NO. 45274-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRY DAVIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Stephanie Arend
The Honorable Judge Jerry Costello

No. 12-1-03559-0
No. 13-1-00377-7

Response Brief

MARK LINDQUIST
Prosecuting Attorney

By
THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal And Other Jurisdictions

Statutes

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in denying defendant's DOSA request where he was an improper candidate given his 9+ offender score consisting of multiple violent offenses including assault in the first degree, felon in possession of a weapon, and kidnapping?

2. Should this Court vacate defendant's Alford plea when there was a sufficient factual basis to support the plea?

B. STATEMENT OF THE CASE.

On September 20, 2012, the State charged Jerry Davis (defendant) with one count of burglary in the second degree and one count of felony harassment (12-1-03559-0). CP 1-2. On January 28, 2013, defendant was additionally charged with one count of trafficking stolen property in the first degree, and one count of theft of a motor vehicle (13-1-00377-7). CP 81-82.

On August 5, 2013, defendant reached an agreement with the State whereby he entered into an Alford plea to the amended charges of one count of attempted burglary in the second degree (12-1-03559-0), and one

count of taking a motor vehicle without permission (13-1-00377-7). CP 48, 49, 57, 112, 113, 121; 8/5/13 RP 14-15. The trial court accepted defendant's guilty plea; finding not only that it was entered freely, knowingly and voluntarily, but also that there was a sufficient factual basis to support both counts. 8/5/13 RP 20-21.

Defendant was sentenced on August 22, 2013. 8/22/2013 RP 3. The State recommended low and standard range sentences. 8/22/13 RP 3-4. Defense counsel asked the court to follow the recommended sentence, waive discretionary fees, and consider a Drug Offender Sentencing Alternative (DOSA). 8/22/2013 RP 8. The State responded that DOSA was not discussed and that defendant was ineligible. 8/22/2013 RP 10.

After hearing from both sides, as well as defendant and his sister, the court declined to grant defendant a DOSA. 8/22/2013 RP 18. The court imposed concurrent standard range sentences for a total of 40 months in custody as well as mandatory and discretionary legal financial obligations. 8/22/2013 RP 16-19; CP 67, 69, 131-133. Defendant timely filed a Notice of Appeal. CP 76, 140.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO GRANT DEFENDANT'S DOSA REQUEST WHERE HE WAS AN UNFIT CANDIDATE DUE TO HIS 9+ OFFENDER SCORE AND MULTIPLE VIOLENT OFFENSES.

As a sentencing alternative, an offender may request a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. The DOSA program intends to provide treatment for some offenders judged likely to benefit from it. It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. ***State v. Grayson,*** 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

A DOSA is a decision left to the discretion of the trial judge. ***Grayson***, at 335. As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. ***State v. Conners***, 90 Wn. App. 48, 52, 950 P.2d 519 (1998). However, an appellant is not precluded from challenging on appeal the procedure by which a sentence was imposed. ***State v. Herzog***, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Despite the broad discretion given to the trial court under the Sentencing Reform Act, the trial court must exercise its discretion within the confines of the law. ***Grayson***, at 335.

While defendant is not entitled to automatically receive a DOSA sentence simply by requesting it, he is entitled to have his request for an alternative sentenced considered by the court. ***Grayson*** at 342. Appellate review is not precluded for the correction of legal errors or abuses in discretion in the determination of what sentence applies. ***State v. Williams***, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). A trial court abuses its discretion when the decision is based on incorrect law or untenable reasons in which it can be said no reasonable person would adopt the trial court's view. ***State v. Castellanos***, 132 Wn.2d 94, 97 935 P.2d 1353 (1997).

Here, the trial court did not abuse its discretion when it declined to grant defendant's request for DOSA. Although the age of defendant's violent offenses did not automatically preclude him from a DOSA, defendant was an improper candidate for DOSA given his extensive violent criminal history. It is highly unlikely that a trial court would have granted his request, regardless of the status of his eligibility.

Defendant has a long criminal history of violent offenses: 9+ offender score consisting of 15 prior offenses including multiple violent offenses (burglary in the first degree, felony in possession of a weapon, kidnapping in the second degree), and a serious violent offense: (assault in the first degree). CP 63-75, 127-139. His extensive criminal history dates as far back as 1980 to the present, and occurred in multiple states. CP 63-75, 127-139. Defendant stipulated to his prior record, and the court was

cognizant of defendant's criminal history stating, "[t]he Court is certainly interested in knowing what the criminal history is in order to decide about an appropriate sentence." 8/22/13 RP 11. Given that defendant has continuously committed crimes of personal invasion, he would not have benefited from a DOSA sentencing alternative and would not have granted his request regardless of his eligibility. Therefore, the trial court did not abuse its discretion when it denied defendant's request for DOSA.

2. THERE WAS A SUFFICIENT FACTUAL BASIS TO SUPPORT DEFENDANT'S PLEA.

"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." CrR 4.2(d). The rule requires a factual basis for the plea in order to ensure the plea is entered voluntarily. ***State v. Perez***, 33 Wn. App. 258, 261, 654 P.2d 708 (1982). The factual basis may be established "from any source the trial court finds reliable," and is not limited to the admissions of the defendant. ***State v. Newton***, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). Even if the defendant does not admit guilt, the court may accept a guilty plea so long as it was a "voluntary choice among the alternative courses of action open to the defendant." ***Newton***, 87 Wn.2d at 372, citing ***North Carolina v. Alford***, 400 U.S. 25, 37, 91 S. Ct. 160 (1970).

Defendant challenges the sufficiency of the facts stated in the Declaration for Determination of Probable Cause considered by the court. Here, as where a defendant challenges the sufficiency of the evidence, the standard of review that should apply is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas,*** 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

When a defendant completes a written plea statement, and admits to reading, understanding, and signing it, this creates a strong presumption

that the plea is voluntary. ***State v. Smith***, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), citing ***Perez***, 33 Wn. App. at 261. When the trial judge personally interrogates the defendant regarding these matters, the "presumption of voluntariness is well nigh irrefutable." ***Perez***, 33 Wn. App. at 261–62, citing ***State v. Branch***, 129 Wn.2d at 635, 642, 919 P.2d 1228 (1996). The court should exercise caution in setting aside a guilty plea after the necessary safeguards have been satisfied. ***State v. Taylor***, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

In this case, defendant entered an ***Alford*** plea, and the court based its factual basis for the plea on the Determination for Probable Cause. CP 48, 58. It alleged that defendant entered and removed items from a U-Haul parked within a fenced area on the victim's property which had been broken into and burglarized over the past four nights. CP 4. It additionally alleged that defendant grabbed a metal pipe from the victim while screaming, "I'm going to fucking kill you." so loud that a neighbor overheard it. CP 4.

From these facts, the court found a sufficient factual basis to support the elements of attempted burglary in the second degree. Attempted burglary in the second degree requires the State to prove the defendant took a substantial step toward committing the crime of burglary in the second degree. ***State v. Smith***, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). "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 dwelling." RCW 9A.52.030(1). "Building," in addition to its ordinary meaning, 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).

Here, defendant's written plea statement and thorough in-court colloquy firmly establishes that he knowingly, voluntarily, and intelligently entered into his Alford plea. 8/5/13 RP 11-20. Defendant stated that he was aware of the elements of the crime that the State would have to prove and that he was entering into his plea freely and voluntarily. 8/5/13 RP 14-15, 19. In addition, there was a sufficient factual basis to support defendant's plea where the Declaration for Determination for Probable Cause established the elements of the crime of attempted burglary in the second degree.

Defendant claims that his plea was not made voluntarily because there was no factual basis to support his plea.[1] *See* Brief of Appellant at 10. Specifically, he claims that there is no factual basis to support the plea because the victim's property was not "a fenced area." *Id.* This claim fails as the victim's property included his residence, as well as a "fenced area" within the meaning of a "building" pursuant to RCW 9A.04.110(5). The

---

[1] In addition to defendant's claim that his plea should be vacated because there was no factual basis to support the plea, he also claims that the plea was not made voluntarily for the same reasons. However, defendant made no motion to withdraw his guilty plea.

Declaration for Determination of Probable Cause stated the following:

> The victim stated that the two defendants were on his property stealing... He told deputies that his *home and property* had been burglarized for the past four nights.... Per the victim, his property is *fenced where it can be fenced, and there is a steep natural barrier that cannot be fenced.* That U-Haul was parked *within the fenced area.* The gate to the fence is locked and there was no trespassing sign posted right where the defendant's vehicle was parked.

CP 3 (emphasis added)

Defendant analogizes the facts of this case to those in ***Engel*** to support his claim that the victim's property was not a "fenced area." *See* Brief of Appellant at 8; ***State v. Engel***, 166 Wn.2d 572, 575, 210 P.3d 1007 (2009). This claim fails however, as the victim's property was "fully enclosed" as required by the court in ***Engel***.

In ***Engel***, the court reversed the defendant's burglary conviction finding that the area in which he entered was not a "fenced area" where one-third of the property was fenced and the other two-thirds was surrounded by various gravel piles consisting of "banks, high banks, and sloping banks." ***Engel***, 166 Wn.2d at 575. The court held 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 that "curtilage is an area that is completely enclosed either by fencing alone or, as was the case in ***Wentz***, *a combination of fencing and other structures*." ***Engel***, 166 Wn.2d at 580 (emphasis added). In support of this conclusion, the court cited justice Madsen's concurring opinion that a

"fenced area must be enclosed or contained, *or be so situated as to complete an enclosed or contained area, to require entry.* ***Engel***, 166 Wn.2d at 588, citing ***State v. Wentz***, 149 Wn.2d 342, 68 P.3d 282 (2003) (emphasis added). The court reached this conclusion in order to avoid the "absurd result" of criminal trespassers being held liable for burglary where they enter unmarked property that they were unaware of being fenced. ***Engel***, 166 Wn.2d at 580.

This case is distinguishable from ***Engel*** in that it was a plea as opposed to a jury trial. Therefore, the facts in this case were not disputed as they were in ***Engel***. Defendant must accept the facts alleged and all reasonable inferences that can be drawn from them. The Declaration of Determination for Probable Cause specifically states that the U-Haul, which defendant had broken into and entered, was "within a fenced area." Where the facts clearly state that the property was fenced, defendant must accept them as true and may not challenge them on appeal.

Further, the property was a "fenced area" because in addition to a no trespassing sign, it was completely enclosed by a combination of fencing and a natural barrier: "the property was fenced where it can be fenced, and not fenced where there is a steep natural barrier." It was enclosed to the fullest extent possible and therefore a "fenced area." This is consistent with the requirements in ***Engel*** as the property was "so situated as to complete an enclosed or contained area, to require entry." ***Engel***, 166 Wn.2d at 588. The facts of this case are not only

distinguishable from ***Engel***, but also consistent with the policy reasons stated in that opinion.

In ***Engel***, two-thirds of the property was unfenced and consisted of various gravel piles, the victim's property here was as enclosed and fenced as it possibly could be. While a trespasser could have mistakenly entered onto the property in ***Engel***, it would be impossible to enter the victim's property here without seeing the no trespass sign, and going through great lengths to bypass the fence and/or steep natural barrier. To find that this property was not a "fenced area" would create an unworkable principle. The court would never find that burglary was committed on properties that cannot be fully enclosed by a fence such as those on waterfronts or cliffs.

Even assuming *arguendo*, that the property was not a "fenced area," the facts are still sufficient to support the guilty plea. Defendant was charged with attempted burglary in the second degree. It is reasonable to infer that defendant took a substantial step toward burglarizing the victim's home; a dwelling, which certainly qualifies as a "building" for the purposes of the burglary statute. The trial court could reasonably infer that defendant took a substantial step toward burglarizing the victim's home. The trial court could reasonably infer that defendant took a substantial step toward burglarizing the victim's home were defendant was found on the victim's property removing a radiator and buckets from the victim's U-

Haul, and the home had been burglarized for the past four nights. As there was a sufficient factual basis to support defendant's plea, the Court should affirm defendant's conviction.

D. CONCLUSION.

The trial court did not abuse its discretion when it denied defendant's request for DOSA where based on his extensive criminal history, he clearly was not a candidate for DOSA. Further, defendant's plea should not be vacated as there was a sufficient factual basis to support the elements of attempted burglary. For the foregoing reasons, the State asks that this Court affirm defendant's conviction.

DATED: May 19, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

/s/ Thomas C. Roberts

THOMAS C. ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

Robin Sand
Rule 9 Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.19.14 /s/ Therese Kai
Date Signature

PIERCE COUNTY PROSECUTOR

May 19, 2014 - 3:36 PM

Transmittal Letter

Document Uploaded: 452740-Respondent's Brief.pdf

Case Name: State v. Davis
Court of Appeals Case Number: 45274-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAttorney@yahoo.com