No. 45274-0-II (Consol.)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JERRY LYNN DAVIS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause Nos. 12-1-03559-0 & 13-1-00377-7
The Honorable Stephanie Arend, Judge
The Honorable Jerry Costello, Judge

AMENDED OPENING BRIEF OF APPELLANT

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3. The trial court erred when it failed to exercise its discretion and consider whether Jerry Lynn Davis should be sentenced under the Drug Offender Sentencing Alternative.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that a factual basis existed in the record to support Jerry Lynn Davis' guilty plea to attempted second degree burglary, where the property Davis allegedly entered was not a building or fenced area? (Assignment of Error 1)

2. Where an offender with a conviction for a violent crime within the last 10 years is not eligible to be sentenced under the Drug Offender Sentencing Alternative, but where Jerry Lynn Davis' violent offenses are over 23 years old, did the trial court err as a matter of law when it found that Davis is not eligible to be

sentenced under that statute? (Assignment of Error 2)

3. Did the trial court fail to properly exercise its discretion at sentencing where it refused to consider Jerry Lynn Davis' request to be sentenced under the Drug Offender Sentencing Alternative after incorrectly finding that Davis is not eligible to be sentenced under that statute? (Assignment of Error 3)

III. STATEMENT OF THE CASE

The State charged Jerry Lynn Davis in cause number 12-1-03559-0 with one count of second degree burglary (RCW 9A.52.030) and one count of felony harassment (RCW 9A.46.020). (CP 1-2) The State charged Davis in cause number 13-1-00377-7 with one count of first degree trafficking in stolen property (RCW 9A.82.050) and one count of theft of a motor vehicle (RCW 9A.56.020, .065). (CP 81-82)

Trial was continued several times with Davis' agreement. (CP 9, 42, 43, 45-47, 107-11) However, Davis objected when his attorney requested a continuance on March 11, 2013. (03/11/13 RP 6-7)[1] Davis told the court that two defense witnesses would be moving out of state on or about April 1, 2013, and that their testimony was critical

[1] The transcripts will be referred to by the date of the proceeding contained therein.

in order for him to receive a fair trial. (03/11/13 RP 6-7) The trial court found that a continuance may not be in Davis' best interest, and denied the request. (03/11/13 RP 7)

At the next hearing on March 20, 2013, the prosecutor and defense counsel informed the court that they were not ready for trial and again requested a continuance. (03/20/13 RP 4) Davis again objected, concerned that his witnesses would be unavailable after April 1. (03/20/13 RP 5) Defense counsel expressed his belief that Davis' assertion was untrue, and reiterated that counsel was not prepared for trial. (03/20/13 RP 5, 6-7) The trial court granted the continuance, over Davis' strenuous objection. (03/20/13 RP 7-8; CP 26, 89)

Davis subsequently filed a pro se motion to dismiss for speedy trial violations. (CP 31-33, 98-100) That motion was not ruled upon. Davis filed a number of other pro se motions and letters with the court throughout the proceedings, attempting to address deficiencies in his representation or requesting reconsideration of sentencing terms. (CP 27, 28-30, 36, 37-40, 85-88, 90, 91-92, 93-95, 96, 101, 102-05, 106, 145-64, 169-93) Those motions were either ignored or denied. (CP 165-67, 188-89)

The trial court appointed new counsel for Davis at a hearing

held on March 27, 2013. (03/27/13 RP 4) The State and Davis subsequently reached plea agreements on both cases, whereby Davis would plead guilty to amended informations charging one count of attempted second degree burglary (cause number 12-1-03559-0) and one count of taking a motor vehicle without permission (cause number 13-1-00377-7). (CP 48, 49, 57, 112, 113, 121)

As part of the plea, the State agreed to recommend standard range sentences in both cause numbers, and to request concurrent sentences. (CP 53, 117) Davis indicated, both in his written plea statements and during the in-court colloquy, that he understood a guilty plea meant a waiver of several important rights, including his right to a speedy trial and his right to appeal a time-for-trial violation, and the right to call witnesses to testify on his behalf. (CP 51, 115; 08/05/13 RP 13, 15, 19) Davis also initialed where the forms indicated that the judge might sentence him under the Drug Offender Sentencing Alternative (DOSA) if he is eligible. (CP 55-56, 119-20)

The trial court found that Davis' guilty pleas were entered freely and voluntarily, and found a factual basis for both counts. (08/05/13 RP 20-21) The court accepted his guilty pleas to both charges. (08/05/13 RP 21)

At sentencing, the State recommended standard range

sentences. (08/22/13 RP 3-4) Davis' attorney indicated that Davis would likely benefit from drug treatment, and that he is responsible for caring for his disabled sister so a shorter term of incarceration would be desirable. (08/22/13 RP 7) Counsel also asked the court to waive any discretionary fines or financial obligations. (08/22/13 RP 7) Davis personally asked the court to consider a DOSA sentence. (08/22/13 RP 16)

The State informed the court that Davis was not eligible for DOSA, so the trial court declined to consider it. (08/22/13 RP 8, 16) The court imposed concurrent standard range sentences, for a total of 40 months of confinement. (08/22/13 RP 19; CP 69, 133) The court also found that Davis would likely be able to find work once he was released from confinement, and imposed both mandatory and non-mandatory legal financial obligations. (08/22/13 RP 16, 18-19; CP 67, 131) This appeal timely follows. (CP 76, 140)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED WHEN IT FOUND A FACTUAL BASIS FOR DAVIS' ALFORD PLEA TO ATTEMPTED SECOND DEGREE BURGLARY BECAUSE THAT FACTS DO NOT ESTABLISH THAT DAVIS ENTERED OR ATTEMPTED TO ENTER A BUILDING OR FENCED AREA.

In North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), the Supreme Court held that a defendant may

enter a plea of guilty, waiving his constitutional right to a trial, even though the defendant does not admit to having committed the charged crime. This is known as an Alford plea. The Washington Supreme Court adopted this rationale in State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976). When a defendant makes an Alford/Newton plea, the trial court must exercise extreme care to ensure that the plea satisfies constitutional requirements. *See* Newton, 87 Wn.2d at 373.

Due process requires that a guilty plea be knowing, intelligent and voluntary. In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257-58, 49 L. Ed. 2d 108 (1976). This requirement is incorporated into Washington's criminal rules:

> The 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. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a *factual basis* for the plea.

CrR 4.2(d) (emphasis added). "[F]ailure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew." Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

The factual basis requirement obligates the judge, before accepting the guilty plea, to determine that the defendant's conduct "constitutes the charged offenses." In re Crabtree, 141 Wn.2d 577, 585, 9 P.3d 814 (2000). A factual basis exists if the evidence is sufficient for a jury to conclude that the defendant is guilty. Newton, 87 Wn.2d at 370. "The court may consider any reliable source of information to determine whether sufficient evidence exists to support a plea, as long as it is made part of the record at the time of the plea." State v. Arnold, 81 Wn. App. 379, 914 P.2d 762 (1996) (citing State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

In this case, Davis entered an Alford plea to the amended information charging attempted second degree burglary, and agreed that the court would review the declaration of probable cause submitted with the original information. (CP 48, 58) In that document, the State alleged that Davis and two other individuals entered P. Duval's property and began removing items from a U-Haul parked on the property. (CP 3) The Declaration states that the property "is fenced where it can be fenced, and there is a steep natural barrier that cannot be fenced. The U-Haul was parked within the fenced area. The gate to the fence is locked and there was a no

trespassing sign posted right where the defendant's vehicle was parked." (CP 4)

From these facts, the trial court was required to find a factual basis to establish the elements of attempted second degree burglary. See CrR 4.2(d); Newton, 87 Wn.2d at 370. "A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). "[I]n addition to its ordinary meaning," the term "building" includes "any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein[.]" RCW 9A.04.110(5). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime[.]" RCW 9A.28.020(1).

In this case, the facts contained in the Declaration do not establish that Davis entered or attempted to enter a "building" because Duval's property was not a "fenced area." In State v. Engel, the defendant challenged his burglary conviction, arguing that there was insufficient evidence that he unlawfully entered or unlawfully remained in a building or fenced area, because only one third of the

property was fenced and the remainder was only "encased by . . . 'banks, high banks, [and] sloping banks.'" 166 Wn.2d 572, 575, 210 P.3d 1007 (2009).

On appeal, our Supreme Court rejected the State's argument that "the common understanding of fenced area includes an area partially enclosed by a fence, where topography and other barriers combine with the fence to close off the area to the public[.]" 166 Wn.2d at 578, 580. The Court reversed Engel's conviction, finding that the term "fenced area" as used in the burglary statute "is limited to the curtilage of a building or structure that itself qualifies as an object of burglary [and t]he curtilage is an area that is completely enclosed either by fencing alone or [by] a combination of fencing and other structures. 166 Wn.2d at 580.

Similarly, Duval's partially fenced property is not "completely enclosed" because the "steep natural barrier" surrounding part of Duval's property is not "fencing" or "other structure." It is therefore not a "fenced area." The trial court clearly erred when it found a factual basis for Davis' plea to attempted second degree burglary.

In his plea form, Davis states:

> I do not admit guilt but have reviewed the evidence with my attorney and believe that there is a substantial likelihood I would be convicted if this proceeded to trial.

> . . . I acknowledge that there is a factual basis for the charge(s) in the Original Information that is set forth in the Declaration for Determination of Probable Cause.

(CP 58) There is no indication in the record that Davis understood that the facts alleged in the Declaration would not support a conviction for either the original burglary charge or the amended charge of attempted burglary. In fact, by asserting that the Declaration contained sufficient facts, the record actually shows that Davis was unaware that the alleged facts would not support a burglary conviction.

A guilty plea cannot be truly voluntary "'unless the defendant possesses an understanding of the law in relation to the facts.'" In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1981) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)). Accordingly, Davis' guilty plea was not truly knowing, intelligent and voluntary. His conviction must be reversed and he must be allowed to withdraw his guilty plea.

B. DAVIS IS ELIGIBLE TO BE SENTENCED UNDER THE DOSA STATUTE AND THE COURT SHOULD HAVE EXERCISED ITS DISCRETION AND DETERMINED WHETHER A DOSA SENTENCE WOULD BE APPROPRIATE.

The special Drug Offender Sentencing Alternative allows a trial court to sentence an offender to a comprehensive substance

abuse assessment and treatment in lieu of or in addition to incarceration. RCW 9.94A.660.[2] If the sentencing judge determines that the offender is eligible for a DOSA, this provision authorizes the judge to "waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative . . . or a residential chemical dependency treatment-based alternative under [.]" RCW 9.94A.660(3).

No defendant is entitled to a DOSA sentence, but every defendant is entitled to ask the sentencing court for meaningful consideration of a DOSA request. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). If a defendant satisfies the DOSA eligibility requirements, the sentencing court must make a discretionary determination about whether it should grant a DOSA to the defendant. RCW 9.94A.660(3); State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519 (1998).

As a general rule, the trial judge's decision whether or not to grant a DOSA is not reviewable. RCW 9.94A.585(1); Grayson, 154 Wn.2d at 338; State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). However, an offender may always challenge the procedure

[2] The full text of RCW 9.94A.660 is contained in the Appendix.

by which a sentence was imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (quoting State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986)). An offender still has the right to "challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)); *see also* State v. Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). "[I]t is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." Williams, 149 Wn.2d at 147 (citing State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999); Herzog, 112 Wn.2d at 423; State v. Channon, 105 Wn. App. 869, 876, 20 P.3d 476 (2001)).

At the sentencing hearing in this case, Davis' counsel told the court that Davis has substance abuse problems and that he believed Davis would benefit from the DOSA program. (08/22/13 RP 7) Davis personally asked the court to consider imposing a sentence under the DOSA statute. (08/22/13 RP 16)

The State informed the judge that Davis is not eligible for DOSA because he has prior convictions for violent offenses (assault

and kidnapping). (08/22/13 RP 8) Based on the State's representations, the trial court found that Davis was not eligible for a DOSA and rejected Davis' DOSA request. (08/22/13 RP 16)

However, the State misrepresented the eligibility requirement contained in the DOSA statute. An offender is excluded from DOSA eligibility if the offender has been convicted of a violent offense, but only if the violent offense occurred "within ten years before conviction of the current offense." RCW 9.94A.660(1)(c).

In 1990, Davis was convicted of four violent offenses, including assault and kidnapping. (CP 61, 125) He has no other violent offenses since that time, over 23 years ago. (CP 61, 125) The State was therefore incorrect when it asserted that Davis was not eligible for a DOSA. The trial court erred when it relied on the State's representation and when it refused to consider Davis' request for a DOSA.

V. CONCLUSION

The facts presented to the trial court at the plea hearing do not contain evidence to establish the essential elements of attempted burglary, and Davis' conviction on that charge should be vacated. Furthermore, the trial court made a legal error when determining the sentence it could and could not impose in this case, and failed to

properly exercise its discretion under the sentencing statutes. Davis' sentence should be reversed and his case remanded for resentencing and consideration of whether he should receive a sentence under the DOSA statute.

DATED: March 26, 2014

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Jerry L. Davis

CERTIFICATE OF MAILING

I certify that on 03/26/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jerry L. Davis, DOC# 368483, Cedar Creek Corrections Center, PO Box 37, Littlerock, WA 98556-0037.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

RCW 9.94A.660, DRUG OFFENDER SENTENCING ALTERNATIVE

West's Revised Code of Washington Annotated
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.94A. Sentencing Reform Act of 1981 (Refs & Annos)
Sentencing Alternatives

West's RCWA 9.94A.660

9.94A.660. Drug offender sentencing alternative--Prison-based or residential alternative

Effective: August 1, 2009
Currentness

(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.533(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 at any time or violent offense within ten years before conviction of the current 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;

(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 sentence 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.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

Credits

[2009 c 389 § 3, eff. Aug. 1, 2009; (2009 c 389 § 2 expired August 1, 2009); 2008 c 231 § 30, eff. Aug. 1, 2009; 2006 c 339 § 302, eff. June 7, 2006; 2006 c 73 § 10, eff. July 1, 2007; 2005 c 460 § 1, eff. Oct. 1, 2005. Prior: 2002 c 290 § 20; 2002 c 175 § 10; 2001 c 10 § 4; 2000 c 28 § 19.]

Notes of Decisions (43)

West's RCWA 9.94A.660, WA ST 9.94A.660
Current with all 2013 Legislation

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