

April 6, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHAITAYA MCCOOL, Appellant.	No. 53937-3-II Consolidated
STATE OF WASHINGTON, Respondent, v. SHAITAYA MCCOOL, Appellant.	No. 53934-9-II
STATE OF WASHINGTON, Respondent, v. SHAITAYA MCCOOL, Appellant.	No. 53944-6-II
STATE OF WASHINGTON, Respondent, v. SHAITAYA MCCOOL, Appellant.	No. 53947-1-II

No. 53937-3
Cons. Nos. 53934-9; 53944-6; 53947-1; 53954-3-II

STATE OF WASHINGTON,

Respondent,

v.

SHAITAYA MCCOOL,

Appellant.

No. 53954-3-II

UNPUBLISHED OPINION

WORSWICK, J. — Shaitaya McCool appeals her standard range sentence for one count of delivery of heroin, two counts of possession of methamphetamine, two counts of possession of heroin, three counts of theft in the second degree, four counts of identity theft in the second degree, one count of vehicle prowl in the second degree, and one count of possession of stolen property in the second degree. She argues that the trial court erred by not granting her requests for a Drug Offender Sentencing Alternative (DOSA). Specifically, McCool argues that the trial court failed to fully and fairly consider McCool’s appropriateness for a prison-based DOSA and that the trial court denied her request on untenable grounds for untenable reasons. She also argues, and the state concedes, that the trial court should strike the interest accrual provision on all legal financial obligations (LFOs) and a discretionary Department of Corrections (DOC) community supervision fee.

Subsequent to the initial briefing in this case, McCool filed a motion to reconsider under RAP 12.4. She argues that in light of our Supreme Court’s holding in *State v. Blake*,¹ we should vacate her four drug possession charges and remand for resentencing. She also restates her

¹*State v. Blake*, No. 96873-0, slip op. at 31 (Wash. Feb. 25, 2021), <http://www.courts.wa.gov/opinions/pdf/968730.pdf>. There, our Supreme Court held that RCW 69.50.4013(1)—the simple drug possession statute—violates due process.

DOSA argument. The State concedes that we are required to vacate McCool's drug possession conviction but argues that the trial court did not abuse its discretion when it denied McCool's request for a DOSA.

McCool's convictions for delivery of heroin, theft in the second degree, identity theft in the second degree, vehicle prowl in the second degree, and possession of stolen property in the second degree are not at issue in this appeal, thus those convictions stand. However, we remand to the trial court to vacate McCool's convictions for possession of methamphetamine and possession of heroin. Because McCool will be resentenced, we do not reach the DOSA arguments.

FACTS

In July 2019 Shaitaya McCool pleaded guilty to one count of delivery of a controlled substance—heroin, two counts of possession of a controlled substance—heroin, two counts of possession of a controlled substance—methamphetamine, three counts of theft in the second degree, four counts of identity theft in the second degree, one count of vehicle prowl in the second degree—felony, and one count of possession of stolen property in the second degree. McCool requested to be screened for DOSA eligibility. The trial court determined that McCool was eligible for DOSA.

The DOC filed a Risk Assessment Report as part of the DOSA screening report that listed McCool's history of drug use and drug dependency. The report also listed McCool's criminal history, much of which was drug related, which dates back to 2010.

No. 53937-3
Cons. Nos. 53934-9; 53944-6; 53947-1; 53954-3-II

McCool was sentenced in August 2019. At sentencing, McCool's DOC community corrections officer filed a letter with the trial court detailing the officer's experience with McCool since her last release from prison in August 2018. The corrections officer explained that McCool had eight DOC violations since her release, including failure to report, failure to follow facility rules, consumption of controlled substances including methamphetamine and heroin, associating with known felons, and traveling outside the state without permission. Attached to the letter was a report from Clark County Jail listing McCool's facility rule violations while in custody awaiting sentencing, including possession of heroin paraphernalia.

At the August 2019 sentencing hearing, the State argued that DOSA was not appropriate, despite McCool's eligibility because her DOC violations and repeated drug infractions demonstrate an unwillingness to change her behavior. Therefore, the State argued, McCool was unlikely to comply with DOSA requirements. McCool argued that based on the Risk Assessment Report she would benefit from DOSA.

The trial court acknowledged that McCool was statutorily eligible for DOSA, but stated it had "a certain amount of discretion" to grant or deny a DOSA. Report of Proceedings (RP) at 42. The trial court denied the DOSA. The trial court explained:

[T]here are certain things that we look for, certain characteristics that are more prone to make this program a success or less likely to make this program a success.

And I don't have any doubt that the drug use here is a major concern. . . .

My concern is that it's perhaps—perhaps too little too late vis a vis *the whole pattern and constellation of information that I have in front of me*, including the report here and the DOC statement.

No. 53937-3
Cons. Nos. 53934-9; 53944-6; 53947-1; 53954-3-II

Again . . . it's one that doesn't seem to fit and from my standpoint is a good use of resources and risks to try to squeeze into this program given the history, which we see a fairly consistent pattern of non-compliance, which is not a good sign for chances of success.

So there may be resources there in prison. I'm sure there are. I hope you take advantage of them, but I'm not going to grant the DOSA alternative.

RP at 42-43 (emphasis added).

The trial court sentenced McCool to a standard range sentence of 90 months of confinement (with multiple sentences running concurrently) followed by 12 months of community custody.

The trial court judge determined McCool was indigent and, in an oral ruling, stated, "I'll strike the legal financial obligations. Indigency seems to be established." RP at 45. However, the trial court imposed "supervision fees as determined by DOC" as part of McCool's community custody. Clerk's Papers (CP) at 49, 90, 139, 206, 252 (boilerplate under section 4.2(B) of each FJS form). The FJS forms also stated, "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP at 51, 92, 141, 208, 254. McCool appealed her sentence, and we issued an opinion. *State v. McCool*, No. 53937-3-II, slip op. at 1 (Wash. Ct. App. Feb 17, 2021), <https://www.courts.wa.gov/opinions/pdf/D2%2053937-3-II%20Unpublished%20Opinion.pdf>.

McCool then filed a motion for reconsideration under RAP 12.4, arguing that her convictions for possession of heroin and methamphetamine be vacated because our Supreme

No. 53937-3
Cons. Nos. 53934-9; 53944-6; 53947-1; 53954-3-II

Court recently held that RCW 69.50.4013 is unconstitutional. The State concedes the issue. We accept the State's concession.

ANALYSIS

I. POSSESSION OF A CONTROLLED SUBSTANCE

McCool argues in her motion for reconsideration that her convictions for possession of a controlled substance should be vacated on the grounds that the Supreme Court recently held that RCW 69.50.4013(1) is unconstitutional. We agree.

Eight days after we entered our initial decision in this case, the Supreme Court decided *State v. Blake*, No. 96873-0, slip op. at 1 (Wash. Feb. 25, 2021), <http://www.courts.wa.gov/opinions/pdf/968730.pdf>. In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013(1), violates state and federal due process clauses and therefore is void. *Blake*, No. 96873-0, slip op. at 31.

A defendant cannot be convicted based on a void statute. *See State v. Rice*, 174 Wn.2d 884, 893, 279 P.3d 849 (2012); *see also State v. Carnahan*, 130 Wn. App. 159, 164, 122 P.3d 187 (2005) (vacating a conviction that was based on a statute that the Supreme Court held was unconstitutional). Therefore, we vacate McCool's convictions for possession of heroin and methamphetamine.

II. LEGAL FINANCIAL OBLIGATION AND INTEREST ACCRUAL

McCool argues, and the State concedes, that the trial court should strike the DOC community supervision fee and an interest accrual provision on legal financial obligations. We accept the State's concession, and on remand, the trial court should not impose these LFOs.

No. 53937-3
Cons. Nos. 53934-9; 53944-6; 53947-1; 53954-3-II

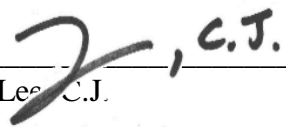
III. CONCLUSION

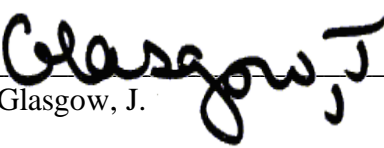
McCool's convictions for possession of heroin and methamphetamine were based on an unconstitutional statute and are therefore void. Accordingly, we remand to the trial court to vacate McCool's convictions for two counts of possession of heroin and two counts of possession of methamphetamine, and we remand to the trial court for resentencing. At resentencing, the trial court should not impose the DOC community supervision fee or an interest accrual provision on non-restitution legal financial obligations.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Lee, C.J.


Glasgow, J.