96619-2

NO. 77152-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID FLAIR,

Appellant.

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner David Flair, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Flair seeks review of the Court of Appeals decision in State v. Flair, No. 77152-3-I, 2018 WL 5993353 (Slip Op. filed November 13, 2018). A copy of the decision is attached as an appendix.

C. REASONS TO ACCEPT REVIEW & ISSUES PRESENTED

RCW 9.94A.664(4) limits sentences at a Drug Offender Sentencing

Alternative (DOSA) treatment termination hearing to one half the midpoint of the standard range. This case presents a question of substantial public interest that should be decided by this Court, to wit; whether section .664(4) applies to an offender who did not report for treatment.

In addition, the King County Prosecutor's boilerplate language provides notice that failure to comply with DOSA treatment "may" result in a sentence "up to" one half the midpoint of the standard range. CP 34. This case presents another question of substantial public interest that should be decided by this Court, to wit; whether the agreement bound the

State to the maximum sentence listed in the notice, and whether it breached the plea agreement by requesting a sentence in excess of that.

1. Is this Court's review warranted under RAP 13.4(b)(4) to determine whether offenders who fail to report for DOSA treatment should be sentenced under RCW 9.94A.664(4)?

2. Is this Court's review warranted under RAP 13.4(b)(4) to determine whether the King County Prosecutor's Office boilerplate language listing a maximum sentence is binding on the State?

3. Is this Court's review also warranted under RAP 13.4(b)(3) to determine whether the Court of Appeals violated principles of State and federal due process under article I, section 3 and the Fourteenth amendment by declining to apply the rule of lenity to the interpretation of an ambiguous statute?

4. Is this Court's review warranted under RAP 13.4(b)(3) to determine whether due process was violated where the prosecutor breached the plea agreement?

D. STATEMENT OF THE CASE

On April 13, 2017, appellant David Flair pleaded guilty to second degree unlawful possession of a firearm and bail jumping. CP 9-38. Flair had been offered a nine to 12-month sentence if he pleaded guilty to the firearm possession, but he chose instead to plead guilty to both in order to

qualify for a Residential DOSA, which the prosecution agreed to recommend under the plea agreement. CP 13, 34, 65-66. Part of the prosecution's sentence recommendation attached to the plea agreement and plea statement provides:

> **NON-COMPLIANCE** with the requirements of the DOSA while in community custody will result in imposition of sanctions, which may include imposition of a term of total confinement of *up to* one-half the midpoint of the standard range.

CP 34 (Italics added).

On April 28, 2017, the trial court imposed the contemplated Residential DOSA based on an Offender Score of "4" and a standard range sentence for both offenses of 12 months and a day to 16 months. CP 52-60. The specifics of the DOSA sentence imposed provide:

> The defendant shall serve 24 months in community custody under the supervision of the DOC, on the condition that the defendant enters and remains in residential chemical dependency treatment certified under RCW CH. 70.96 for *3-6* (between 3 and 6) months. The DOC shall make chemical dependency assessment and treatment services available during the term of community custody, within available resources.
>
> Pending placement in a residential chemical dependency treatment, defendant is ordered to attend a DOC day reporting center and follow all applicable rules. The defendant shall report to DOC to begin the DOC day reporting program within 24 hours of release.
>
> . . .

> **NON-COMPLIANCE.** RCW 9.94A.664(4): At the progress hearing or treatment termination hearing, the court may modify the conditions of community custody, authorize termination of community custody status on expiration of the community custody term, or impose a term of total confinement equal to one-half the midpoint of the standard range, along with a term of community custody.

CP 55.

As outlined in a defense memorandum filed July 17, 2017, Flair had difficulty complying with the terms of the Residential DOSA. CP 65-88. For example, Flair was released after sentencing on April 28, 2017, and ordered to "take the van to ABHS treatment on May 3, 2017," but he did not so a warrant was issued. CP 67. Flair was arrested and jailed on May 12, 2017, but the court maintained the Residential DOSA and ordered Flair released on May 24, 2017 to "take the van to treatment." Id. When released on the 24th, however, Flair did not get on the van and instead fled, avoiding his brother's attempt to catch him. Another warrant was issued. Id.

Flair was arrested again on May 30, 2017, and jailed. On June 9, 2017, the court once again maintained the Residential DOSA and ordered him released on June 14, 2017, with his attorney escorting him onto the van to the treatment facility. Flair, however, got out before the van

reached the facility and fled. Another warrant was issued, and Flair was arrested again on July 9, 2017. Id.

A hearing was held July 21, 2017, before the Honorable Susan J. Craighead, to address Flair's most recent non-compliance. RP 1-18. The prosecution asked the court to revoke the Residential DOSA and impose a low-end standard range sentence of 12 months and a day. RP 3-6. As set forth in the July 17th defense memorandum, Flair's counsel argued that if the court was going to revoke, it was limited by statute to imposing a term of confinement equal to one-half the midpoint of the standard range sentence, which counsel correctly[1] calculated as seven months.

The prosecution responded by claiming that because Flair never entered treatment, he should not benefit from the statutory language authorizing imposition of a sentence not exceeding half the midpoint of the standard range when a Residential DOSA is revoked. The prosecution argued "common sense" supported its interpretation of the relevant statutory provisions. The prosecution argued it would be inequitable for Flair to get the benefit of a lesser sentence by failing to comply with a Residential DOSA when he never made it to the treatment center, when a

[1] The standard range was 12 months and a day to 16 months, so the midpoint is 14 months, half of which is seven months. CP 53.

defendant that fails at a prison-based DOSA faces a sentence anywhere within the standard range. RP 5-6, 10.

Flair's counsel responded by noting that RCW 9.94A.660 is a "general" DOSA statute, whereas RCW 9.94A.664 is "specific" to a Residential DOSA. RP 6. Counsel argued that under rules of statutory construction, the more specific statute, RCW 9.94A.664, controls, and that any ambiguity in the relevant statutes should be interpreted in Flair's favor under the rule of lenity. RP 6-7. Counsel urged the court not to impose more than seven months, with credit for time served. RP 10.

The trial court was sympathetic to the defense arguments, but ruled in the prosecution's favor;

> THE COURT: All right. I . . . have heard this argument before, and I am. . . troubled by the lack of clarity in the statutes and . . . in the state sentencing recommendation. And it would not hurt my feelings at all if you appeal, [Defense Counsel], because we need to get this resolved.
>
> However, I have to think about [the fact that] I handle this calendar for all the judges on this court, and I think no one sentences people to residential DOSA, expecting that person will potentially not go to inpatient treatment in the first place, and then get a much better deal than the next person who didn't get residential DOSA. And that's a common sense argument, and it – and so however this term noncompliance is interpreted, to me, I have to look at the basic fairness among defendants and the fact that running away from treatment shouldn't get you a better sentence than the next guy who didn't ask for residential DOSA. Okay?

> So I am going to revoke and I'm going to impose the low end. . . .

RP 15-16.

On appeal, Flair argued the hearing terminating his DOSA treatment was in fact a treatment "termination hearing" under the meaning of RCW 9.94A.664(4)(c). As a result, the maximum sentence the court was authorized to impose was one half the midpoint of the standard range. Brief of Appellant (BOA) at 9. Even if the court's alternative interpretation was reasonable, the rule of lenity must be applied in favor of a criminal defendant. BOA at 11 (citing State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008); State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

Moreover, given the language in the plea agreement, notifying Flair that the maximum sentence imposed would be one half the midpoint of the standard range, the State violated the plea agreement by recommending a higher sentence. BOA at 11-14.

In an unpublished opinion, the Court of Appeals rejected Flair's claims, noting it had recently addressed the same issues in State v. Church, __ Wn. App. __, 428 P.3d 150 (Slip Op. filed October 8, 2018) petition for review pending (filed November 7, 2018). Appendix at 1.

In Church, Division One held section .664(4)(c) did not apply to an offender who failed to report for treatment, declined to apply the rule of lenity, and held the State had not violated the plea agreement. Church, 428 P.2d at 152. The Court reasoned section .660 provided broad authority to sentence an offender who violated the terms of a sentence or failed to make satisfactory treatment. Id. at 152-53. The provisions of section .664, limiting a sentence to one half the midpoint of the standard range, provided a process by which the treatment provider was required to send the court a progress report within 30 days of the offender reporting for treatment, and the court in response must schedule a "termination hearing." Id. at 153. The Court reasoned that Church's failure to report for treatment meant there would be no progress report sent and therefore the hearing was not a "termination hearing" under the meaning of the statute, even if it was a hearing that terminated treatment. Id. Thus, the Court was authorized to sentence her under the broader section .660. Id.

The Court in Church further reasoned the "plain language" of the statute was "unambiguous," and so declined to apply the rule of lenity. Id. at 154. The Court further noted that although the plea agreement "provided notice that sanctions will result for noncompliance . . [and] identifies an example of one sanction a court may impose," it was not a

"promise" by the State to refrain from seeking a higher sanction. Id. at 155.

This Court has been asked to review the decision in Church. Flair likewise asks this Court to review the decision in his appeal.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

REVIEW IS WARRANTED TO DETERMINE WHETHER A HEARING TERMINATING TREATMENT IS A TREATMENT "TERMINATION HEARING" UNDER RCW 9.94A.664(4), AND WHETHER A PROSECUTOR VIOLATES THE PLEA AGREEMENT BY RECOMMENDING A SENTENCING IN EXCESS OF THE MAXIMUM SENTENCE PROVIDED IN THE AGREEMENT'S NOTICE SECTION.

1. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

A court's sentencing authority at a hearing terminating treatment under a DOSA presents a question of substantial public interest.

As discussed above, the Court of Appeals' published decision in Church concluded RCW 9.94A.664(4) did not apply to defendants granted a Residential DOSA who fail to ever report for treatment. 428 P.3d at 152. In reviewing the statute providing authority to impose sanctions based on RCW 9.94A.664(4)(c), the Court interpreted the statute as requiring preconditions that must be satisfied. Id. at 152-53. The Court explained there is a process by which treatment providers, within 30 days of the patient's "arrival" to the program, must provide the court with a

treatment plan. Id. at 153 (citing RCW 9.94A.664(3)(a)). "'Upon receipt'" of that plan, the trial court schedules a "'termination hearing.'" Id. (quoting RCW 9.94A.664(3)(b)). Essentially the Court found that where a patient had never arrived at the treatment program, the hearing terminating the DOSA was not in fact a treatment "termination hearing" under the terms of the statute and was in fact a sentencing violation hearing at which the treatment happened to be terminated.

While the Court of Appeals adopted one possible interpretation of the statute, it is by no means the only reasonable interpretation. It is equally possible to interpret the statute to mean that once a DOSA is imposed, any hearing that in fact terminated treatment is a "termination hearing" under section .664(4). And further that at any such "termination hearing" the maximum possible sentence is one half the midpoint of the standard range.

This Court's review of Church and Flair has the potential to define whether offenders who fail to report for a DOSA may be sanctioned under the broad authority of section .660, or whether instead they must be sanctioned under the more limited authority provided in .664. As a result, it has the potential to impact a large number of offenders within the State and presents a substantial question of public interest.

The related question – whether a prosecutor breaches a plea agreement by recommending a sanction in excess of .664's authority – also presents a question of substantial public interest. This is particularly true where the plea agreements in King County provide boilerplate language that appears to notify defendants that the maximum sentence they can receive for a failure to comply with their DOSA sentence is one half the midpoint of the standard range. This Court should accept review under RAP 13.4(b)(4).

2. This case presents a significant question of State and federal constitutional law under RAP 13.4(b)(3).

As in Church, Flair's appeal involves the breach of a prosecutor's plea agreement and the rule of lenity, both of which present significant questions of due process implicating State and federal constitutional law.

As conceded by the Court of Appeals in Church, a prosecutor's plea agreement "'is a contract with constitutional implications.'" Id. at 154 (citing State v. Townsend, 2 Wn. App. 2d 434, 438, 409 P.3d 1094 (2018); State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997)).

In addition, the purpose of the "rule of lenity" is to "ensure[] fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." U.S. v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). The rule of lenity is closely related to

constitutional due process rights and the "fair warning" requirement, as articulated by Justice Holmes. "[W]hat Justice HOLMES spoke of as "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 265 (quoting McBoyle v. U.S., 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816 (1931)). "'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" Id. at 265 (quoting Bouie v. City of Columbia, 378 U.S. 347, 351, 84 S. Ct. 1697, 1701, 12 L. Ed. 2d 894 (1964) (quoting U.S. v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 811-812, 98 L. Ed. 989 (1954))).

> [A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, . . . due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope . . . .

Lanier, 520 U.S. at 266 (emphasis added) (citations omitted); also U.S. CONST., AMEND. XIV; WASH. CONST., ART. I, SEC. 3.

This case along with Church presents the significant constitutional issue of whether principles of due process permit the application of the Court of Appeals' construction of the ambiguous and potentially

conflicting sentencing provisions of section .660 and .664. It also presents the significant issue of whether the boilerplate notice in the King County Prosecutor's Office constitutes a binding promise by the State not to seek sanctions above the purportedly maximum sentence as noted in the agreement. This Court should accept review under RAP 13.4(b)(3).

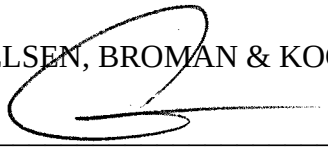
F. CONCLUSION

For the reasons stated, this Court should grant review.

DATED this 3rd day of December, 2018

Respectfully submitted,

NIELSEN, BROMAN & KOCH PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID TIMOTHY FLAIR, Appellant.	)	No. 77152-3-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2018

BECKER, J. — The trial court sentenced David Flair to a standard range term of confinement after revoking his residential drug offender sentencing alternative (DOSA). We affirm. Flair contends that a lesser sentence was required by RCW 9.94A.664 and his plea agreement, but we rejected those arguments in State v. Church, No. 76573-6-I (Wash. Ct. App. Oct. 8, 2018), http://www.courts.wa.gov/opinions/pdf/765736.pdf.

Flair pleaded guilty to unlawful possession of a firearm and bail jumping on April 13, 2017. Given Flair's offender score of 4, the standard range prison sentence was 12 to 16 months. The prosecutor agreed to recommend a DOSA (drug offender sentencing alternative), a treatment-based alternative to a standard range sentence available to nonviolent drug offenders when deemed appropriate by the trial court. RCW 9.94A.660(3). The court accepted this recommendation at sentencing on April 28, 2017. The court imposed a

residential DOSA (as opposed to a prison-based DOSA) under RCW 9.94A.664.[1] The court sentenced Flair to 24 months' community custody on the condition that he engage in chemical dependency treatment for 3 to 6 months.

Flair did not show up for treatment on his start date of May 3, 2017. During a hearing on May 19, 2017, Flair admitted to violating the terms of his DOSA. The court ordered him to start treatment on May 24, 2017. On that date, Flair ran away from the van waiting to take him to treatment. He was brought back to court. The judge denied the State's request to revoke Flair's DOSA, instead granting Flair another opportunity to enter treatment. He again failed to do so and was arrested.

During a hearing on July 21, 2017, the prosecutor asked the court to re-sentence Flair to a standard range term of confinement. The prosecutor argued that the court had "discretion to impose anywhere within the standard range for purposes of somebody being in violation or revocation" of a DOSA. This was presumably a reference to RCW 9.94A.660, a statute applicable to both residential and prison-based DOSAs. It authorizes a trial court to impose sanctions that include "a term of total confinement within the standard range of the offender's current offense":

> (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

[1] The statute provides, "A sentence for a residential chemical dependency treatment-based alternative shall include a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the offender entering and remaining in residential chemical dependency treatment certified under chapter 70.96A RCW for a period set by the court between three and six months." RCW 9.94A.664(1).

> 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.

RCW 9.94A.660(7)(a)-(d).

Flair urged application of a different statute, RCW 9.94A.664. That statute is specific to residential DOSAs. It describes options available to a judge at a "progress hearing or treatment termination hearing" conducted after the court receives information from the defendant's treatment provider. RCW 9.94A.664(4). At such a hearing, the court is authorized to impose "a term of total confinement equal to one-half the midpoint of the standard range":

> (3)(a) If the court imposes a sentence under this section, the treatment provider must send the treatment plan to the court within thirty days of the offender's arrival to the residential chemical dependency treatment program.
>
> (b) Upon receipt of the plan, the court shall schedule a progress hearing during the period of residential chemical dependency treatment, and schedule a treatment termination hearing for three months before the expiration of the term of community custody.
>
> (c) Before the progress hearing and treatment termination hearing, the treatment provider and the department shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment.

> (4) At a progress hearing or treatment termination hearing, the court may:
> ....
>
> (c) Impose a term of total confinement equal to one-half the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

RCW 9.94A.664(3)(a)-(c), (4)(c). Relying on RCW 9.94A.664(4)(c), Flair argued that the proper sanction for his noncompliance was incarceration for 7 months, half the midpoint of his standard range of 12 to 16 months. The court determined that section did not apply. The court said, "I am going to revoke and I'm going to impose the low end." Relying on RCW 9.94A.660(7)(c), the court ordered Flair to serve a prison term of 12 months and 1 day. Flair appeals from that order.

Flair maintains that the trial judge erred by imposing a sentence exceeding 7 months. He argues that RCW 9.94A.660(7)(c) and .664(4)(c) conflict and that rules of statutory construction, including the rule of lenity, support a conclusion that the latter section governs his situation.

We addressed these arguments in Church, a decision published after Flair filed the present appeal. The scenario in Church was the same as here: the defendant, given a DOSA sentence, completely failed to attend treatment. For that reason, the trial court revoked the DOSA sentence. The court then imposed a standard range sentence under RCW 9.94A.660(7) despite the defendant's argument that she could only be sanctioned under RCW 9.94A.664(4)(c). On appeal, we found no error in the sentence. We held that "the provisions of RCW 9.94A.664(4) are inapplicable to an offender who fails to report to residential treatment." Church, slip op. at 1.

> The court's authority to impose sanctions based on RCW 9.94A.664(4)(c) requires satisfaction of the section's preconditions. These include the condition that the offender report to the facility for residential treatment. Because Church never reported for treatment, she could not be evaluated, the treatment provider could not develop a treatment plan, and the court could not schedule a progress or termination hearing. Therefore, Church's failure to report to treatment made the sanctions provision of RCW 9.94A.664(4)(c) inapplicable to her.
>
> Furthermore, the purpose of the DOSA statutes is "to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community." The same interests are at issue when the trial court decides the sanctions for noncompliance. Church's desired reading of RCW 9.94A.664(4) would undermine these interests by creating a disincentive to comply with the terms of a residential DOSA. Accepting Church's reading of the statutes, offenders would be tempted to agree to a residential DOSA and then fail to report in order to reduce a standard range sentence to half the midpoint of the standard range. This would undermine the DOSA statutes' purpose.

Church, slip op. at 5-6 (footnotes omitted), quoting State v. Grayson, 154 Wn.2d 333, 343, 111 P.3d 1183 (2005). This reasoning applies with equal force to Flair's appeal. Following Church, we conclude the trial court's sentencing decision was not error.

A provision of Flair's plea agreement said that noncompliance with his DOSA would "result in imposition of sanctions, which may include imposition of a term of total confinement of up to one-half the midpoint of the standard range." Flair contends that the State violated this provision by recommending a standard range sentence during the hearing on July 21, 2017. The same argument was raised by the appellant in Church, and it was rejected by this court. We reasoned that the provision in the plea agreement did not create a promise by the State to recommend a particular sentence upon revocation of the DOSA: "The 'noncompliance' section of the plea agreement merely provides notice that

sanctions will result for noncompliance. It then identifies an example of one sanction a court may impose." Church, slip op. at 8. We adhere to this reasoning.

Affirmed.

Becker, J.

WE CONCUR:

Mann, ACJ

NIELSEN, BROMAN & KOCH P.L.L.C.

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Transmittal Information

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