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NO. 35958-8

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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

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STATE OF WASHINGTON, RESPONDENT

v.

RICHARD CARLSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick

No. 06-1-03535-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court treat the trial court's findings of fact and conclusions of law as verities on appeal when defendant has failed to support his assignments of error with citations to the record, argument or authority, or by supporting his claims with substantial evidence?
2. Was the evidence sufficient to support the trial court's finding of guilt?
3. Is defendant entitled to a new sentencing hearing when the trial court erred in finding that defendant was ineligible for a DOSA sentence?
4. Did defendant receive effective assistance of counsel?

B. STATEMENT OF THE CASE.

1. Procedure

On July 31, 2006, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, RICHARD LEE CARLSON, hereinafter "defendant", with one count of first degree escape and one count of unlawful possession of a controlled substance cocaine. CP 1-2<sup>1</sup>.

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<sup>1</sup> CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on September 13, 2006.

2RP refers to the verbatim report of proceedings that occurred on December 13, 2006.

3RP refers to the verbatim report of proceedings that occurred on January 30, 2007.

4RP refers to the verbatim report of proceedings that occurred on February 23, 2007.

Defendant waived his right to a jury trial, and the court conducted a colloquy to ensure defendant's waiver was knowing, voluntary and intelligent. 3RP 4.

A bench trial commenced on January 30, 2007, before the Honorable Lisa Worswick. 3RP 3. At the conclusion of trial, the court found defendant guilty of first degree escape and unlawful possession of a controlled substance cocaine. 3RP 90-91. Defendant filed a timely appeal. CP 16-26.

## 2. Facts

On July 29, 2007, defendant was a resident of the RAP Lincoln Work Release Facility. 3RP 54. Defendant was approved to work for Brush Works, a painting company, as part of his work release program. 3RP 54, 68. That morning, defendant signed out at 7:26 a.m. with a work pass, and was scheduled to return by 6:30 p.m. 3RP 54-55. Defendant acknowledged his daily schedule by signing out in the morning. 3RP 56-57.

That evening, Mr. Walkup, a program monitor employed to track inmate compliance with the work release program, took a call from Mr. Parker, a former work release inmate and current foreman employed at Brushworks. 3RP 50, 58. Mr. Parker requested an extension for defendant's work pass, because he needed defendant to put in overtime. 3RP 58. Mr. Walkup authorized the overtime until 9:30 p.m., and granted

defendant up to 2 hours of travel time back to the facility. 3RP 58. Mr. Walkup clearly informed Mr. Parker of defendant's deadline. 3RP 59. Mr. Parker told Mr. Walkup that defendant would be back to the facility well before his extended deadline. 3RP 59.

At about 10:00 p.m. that evening, Officer Gary Tracy, with the Puyallup Tribal Police Department, was on patrol duty at or near the 2200 block of East Browning in Tacoma, Washington. 3RP 17-19. Officer Tracy noticed a white van parked on the opposite side of Browning, facing the wrong direction and parked pointing down the hill. 3RP 20. Officer Tracy became concerned because the van was parked on a gravel shoulder near a steep drop off. 3RP 21.

When Officer Tracy pulled up behind the vehicle with his lights and spotlight activated, he noticed both the driver and passenger making movements as if they were pulling their pants up or putting clothing back on. 3RP 21. Because of his position behind the van on the steep incline, Officer Tracy could see into the van through its windows. 3RP 22.

Officer Tracy contacted defendant, who was seated in the driver's seat. 3RP 23. Defendant told Officer Tracy that he and the passenger were just talking, and that he had picked up the passenger on South Tacoma Way. 3RP 22, 25. Defendant gave Officer Tracy his identification, and told him that he was on work release and was supposed to have been back to his facility by 6:00 p.m. 3RP 23, 27. Officer Tracy arrested defendant for escape. 3RP 27.

When searching the van incident to defendant's arrest, Officer Tracy discovered a whitish-colored crumb substance scattered across the dash from the passenger side to the driver's side of the van. 3RP 28. Believing that the substance resembled crack cocaine, Officer Tracy collected it. 3RP 28. The substance field tested positive as crack cocaine. 3RP 28. Defendant was then charged with unlawful possession of a controlled substance cocaine. 3RP 28.

At 11:00 p.m., defendant had still not reported back to the facility. 3RP 59. Mr. Walkup attempted to reach defendant's supervisor, but was unable to reach him. 3RP 60. Mr. Walkup eventually reached Mr. Parker on his cell phone. 3RP 60. Mr. Walkup was told by Mr. Parker that defendant had just been dropped off at the bus stop but that Mr. Parker would go back to the bus stop to find out why defendant was delayed. 3RP 60.

Approximately 15 minutes later, Mr. Parker called Mr. Walkup and informed him that defendant had been arrested by the police. 3RP 60.

At trial defendant testified that on July 29, 2006, he had parked on the side of the road in order to allow his passenger to finish drinking a beer. 3RP 70. During cross examination, defendant admitted that he had numerous prior convictions involving acts of dishonesty. 3RP 76. Defendant also admitted that at the time he was contacted by Officer

Tracy, he was neither at his work site, nor in the process of returning to his work release facility, and did not have permission to engage in the activities he was doing. 3RP 77.

C. ARGUMENT.

1. THIS COURT SHOULD TREAT THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AS VERITIES ON APPEAL AS DEFENDANT HAS FAILED TO SUPPORT HIS ASSIGNMENT OF ERROR WITH CITATIONS TO THE RECORD, ARGUMENT OR AUTHORITY. MOREOVER, THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Hill, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings

were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; see also, State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

In the present case, defendant challenges the trial court's Finding of Facts and Conclusions of Law. (See Appendix A). While defendant argues that these findings are inadequate on the basis that they lack sufficient specificity, he has failed to provide argument in the brief as to how these findings are unsupported by the evidence. Brief of Appellant. Defendant fails to substantiate his challenge by citing to the record or arguing why the finding was insufficient to persuade a fair-minded, rational person of the truth of the finding. Because defendant has failed to support his assignment of error to the trial court's findings of fact with argument, citations to the record, and applicable citations to authority, this court should treat the assignment as being without legal consequence. The finding should be considered a verity upon appeal.

Moreover, the court's Findings of Fact and Conclusions of Law are supported by substantial evidence. Prior to the start of trial, defendant

stipulated that he was being detained in a work release facility, pursuant to a felony conviction, and that the State would be able to prove both the felony charge and defendant's placement in the work release facility beyond a reasonable doubt. 3RP 11. Defendant also stipulated that the drug test conducted on the substance found in the van he was driving at the time of his arrest was accurate. 3RP 11.

At trial, John Walkup testified that he is a program monitor at the RAP House/Lincoln Park Work Release, and was on duty the night defendant's supervisor requested approval for defendant to work additional hours. 3RP 49-50, 57-58. Mr. Walkup testified that defendant was authorized to work for Brush Works, and that he extended defendant's overtime until 9:30 p.m., plus a 2-hour travel time on the evening of July 29, 2006. 3RP 54, 58.

Officer Gary Tracy, with the Puyallup Tribal Police Department, testified that on July 29, 2006, at about 10 p.m. he discovered a white van, driven by defendant, parked on the opposite side of the street facing the wrong direction, and pointing down a hill on Browning Street. 3RP 20. Officer Tracy contacted the driver, who told him that he and the passenger were "just talking." 3RP 22. Defendant identified himself for Officer Tracy and stated that he was on work release and was to have been back by 6 p.m. that day. 3RP 27. After verifying defendant's work release status, Officer Tracy arrested him for escape. 3RP 28. When searching the van incident to defendant's arrest, Officer Tracy noticed a white

colored crumb substance scattered across the center console. 3RP 28. The substance field tested positive as crack cocaine. 3RP 28. Defendant was then charged with possession of cocaine. 3RP 28.

The above facts constitute substantial evidence because they provide the court with a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Therefore, the trial court's Findings of Fact and Conclusions of Law are binding on the appellate court. This court should not reverse defendant's convictions on this basis.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT'S FINDING OF GUILT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983), see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989), State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993), State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990), State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988), State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965), State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In the present case, despite defendant's challenges to the sufficiency of the evidence as argued in the following subsection, when viewed in the light most favorable to the State, the evidence in this case is sufficient to support the trial court's finding that defendant committed escape knowingly.

- a. The trial court properly found that defendant committed escape knowingly, when any rational trier of fact would have determined beyond a reasonable doubt that defendant knowingly escaped from work release.

A charge of escape in the first degree requires that the State prove that defendant, having been charged with a felony, knowingly escaped from custody. RCW 9A.76.120(1)(b). The State bears the burden of proving these elements beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In the present case, the only element of the charge challenged by defendant is whether he acted

knowingly. However, the State met its burden of establishing that defendant, having been charged with a felony, knowingly escaped from custody.

A person acts knowingly when he is aware of a fact, facts, or circumstances or result described by a statute defining an offense, or he has information which would lead a reasonable man in the same situation to believe that facts exist which are described by a statute defining an offense. RCW 9A.08.010(1)(b)(i) and (ii). In Christian, the court ruled that the State bears the burden of demonstrating that a defendant, charged with first degree escape, knew that his actions would result in leaving confinement without permission. State v. Christian, 44 Wn. App. 764, 771, 723 P.2d 508 (1986). The Christian court found that because the defendant knew he was required to comply with the work release facility rules but failed to sign out or report back, it is a “matter of logical probably that [defendant] knew his actions would result in leaving the facility without permission.” Christian at 771.

Similarly here, defendant also knew that he was required to comply with the rules of the work release facility but failed to adhere to the activities authorized by his community corrections officer, and as allowed within his daily work pass.

At trial, Mr. Walkup testified that each resident of the work release facility has their own corrections officer who determines whether or not each resident is approved to work. 3RP 50. Mr. Walkup was responsible

for monitoring the compliance of the residents and ensuring they returned back to the facility on time. 3RP 51. Before leaving the facility each time, a resident must sign out and indicate that he knows what time he is to report back and that he is going to be out in the community for his permitted purpose. 3RP 51.

On July 29, 2006, defendant signed out on a work pass to Brush Works at 7:26 a.m. 3RP 54. Defendant acknowledged being due back at 6:30 p.m. when signing out. 3RP 54. That evening, Mr. Walkup received a phone call from Mr. Parker, a foreman for defendant's employer, requesting an extension of defendant's work pass so that defendant could work until 9:30 p.m. that night. 3RP 58. Mr. Walkup authorized an extension to work until 9:30 p.m., plus up to two hours of travel time. 3RP 54, 58. When doing so, Mr. Walkup clearly told Mr. Parker that defendant's deadline to return was 11:30 p.m., to which Mr. Parker responded that defendant would be back well before that. 3RP 59. However, defendant never returned to the work release facility that night. 3RP 60.

At trial, Officer Tracy testified that at about 10:00 p.m. on the night of July 29, 2006, he came into contact with defendant who was seated in a white van pulled off to the side of East Browning. 3RP 18-20. Defendant provided Officer Tracy with his identification, and told the officer that he was on work release and needed to be back at his facility by 6 p.m. 3RP 23, 27.

On cross-examination, defendant admitted that at the time he was contacted by Officer Tracy he was not at a job site, or traveling from a jobsite. 3RP 77. Defendant also admitted that neither his community corrections officer, nor Mr. Walkup, had authorized him to pick up strangers during his scheduled work time. 3RP 79.

When viewing the above evidence in the light most favorable to the State, it clearly supports the conclusion that defendant knowingly failed to return to his work release facility, and thus committed first degree escape. At the time of his arrest, defendant failed to report back to his facility, despite knowing that he was due back and having knowledge of the policies of the facility and the limitations of his work pass. Additionally, defendant knew he was not authorized to pick up passengers and park beside the road with them. This evidence would have led a reasonable person to believe that he was committing escape by failing to return on time or to operate within the program requirements.

Prior to leaving on the morning of July 29, 2006, defendant signed a check-out sheet, acknowledging that he was due back to the facility by 6:30 p.m. 3RP 54. Mr. Walkup clearly informed Mr. Parker that although he was granting defendant an extension, defendant was to leave work and return to the facility immediately. 3RP 59. Mr. Parker acknowledge this instruction and told Mr. Walkup that defendant would be back well before 11:30 p.m. 3RP 59. The evidence is therefore sufficient to establish that

defendant knew he was violating the terms of his work release by engaging in non-authorized activities, and by failing to report back by the time at which he was due back.

Upon viewing the above evidence in the light most favorable to the State, and drawing all reasonable inferences in favor of the State, it is clear that any rational trier of fact would have determined beyond a reasonable doubt that defendant knowingly escaped from his work release program, as the record contains substantial evidence to support this finding.

Defendant's conviction may not be reversed.

3. THE DEFENDANT IS ENTITLED TO A NEW SENTENCING HEARING, AS THE COURT ERRED IN FINDING THAT DEFENDANT WAS INELIGIBLE FOR A DOSA SENTENCE.

As a sentencing alternative, an offender may request a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. The DOSA program is an attempt to provide treatment for some offenders judged likely to benefit from it. It 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. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

A DOSA is a decision left to the discretion of the trial judge. Grayson, at 335. As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. State v. Conners, 90 Wn. App. 48, 52,

950 P.2d 519 (1998). However, an appellant is not precluded from challenging on appeal the procedure by which a sentence was imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Despite the broad discretion given to the trial court under the Sentencing Reform Act, the trial court must exercise its discretion within the confines of the law. Grayson, at 335.

While defendant is not entitled to automatically receive a DOSA sentence simply by requesting it, he is entitled to have the court consider his request for an alternative sentence. Grayson at 342. Appellate review is not precluded from the correction of legal errors or abuses in discretion in the determination of what sentence applies. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Challenges to the appropriateness of a court's sentencing eligibility decision are challenges of legal error, and are available for appellate review. Williams at 147.

Current provisions governing offender eligibility for DOSA state that an offender is eligible for the special drug offender sentencing alternative if the offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense. RCW 9.94A.660(1)(f). At the time of defendant's sentencing on February 23, 2007, he had previously received a DOSA sentence in 2003.

At sentencing, defense counsel requested that defendant be granted a DOSA if he could qualify for one, as he had only received one previously. 4RP 5. The court responded by stating, “Well I think if he’s failed a DOSA as recent as 2003, he’s not qualified for a DOSA.” 4RP 6. Defense counsel responded that he couldn’t be sure that was the case. 4RP 6. After reviewing the relevant statute, the court denied defendant’s request for a DOSA, stating:

My reading of the DOSA statute is that the defendant is ineligible and that DOSA is only available once every 10 years. If he has received a DOSA sentence, whether he completed it or whether he failed it appears to be irrelevant to the statute.

4RP 6.

The first part of this ruling appears to be a finding that the defendant is ineligible for a DOSA sentence because a defendant may only receive one every ten years. However, the second portion of the ruling may be a discretionary determination that defendant does not merit a DOSA as he previously failed to complete one. The State submits that this record is ambiguous as to whether the court was rejecting a DOSA sentence based upon an error of law or as a result of a discretionary determination. If the court was finding defendant ineligible as a matter of law, defendant would be entitled to a new sentencing hearing.

Because the court may have erroneously considered defendant to be ineligible for a DOSA, the State agrees to a new sentencing hearing,

where the court can clarify whether or not it was making a discretionary ruling rejecting a DOSA sentence. If the court indicates that it did not believe that defendant was legally eligible for a DOSA, the court may reassess its sentence based upon a correct assessment of defendant's eligibility.

4. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The court in Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986), stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Washington Supreme Court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

The Washington Supreme Court, in State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991), gave further clarification to the intended application of the Strickland test. The Lord court held:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Strickland, at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. Because [the defendant] must prove both ineffective assistance of counsel

and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. Strickland at 697; Lord, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. State v. Hayes, 81 Wn. App. 425, 442, 914 P.2d 788 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective

assistance of counsel. Lord, 117 Wn.2d at 883. Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336. Defendant may not supplement the record on direct appeal. Id. If a defendant wishes to raise issues on appeal that requires evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. See Washington State Bar Ass'n, Appellate Practice Desk Book § 32.2(3)(c), at 32-6 (2d ed. 1993) (citing State v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)). Finally, in determining whether trial counsel's performance was deficient, counsel's actions are examined based on the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994).

In the present case, defendant asserts that he received ineffective assistance of counsel due to his trial counsel's failure to present additional argument pertaining to defendant's eligibility for a DOSA. Appellant's Brief at 18. Defendant asserts that his counsel was prejudicially ineffective. Appellant's Brief at 18.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, the defendant must demonstrate not only that the legal grounds for such a motion or objection were

meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375, United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). In this case, defendant cannot meet this burden.

While the legal ground for further argument about defendant's DOSA eligibility may have been meritorious<sup>2</sup>, defendant has failed to demonstrate that the result would have been different if objections had been made. Defendant is not entitled to a DOSA as a matter of law, and there is no evidence in the record that the trial court would have imposed a DOSA if defense counsel had presented further argument.

During the sentencing hearing, defense counsel told the court that defendant had previously received a DOSA in 2003, which defendant had failed due to "dirty U.A.'s" (testing positive for illegal substances). 4RP 5. Defense counsel then asked the court to consider granting defendant another DOSA if he was able to meet qualification standards. 4RP 5. The court responded that if defendant had failed a DOSA so recently, he is likely not qualified for another. 4RP 6.

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<sup>2</sup> See above DOSA eligibility argument.

Defense counsel responded that he couldn't be sure that "that is the case." 4RP 6. This statement indicated his disagreement with the court's opinion that a prior receipt of a DOSA would result in his ineligibility for a second one at present.

The State offered to recess so that both parties could research defendant's DOSA eligibility, and the court took time off the record to review the statute and consider defendant's request. 4RP 6. After reviewing the statute, the court ruled that defendant is "only eligible once every ten years." 4RP 6.

Defense counsel did assert that he was uncertain as to whether the court's opinion on DOSA eligibility was proper. However, as the court took time out of the sentencing hearing to review the statute, it is likely that even if defense counsel had made further arguments or objections regarding defendant's DOSA eligibility, they would have been denied. As counsel is under no obligation to bring a meritless motion, the decision to forgo presenting further argument on the DOSA issue cannot be considered deficient performance. Defendant has failed to meet his burden of showing deficient performance.

Additionally, defendant cannot show that he was prejudiced by the failure to present further argument as to his DOSA eligibility. Defendant cannot be prejudiced by the failure to raise an objection that would have

been denied. The record supports the conclusion that the court itself reviewed the DOSA statute, and upon consideration of this language contained within it, determined that defendant was ineligible. Any objections raised by defense counsel would likely have been overruled. Defendant has failed to meet his burden of demonstrating the prejudice prong of the Strickland test.

Therefore, because defendant has failed to demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted, defendant's ineffective assistance of counsel claims fail. This court should not reverse defendant's convictions on this basis.

D. CONCLUSION.

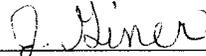
For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: October 31, 2007.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



KAREN WATSON  
Deputy Prosecuting Attorney  
WSB # 24259



Jessica Giner  
Deputy Prosecuting Attorney  
WSB # 39220

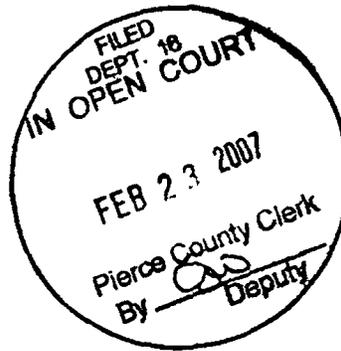
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/31/07   
Date Signature

## **APPENDIX “A”**

*Findings of Fact and Conclusions of Law*



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,  
Plaintiff,  
vs.  
RICHARD LEE CARLSON  
Defendant.

CAUSE NO. 06-1-03535-8

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THIS MATTER having come on before the Honorable Lisa Worswick, for trial on January 30, 2007, upon an Information charging the defendant with ESCAPE IN THE FIRST DEGREE, and UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE; the defendant having been present and represented by Michael Jordan and the State being represented by Deputy Prosecuting Attorney Jennifer Sievers, and the Court having observed the demeanor and heard the testimony of the witnesses, having examined all exhibits and stipulations, and having considered the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACTS

I.

The parties stipulated that the defendant's statements were admissible at trial.

II.

The parties stipulated that on July 29, 2006, the defendant was serving a sentence in the work release program, after having been convicted of a felony.

III.

The defendant was residing at the RAP House / Lincoln Park work release facility located on South Yakima in Tacoma, Washington.

IV.

The defendant's Community Corrections Officer from the Department of Corrections had approved the defendant's employment at Brushworx Painting Company.

V.

The defendant was allowed to work from 8:00 a.m. until 4:30 p.m. daily, with 2 hours of travel time allowed on weekdays and 3 hours of travel time allowed on holidays and weekends.

VI.

John Walkup is a program monitor at the work release facility. He monitors the inmates as they leave and return. Mr. Walkup is allowed to approve overtime work for the inmates.

VII.

On July 29, 2006, the defendant signed out and left the work release facility at 7:26 a.m. to go to work at Brushworx Painting Company.

VIII.

1 Leonard Parker is a crew leader at Brushworx Painting Company and he sometimes  
2 supervises the defendant. He began working at Brushworx Painting when he was in the  
3 work release program as well.

4 IX.

5 On July 29, 2006, Mr. Parker called Mr. Walkup at the work release facility in order  
6 to get overtime approved for the defendant. Mr. Parker stated that the defendant would be  
7 needed to work until 9:30 p.m.

8 X.

9 Mr. Walkup approved the overtime and allowed two hours of travel time. He advised  
10 Mr. Parker that the defendant must be back to work release by 11:30 p.m. Mr. Parker  
11 assured Mr. Walkup that the defendant would be back in time.

12 XI.

13 At 9:56 p.m. that night, Puyallup Tribal Police Officer Gary Tracy was on patrol in  
14 the 2200 block of East Browning, in Pierce County, Washington.

15 XII.

16 At that location, Officer Tracy saw a Toyota Van parked along the side of the  
17 roadway. East Browning is a back road that is poorly lit. The van was parked facing the  
18 wrong direction, on a hill, where there is a steep bank. Officer Tracy had concerns for the  
19 safety of other drivers and any passengers inside the van.  
20

21 XIII.

1 Officer Tracy pulled his patrol car behind the van and activated his takedown lights,  
2 which illuminated the inside of the Toyota Van. Officer Tracy could see two individuals  
3 in the front seats. They appeared to be pulling up their pants as Officer Tracy approached  
4 the driver's side of the van.

5 XIV.

6 The defendant was in the driver's seat. He was cooperative with Officer Tracy. He  
7 identified himself, and told Officer Tracy that he did not know the male in the passenger  
8 seat, because he had just picked him up on South Tacoma Way.

9 XV.

10 The defendant also told Officer Tracy that he was on work release and was supposed  
11 to be back to the facility by 6:00 p.m. (It was approximately 10:00 p.m. by this time.) When  
12 Officer Tracy checked the defendant's license and warrant status, he confirmed that the  
13 defendant had active conditions with the Department of Corrections.

14 XVI.

15 There was no evidence that there was anything mechanically wrong with the van that  
16 the defendant was driving.

17 XVII.

18 Officer Tracy arrested the defendant for escape in the first degree. Officer Tracy  
19 arrested the passenger, Rene Hunt, on an outstanding warrant.

20 XVIII.

21 Officer Tracy searched the van incident to arrest. He leaned into the van with his  
22 flashlight and could clearly see scattered crumbs of suspected cocaine on the center, table-  
23 like surface between the driver and passenger seats. The crumbs were in plain view, laying  
24  
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1 on top of paperwork that was there. They were easily accessible to the driver and the  
2 passenger.

3 XIX.

4 The parties stipulated that the crumbs of suspected cocaine found inside the van were  
5 tested by the Washington State Patrol Crime Lab and determined to be cocaine.

6 XX.

7 The defendant was booked into the Pierce County Jail that night and he never  
8 returned to the work release facility.

9 XXI.

10 At 11:00 p.m. that night, the defendant had not returned and Mr. Walkup was  
11 becoming concerned. Mr. Walkup called Mr. Parker to make sure that the defendant was  
12 on his way back. Mr. Parker advised Mr. Walkup that he had recently dropped off the  
13 defendant at the bus stop, but he would return to the bus stop to check on him.

14 XXII.

15 Mr. Parker called Mr. Walkup back fifteen minutes later and told him that the  
16 defendant had been arrested.

17 XXIII.

18 Officer Gary Tracy was found to be credible.

19 XXIV.

20 John Walkup was found to be credible.

21 XXV.

22 Leonard Parker was found not credible.

23 XXVI.

1 The defendant, RICHARD LEE CARLSON, was found not credible.

2 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.  
3

4  
5 CONCLUSIONS OF LAW

6 I.

7 The Court has jurisdiction over this case and the defendant. The events occurred in  
8 Pierce County, Washington.

9 II.

10 The defendant, RICHARD LEE CARLSON, is guilty beyond a reasonable doubt of  
11 ESCAPE IN THE FIRST DEGREE in that: On or about July 29, 2006, RICHARD LEE  
12 CARLSON knowingly escaped from custody or a detention facility while being detained  
13 pursuant to a conviction of a felony, in the State of Washington.

14 III.

15 The affirmative defense, that uncontrollable circumstances prevented the defendant  
16 from returning to custody, was neither pled nor satisfied in this case. That defense requires  
17 that the defendant not contribute to the creation of such circumstances in reckless disregard  
18 of the requirement to return. In this case, the defendant did contribute to the circumstances  
19 because his activities led to his arrest.

20 IV.

21 The defendant, RICHARD LEE CARLSON, is guilty beyond a reasonable doubt of  
22 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, TO WIT – COCAINE,  
23  
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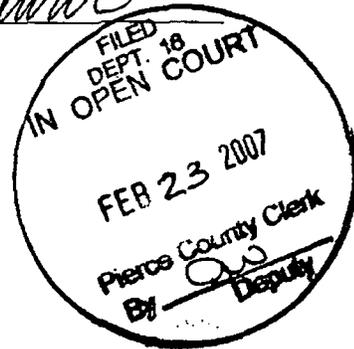
1 in that: On or about July 29, 2006, RICHARD LEE CARLSON, possessed a controlled  
2 substance in the State of Washington.

3  
4 DONE IN OPEN COURT this 23<sup>rd</sup> day of February, 2007.

5  
6 *W. W. W.*  
7 JUDGE

8 Presented by:

9 *Jennifer Sievers*  
10 JENNIFER L SIEVERS  
11 Deputy Prosecuting Attorney  
12 WSB# 35536



13 Approved as to Form:

14 *[Signature]*  
15 MICHAEL W. JORDAN  
16 Attorney for Defendant  
17 WSB# 16906

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