consider each factor. The statute does not indicate the court *shall* consider the factors; rather it uses the words “upon consideration of such factors as,” indicating the list contains examples of characteristics the court should consider. Indeed, it would be absurd to require the court to consider a factor about which it has no information. The statute simply gives the court direction about which factors may be helpful in making the determination. At the same time, the court is not limited to the factors listed if other relevant information is brought to the court’s attention.

In the present case, the trial judge followed the proper procedures in rejecting the DOSA sentence. Specifically, she considered the quantity of the drugs, looking at the weight as well as the defendant’s argument about tolerance, and determined that the amount of drugs was not a “small quantity”:

Although I think he could argue, depending on a person’s use and tolerance what is a large or small

quantity, I do not believe, and I cannot find that 24 grams or 26 grams is a small enough amount. . . . I would be dishonest with myself if I would suggest somehow that that is a small amount in the statute in this particular case.

7/31/09RP 15-16. She also likely took into account the packaging, as it presumably makes up for the difference between 24 grams and 26 grams. This is true because it is common knowledge in our courts that the crime lab rarely if ever weighs the packaging. Neither party presented any information regarding the street value, sales price, or purity. The trial court carefully considered the factors presented to it by both parties.

The defendant's argument that the sentencing judge did not follow the proper procedure should be rejected. The determination that the amount of drugs was not a "small quantity" is entirely within the sentencing judge's discretion. See State v. Bramme, 115 Wn. App. 844, 853, 64 P.3d 60 (2003). Because the statute does not require the judge to consider each factor listed, the sentencing judge followed the proper procedure in considering and rejecting the DOSA sentence, this court should affirm the trial court's finding.

**2. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND 24 GRAMS OF METHAMPHETAMINE WAS NOT A SMALL QUANTITY.**

The sentencing court has wide discretion in making its determination of whether the amount of drugs was a “small quantity.” Bramme, 115 Wn. App. at 852. A trial court abuses its discretion only when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 136 (1997); State v. Olivera-Avila, 89 Wn. App. 313, 949 P.2d 824 (1997). Said another way, a trial court abuses its discretion only when it takes a position on an issue that no reasonable person would adopt. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

“Small is a relative term for DOSA purposes.” Bramme, 115 Wn. App. at 852. “In the case of methamphetamine, an individual user can purchase the drug in quantities as small as one

gram.” Id. Because there is no bright line rule as to what is a “small quantity” of drugs, it is largely left up to the sentencing judge’s discretion.

In this case, the court ruled within its discretion. The defendant possessed more than twenty-four times the smallest amount typically possessed. The defense conceded that the amount appeared to be a large amount:

“there is no dispute that on its face 24.4 grams of methamphetamine does appear to be a large quantity of drugs. . . . I guess I want to emphasize that it’s a large amount, but for the DOSA statute I think the [c]ourt has discretion to find a small quantity because the majority of the methamphetamine was found on Mr. Berry was for his own personal use.”

7/31/09RP 5 and 9. Instead, the defense argued that in the context of the defendant’s tolerance and the extreme amounts of drugs he uses, it is actually a small amount for him.

A fundamental and critical component of exercising discretion is the court’s analysis of the validity or truth in an argument. In this case, the defendant presented the court with conflicting facts as the basis for his argument. On one hand, the defendant stipulated that he intended to sell the methamphetamine, and he used the scale and the baggies for selling the drugs. CP 16 and 18. On the other hand, the defendant told the court that he

was buying in bulk to save money and that it was for his own personal use. 7/31/09RP 11. The court specifically asked the defense about this inconsistency: "How can you tell me it was for his use when he admitted to selling it?" 7/31/09RP 10. Thus, the court likely considered the validity of the defendant's claims in the context of the defendant's credibility. When considering the amount of drugs in the context of the defendant's inconsistent explanations, a reasonable judge would find the defendant's assertions dishonest or unpersuasive.

The defendant's position is absurd. It would require the court to consider factors upon which it has no information. Parties often choose not to argue certain factors because there is no information to support such an argument or because the parties believe other factors to be more persuasive. Obviously, the factors which are relevant depend on the facts and circumstances of each case. Had this case involved an unusually high or low purity, value, or price, the parties could have addressed it. The defendant makes no assertions of how the court's decision could be affected if the court were to consider purity, street value, and street price in this case. It would be a waste of time to require the court to consider irrelevant factors without any information about them.

The standard of review is abuse of discretion. Bramme, 115 Wn. App. at 853. It cannot be said that no reasonable judge would have declined to impose a DOSA sentence in this case. The defendant had over 24 grams of methamphetamine in his possession and pled guilty to possession with intent to sell. The defendant also gave inconsistent information to the court in presenting his allocution. The trial judge considered the quantity of the drugs as well as the information provided and determined a DOSA sentence was not appropriate. This was not an abuse of discretion and the sentence should be affirmed.

**3. THE DEFENDANT'S ADDITIONAL GROUNDS FOR APPEAL SHOULD BE REJECTED.**

The defendant's first additional ground for review is that his constitutional rights were violated because he did not receive a DOSA sentence. Even if an offender is eligible for a DOSA, there is no right to it, constitutional or otherwise. State v. Watson, 120 Wn. App. 521, 532, 86 P.3d 158 (2004). This is particularly true where, as in this case, the court has discretion to determine whether or not the defendant is even eligible for a DOSA. See Bramme, 115 Wn. App. 850-53. To the extent the defendant

argues that his due process rights were violated, the record in this case supports the contrary. The defendant received a hearing where the court properly considered the relevant factors and information presented by his attorney, his mother, his social worker, and the defendant himself. As a result, the trial court's decision should be affirmed.

The defendant's second additional ground for review is that he was provided ineffective assistance of counsel, because his counsel did not provide the court with cases which were "worse than [the defendant's]."

Every accused person enjoys the right to assistance of counsel for his defense. U.S. Const. amend. VI. The right to assistance of counsel includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984).

The benchmark for judging any claim of ineffective assistance of counsel "must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. A convicted defendant's claim that counsel's assistance was ineffective has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant has the burden of proof as to both components of the Strickland test. Id. There is no requirement that a court address the components in any particular order or even to address both components if the defendant makes an insufficient showing on one of them. Id. at 697.

The performance inquiry is whether counsel's performance was reasonable considering all the circumstances. Id. at 688. Apart from a conflict of interest, the courts have declined to define whether specific actions meet this standard. See McFarland, 127 Wn.2d at 336, (overruling State v. Tarcia, 59 Wn. App. 368, 798 P.2d 296 (1990)). Accordingly, each case must be evaluated on a case by case basis.

Judicial scrutiny of defense counsel's performance must be highly deferential: "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. As a result, the courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. McFarland, 127 Wn.2d at 335 and 337. Thus, defendant must overcome the strong presumption that, under the circumstances of the case, counsel's actions "might be considered sound trial strategy." Id. Thus, if the actions of counsel "might be considered sound trial strategy" or fall within the "wide range of reasonable professional assistance," then the defendant has not met his burden. Id.

Even if a defendant shows that particular conduct by counsel was unreasonable, he must show that it actually had an adverse effect on the outcome to meet his burden. Id. at 693. It is insufficient to show that the error has some conceivable effect on the outcome. Id.

In this case, the defendant fails to meet either test. First, defense counsel provided a novel argument to the court in a case where counsel was required to admit that the amount of drugs appeared to be a large amount. Defense counsel not only presented extensive argument and briefing on behalf of his client, but also presented information from the defendant's mother and the defendant's social worker. The sentencing judge acknowledged that tolerance could be an appropriate factor in making its determination, despite the fact that it is not listed in the DOSA statute: "I think he could argue, depending on a person's use and tolerance what is a large or small quantity." 7/31/09RP 15. Thus, the court found defense counsel's argument persuasive in theory.

In the cases cited by the defendant in his statement for additional grounds for review, the courts did not decide whether the amount of drugs was a large or small amount, and they are not persuasive. Indeed, defense counsel appears to have researched the issue, but found most cases supported the State's position. 7/11/09RP 6. Despite the fact that case law did not support the defendant's position, defense counsel referenced a number of cases involving DOSA sentences and similar quantities of drugs asking the court to take judicial notice of them. See CP 29. Thus,

the defendant bases his claims on his counsel's alleged failure to provide certain information to the court, when in fact, counsel did present it to the court. Because counsel's representation was zealous, creative, and in some respects effective, he did not violate the defendant's constitutional rights, the trial court's decision should be affirmed.

**D. CONCLUSION**

For the reasons stated above, the State respectfully requests that this Court affirm the defendant's conviction.

DATED this 18<sup>th</sup> day of February, 2010.

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 Nancy Collins, 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. KEITH BERRY, Cause No. 63927-7-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.

Janice Schwarz  
Name

2/18/10  
Date

Done in Kent, Washington.

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