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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 37453-6-II

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

STATE OF WASHINGTON, Respondent

v.

REBECCA BABBITT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00320-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

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I. STATEMENT OF FACTS AND ARGUMENT

The sole issue on appeal is a claim that the trial court abused its discretion when it did not give a DOSA sentence to the defendant.

On September 27, 2007, the defendant changed her plea to guilty. The guilty plea was to five felonies: Identity Theft in the Second Degree (2 counts); Forgery (2 counts); and Theft in the Second Degree. Her offender score was listed as 13 (RP 5) with a standard range sentence of 43 to 57 months. The court went on to indicate that the defense was free to argue for a DOSA and that if a DOSA was not granted, the State would recommend 43 months confinement. (RP 7). The court also indicated that the time that would be recommended would be concurrent with any probation violation time. At the time of the change of plea there were three outstanding probation violations. (RP 8). Prior to the court accepting the guilty pleas it went through the DOSA provisions (RP 9-10) and ultimately took the guilty pleas from her. The court also made it clear to the defendant that it did not have to follow any recommendation as to sentencing. (RP 8).

The matter of sentencing was set over to allow an opportunity for the defendant to obtain a pre-sentence report as to the DOSA. That would include a DOSA evaluation and report from both Lifeline Connections and

the Department of Corrections. The State let the court know that it was not recommending the DOSA but free to recommend within the 43 month limit that had previously been discussed. (RP 14).

On January 29, 2008, on one of the morning dockets, it was discussed with the court that the parties were requesting a fairly quick sentencing concerning her. Apparently, she had been picked up by the bondsman and was in custody. (RP 23-24). This matter was then set over to February 5, 2008 for purposes of sentencing.

At the time of sentencing, the deputy prosecutor laid out some of the issues and difficulties which were preventing the State from requesting a DOSA on behalf of this defendant.

> MR. PEARCE (Deputy Prosecutor): Your Honor, the – on November 15th – or, actually on November – or September 27th, there was a change of plea and Defense had asked for a DOSA evaluation, which was granted, and so Ms. Babbitt went through a DOSA evaluation, and we have a copy of the risk assessment report by the Department of Corrections and Lifeline Connections
>
> She was set for sentencing on November 15th; however, apparently she wanted -- according to the Life Connection report, there was a concern that she should get into immediate treatment. And apparently the evaluator at Lifeline contacted Spokane and arranged a date and time where she could go into treatment in Spokane.
>
> So sentencing was set over to December 14th. On December 14th, that was the new date set for sentencing,

Ms. Babbitt did not appear on the date and time set for sentencing.

A call was made to the treatment provider in Spokane, who indicated that she was not present. There's no indication at all that she – that she actually went to Spokane and went into the inpatient treatment as she said she was going to do.

In addition to that, I did talk to Wendy Humphreys from the County corrections, and she indicated that – Ms. Humphreys, when she interviewed her when she was picked up just this last time, she indicated that Ms. Babbitt did admit to using methamphetamine, but there was also another problem, in that she moved and left no new address with the Supervised Release, so there were actually two violations there.

The State back when we first received the Lifeline Connections report, we were concerned because this is probably the most alarming report that we had received up to this point, and so we were opposed to DOSA up to that point, saw the Lifeline Connection report and started considering whether or not we should recommend it. However, as the Court's aware, it's going to take some effort on defendant's part if she's gonna make this a success.

She indicated that she wanted to go to treatment in Spokane; however, she never – apparently she never appeared, never went to treatment, and she fails to appear. So it doesn't appear that she's making any effort whatsoever to try to – to improve her situation. In fact, yet the State would argue that if she does go through a DOSA program it's gonna mean going to two years in prison, coming out and being in the community for two years, which is going to require some effort on her part, and she has – she has displayed absolutely no effort to try to better herself.

> So the State at this point in time will not recommend a DOSA sentence. We will recommend a standard sentence of 43 months prison.
>
> -(RP 28, L5 – 30, L13)

This information provided to the court was not disputed by the defense but they did offer explanations as to why she didn't show up in Spokane.

After hearing from counsel and from the defendant, the court indicated as follows:

> THE COURT: Alright, Ms. Babbitt, again, unfortunately you had an opportunity. I have read the reports prior to December date and I very well have sentenced you to a DOSA type situation, but basically you forfeited that opportunity by your actions when we authorized your release in September.
>
> Can't – cannot rely upon any good judgment. I think perhaps that being in prison for the four plus years may very well dry you out and hopefully dry out your mind that you can deal with it and not get back into the drug culture.
>
> The benefits of some of these programs have to be earned, and that's not happened.
>
> -(RP 34, L2-15)

Ordinarily, a sentencing court's decision not to apply DOSA is unreviewable. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519 (1998); State v. Bramme, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). A DOSA sentence is an alternate form of a standard range sentence. Because of that,

it is considered to be a standard range sentence and generally defendants may not appeal from those. State v. Conners, 90 Wn. App. at 52. A defendant may appeal a standard range sentence on constitutional grounds. State v. Conners, 90 Wn. App. at 52. However, the State would submit, that there does not appear to be anything of a constitutional nature concerning this claim.

The defendant in our situation was given the opportunity to get into the necessary programs. In fact, she was going to show good faith by going to Spokane to get into a program there. Not only did she not go to Spokane, she was not keeping in contact with the Supervised Release officials. This caused concerns to the bondsman who had her bail revoked and she was put into custody.

This is not a constitutional situation. Thus, the State maintains that the trial court's decision to deny her request for a DOSA sentence is a discretionary decision not reviewable on appeal. State v. Watson, 120 Wn. App. 521, 529-530, 86 P.3d 158, review granted, 152 Wn.2d 1036, 103 P.3d 801 (2004). There has been absolutely no showing that the trial court abused its discretion in any way in not giving her a DOSA sentence. As the trial court indicated to her, he very well may have sentenced her to a DOSA situation, but she forfeited that opportunity by her own actions.

There is nothing inappropriate about the exercise of this discretion by the trial court.

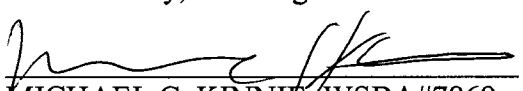
II. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 7 day of Nov, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
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STATE OF WASHINGTON, Respondent, v. REBECCA BABBITT, Appellant.	No. 37453-6-II Clark Co. No. 07-1-00320-7 DECLARATION OF TRANSMISSION BY MAILING

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STATE OF WASHINGTON)
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COUNTY OF CLARK)

On November 10, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Anne Cruser Attorney at law PO Box 1670 Kalama, WA 98625
	Rebecca Babbitt DOC# 790046 WA Corr. Center for Women 9601 Bujacich Rd. NW Gig Harbor, WA 98332-8300	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Jennifer Casey

Date: Nov 10, 2008.
Place: Vancouver, Washington.