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Court of Appeals
Division I
State of Washington

Court of Appeals No. 73602-7-I

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

STATE OF WASHINGTON,

Plaintiff/Appellee

vs.

NEIL JHAVERI
Defendant/Appellant

APPELLANT NEIL JHAVERI'S OPENING BRIEF

**Snohomish County Superior Court Nos. 15-1-00289-3, 15-1-00346-6,
14-1-01255-6, 14-1-01434-6**

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Table of Contents

- I. ASSIGNMENTS OF ERROR..... 1
 - A. The Trial Court erred when it accepted Jhaveri’s guilty plea because it was not voluntarily and intelligently made when it was based on counsel’s failure to advise him of current search and seizure law..... 1
 - B. The Trial Court erred in not sentencing Jhaveri under the drug offender sentencing alternative..... 1
- II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1
 - A. Did Jhaveri’s voluntarily and intelligently plead guilty when his counsel failed to recognize an illegal search and to advise Jhaveri he could file a motion to suppress based on that illegal search? 1
 - B. Should the trial court have sentenced Jhaveri under the Drug Offender Sentencing Alternative when the court was willing to do so and Jhaveri indicated that is what he wanted? 1
- III. STATEMENT OF THE CASE..... 1
 - A. Facts related to Motion to Suppress..... 2
 - 1. Case No. 15-1-00289-3 (1/13/15)..... 2
 - 2. Case No. 14-1-01434-6 (3/25/15)..... 4
 - B. Sentencing..... 5
- IV. ARGUMENT 7
 - A. Standard of Review..... 7
 - B. Jhaveri’s guilty plea was not entered into voluntarily and intelligently because defense counsel failed to recognize an unlawful search and to advise Jhaveri he could file a motion to suppress the fruits of that search. 8
 - 1. Searches incident to arrest 9
 - C. Defense Counsel’s ineffective assistance prejudiced him and rendered his plea invalid. 14

D. The trial court should have sentenced Jhaveri under the Drug Offender Sentencing Alternative when the court was willing to do so, that is what Jhaveri indicated he wanted, and the only person saying otherwise was his counsel. 15

V. CONCLUSION 17

TABLE OF AUTHORITIES

United States Constitutional Provision

<i>Arizona v. Gant</i> , 556 U.S. 332, 333, 129 S.Ct. 1710 (2009)	10
<i>Strickland v. Washington</i> , 466 U.S. 668,104 S. Ct. 2052 (1984)	8, 9

United States Supreme Court Cases

U.S. Const. Amend. 14	9
-----------------------------	---

Washington Cases

article I, section 7	12
Article I, section 7	10

Washington Statutes

<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	7
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)	9
<i>State v. Bandura</i> , 85 Wn. App. 87, 97, 931 P.2d 174, (Ct. App. Div. II 1997)	15
<i>State v. Cameron</i> , 30 Wn. App. 229, 232, 633 P.2d 901 (1981)	8
<i>State v. Grayson</i> , 154 Wn.2d 333, 335, 111 P.3d 1183 (2005)	16
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)	8, 9
<i>State v. Holley</i> , 75 Wn. App. 191, 197, 876 P.2d 973 (Ct. App. Div. II 1994)	8
<i>State v. Kyllo</i> , 166 Wn.2d 856, 862, 215 P.3d 177 (2009)	7
<i>State v. Maurice</i> , 79 Wn. App. 544, 551, 903 P.2d 514 (1995).....	9
<i>State v. O'Neill</i> , 148 Wn.2d 564, 594, 62 P.3d 489 (2003).....	12
<i>State v. Osborne</i> , 102 Wn.2d 87, 99, 684 P.2d 683 (1984)	8
<i>State v. Parker</i> , 139 Wn.2d 486, 496, 987 P.2d 73 (1999).....	10
<i>State v. Rathbun</i> , 124 Wn. App. 372, 378-80, 101 P.3d 119 (2004)	11
<i>State v. Ross</i> , 129 Wn.2d 279, 284, 916 P.2d 405 (1996).....	8
<i>State v. S.M.</i> , 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).....	7
<i>State v. Simpson</i> , 95 Wn.2d 170, 188, 622 P.2d 1199 (1980)	9
<i>State v. Smith</i> , 118 Wn. App. 288, 290, 75 P.3d 986 (2003)	7
<i>State v. Snapp</i> , 174 Wn.2d 177, 181-82, 275 P.3d 289 (2012).....	10
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	14
<i>State v. Valdez</i> , 137 Wn. App. 280, 289, 152 P.3d 1048 (Ct. App. 2007) 12	
<i>State v. Walsh</i> , 143 Wn.2d 1, 7, 17 P.3d 591 (2001)	8
<i>State v. White</i> , 123 Wn. App. 106, 113, 97 P.3d 34 (2004).....	15
<i>State v. Williams</i> , 149 Wn.2d 143, 146, 65 P.3d 1214 (2003).....	15
Court Rules	
RCW 69.50.401(2)(a)	5
RCW 9.94A.660(1).....	16

RCW 9.94A.660(3).....	16
RCW 9.94A.660(5)(a)(iv).....	16
RCW 9.94A.662.....	16

I. ASSIGNMENTS OF ERROR

- A. The Trial Court erred when it accepted Jhaveri's guilty plea because it was not voluntarily and intelligently made when it was based on counsel's failure to advise him of current search and seizure law.**
- B. The Trial Court erred in not sentencing Jhaveri under the drug offender sentencing alternative.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did Jhaveri's voluntarily and intelligently plead guilty when his counsel failed to recognize an illegal search and to advise Jhaveri he could file a motion to suppress based on that illegal search?**
- B. Should the trial court have sentenced Jhaveri under the Drug Offender Sentencing Alternative when the court was willing to do so and Jhaveri indicated that is what he wanted?**

III. STATEMENT OF THE CASE

Neil Jhaveri was charged with possession of a controlled substance with intent to manufacture or deliver on February 12, 2015 under cause number 15-1-00289-3; possession of a controlled substance on February 19, 2015 under cause number 15-1-00346-6; possession of a controlled substance with intent to manufacture or deliver on June 19, 2014 under cause number 14-1-01255-6; and with Possession of a Controlled Substance (Heroin) on March 25, 2014 under cause number 14-1-01434-6.

A. Facts related to Motion to Suppress

1. Cause No. 15-1-00289-3

In this case, Jhaveri was not under arrest at the time of the search. According to Officer Atterbury's affidavit of probable cause, he observed some suspicious activity that he thought was consistent with narcotics transactions at a 7-11 in Bothell on January 13, 2015. The activities involved two cars, a Chrysler and a Honda. CP 43. The officer noticed both cars idling in the parking lot. He then saw one passenger from each car exit and enter the store for a few moments. When they both emerged from the store, both passengers went to the Chrysler. The passenger from the Honda went back to the Honda for a moment and then back to the Chrysler, which left the parking lot. CP 43.

When he walked up to the passenger side of the Honda he recognized the driver as the defendant from having recently arrested him. Officer Atterbury observed a clear plastic straw that had been cut in half with one end melted. He recognized this as a "tooter" used to smoke heroin and prescription pills off of foil. CP 44. He also noticed Jhaveri's eyes were extremely constricted and they did not react to direct light and Jhaveri's forefingers and thumb were stained deep brown with small sticky-looking chunks. *Id.* Officer Atterbury stated that he had seen this staining on

numerous occasions on the hands of individuals who have recently handled tar heroin. *Id.*

Officer Atterbury ordered Jhaveri to exit the vehicle and he initially refused. Officer Atterbury then called dispatch and asked for a narcotic K-9. Jhaveri denied consent to search the car, but after he stepped out, Officer Atterbury conducted a search of his person. *Id.* Officer Smith of the Marysville Police Department arrived and applied K-9 “Katy” to the exterior of Jhaveri’s vehicle and advised officer Atterbury that she gave a positive alert to the presence/odor of narcotics. CP 44. When Jhaveri again denied consent to search his vehicle, Officer Atterbury asked dispatch to call Sky Valley Towing to have them impound the vehicle for a search warrant. *Id.*

At that time, Officer Atterbury placed Jhaveri under arrest for the investigation of possession of a controlled substance and conducted a search incident to arrest and found \$260 in his pocket in amounts consistent with street level narcotics dealing. Jhaveri’s vehicle was held in impound until Officer Atterbury obtained a search warrant for it on January 15, 2015. A search of the vehicle revealed heroin and methamphetamine paraphenalia, a 5.9 gram chunk of tar heroin wrapped in a plastic bag, 2 grams of methamphetamine, and four Suboxone sublingual films. CP 44-45.

2. Cause No. 14-1-01434-6

According to Officer Atterbury's affidavit of probable cause, he conducted a traffic stop after the driver appeared to be swerving within his lane. CP 49. When he approached the driver, he recognized Jhaveri from a recent encounter where he had arrested a passenger in Jhaveri's car, Vladislav Malyarenko, on a felony drug warrant. Malyarenko had alluded to the officer that he and Jhaveri had used heroin together. *Id.* Officer Atterbury then moved his flashlight from directly into Jhaveri's eyes to out of view and Jhaveri's pupils did not react. He also spotted black/brown stains on the thumb and index finger on both of Jhaveri's hands, which is common of those who handle tar heroin. Jhaveri's reactions both verbally and physically were slow and depressed. CP 50.

Believing Jhaveri was under the influence of drugs, Officer Atterbury placed him under arrest and read Miranda Warnings. Then Officer Atterbury searched Jhaveri's person, and finding no weapons or evidence of a crime, placed him in his patrol vehicle. Officer Atterbury then called in a K-9 detective who sniffed the exterior and alerted positive to the presence/odor of narcotics. *Id.*

When Jhaveri declined consent to search the vehicle, Officer Atterbury had it impounded so he could apply for a search warrant. *Id.* Officer Saarinen stayed on scene with the vehicle until Sky Valley arrived.

He followed the vehicle to the station and secured it in the secure parking garage at the police department pending a search warrant. CP 50. Officer Atterbury prepared a blood search warrant and went back down to the cell to speak with Jhaveri further. Defendant provided a voluntary breath sample and admitted he last injected heroin a few hours before he was stopped and that there were syringes in the vehicle. *Id.*

When Officer Atterbury executed a search warrant for the car on March 31, 2014 he found various items of drug paraphernalia, prescription pills, and .2 grams of suspected methamphetamines. CP 51. Based on the recovery of these items, Jhaveri was charged with Possession of a controlled substance with intent to manufacture or deliver under RCW 69.50.401(2)(a). CP 47.

Jhaveri was represented by Robert Chavez during the discovery phase. No motion to suppress was ever noted. Upon advice of counsel, he pled guilty to all charges. See CP 15, 47.

B. Sentencing

The sentencing hearing was held on May 18, 2015. RP 1. Jhaveri asked to be sentenced under the Drug Offender Sentencing Alternative (DOSA). At the hearing, Jhaveri acknowledged that he had a drug problem, but was working, staying clean, and would like to the

opportunity to obtain treatment. RP 6-7. Jhaveri also expressed his committed to completing treatment. RP 7.

The court inquired whether Jhaveri's was only interested in reducing his sentence because there are limited spots for a DOSA they need to fill them with serious candidates. RP 7-8. Jhaveri told the court that during his interview with DOC he was confused by the process and thought that if he received a DOSA there was no jail time associated with it, but now understands. RP 8. Jhaveri further stated that he would not mind being monitored and would even like it in a way "because I would have something like a system kind of checking on me and making sure I stay on track..." RP 8.

The court informed Jhaveri that his sentence under a DOSA would be 40 months – 20 months in custody and 20 months under community supervision and that the state was recommending straight 20 months. RP 9. Then the court said, "I guess what I want to know – there is no downside for the court to award you a DOSA. What I want to know is do you really want treatment?" Jhaveri responded, "I definitely do. I definitely do." RP 10. The court even explained that if he does not complete the program or he violates the rules of the program then he must complete the whole 40 months in custody. RP 10. Jhaveri responded, "Yeah, I do understand and, you know, it's -- it's -- I guess seems like – I

mean, from my point of view I -- I want this, you know. It's a challenge for me. I love challenges and I -- I think – RP 10.

At that point, Jhaveri was interrupted by his counsel who asked for time to confer and a short recess was taken. When the parties came back on the record, counsel told the court that Jhaveri wanted the straight time. When asked, Jhaveri said that was correct. RP 10-11. The court imposed 20 months of custody and 12 months of community supervision.

IV. ARGUMENT

A. Standard of Review

This Court reviews a claim of ineffective assistance of counsel de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). 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). Abuse of discretion is defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

B. Jhaveri’s guilty plea was not entered into voluntarily and intelligently because defense counsel failed to recognize an unlawful search and to advise Jhaveri he could file a motion to suppress the fruits of that search.

Due process, under both the federal and state constitutions, require a defendant to enter a guilty plea voluntarily and intelligently. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). A plea is voluntary only if the defendant made it with knowledge of the direct consequences of the plea. See *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The voluntariness of a plea may be raised for the first time on appeal. *Walsh*, 143 Wn.2d at 4.

Every defendant has the constitutional right to effective assistance by counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). When a defendant is considering a plea bargain, effective assistance requires counsel to “actually and substantially [assist] his client in deciding whether to plead guilty.” *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981)). Part of counsel’s responsibility is “to aid the defendant in evaluating the evidence against him[.]” *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (Ct. App. Div. II 1994).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) his counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; *Hendrickson*, 129 Wn.2d at 77. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Maurice*, 79 Wn. App. 544, 551, 903 P.2d 514 (1995). Counsel's performance is not deficient if his or her conduct can be characterized as legitimate trial strategy or tactics. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

The defendant assigns the error of ineffective assistance of counsel in this case because trial counsel failed to recognize an unlawful search and seizure and to advise Jhaveri of the probability of the evidence used to form the basis of the complaint against him, in cause numbers 15-1-00289-3 and 14-1-01434-6, being suppressed. If counsel for the defendant had argued the 3.6 motion and prevailed under that theory, the defendant would not have pled guilty because the state would have had no case. Suppression of the evidence would have resulted in dismissal.

1. Searches of the vehicles

Warrantless searches are per se unreasonable. Wash. Const. Art. I, §7; U.S. Const. Amend. 14; *State v. Simpson*, 95 Wn.2d 170, 188, 622 P.2d 1199 (1980). Accordingly, Washington courts will suppress the evidence seized following a warrantless search or seizure unless the

prosecution meets its burden of proving the officer's conduct fell within an exception. See *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

One of those exceptions is the search incident to arrest. A warrantless vehicle search incident to the arrest of a recent occupant of that vehicle does not offend the U.S. Constitution under the following circumstances:

1. When the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or
2. When it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle

Arizona v. Gant, 556 U.S. 332, 333, 129 S.Ct. 1710 (2009).

However, the second prong of this exception does offend Article I, section 7 of the state constitution. *State v. Snapp*, 174 Wn.2d 177, 181-82, 275 P.3d 289 (2012). Even though Washington has adopted the first prong of this exception, the focus in determining the reasonableness of a search incident to arrest is still on officer safety. *State v. Valdez*, 167 Wn.2d 761, 776, 224 P.3d 751 (2009).

This Court's decision in *State v. Webb*, 147 Wn. App. 264, 267, 195 P.3d 550 (2008), shows the searches incident to arrest in the instant cases were unlawful. In *Webb*, a police officer pulled Webb over on

suspicion of driving under the influence. Webb exited his car upon the officer's request. Another officer arrived and conducted field sobriety tests. Upon failing the tests, the officer arrested Webb, handcuffed him, and placed him in a nearby patrol car. Officers then searched the passenger compartment of Webb's car and discovered illegal drugs. *Id.* at 267-68.

The issue on appeal was whether Webb was close enough to his vehicle at the time of arrest to justify a search of the passenger compartment of his car incident to arrest. *Id.* at 269. The Court of Appeals held that the State failed to show the search of Webb's vehicle incident to his lawful arrest fell within an exception to the warrant requirement because there were no findings addressing Webb's physical proximity to either the passenger compartment or his vehicle at the time of his arrest. *Id.* at 274. Therefore, the evidence should have been suppressed.

A valid search incident to arrest requires that a suspect have immediate access to the passenger compartment of his vehicle at the time of arrest. *State v. Rathbun*, 124 Wn. App. 372, 378-80, 101 P.3d 119 (2004). Otherwise, the justification for the exception no longer exists. *Id.* at 380. Once an officer completes a search incident to arrest, concerns for officer safety are removed and he cannot commence another search unless he establishes ongoing exigent circumstances justifying another

warrantless search. *State v. Valdez*, 137 Wn. App. 280, 289, 152 P.3d 1048 (Ct. App. 2007), aff'd *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

“A person is seized under article I, section 7 when by means of physical force or a show of authority his or her freedom of movement is restrained such that a reasonable person under the same circumstances would believe that he or she is not free to leave or decline the officer's request and terminate the encounter.” *State v. O'Neill*, 148 Wn.2d 564, 594, 62 P.3d 489 (2003).

Based on Officer Atterbury's own affidavit for cause number 14-1-01434-6 the search of the vehicle was unlawful and any evidence found in it would have been suppressed. First, Jhaveri was secured in the back seat of the police vehicle and the officer had already searched Jhaveri's person for weapons. Any concern for officer safety had already been alleviated, so there was no justification for the K-9 search. The officer did not establish any ongoing exigent circumstances that justified another warrantless search. This exceeded the scope of the search incident to arrest. In addition, the eventual search warrant for the vehicle was predicated on the positive alert by the K-9 unit. Because that was an unlawful search in itself, it cannot be the basis of probable cause for a search warrant.

Officer Atterbury's affidavit of probable cause for cause number 15-1-00289-3, shows that this search was also unlawful and was even more blatant than in *Webb*. The search incident to arrest exception to a warrant first requires that there be a lawful arrest. Here, Jhaveri was not placed under arrest until after the K-9 gave a positive alert. CP 44. But, there were no exigent circumstances to justify the K-9 search. At most, the "tooter" and the brownish stains on Jhaveri's fingers gave Officer Atterbury reason to believe that he had recently used heroin. It was not reasonable suspicion that he was trafficking heroin or that he had recently conducted a drug transaction. Officer Atterbury did not see any exchange of money or drugs. He approached the Honda because he saw both passengers enter and exit the store together both passengers left the parking lot in the Chrysler. Again, that positive alert formed the basis for the eventual warrant to search the vehicle. CP 45.

Without probable cause for an arrest or search, Officer Atterbury called for a narcotics K-9. It was the positive alert by that K-9 that provided the basis for the warrant. CP 45. The search of the vehicle was not a search incident to arrest because it was searched by the K-9 before an arrest was made. This is because probable cause to arrest did not exist until after the search. The constitution does not allow for this kind of

circular reasoning; there must be probable cause and exigent circumstances before a search is conducted.

In addition, Jhaveri's vehicle was seized without a warrant and without any justification, other than the positive alert by the narcotics K-9. Under these circumstances, Jhaveri had ample grounds for a motion to suppress all evidence discovered in the vehicle on both occasions.

C. Defense Counsel's ineffective assistance prejudiced him and rendered his plea invalid.

Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Mr. Jhaveri was charged with crimes based on the evidence obtained in his vehicle, i.e., possession of a controlled substance with intent to manufacture. Mr. Jhaveri pled guilty based on that evidence and there is more than a reasonable possibility that Mr. Jhaveri would not have pled guilty had he been aware of the current search and seizure jurisprudence. Mr. Jhaveri was prejudiced by his counsel's failure to advise him about the law and to bring the issue of illegal searches before the trial court. Therefore, his plea was not voluntary and is invalid.

D. The trial court should have sentenced Jhaveri under the Drug Offender Sentencing Alternative when the court was willing to do so, that is what Jhaveri indicated he wanted, and the only person saying otherwise was his counsel.

The right to counsel attaches at every critical state of a criminal prosecution, including sentencing. *State v. Bandura*, 85 Wn. App. 87, 97, 931 P.2d 174, (Ct. App. Div. II 1997) rev. denied 132 Wn.2d 1004, 939 P.2d 215 (1997).

“A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision.” *State v. Harkness*, 145 Wn. App. 678, 684, 186 P.3d 1182 (Ct. App. Div. 1 2008) citing *State v. White*, 123 Wn. App. 106, 113, 97 P.3d 34 (2004). Generally, the length of a sentence is not subject to appeal if the punishment falls within the standard sentencing range established by the Sentencing Reform Act (SRA). *Harkness*, 145 Wn. App. at 684 citing *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). But, a party can challenge the underlying legal conclusions and determinations that led a court to apply a particular sentence. *Williams*, 149 Wn.2d at 147.

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 that 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. RCW 9.94A.662.

Although the decision to impose or to deny a DOSA sentence is within the trial court's discretion, the trial court must exercise its discretion within the confines of the law, and Jhaveri can challenge the trial court's application of the sentencing law on appeal. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005).

The instant case is unique in that Jhaveri qualified for a DOSA and the Court agreed to sentence him under a DOSA. Jhaveri told the court he understood what was required, that he was committed to completing the treatment, and that he wanted a DOSA sentence. At the last minute, defense counsel pulled Jhaveri aside and immediately following asked the court to sentence Jhaveri to straight time.

Although sentencing is governed by the SRA, these circumstances are analogous to a plea hearing because the Court essentially allowed Jhaveri to choose his sentence. Therefore, the knowingly and voluntary standard for plea agreements should apply. Jhaveri did not knowingly and voluntarily choose the straight time because he gave the court all his reasons for wanting a DOSA, yet blindly agreed with defense counsel to accept the straight time instead of a DOSA.

V. CONCLUSION

For all these reasons, this court should invalidate Jhaveri's plea and remand the cases to trial. In the alternative, this court should remand this matter to the trial court to enter a sentence under DOSA.

Dated this 2nd day of October, 2015

Respectfully Submitted By:

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 2nd day of October, 2015, I served the original and correct copy of the foregoing APPELLANT'S OPENING BRIEF filed by the Law Office of Corey Evan Parker, PC to the following individuals by regular mail and e-mail addressed to the following party:

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I also mailed a copy to the Appellant, Neil Jhaveri at the following address:

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DATED this 2nd day of October, 2015.

By:

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Corey Evan Parker
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