No. 34177-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARVIN DOUGLAS MCCORMICK,

Appellant.

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Sergio Armijo, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove the essential "knowledge" element of the prosecution's case.

2. The trial court erred as a matter of law in holding failing to apply the law as it existed at the time of the offense in imposing the sentence and in interpreting current law as prohibiting even considering imposing a Drug Offender Sentencing Alternative sentence.

3. Appellant was deprived of his Article I, §22 and Sixth Amendment rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The only issue in this case was whether Mr. McCormick, who was in possession of pseudoephedrine, possessed it with the required knowledge and intent to facilitate or aid someone else in possessing it with the intent to manufacture methamphetamine and thus was an accomplice to that crime. Was the evidence insufficient to support the conviction where the prosecution relied on two "facts" to prove the required knowledge, one of which was an improper mandatory presumption and reliance on the other runs afoul of the *corpus delicti* rule?

Further, is reversal required where counsel's inexplicable ineffectiveness in failing to raise a *corpus delicti* objection and motion to dismiss prejudiced his client because such a motion would have been granted?

2. At sentencing, counsel asked for a Drug Offender Sentencing Alternative (DOSA) to be imposed. The sentencing court denied the request based solely upon the mistaken belief that Mr.

McCormick was not statutorily eligible for a DOSA because he had already received one such sentence in the past ten years.

Did the court err and violate RCW 9.94A.345 and the clear intent of the Legislature in applying the "ten-year" rule to Mr. McCormick where that rule was created in 2005 amendments to RCW 9.94A.660, Mr. McCormick's offense was committed in November of 2004, and the Legislature specifically declared that the amendments would only apply to crimes committed on or after October 1, 2005?

Further, where counsel knew in advance that the prosecution was going to argue that his client was not eligible for such a sentence based upon the 2005 amendments, was counsel prejudicially ineffective in failing to even conduct minimal investigation into the language of the statutory amendments to determine whether they applied, and in failing to present the sentencing court for any authority for his argument those amendments did not apply?

3. The 2005 amendments to the DOSA statute prohibited a court from considering imposing a DOSA sentence if the defendant had "received a drug offender sentencing alternative more than once in the prior ten years before the current offense." Did the sentencing court err in holding that these amendments meant that a defendant with a single prior DOSA sentence in the ten years could not receive a second DOSA as a matter of law?

Further, where counsel knew in advance that the prosecution was going to argue that the 2005 amendments precluded his client from receiving a DOSA, was counsel prejudicially ineffective in failing to even

read the relevant statute, let alone present its clear, plain language to the court?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Douglas McCormick was charged in Pierce County superior court by information with "acting as an accomplice" to the possession of pseudoephedrine or ephedrine with intent to manufacture methamphetamine on November 16, 2004. CP 1-2; RCW 69.50.440(1).

After a motion to continue before the Honorable James R. Orlando on October 6, 2005, pretrial and trial proceedings were held before the Honorable Sergio Armijo on October 10-12, 2005, after which the jury found Mr. McCormick guilty as charged.[1] CP 20.

At sentencing on November 18, 2005, Judge Armijo ordered Mr. McCormick to serve a standard range sentence of 100 months in custody, denying a requested Drug Offender Sentencing (DOSA) alternative. CP 27-37; SRP 10-11. Mr. McCormick appealed, and this pleading follows. CP 40-49.

2. Overview of facts[2]

Pierce County Deputy Kory Shaffer arrested Marvin McCormick on November 16, 2004, after a surveillance operation showed Mr.

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[1]The verbatim report of proceedings will be referred to as follows:
the volume containing October 6, 2005, as "1RP;"
the two volumes containing October 10-11, 2005, as "2RP;"
the volume containing October 12, 2005, as "3RP;"
the volume containing the sentencing of November 18, 2005, as "SRP."

[2]More detailed discussion of the facts relevant to the issues is contained in the argument section of this brief, *infra*.

McCormick trying to buy two boxes of cold and allergy pills containing pseudoephedrine at one store and buying pseudoephedrine pills at three other stores. 2RP 48-62. He was also seen throwing the empty box from the cold pills underneath the vehicle after leaving several of the stores. 2RP 58-61.

Mr. McCormick went from store to store in a car driven by Tina Perkovich, who also went into several stores and bought cold pills. 2RP 57-58, 60-61. The car was not licensed to Mr. McCormick or Ms. Perkovich and police were not sure to whom it belonged. 2RP 84-85. Mail for both Ms. Perkovich and Mr. McCormick were in the car. 2RP 75.

After Mr. McCormick was read his rights, he asked if he could "just make a deal" with the officer, acknowledged knowing that the officers had been "watching," and admitted that he bought some pills at several stores, including two about which the officers were unaware. 2RP 63. The deputy testified that Mr. McCormick said he bought the pills for about $6.00 and then sells them for $10.00 to an unknown person, a friend of a friend. 2RP 66-67. The deputy also testified that Mr. McCormick said the guy then made methamphetamine with the pills and that Mr. McCormick would then get "a cheaper price for meth." 2RP 67.

When Mr. McCormick was searched, he had a metal spoon in a pocket, which tested positive for methamphetamine. 2RP 68-69, 101-102. A receipt for Walgreens cold medicine was found in a red and black jacket in the passenger's side of the car, and another receipt was found on Ms. Perkovich. 2RP 69. Two boxes of Target brand cold medicine were on

the passenger's side of the vehicle's floor board and an empty box of Wal-Act cold on the floor of the floor board. 2RP 79. Under the driver's side of the vehicle were three "blister packs" of pseudoephedrine, in the front driver's side door storage was a vinyl bag with ten blister packs, and in the trunk of the vehicle were six blister packs and a plastic bag with four more. 2RP 76. Also inside the trunk, inside a separate bag, was a full bag of ammonium sulfate and a receipt for Spanaway Ace Hardware for a quart of muriatic acid. 2RP 77-80.

Deputy Shaffer had worked as a lab investigator, had manufactured methamphetamine, and described in detail the "anhydrous ammonia lithium method" for manufacturing that drug. 2RP 49-51. He testified that the first, "extraction" phase cannot be done without pseudoephedrine, a "precursor" to methamphetamine found often in cold tablets. 2RP 51. 2RP 51. The tablets have to ground into powder form and filtered through some type of alcohol and then trapped into a jar. 2RP 51. Once the ephedrine has thus been extracted from the pills, the second, "reaction" phase, occurs, in which the alcohol is boiled off on a hot plate and lithium and anhydrous ammonia are added. 2RP 51-52. At that point, the third, "gassing out" phase occurs when muriatic acid or sulfuric acid and rock salt are added to make hydrochloric gas and add it to the liquid and it will "gas out," forming crystals in the liquid which are methamphetamine. 2RP 52-53. That is usually put through a funnel into a coffee filter to dry. 2RP 54.

The deputy testified that manufacturers "typically work in teams," so that some people do one phase and others do other parts. 2RP 54. He

also testified that he "quite often" ran into people who "just specifically go buy precursors, such as your pills, your chemicals, your stuff to manufacture the anhydrous ammonia itself." 2RP 54.

Mr. McCormick admitted he was in possession of the pseudoephedrine but said he had bought it for someone "down on Hilltop" who would trade it for crack. 2RP 109, 11. He said he could get a $20 rock for a $6 expense of a 24 count blister pack. 2RP 111. A guy had told him that he could get his stuff for less money if he did it, and so Mr. McCormick did it twice. 2RP 112. Mr. McCormick said the man did not indicate what he was going to use the pseudoephedrine for and that he did not know. 2RP 112-13. Mr. McCormick explained that he was "strung out on crack" and that was all that mattered to him. 2RP 113. He did not care what the guy used the pills for. 2RP 113. He told the officer not that he was doing it to get a cheaper price for meth but rather to get a cheaper price for "drugs." 2RP 113. He has never seen methamphetamine produced except on a television special. 2RP 114. The car belonged to someone else and they had loaned it to him to go shopping for pills. 2RP 114. He said he did not realize or know there was any fertilizer in the trunk or that there had been muriatic acid. 2RP 115. He knew that psuedoephedrine was used for making methamphetamine but he assumed it was being used it "in their coke or something." 2RP 117. He did not ask what they were going to use it for, just wanting to get his stuff and leave. 2RP 117.

On cross-examination, when asked if people can get methamphetamine by getting ingredients the "cooks" need to make the

drug, he said, "I suppose so." 2RP 122. He said that "anybody could" do that but that he did not and that he was really not "that familiar" with that practice. 2RP 122-23. He freely admitted knowing that pseudoephedrine was used to manufacture methamphetamine, having read about that in the newspaper, but said he was getting the pseudoephedrine for a crack dealer and did not know it was going to be used to make methamphetamine. 2RP 124.

The deputy testified that he had never heard of anyone trading pseudoephedrine for crack, and that it is usually traded for methamphetamine. 2RP 81. A forensic scientist testified that he was not aware of any case in which he had analyzed cocaine and found it was cut with pseudoephedrine 2RP 105-106.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION ABSENT APPELLANT'S STATEMENTS AND COUNSEL WAS INEFFECTIVE

Under both the state and federal due process clauses, the prosecution is required to prove each essential part of its case, beyond a reasonable doubt. In re Personal Restraint of Davis, 152 Wn.2d 647, 824, 101 P.3d 1 (2004); 14th Amendment; Article I, § 3. Where the evidence is insufficient to support the conviction, reversal and dismissal is required. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In this case, this Court should reverse and dismiss, because the prosecution failed to meet its burden of proof on the crucial element of the required intent.

a. Relevant facts

At trial, the prosecutor argued that Mr. McCormick was guilty as an accomplice because he bought the pills and

> [h]e admitted that he knows pseudoephedrine is used to manufacture methamphetamine, and he admitted to Deputy Schafer that he was going to give the pills that he possessed to a guy who was going to use the pills to make meth. That makes him an accomplice, and that makes him guilty under the law. Pretty simple case.

3RP 6. Later, in rebuttal closing argument, the prosecutor agreed that the "one issue in this case" was "whether or not the defendant knew that the pills, the pseudoephedrine pills, were going to be used to manufacture methamphetamine." 3RP 21. He described the defense as that the defendant "didn't know" that fact, then declared that the only three possible purposes for methamphetamine: colds, cutting cocaine, and manufacturing methamphetamine. 3RP 22-23. He argued that the "cutting cocaine" purpose was not supported by the evidence as an actual purpose, and everyone knew this case was not about colds. 3RP 22-23. As a result, the prosecutor argued:

> Eliminate what did not happen; you are left with what did happen. Pseudoephedrine is going to be used to manufacture methamphetamine. That is the only possible thing that pseudoephedrine could be used for in this case, and the defendant knew it.
>
> How do we know that the defendant knew that pseudoephedrine would be used to make meth? Well, we just established there's no other reasonable purpose for it. The defendant has a ten-year history with methamphetamine. . .
>
> He know what pseudoephedrine is for, and he admitted it. He admitted it on the stand, and he admitted it to Deputy Schafer. He's specifically admitted to Deputy Schafer that he was giving the pills to someone who would use the pills to make meth, and the deputy specifically wrote that in his report.

3RP 24. The prosecutor then reminded the jury of Mr. McCormick's testimony at trial that he was honest with the deputy because he thought things would "go better" if he was, and that he probably "didn't fully understand accomplice liability" and that when he admitted he was "giving these pills to someone to make meth, he was making himself an accomplice. He was making himself guilty under the law." 3RP 25. The prosecutor argued that Mr. McCormick was guilty as a principal and an accomplice but that it was "more clear in this case that the defendant was going to give it to somebody else to manufacture methamphetamine, and that makes him an accomplice." 3RP 26.

Finally, the prosecutor argued that Mr. McCormick was guilty as an accomplice "if he knew or he should have known the pills would be used to manufacture methamphetamine," and

> [H]e knew the pills would be used to manufacture methamphetamine because there's no other purpose for pseudoephedrine. He has a ten-year history with meth. He admitted he knew what pseudo was used for, and he admitted to Deputy Schafer he was giving the pills for someone to use them to make meth. Deputy wrote that in his report.
>
> There's no way a reasonable person in the defendant's situation would not know that the pseudoephedrine was going to be used to manufacture methamphetamine. He, therefore, acted knowingly. A reasonable person would know pseudoephedrine would be used to manufacture meth.

3RP 28.

b. <u>The prosecution did not prove knowledge independent of appellant's statement and counsel was ineffective in failing to move for dismissal under the *corpus delicti* rule</u>

Mr. McCormick was charged with committing the crime of "acting as an accomplice" to possession of pseudoephedrine with intent to

manufacture methamphetamine. CP 1-2. Accomplice liability is defined in RCW 9A.08.020(3), which provides, in relevant part:

> A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it[.]

Under this statute, a defendant is not guilty as an accomplice for every possible crime the person they are an accomplice to might commit. State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2000). Instead, the statute does not provide for such "strict liability," but only provides for liability for the crime the defendant had "knowledge of" and took acts towards. 142 Wn.2d at 510. As the Supreme Court has held, in the accomplice liability statute, it is clear the Legislature "intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge,' the *mens rea* of RCW 9A.08.020." 142 Wn.2d at 211. While an accomplice need not have specific knowledge of the facts establishing every element of the crime committed by the principal, he must be shown to have general knowledge of the particular crime. 142 Wn.2d at 512.

In this case, the particular crime was possession with intent to manufacture methamphetamine. CP 1-2. As a result, to prove his guilt, the prosecution was required to prove that Mr. McCormick knew that the pseudoephedrine would be used to manufacture methamphetamine.

The prosecution failed to meet its burden in this case. The prosecution claimed that the required knowledge was proved by 1) the "fact" that anyone in Mr. McCormick's position would know that pseudoephedrine could be used for "nothing else" other than making methamphetamine and Mr. McCormick's admission that he knew pseudoephedrine was used to make the drug, and 2) Mr. McCormick's statements to the police in which the officers said he told them he planned on trading the pseudoephedrine to someone who would make methamphetamine with it to get a better price for the drug in return. 3RP 6, 21-28. Neither of those "facts" supported the conviction, however.

First, the prosecution was simply wrong as a matter of law when it claimed that Mr. McCormick's mere possession of the pseudoephedrine and knowledge it was an ingredient in methamphetamine was sufficient to prove his guilt. In State v. Whalen, 131 Wn. App. 58, 63, 126 P.3d 55 (2005), this Court specifically rejected the idea that the facts that pseudoephedrine is a known precursor to methamphetamine and that a person possesses a large amount of pseudoephedrine, even illegally, is insufficient to prove intent to manufacture. In addition, the majority rejected the idea that the mere attempt to acquire a large amount of pseudoephedrine illegally in a short period of time created a reasonable inference all by itself of such intent. 131 Wn. App. at 63-64. The Legislature had specifically made possession of more than three packages of pseudoephedrine within a 24 hour period a gross misdemeanor under RCW 69.43.110(2). Thus, it was clear to the majority that the Legislature did not intend for possession of a certain number of boxes of

pseudoephedrine cold medicine was by itself proof of intent to manufacture. Whalen, 131 Wn. App. at 65. Otherwise, it would not have created the separate misdemeanor of possession of such an amount and the felony of possession of any amount with intent to manufacture. 131 Wn. App. at 65.

As a result, mere possession with of a number of boxes of pseudoephedrine cold medicine, even with the knowledge that such medicine is used to manufacture methamphetamine, is not sufficient to prove an intent to manufacture. It necessarily follows that Mr. McCormick's possession of pseudoephedrine and his knowledge that it can be used to manufacture methamphetamine is not sufficient to prove that he *knew* he was facilitating or aiding someone who had an intent to manufacture. That is especially true here because RCW 69.43.110(3) and (4) makes it also a gross misdemeanor to sell or distribute pseudoephedrine unless they are licensed to do so. The Legislature clearly thus indicated that it did not intend that mere selling or transfer of pseudoephedrine would be a felony unless the prosecution also proved the required element of knowledge that such a sale or transfer was going to specifically facilitate this particular buyer or transferee in possessing it with intent to manufacture methamphetamine.

Indeed, the prosecutor's argument effectively amounts to an improper mandatory presumption - that everyone who possesses *any* amount of methamphetamine and gives it to anyone else is presumed to have committed the crime of being an accomplice to possession with intent to manufacture, even if the prosecution presents no evidence that the

defendant had any knowledge that the specific person to whom he was acting as an accomplice had any intent to manufacture methamphetamine. As noted in Whalen, however, the Legislature did not intend for strict liability and the statute is not so written. 131 Wn. App. at 63.

In addition, mandatory presumptions which relieve the prosecution of the burden of proving an essential element of its case are unconstitutional. See State v. Cantu,156 Wn.2d 819, 132 P.2d 725 (2006). A burden is deemed shifted if the trier of fact is told to draw "a certain inference upon the failure of the defendant to prove by some quantum of evidence that the inference should be drawn." State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The prosecution's argument here told the jury to draw just such an improper inference by finding that proof of possession of pseudoephedrine coupled with the general knowledge that it is used to make methamphetamine was *prima facie* evidence of knowledge that anyone to whom the pseudoephedrine was given would necessarily be using it to manufacture methamphetamine. The only way around the presumption was for the defense to present evidence that despite the possession and general knowledge of the drug's use, the defendant had no specific knowledge of the intent of this particular person.

The prosecution's evidentiary presumption that *anyone* would know that pseudoephedrine was used for methamphetamine manufacture relieved it of its constitutionally mandated burden of proving the essential element of Mr. McCormick's knowledge, as required for accomplice liability. That presumption did not amount to sufficient evidence to prove knowledge and thus the conviction cannot be upheld as supported by such

evidence based on the presumption.

The only remaining basis upon which the prosecution's claim of "knowledge" rests is Mr. McCormick's statement, as reported by police, that he was getting the pseudoephedrine to trade to some guy who would make methamphetamine with it and give Mr. McCormick a better deal on methamphetamine. Reliance on those statements to support the conviction, however, runs afoul of the *corpus delicti* rule. That rule prohibits conviction based upon confession alone. See State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). Instead, the prosecution must provide evidence - independent of the defendant's statements- which proves the necessary elements of the crime. See State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

In this case, the evidence is insufficient to prove the essential element of knowledge, without Mr. McCormick's statements to police. As a threshold matter, this issue is properly before the Court. In general, because the corpus delicti rule is not grounded in the constitution, objection below is required to preserve the issue for appeal. See State v. C.D.W., 76 Wn. App. 761, 763-64, 887 P.2d 911 (1995). Here, however, it is Mr. McCormick's position that counsel was ineffective in failing to raise an objection below based on the *corpus delicti* rule. This Court can review the issue. See C.D.W., 76 Wn. App. at 763-64.

On review, this Court should reverse. Failure to raise a *corpus delicti* objection is deficient performance where the evidence was insufficient to establish the elements of the crime, absent the defendant's statements. C.D.W., 76 Wn. App. at 763-64. Here, the evidence was

insufficient to establish that Mr. McCormick was "knowingly" assisting or aiding (i.e. an accomplice) possession with intent to manufacture, absent his statement to police. Evidence is only sufficient to prevail against a *corpus delicti* challenge if there is "evidence of sufficient circumstances which would support a logical and reasonable inference" that the elements of the crime were proved. Vangerpen,125 Wn.2d at 796; see Aten, 130 Wn.2d at 656. In reviewing the evidence in this situation, the Court assumes its truth and takes it in the light most favorable to the state. See State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2000).

Thus, in Whalen, a defendant was caught shoplifting multiple boxes of cold medicine and the conviction of possession of pseudoephedrine with intent to manufacture methamphetamine was in violation of the *corpus delicti* rule. 131 Wn. App. at 61-62. The only evidence of intent to manufacture was the defendant's admission that he knew why people used pseudoephedrine, that he was not the cook and someone else was, and that he was getting the pseudoephedrine to give to the cook to satisfy a "marijuana debt." 131 Wn. App. at 61-62.

In reversing, this Court noted that, absent the admissions to police about what he was going to do with the methamphetamine, the evidence was insufficient to prove the required intent to manufacture methamphetamine, even though the defendant had stolen a large amount of cold medicine. 131 Wn. App. at 63; see also, State v.Cobelli, 56 Wn. App. 921, 922, 788 P.2d 1081 (1990) (insufficient evidence that possessed marijuana with intent to deliver even though officers saw him carry on a series of short communications with "clusters" of people outside a

convenience store and officers testified the "manner in which it was happening [was] real indicative" of what had been seen "before in the sales and purchase of drugs").

Here, absent the improper presumption that all pseudoephedrine is by definition going to be used for manufacturing, the only evidence Mr. McCormick had any knowledge that the person he was thinking of selling or trading the pseudoephedrine to was going to use it to manufacture methamphetamine were his statements as the police related them. Indeed, the prosecution specifically relied on those statements for that purpose. 3RP 6 ("he admitted to Deputy Schafer that he was going to give the pills that he possessed to a guy who was going to use the pills to make meth. That makes him an accomplice[.]"); 3RP 24 ("[h]e specifically admitted to Deputy Schafer that he was giving the pills to someone who would use the pills to make meth[.]"); 3RP 25 (admitting he was giving the pills to someone who was going to make meth made him "guilty" as an accomplice); 3RP 28 (he "admitted to Deputy Schafer he was giving the pills for someone to use them to make meth").

At trial, Mr. McCormick testified to the contrary, that he was planning on giving the pseudoephedrine to a "crack" dealer so he assumed it was going to be used in some way in relation to that drug. 2RP 109-13.

Thus, had counsel made the motion to dismiss based on *corpus delicti*, it would have been error not to grant it. Counsel's failure to make the required motion consigned his client to be convicted based solely on his word, in violation of the *corpus delicti* rule. There could be no tactical error to fail to raise the objection where, as here, the defense position was

always that Mr. McCormick did not have the required knowledge and the need to keep out the statements was so clear. Counsel's performance fell below an objective standard of reasonableness when he failed to raise the *corpus delicti* motion, and that performance clearly prejudiced Mr. McCormick. This Court should reverse.

2. THE COURT ERRED IN HOLDING THAT APPELLANT WAS NOT ENTITLED TO HAVE THE COURT CONSIDER A DRUG OFFENDER SENTENCING ALTERNATIVE UNDER EITHER CURRENT OR FORMER LAW AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

One of the sentencing alternatives defendants may request in drug cases is a Drug Offender Sentencing Alternative (DOSA). See RCW 9.94A.660(1) (2005). In general, appellate courts do not review a trial court's decision whether to grant or deny a DOSA sentence. See State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). A defendant is entitled, however, to have the court review the denial of a request for a DOSA in order to correct a legal error or an abuse of discretion. See State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). In addition, a defendant may challenge the procedure by which a sentence was imposed and is entitled to have a trial court give a request for a DOSA sentence "meaningful consideration." Grayson, 154 Wn.2d at 342.

In this case, even if the Court does not reverse and dismiss based on the insufficiency of the evidence and counsel's ineffectiveness on that point, reversal of the sentence is required because the court erred by failing to apply the law in effect at the time of the offense and refusing to even consider whether Mr. McCormick should receive a DOSA, and by its

erroneous interpretation that the current version of the DOSA statute precluded consideration of a DOSA in this case. Further, counsel was, again, prejudicially ineffective in representing his client.

a. Relevant facts

At the sentencing hearing before Judge Armijo on November 18, 2005, the proceedings started with counsel passing forward some letters on behalf of Mr. McCormick, and the judge stated, "[y]ou could have provided this to me a little bit early, counsel." SRP 2. Counsel said only, "[s]orry, Your Honor," and time was then taken on the record while the judge read the letters, which were in support of Mr. McCormick. SRP 3.

Sentencing then proceeded and the prosecutor argued against the DOSA request by the defense, stating that the DOSA statute "as recently amended" only allowed a defendant to receive one such sentence every ten years. SRP 3. He noted that Mr. McCormick had received such a sentence less than ten years before and argued that the "only sentencing option range available to the Court is a standard range sentence of 100 to 120 months." SRP 3.

Counsel then stated:

> I think this issue we have here with regard to DOS[]A is - - and I'm not sure here, there may be something in the statute that says that - - is kind of an ipso facto thing but at the time of this occurrence, at the time the crime was committed, this ten-year limitation wasn't in place. And so I think DOS[]A is an option.

SRP 4. Counsel also argued that someone "sold [Mr. McCormick] the bill of goods" by entering the prior DOSA on a very short case "[s]o he ends up burning a DOS[]A, basically, on a very modest offense." SRP 4. He stated that courts now recognize that it such a short DOSA was "just not

enough time to provide oversight and treatment for people." SRP 4. He noted that Mr. McCormick had been out of custody for most of the trial and had successfully completed an inpatient treatment program during that time, as well as completing the "Break The Cycle" (BTC) program. SRP 4-5.

Mr. McCormick addressed the court and talked about his addiction and his work on recovery, especially in the BTC program. SRP 6-7. After his release from the voluntary inpatient program, he had immediately moved into a "clean and sober" environment and he began building "a new network of nonusing and in-recovery friends." SRP 7. He stated that the BTC program changed his life and gave him "a new, positive direction to go." SRP 8. He also stated his new understanding that "hiding behind drugs is really to cop out on life," and that he was excited for the future and hoped to continue in treatment. SRP 10.

The prosecutor then told the court he did not "want to spend a long time debating whether or not Mr. McCormick is an appropriate candidate for DOS[]A because he is simply not statutorily eligible under the RCW." SRP 10.

In denying the request for a DOSA sentence, the court told counsel:

> You bring the issue of whether this new statute is retroactive. Something more than just argument needs to be done. Some type of statutory analysis as to when this statute came into effect and why and how. Just to argue, I take this to be just like any other deferred prosecution or any type of program that people go through. He's gone through one. He doesn't qualify for a second one, not within ten years. That's the way I see it.

SRP 10. The court then imposed the "minimum" under the standard range, for a sentence of 100 months in custody.

b. The sentencing court erred as a matter of law because Mr. McCormick was statutorily eligible to be considered for a DOSA

The sentencing court erred as a matter of law in refusing to even consider Mr. McCormick as a candidate for DOSA based upon the erroneous belief he was not statutorily eligible to receive such a sentence. First, the court erred and violated RCW 9.94A.345 and the plain language of the 2005 amendments to the DOSA statute in applying them to this sentencing rather than the law in effect at the time the crime was committed. Second, even if the current law applied, the plain language of the statute made it clear Mr. McCormick was still statutorily eligible for a DOSA.

Under the current version of RCW 9.94A.660(1)(f) (2005), a defendant may not receive a drug offender sentencing alternative if he has received such a sentence "more than once in the prior ten years before the current offense." That portion of the statute was added by Laws of 2005, ch. 460, § 1, which was not effective until October 1, 2005. Laws of 2005, ch. 460, § 1. Prior to that date, there was no limit to the number of DOSA sentences which could be imposed for an otherwise qualified individual within any time period. See former RCW 9.94A.660(1)(2002).

RCW 9.94A.345 provides that "[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was *committed.*" (Emphasis added). This statute was enacted in 2000 and one of its stated purposes was "to clarify the applicability of statutes creating new sentencing alternatives *or modifying the availability of existing alternatives.*" Laws of 2000, ch. 26, § 1

(emphasis added); see State v. Smith, 144 Wn.2d 665, 681, 30 P.3d 1245 (2001), superseded by statute in part and on other grounds as noted in State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Mr. McCormick's offense was committed on November 16, 2004. CP 1-2. Thus, clearly, under RCW 9.94A.345, Mr. McCormick was entitled to have the court apply the law in effect in 2004, former RCW 9.94A.600(1) (2002), not the version which included the limitations added by the Legislature after the offense was committed, in 2005.

Indeed, the Legislature itself declared that the 2005 changes were not applicable to Mr. McCormick's case. Laws of 2005, ch. 460, § 2 specifically provides that the act "applies to sentences *imposed on or after the effective date of this act*," and § 3 provides that the act "takes effect October 1, 2005." (Emphasis added). With these provisions, the Legislature has clearly stated its intent that the 2005 amendments to the statute should operate only prospectively.

Notably, courts have repeatedly held that the eligibility and requirements for a DOSA sentence, when changed, cannot apply retroactively. See In re Sentencing of Holt, 105 Wn. App. 619, 622, 20 P.3d 1033 (2001); State v. Kane, 101 Wn. App. 607, 617-18, 5 P.3d 741 (2000). And RCW 10.01.040, the "criminal prosecution saving statute," "presumptively saves all offenses already committed, and all penalties or forfeitures already incurred, from being affected by the amendment or repeal of a criminal or penal statute." Kane, 101 Wn. App. at 609.

Thus, the sentencing court erred in applying the 2005 amendments to the DOSA statute for a crime which occurred in 2004. The 2005 limit

on the number of DOSA's for which a person may be eligible did not apply.

In any event, even if it *had* applied, the limit added in 2005 did not support the court's decision that Mr. McCormick was statutorily ineligible to be considered for a DOSA in this case. Current RCW 9.94A.660(1) (2005) provides, in relevant part:

> An offender is eligible for the special drug offender sentencing alternative if:
>
> . . .
>
> (f) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

Thus, the statute does not, even now, provide that a person is not eligible to receive a DOSA if they have received such a sentence once within the past ten years. It prohibits a DOSA only if the defendant has received a DOSA *more than once* in that time.

Mr. McCormick had only received one prior DOSA within the past ten years. He was still eligible for a DOSA even under the current version of the statute. The trial court erred in holding otherwise.

Because the trial court erred as a matter of law in holding that Mr. McCormick was not statutorily eligible to be considered for a DOSA, reversal is required to allow the court to conduct the required evaluation of whether Mr. McCormick should receive such a sentence, rather than 100 months in custody, for this crime. See Holt, 105 Wn. App. at 622. This is especially true because here, had the court not thought Mr. McCormick was statutorily ineligible for a DOSA, it is likely the court would have granted a DOSA sentence. The court gave Mr. McCormick the very

bottom of the standard range, and heard evidence about his significant progress in treatment and the great strides he had made. Indeed, Mr. McCormick was a very strong candidate for the DOSA treatment, given his minimal role and link to the suspected manufacturing and the fact that his involvement was fueled not by financial motivations but by his addiction. Reversal and remand with instructions to consider Mr. McCormick's eligibility for a DOSA sentence is required. See Holt, 105 Wn. App. at 622.

c. Counsel was again prejudicially ineffective

In a hearing on remand, new counsel should be appointed, because the sentencing proceeding, like the trial, reveals counsel again as ineffective in his actions - and lack of action - on his client's behalf.

Counsel is ineffective if his performance falls below an objective standard of reasonableness and that deficiency prejudiced the defendant. State v. Stenson, 132 Wn.2d 668, 705-706, 940 P.2d 1239 (1997), cert. denied sub nom Stenson v. Washington, 523 U.S. 1008 (1998). While there is a presumption that counsel was effective, that presumption can be overcome by evidence of such things as the attorney's failure to properly investigate, determine appropriate defenses, or properly prepare for trial or sentencing. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). To amount to ineffectiveness, there must be no legitimate strategic or tactical rationale for the conduct, at least none that any reasonably competent attorney would find reasonable. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In this case, counsel was clearly prejudicially ineffective. First, counsel failed to present the court with letters in support of Mr. McCormick at an appropriate time in order to give the court the opportunity to fairly consider them. SRP 1-3. Instead, he waited to present them at sentencing, even though a number of them were apparently written almost a week before. See Supp. CP ___ (Letters in support,11/22/05). And this clearly angered or frustrated the court, which saw the need to chastise counsel for his lateness. SRP 1-3. Counsel gave no excuse for this failure. 3RP 1-3.

More important, however, was counsel's failure to even *know the law about which he was arguing*. As noted above, the prosecution's declaration of the "ten-year" clause in the current statute was erroneous, and only someone with *more* than one DOSA was ineligible for a DOSA on a current offense. The prosecutor had apparently told counsel prior to sentencing, that he would be arguing Mr. McCormick was statutorily ineligible for a DOSA based on the new subsection of RCW 9.94A.660 (2005), showing him the "proof" of the prior DOSA. SRP 3. Yet counsel apparently did not even read the statute, because if he had he would certainly have brought the prosecution's misreading of the statute - and Mr. McCormick's eligibility under the actual language - to the court's attention. While Mr. McCormick contends that the court's error of law is, by itself reviewable, it cannot be doubted that the experienced Honorable Judge would have followed the plain language of the statute had that been provided to him.

Further, counsel failed to provide the court with any authority

whatsoever that the 2005 amendments should not apply, and did not even appear to know himself. See SRP 4 (noting that the statute might have an "ipso facto" clause in it but he did not know). Again, the court was clearly frustrated by counsel's lack of preparation and faulted his client for it by failing to even consider counsel's arguments. SRP 10. And again, as noted above, had counsel conducted even rudimentary investigation into the 2005 amendments he would have seen the plain language in sections 2 and 3, making the Legislature's intent clear. Had counsel simply provided the court with an easily available copy of the chapter law, the court would have seen that the prosecution was in error and that the amendments did not apply to Mr. McCormick's case.

Counsel's failure to even engage in minimal preparation and investigation on his client's behalf at sentencing was clearly prejudicial to Mr. McCormick. As a result of those failures, the court refused to even consider a DOSA sentence, for which Mr. McCormick was actually qualified and which it is likely he would have otherwise received. No reasonable attorney would so fail to know the law and be prepared to argue and present it on his client's behalf. See, e.g., State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (counsel's failure to object to legally improper instructions was ineffective where it allowed the client to be convicted under a statute which did not apply). Nor could such a complete failure to provide a client with even minimally competent assistance at sentencing amount to a "tactical decision." This Court should reverse the sentence not only because the sentencing court erred as a matter of law in finding Mr. McCormick statutorily ineligible for a DOSA but also because

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Pierce County Prosecuting Attorney's Office, 946 County City Building, 930 Tacoma Avenue S., Tacoma, Washington, 98402;

to Mr. Marvin D. McCormick, DOC 756508, McNeil Island Corr. Center, P.O. Box 88-1000, Steilacoom, WA. 98388.

DATED this 24th day of July, 2006.

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