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Court of Appeals
Division I
State of Washington

NO. 73430-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER A. NAKAMURA,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JANICE C. ALBERT
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUE

Following the defendant's termination from drug court and conviction on three new felonies, the trial court considered the defendant's DOSA evaluation. The evaluation recommended against a DOSA as did the State. Did the court abuse its discretion when it found that neither the defendant nor the community would benefit from a DOSA based on the defendant's behavior in drug court and his continued denial of any drug use?

II. STATEMENT OF THE CASE

On February 20, 2013, the defendant was accepted into Snohomish County's Adult Treatment Drug Court after committing three crimes under separate cause numbers, all consolidated for this appeal. 1 CP 103-108; 194-199; 300-305. Because of his prior criminal history, his standard ranges were 12+-24 months for Possession of a Controlled Substance, 60+-120 months for Possession with Intent to Deliver, and 43-57 months for Possession of a Stolen Vehicle, respectively. Id. Upon his entry into drug court, the defendant agreed in writing that the court should impose concurrent high-end sentences if he were to be terminated. Id. The court discussed that agreement with the defendant at different times during the defendant's drug court tenure. RP 20.

Almost two years later, on January 30, 2015, the defendant was terminated following a positive UA. 1 CP 38-102. The court set sentencing and ordered a DOSA (Drug Offender Sentencing Alternative) evaluation. CP __ (12-1-02140-1, Sub no. 113). The DOSA Risk Assessment was filed on March 13. CP __ (12-1-02140-1, Sub. no. 114).

The DOSA assessment described the defendant's history of unsuccessful supervision. Id. The defendant failed a 2008 residential DOSA that was revoked after three failed attempts at treatment. The defendant had multiple problems during court-ordered supervision from March 2011 to April 2012 when he was violated for failing to report, failing to complete treatment, failing to obey all laws, using controlled substances, changing residence without permission, and failing to abide by UA monitoring. The defendant was terminated from drug court in 2015 following a positive UA. Moreover, the defendant was still denying having used drugs and claimed two years of clean and sober living. Id.

The DOSA assessment writer found the defendant statutorily eligible but a "questionable candidate" for a DOSA. She based her opinion on the defendant's lack of success during two sentencing

alternatives and his continued insistence that he was and had been drug-free for two years. Id.

At the April 17 sentencing hearing, the court said it had received the DOSA assessment. RP 2. The State referenced the original high-end recommendation to which the defendant had agreed. RP 3. The State reminded the court that the defendant had been unsuccessful in both drug court and a 2008 residential DOSA. RP 3. It reminded the court that the positive UA, a UA the defendant continued to disavow, was not the defendant's first problem in drug court. RP 4. Nonetheless, in light of the defendant's long engagement in drug court, the State reduced its recommendation on the most serious charge from 120 months to 90 months. RP 3-5.

The defendant argued that he would be a good candidate for a DOSA "despite DOC's report." RP 8. He argued that his denial of recent drug use was an additional factor in favor of a DOSA sentence. RP 9.

The court disagreed. The court listed a number of reasons for the drug court termination in addition to the positive UA including the defendant's continued attempts at manipulation. RP 20. "Your tenure in drug court was one of fighting me." Id. The

court reminded the defendant, as it had before, that he had agreed a 120-month sentence upon termination. Id. The court asked what the point of treatment would be if the defendant did not believe he had a problem and if he insisted the positive UA was a mistake. Id.

The court denied the DOSA request. RP 22-23. Instead, the court followed the State's recommendation and imposed standard-range concurrent sentences, the longest of which was 90 months. RP 22-23.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT CONSIDERED AND REJECTED THE DEFENDANT'S DOSA REQUEST BECAUSE OF THE DEFENDANT'S HISTORY OF FAILING TO COMPLY WITH SUPERVISION AND CONTINUED DENIAL OF DRUG USE.

A DOSA is a form of standard range sentence where an offender serves half of the mid-range sentence in total confinement followed by a period of community supervision. RCW 9.94A.660(2); State v. White, 123 Wn. App. 106, 113, 97 P.3d 24 (2004); State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). A standard range sentence is generally not appealable. Smith, 118 Wn. App. at 292. However, a defendant may challenge the determinations on which the sentence is based as an abuse of the trial court's discretion. Id.

A trial court must consider a DOSA sentence if the defendant requests one and a DOSA is authorized by statute. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). However, it is the trial court that decides if a DOSA is appropriate and whether it will benefit the defendant and the community. Id. State v. Smith, 142 Wn. App. 122, 129, 173 P.3d 973 (2007). A trial court abuses its discretion when no reasonable person would adopt the trial court's view or when its decision is based on manifestly unreasonable grounds or reasons. White, 123 Wn. App. at 114.

1. The Trial Court Properly Considered The Defendant's DOSA Request.

The defendant's first claim that the trial court failed to consider a DOSA is belied by the record. The trial court ordered a DOSA evaluation, acknowledged it had received the evaluation prior to sentencing, listened to argument from both sides that cited to the DOSA evaluation, and listed its reasons for denying the DOSA.

In Grayson, the trial court denied a DOSA solely because it believed that the program had run out of funds. 154 Wn.2d 333. This categorical refusal to consider a DOSA was reversible error.

Id. at 342. However, when the court denies a DOSA because it believes the program will not benefit the defendant, the court has exercised its discretion and no error has occurred. State v. Gronnert, 122 Wn. App. 214, 205-06, 93 P.3d 200 (2004).

In the present case, the court did consider a DOSA. It did not categorically refuse to consider a DOSA but rather looked at facts specific to the defendant and rejected the sentencing alternative. The court considered a DOSA even after the defendant had previously agreed to high-end sentences.

2. The Trial Court Properly Exercised Its Discretion When It Determined That A DOSA Would Benefit Neither The Defendant Nor The Community.

The defendant also complains that the trial court abused its discretion because it did not determine consider what the defendant had done since his termination from drug court or whether a DOSA would benefit him. The record shows otherwise.

After termination, the defendant was interviewed by the DOSA evaluator. The defendant continued to insist that, despite a positive UA, he had not used and had been drug-free for two years. In considering what the defendant had done in the short time between termination and sentencing, the court found this to be a

telling indicator of what sentencing was appropriate because it showed the defendant was not amenable to treatment.

You don't need treatment because you claim you didn't use. So you want to take up bed space in a therapeutic setting where you will maintain that you didn't use. How is that beneficial to any other participants who readily admit that they did use... It's hard for me to give you that opportunity, I can't do it.

RP 22. In other words, a DOSA would benefit neither the defendant nor the community. That is exactly the analysis required under the DOSA statute. Those are manifestly reasonable grounds to deny a DOSA, particularly when the defendant had failed in three other attempts at supervision in eight years, two of those sentencing alternatives.

In White, after the defendant's case had been remanded due to an offender score issue, the trial court refused to reimpose a DOSA sentence. 123 Wn. App. 106. The trial court based its decision on the defendant's actions after sentencing while he was in prison pending the appeal. Id. at 114-15. The reviewing court said that was not an abuse of discretion. Id. The defendant's actions in prison assisted the court in determining whether the DOSA would benefit both the offender and the community. Id. at 114-15.

That reasoning applies here. The court looked at the defendant's actions both before and after termination - his performance on prior supervisions, his performance in drug court, his denial of drug use both in drug court and afterwards to the DOSA writer - and determined that a DOSA would benefit neither the defendant nor the community. No abuse of discretion occurred because the trial court's decision was manifestly reasonable.

IV. CONCLUSION

Because the trial court considered and cited sound reasons for rejecting the defendant's DOSA request, there was no abuse of discretion and the sentence should be affirmed.

Respectfully submitted on November 19, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:



JANICE C. ALBERT, #19865
Deputy Prosecuting Attorney
Attorney for Respondent

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of November, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Thomas Kummerow, Washington Appellate Project, tom@washapp.org and wapofficemail@washapp.org.

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

Dated this 20th day of November, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office