

62472-5

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No. 62472-5-I

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

STATE OF WASHINGTON,
Respondent,
v.
VANNAK YUN,
Appellant.

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CLERK OF APPELLATE COURT
STATE OF WASHINGTON
FILED

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

The Honorable Douglas McBroom

BRIEF OF APPELLANT

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STATUTES

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A. ASSIGNMENT OF ERROR

The court erred in failing to meaningfully consider Mr. Yun's request for a Drug Offender Sentence Alternative (DOSA).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The sentencing court has broad discretion in denying a DOSA. Nevertheless, the court abuses that discretion when it categorically refuses to consider a DOSA where the defendant is otherwise statutorily eligible. Did the court here abuse its discretion where Mr. Yun was statutorily eligible for a DOSA but the court simply refused to consider a DOSA based on its own opinion that Mr. Yun's sentence should be consistent with his co-defendant's sentence?

C. STATEMENT OF THE CASE

Following a jury trial, Vannak Yun was convicted of taking a motor vehicle in the second degree. CP13. At sentencing, Mr. Yun sought a Drug Offender Sentence Alternative (DOSA) sentence. CP14-15; 9/12/08RP 4-6. The trial court refused to consider a DOSA and imposed a sentence of 25 months, having previously noted that it wished to be consistent in the sentences imposed on Mr. Yun and his co-defendant Khamsay Keodara:

But if the Court is concerned about consistency, which I am, Mr. Keodara has 48 straight months, how do I justify in my own mind giving Mr. Yun a DOSA, especially when he has an offender score two-and-a-half times that of Mr. Keodara. I understand he is convicted of a different offense.

9/12/08RP 4, 6.¹ The court imposed a standard range sentence of 25 months. CP 19.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CONSIDER A DOSA FOR MR. YUN

The DOSA program is an attempt by the Legislature to provide treatment for some offenders judged likely to benefit from it. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program 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. *See generally* RCW 9.94A.660. Under a DOSA sentence, the defendant serves only about one-half of a standard range sentence in prison and receives substance abuse treatment while incarcerated. After completion of the one-half sentence, the defendant is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.660(2).

¹ Mr. Keodara was convicted of possession of stolen property in the first degree as the driver of the car. Mr. Yun was the passenger.

Under RCW 9.94A.660(1)(a), a defendant is eligible for a DOSA sentence if he is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a firearm or deadly weapon sentence enhancement. If an offender is determined to be eligible for a DOSA, the court may order an examination which may address:

(a) Whether the offender suffers from drug addiction;

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

(c) 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

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

RCW 9.94A.660(2)(a). The examination report should also contain a treatment plan, designate a treatment provider, set forth a monitoring plan, and identify affirmative conditions. RCW 9.94A.660(3). If the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence in prison receiving chemical dependency treatment.

RCW 9.94A.660(5)(a). Once the defendant has completed the custodial part of the sentence, he is released into closely monitored community supervision and treatment for the balance of the sentence. RCW 9.94A.660(2). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(8)(c); *Grayson*, 154 Wn.2d at 338.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. Because a sentence under DOSA falls within the standard sentence range set by the legislature in the sentencing statute, appellate courts presume that the trial court did not abuse its discretion. *State v. Garcia-Martinez*, 88 Wn.App. 322, 329, 944 P.2d 1104 (1997). Although not every defendant is entitled to a DOSA, every defendant is entitled to ask the trial court for meaningful consideration of his request. *Grayson*, 154 Wn.2d at 342. A party may challenge a trial court's failure to exercise any discretion where the trial court categorically denies a DOSA sentence. *Grayson*, 154 Wn.2d at 342.

In *Grayson*, the trial court refused the defendant's request for a DOSA on the basis that

the State no longer has money available to treat people who go through the DOSA program. So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I'm unwilling to do that for this purpose alone. There's no money available. He's not going to get any treatment; it's denied.

154 Wn.2d at 337 (emphasis in original). In reversing, the Washington Supreme Court ruled, "Considering all of the circumstances, the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error." *Id.* at 342. The Court came to this conclusion even after acknowledging Mr. Grayson was not a good candidate for a DOSA and would likely not receive one on remand. *Id.* at 343.

Here the court refused to even consider a DOSA on the grounds it wanted Mr. Yun's sentence to be consistent with his co-defendant's sentence of 46 months. 9/12/08RP 4. To the extent the Legislature has made the DOSA sentence available to offenders convicted of these offenses, the judge's blanket refusal to consider a DOSA because it would not be consistent with the co-defendant's sentence is a categorical rejection. *Grayson*, 154 Wn.2d at 342 (categorical rejection of a DOSA for delivery of cocaine found to be an abuse of discretion). The appropriate remedy is reversal of the sentence and remand for resentencing.

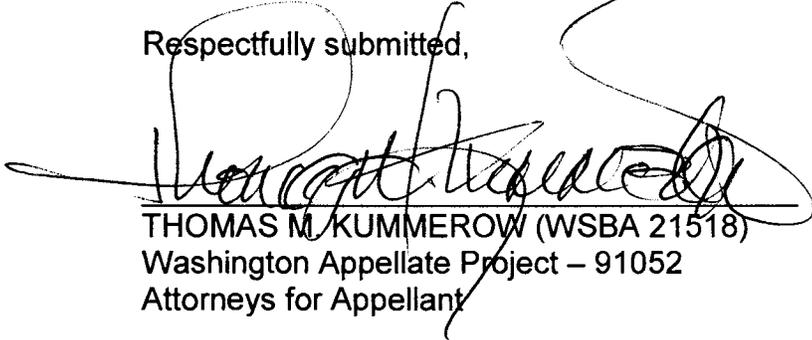
Grayson, 154 Wn.2d at 343 (“We reverse on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate.”). This Court must reverse Mr. Yun’s sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, Mr. Yun submits this Court must reverse his sentence and remand for resentencing.

DATED this 22nd day of July 2009.

Respectfully submitted,



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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JULY, 2009.

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