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67529-0

NO. 67529-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEX CHAVEZ,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Chavez's guilty plea was not knowingly, intelligently, and voluntarily entered, in violation of the Due Process Clause of the Fourteenth Amendment.

2. The sentencing court abused its discretion in denying Mr. Chavez's request for a Drug Offender Sentencing Alternative ("DOSA").

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Although a voluntary guilty plea acts as a waiver of the right to appeal, a guilty plea is not voluntary where a defendant's attorney endorses his view that pretrial rulings may be appealed, and where neither the prosecutor nor the court corrects the misapprehension. Under such circumstances, the defendant must be allowed to withdraw his guilty plea. Here, Mr. Chavez pled guilty to four counts of felony violation of a no-contact order, but his attorney told the sentencing judge that she was filing a notice of appeal because "[t]here were some pretrial issues and other things that he would like to address on appeal." Where neither the court nor the prosecutor corrected the misapprehension that Mr. Chavez had the right to appeal, must the case be remanded so Mr. Chavez may withdraw his guilty plea?

2. A court should impose a DOSA in an appropriate case, i.e., where treatment would benefit both the defendant and the community. Did the sentencing court abuse its discretion in denying Mr. Chavez's request for a DOSA, where the social worker's report to the judge indicated that Mr. Chavez had taken a variety of drugs from the time he was fourteen years old and had never had treatment, and where the social worker opined that treatment would benefit Mr. Chavez and reduce his likelihood of recidivism?

C. STATEMENT OF THE CASE

The State charged Alex Chavez with four counts of felony violation of a court order and one count of witness tampering. CP 96-97. Mr. Chavez made multiple pre-trial motions which were denied. CP 6-15, 42-50, 71-74, 88.

In exchange for dismissal of the witness-tampering charge, Mr. Chavez pled guilty to four counts of felony violation of a court order. CP 100-110; 4/14/11 RP 2-18. After the hearing, Mr. Chavez indicated he wished to withdraw his guilty plea. Accordingly, new counsel was appointed to represent him in order to file such a motion. 5/26/11 RP 2-4. However, no motion to

withdraw the guilty plea was ever filed, and the case proceeded to sentencing.

At the sentencing hearing, Mr. Chavez requested a prison-based DOSA, and presented two reports from social workers in support of his request. CP 125-33, 150-52, 8/5/11 RP 3, 7-11; Supp. CP ____ (sub no. 80). The court denied the DOSA request, and imposed a sentence of 55 months. 8/5/11 RP 11; CP 166.

Mr. Chavez's attorney then noted she would be filing a notice of appeal, because "[t]here were some pretrial issues and other things that he would like to address on appeal." 8/5/11 RP 15. Neither the court nor the prosecutor told Mr. Chavez that he had waived the right to appeal pretrial issues by pleading guilty. 8/5/11 RP 15-16.

D. ARGUMENT

- 1. This Court should remand to the trial court to permit Mr. Chavez to withdraw his guilty plea because Mr. Chavez's mistaken belief that he could appeal pre-trial rulings rendered his plea involuntary.**

Principles of due process require that a guilty plea be knowing, intelligent and voluntary. U.S. Const. amend XIV; Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Chervenell, 99 Wn.2d 309, 312, 662 P.2d 836

(1983). This standard is reflected in CrR 4.2 (d), which mandates that the trial court “shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.”

A guilty plea is not voluntary where a defendant mistakenly believes he retains the right to appeal pre-trial rulings. State v. Smith, 134 Wn.2d 849, 852-54, 953 P.2d 810 (1998). In Smith, the defendant pled guilty to possession of cocaine after losing a motion to suppress the evidence. Id. at 851. The defendant signed the Statement of Defendant on Plea of Guilty, which included a statement that he was giving up “a right to appeal a determination of guilt after trial.” Id. A colloquy indicated the plea was knowing and voluntary. Id. at 852. However, the defendant’s attorney orally stated that he reserved the right to appeal the pre-trial ruling on the motion to suppress, and neither the court nor the prosecutor corrected the misstatement. Id. at 851, 853.

On appeal, the Supreme Court recognized that “defense counsel in open court expressed an erroneous legal interpretation of the plea statement which is at odds with a valid waiver.” Id. at 853. “Because this statement went uncorrected by opposing

counsel or the court itself, it seems apparent that Smith and everyone else in the courtroom had the same understanding, even if this understanding is inconsistent with the language in the plea statement saying Smith waived his right to appeal a determination of guilt after a trial.” Id. As to the remedy, the Court held, “because it is not clear that Smith entered his plea with an understanding of the effect it would have on his right to appeal the suppression ruling, we remand to the trial court to permit Smith to withdraw his plea.” Id.

Here, as in Smith, defense counsel stated in open court that Mr. Chavez would be appealing pre-trial rulings, and neither the court nor the prosecutor told Mr. Chavez he had waived his right to do so. Although the misstatement was made at the sentencing hearing and is not on the record during the plea colloquy, it is clear that Mr. Chavez pled guilty believing incorrectly that he could appeal the pre-trial rulings. His mistaken belief rendered the plea involuntary. The remedy is reversal and remand to the trial court so that Mr. Chavez may withdraw his guilty plea. Smith, 134 Wn.2d at 853.

2. In the alternative, the case should be remanded for resentencing because the sentencing court abused its discretion in denying Mr. Chavez's request for a DOSA.

a. The Legislature created DOSA to treat drug addicts and prevent recidivism, and courts should impose it where both the offender and the community will benefit from its use.

In 1995, the legislature enacted the DOSA program as a "treatment-oriented alternative to a standard range sentence." State v. Kane, 101 Wn. App. 607, 609, 5 P.3d 741 (2000). It is focused on treatment for addicted offenders who do not have a history of violent crime or high-quantity drug offenses. State v. Bramme, 115 Wn. App. 844, 852, 64 P.3d 60 (2003).

The Legislature clearly intends that drug treatment be used as an alternative to standard sentencing in order to reduce recidivism:

It is the intent of the legislature to increase the use of effective substance abuse treatment for defendants and offenders in Washington in order to make frugal use of state and local resources, thus reducing recidivism and increasing the likelihood that defendants and offenders will become productive and law-abiding persons. The legislature recognizes that substance abuse treatment can be effective if it is well planned and involves adequate monitoring, and that substance abuse and addiction is a public safety and public health issue that must be more effectively addressed if recidivism is to be reduced.

Laws of 2002, ch. 290, § 1.

The Legislature granted sentencing courts discretion to impose a DOSA where the offender meets certain eligibility requirements and the court determines that sentencing alternative is appropriate. RCW 9.94A.660. A defendant is eligible for a DOSA if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon enhancement; (2) his current offense is not a felony DUI; (3) his prior convictions do not include violent offenses or sex offenses; (4) his current offense, if drug-related, involved only a small quantity of drugs; (5) the defendant is not subject to deportation; (6) the standard range sentence for the current offense exceeds one year; and (7) the defendant has not received a DOSA more than once in the last 10 years. RCW 9.94A.660(1). If the defendant is eligible, the court may order an examination of the defendant to determine, inter alia, “whether the offender and the community will benefit from the use of the alternative.” RCW 9.94A.660(5)(a)(iv).

After receipt of the examination report, the court determines whether a DOSA would be an “appropriate” sentence. RCW 9.94A.660(3). If so, the offender serves half of his standard-range sentence in prison where he receives a comprehensive substance

abuse assessment and treatment services, and the other half as a term of community custody, with continuing treatment. Id.; RCW 9.94A.662.

This Court reviews the denial of a DOSA for abuse of discretion. State v. Smith, 118 Wn. App. 288, 290, 75 P.3d 986 (2003).

- b. The court abused its discretion in denying the DOSA request because Mr. Chavez showed that both he and the community would benefit from it.

The trial court denied Mr. Chavez's request for a DOSA, stating only, "I am not imposing a DOSA because I don't think it's appropriate for this case." 8/5/11 RP 11. This ruling constituted an abuse of discretion because the evidence before the court showed that the sentencing alternative was appropriate for this case because it would benefit both Mr. Chavez and the community.

In her report to the sentencing court, the social worker stated, "it appears that Mr. Chavez would strongly benefit from a Prison Based DOSA, followed by outpatient treatment upon his release." Supp. CP ____ (sub no. 80). And as for the community, "[i]f Mr. Chavez is sent to prison without treatment, there is an extremely high probability that he will relapse once released back

into the community.” Id. The social worker’s conclusions were based on the facts that Mr. Chavez had been using various drugs since the age of 14, had never before received substance abuse treatment, and expressed a desire for help. Id.

Even the State recognized that “treatment may be appropriate,” but argued against it “due to Mr. Chavez’s history of committing crimes, ignoring court orders, and victimizing Ms. Wilson.” 8/5/11 RP 5. But the fact that treatment is appropriate means it is not only likely to benefit Mr. Chavez, but would also reduce his likelihood of committing additional crimes. Indeed, that is the very purpose of the DOSA. Laws of 2002, ch. 290, § 1.

This case stands in contrast to Smith, 118 Wn. App. 288. There, the defendant had been given a chance to participate in drug court and obtain treatment in lieu of confinement, but he failed to comply and was terminated from drug court after four positive urinalysis tests. Id. at 291. The sentencing court properly based its denial of a DOSA on the fact that this individual had already been given multiple chances to engage in treatment through drug court. Id. at 293. Mr. Chavez has had no such chance. Supp. CP ____ (sub no. 80).

The Legislature created the Drug Offender Sentencing Alternative for people like Mr. Chavez. The sentencing court abused its discretion when it determined that DOSA was inappropriate for him. This Court should reverse and remand for imposition of a DOSA.

E. CONCLUSION

For the reasons set forth above, Mr. Chavez respectfully requests that this Court reverse his convictions and remand to the trial court so that he may withdraw his guilty plea. In the alternative, he asks the Court to reverse the sentence and remand for imposition of a DOSA.

DATED this 8th day of February, 2012.

Respectfully submitted,


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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 67529-0-I
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)	
ALEX CHAVEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF FEBRUARY, 2012, 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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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF FEBRUARY, 2012.

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