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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON
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NO. 68033-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LYDIA TAMAS,
aka DIANA JOHNSON,
aka DIANA SMITH, Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. The State has provided no reason why *de novo* is not the proper standard of review in this case.

A. The Case Concerns Questions of Statutory Construction

In the Brief of Respondent, at 3-4, the State attempts to summarily dispose of Appellant's Assignments of Error Nos. I-IV and assumes that the only standard of review applicable in this case is the abuse of discretion standard.

The entirety of the State's response to Appellant's Assignments of Error Nos. I-IV and Appellant's argument that the *de novo* standard of review applies (Brief of App. pp. 1-17) is recited as follows:

“Examination of the record demonstrates that this Court need not consider the first two arguments that Tamas raises. Neither the lower court nor the State has ever disputed Tamas's eligibility, under RCW 9.94A.640, for vacation of her conviction, recognizing that her crime of conviction does not necessarily bar her from relief. See CP 59-60. And the superior court did not otherwise base its decision on a parsing of the language within the Sentencing Reform Act's definitional statute, RCW 9.94A.030.”

Brief of Resp., at 3.

Conclusory statements made by the Respondent without analysis or support in the record are not well-taken. For instance, it has always been agreed by all parties in this case that Appellant was *eligible* for vacation under R.C.W. 9.94A.640. “In preparing the Appellant’s motion to vacate, counsel submitted extensive documentation and briefing in order to demonstrate that Appellant’s conviction for attempted assault 2nd degree qualified under R.C.W. 9.94A.640 as an offense eligible for vacation. CP 35, 45-58, 37-44.” Brief of App. at 8. Appellant has never understood the State to be against Appellant’s *eligibility* to vacate. Insinuations to the contrary only serve to cloud the real issues present in this case.

Furthermore, it has always been agreed by all parties that the decision on whether to vacate the conviction of an eligible defendant or not was within the trial court’s discretion.

“Mr. Conom [to the Court]: ...I think Your Honor is correct that the statute does not require or does not direct the Court in a mandatory fashion to grant the vacation if she is eligible; you have discretion.” RP 6.

This case, however, turns on *how* that discretion was used. Just because a court has discretion does not mean it can make a

decision for an improper reason, or no reason at all. “(‘The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure.’) Coggle, 56 Wn.App. at 504 (quoting Cardozo, The Nature of the Judicial Process 141 (1921)).” Brief of App., at 18. As this Court stated in Coggle v. Snow, the “discretion” of a court “**requires decisionmaking founded upon principle and reason.**” Coggle, 56 Wn.App. at 505 (emph. added). Brief of App. at 19.

The only reason for exercising discretion given by the trial court in this case was the “seriousness” of the offense. The State argues in its brief that the “superior court did not otherwise base its decision on a parsing of the language within the Sentencing Reform Act’s definitional statute... .” Brief of Resp. at 3. How can the State claim to know what was or was not the basis for the court’s decision when the court did not discuss it in any detail? The very fact that the trial court did not elaborate is the reason why *de novo* review by this Court is proper here.

What did the trial court intend when she ruled the offense to be “serious?” Appellant’s contention, discussed at length in her brief and unaddressed by the State, is that the court intended the legal meaning of serious, which is referenced by statute at R.C.W.

9.94A.030. See, Brief of App. pp. 8-17. Attempted assault 2nd degree is not a “violent offense” under the law. Paradoxically, however, it is considered a “serious violent offense” under the law. This conflict is central to the resolution of this case, where the trial court used one word so loaded with legal meaning to deny Appellant’s motion.

Because this case, therefore, concerns issues of statutory construction, the proper standard of review is *de novo*. State v. Smith, 158 Wn.App. 501, 246 P.3d 812 (2010). Based on that standard of review, the trial court, at best, relied on an ambiguous statute (the various incongruent definitions of “serious” offenses contained in R.C.W. 9.94A.030) requiring the rule of lenity be applied in favor of Appellant, and at worst, decided the motion based on an improper interpretation of law. Whatever the interpretation of the trial court’s actions, *de novo* is the correct standard of review and reversal is the correct outcome.

B. *De Novo* Review is Also Proper For Mixed Questions of Law and Fact

As discussed in detail (and unaddressed by the Respondent) in Appellant’s Brief, pp. 6-8, even if this Court were to find that the

issues at bar contain questions of both statutory construction and factual questions, the *de novo* standard of review still applies.

“In cases that involve both questions of statutory construction as well as questions of fact (so-called “mixed” questions of law and fact), the proper standard of review is the “error of law” standard. Department of Revenue v. Boeing Co., 85 Wn.2d 663, 667, 538 P.2d 505 (1975). Under the “error of law” standard of review, “the court here will exercise its ‘inherent and statutory authority to make a de novo review independent of the [[trial court's]] decision.’ Weyerhaeuser Co. v. Department of Revenue, 16 Wn. App. 112, 115, 553 P.2d 1349 (1976).” Daily Herald v. Employment Security, 91 Wn.2d 559, 562, 588 P.2d 1157 (1979) (modified).”

Brief of App. at 7.

“An error of law resulting from a discretionary ruling also automatically constitutes an abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).” Brief of App. at 8. Where the trial court did not lay out the **principles** and **reasons** behind her decision regarding her exercise of “discretion”, the mandate of Coggle and other decisions cited by Appellant require that this Court conduct an independent, *de novo* review of the record.

2. The trial court's decision was unreasonable where it was not grounded on any reason and was ambiguous.

The abuse of discretion standard is not appropriate here, contrary to the Respondent's position. However, if this Court should hold that the abuse of discretion standard is the proper standard of review, this Court should hold that the court below abused that discretion and reverse and vacate the record of conviction.

The trial court abused its discretion where it did not give any tenable reason for deciding the way it did. The Respondent states in its brief that "the superior court's conclusion that vacation was inappropriate due to the seriousness of the underlying facts of Tamas's offense was entirely reasonable." Brief of Resp. at 8. But the trial court did not make a finding that "the seriousness of the underlying facts of Tamas's offense" was the basis for using its discretion and denying Appellant's motion. Rather, all the trial court said about the matter was that the motion was denied based on the "seriousness of that case." RP 13. In fact, there is no way to know what the judge meant when she ruled on the "seriousness of [Appellant's] case."

The Respondent, in an effort to bolster the non-existent findings of fact, attempts to justify the trial court's decision by pointing to the facts of the underlying charge, where it was alleged that Appellant had attempted to recruit an "assassin to murder the wife of her (purported) romantic partner." Brief of Resp. at 8. Putting aside the fact that Appellant never plead guilty to the original charge of Solicitation of Murder 2nd Degree but the much lesser charge of attempted assault 2nd degree, and also putting aside the understanding of the trial court that "[Appellant] did not stipulate to real facts when she pled guilty on the [attempted assault 2nd degree]" (RP 5), the State's effort is nevertheless irrelevant to the question before the Court.¹

This Court should not concern itself with the Respondent's *post hoc* justifications for why it thinks the trial court did or did not exercise its discretion. The only relevant inquiry here is what the trial

¹ Likewise, the Respondent's discussion of the vacation statute, R.C.W. 9.94A.640, and the Legislature's grant of discretion to the trial court through the use of the word "may" rather than "shall" is also irrelevant. Brief of Resp., pp 5-7. No one disputes that the trial court had discretion to make a decision. But even in cases where a court has discretion, a long history of case law is clear that a court may not simply make a decision without adequately explaining why. Where no such explanation was given and in fact information exists in the record to believe that the trial court based its decision on an erroneous interpretation of the law, review and reversal by this Court is proper. See Coggle, supra.

court actually said on the record itself. And the only word used by the trial court itself was “serious.” Under the law, a court may exercise its discretion for a legitimate reason. What it cannot do is exercise its discretion for no reason, or for an ambiguous reason, or for a legally untenable reason. Based on the information present in the record here, some or all of these things are exactly what happened in this case.

Without further elaboration by the court, it is unknown whether the court agreed with the State’s interpretation of the “seriousness of the case” or the Appellant’s legal interpretation of the word “serious.” Where such conflict and ambiguity exists, it cannot be said that a decision is based on tenable grounds or is manifestly reasonable. The trial court abused its discretion in this case.

CONCLUSION

Under any conceivable standard of review, the trial court’s decision was in error and ought to be REVERSED. Under a *de novo* standard of review, this Court stands in the shoes of the trial court and should then VACATE the Appellant’s record of conviction. An error of law committed by the trial court is an automatic abuse of discretion warranting reversal.

DATED THIS 10th day of JULY, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Derek T. Conom", written over a horizontal line.

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