

No. 40340-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAY KASBAUM,

Appellant.

11/15/15
STATE OF WASHINGTON
BY [Signature]
KATHRYN RUSSELL SELK

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

The Honorable Bryan E. Chushcoff (motion) and the Honorable Frank E.
Cuthbertson (trial and sentencing), Judges

APPELLANT/CROSS-RESPONDENT'S BRIEF OF CROSS-
RESPONDENT AND BRIEF IN REPLY

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A. STATEMENT OF ISSUES IN CROSS-RESPONSE

1. The trial court did not abuse its considerable discretion or err in ordering appellant/cross-respondent Jay Kasbaum to serve a Drug Offender Sentencing Alternative (DOSA).

2. The trial court did not err in failing to make findings required under RCW 9.94A.607 before ordering the DOSA because that statute does not set forth the requirements for a DOSA sentence.

3. The prosecution failed to properly assign error to the findings it argues about and there was more than substantial evidence to support those findings and the sentencing court's decision to impose the DOSA.

B. STATEMENT OF THE FACTS IN CROSS-RESPONSE

On December 28, 2009, in open court, Judge Culpepper ordered a prison-based "DOSA CD SCREEN" in order "[t]o assist the court in making its determination of suitability for a Prison-Based DOSA option[.]" CP 53. The prosecutor signed the order without writing any objection. CP 53.

In his sentencing memorandum, Kasbaum asked for an exceptional sentence below the standard range or, in the alternative, for a DOSA. CP 55-59. He noted that the Department of Corrections "screener" had "determined that Mr. Kasbaum is chemically dependent." CP 56. He also argued that the standard range sentence of 51-60 months in custody was excessive and shocked the conscience because that sentence was being sought for Kasbaum's failing to appear twice for proceedings where the underlying charges were dismissed and should not have been filed in the

first place. CP 55-59.

Also filed were a “Chemical Dependency Drug Dependence Screen” conducted by a Department of Corrections (DOC) community corrections officer (CCO). CP 60-62. The screening indicated that it was administered by a DOC CCO either by giving the offender a copy and having them fill it out in front of the CCO or by having the CCO ask the offender the screening questions and circling “the appropriate answers.” CP 60-62. The questions asked included such things as whether, during the last 12 months or before being incarcerated, the person being screened had “spent a lot of time getting drugs/alcohol, using them, or recovering from their use,” whether they had tried to “cut down” on use and been unable to do so, whether he had put himself or others in danger or caused an accident because he was so high or sick from drugs or alcohol or whether he had problems with family, friends, work or police as a result. CP 60-62. Kasbaum answered all of these questions in the affirmative. CP 60-62.

In addition, the DOC screening report established how often the person being screened used drugs in the last 12 months. CP 61-62. For Kasbaum it was 1-5 times a month for alcohol but daily for marijuana/hashish and methamphetamine or other “uppers.” CP 61-62. Kasbaum also said he had injected drugs with a needle every day. CP 61-62. On the form, Kasbaum indicated his concern that he had serious problems with drug abuse and that it was important for him to get treatment, which he had tried once before. CP 61-62.

At sentencing, the prosecutor first acknowledged that Kasbaum

had prior convictions which included drug offenses, describing his criminal history including a 1997 unlawful possession of a controlled substance, a 1997 conviction for assault with a deadly weapon enhancement, a 1998 conviction for taking a motor vehicle without permission, 1998 convictions for unlawful possession of a controlled substance and unlawful possession of a firearm, a 2000 conviction for “attempt to elude,” and 2000 convictions for unlawful manufacturing of methamphetamine, unlawful possession with intent to distribute methamphetamine, and attempting to elude. SRP 3-4.

The prosecution also presented testimony from a DOC community corrections officer, Sally Saxon. SRP 4-5. Saxon had previously been Kasbaum’s CCO and in fact had been the person who released Kasbaum from work release in December of 2007. SRP 4-5. Saxon testified that Kasbaum had, in the past, 1) submitted paperwork for a drug evaluation, 2) participated in that evaluation at Milam Recovery Center on September 12, 2008, and 3) had an antidrug course recommended for him although the evaluator could not really come to a diagnosis because Kasbaum had been in custody, not free and thus able to imbibe in drugs/alcohol at will as if in the community, for 13 years. See SRP 5-6.

The prosecutor faulted Kasbaum for having denied his guilt and thus not taken “responsibility,” arguing the court should move the sentence from the midpoint of the standard range “up” as a result. SRP 6-7. In fact, the prosecutor declared, Kasbaum was “unconvincing” and, in the prosecutor’s opinion, “just flat out lied” at trial. SRP 6-7.

The prosecutor then argued that the court should deny a DOSA

sentence because the requirement under “9.94A.607” was that “chemical dependency has to contribute to the crimes that he was convicted of” and the court had to find that Kasbaum would be successful in treatment for him to be eligible for such a sentence. SRP 7-8. A moment later, however, the prosecutor admitted that, “technically,” Mr. Kasbaum was eligible for a DOSA. SRP 9.

Nevertheless, the prosecutor did not think a DOSA should be ordered. SRP 9. He faulted Kasbaum for having only apparently previously sought treatment once. SRP 9. But what appeared to be of most importance to the prosecutor was his obvious frustration that Kasbaum had chosen to go to trial. SRP 9. The prosecutor decried Kasbaum for failing to “take responsibility for his actions” and having not “shown that to the Court in any way, shape, or form.” SRP 9. The prosecutor concluded that Kasbaum was just trying to “[e]scape punishment for his crimes” by asking for an exceptional sentence below the standard range or, in the alternative, a DOSA. SRP 9. Because Kasbaum was convicted, the prosecutor opined, that meant the jury did not believe Kasbaum’s testimony about why he had missed the court dates and thus Kasbaum should be denied the benefit of a DOSA as a result. SRP 9.

The prosecutor said that the reason the original changes were dismissed was because of U.S. Supreme Court precedent changing the relevant law about whether it was constitutional to search a car incident to arrest of its occupant. SRP 10. The prosecutor stated that he had made an “plea” offer several times which would have disposed of the case with a much lower sentence than Kasbaum was now facing. SRP 9-12. The

prosecutor argued that Kasbaum had insisted on going to trial knowing what the standard range was so he should not get a DOSA as a result. SRP 9-12. The prosecutor also faulted Kasbaum for never having “taken responsibility” and said Kasbaum had “made his choice” to go to trial instead of taking the plea deal and “has to live with” the standard range he faced as a result. SRP 11-12.

Because the prosecutor had not asked the CCO about the screening document DOC had submitted which the court said “indicates that there’s some chemical dependence,” the court asked those questions. SRP 12. The judge wanted to know why that document did not include an opinion of whether Kasbaum was a good candidate for a DOSA. SRP 12. The CCO responded that the form was something new to her and that it had been changed significantly from the old form. SRP 12. She stated her belief that DOC officers filled out the form by meeting with the defendant and marking down the answers he provided “just for eligibility of DOSA.” SRP 12. The form did not indicate a finding by the DOC officer about whether or not Kasbaum was chemically “dependent” because DOC did not want to get involved in a “chemical dependency provider’s aspect” in their cases. SRP 12.

For his part, counsel argued that the punishment did not fit the crimes. SRP 15-16. Instead, he said, Kasbaum missed court by two days and then was late a second time, each time going to try to handle things right away. SRP 16. Counsel argued that it shocks the conscience for the prosecution to ask to “lock this man in a cage for 60 months, five years”

under the circumstances, when he did not flee the state and actually tried to go to court when he realized he had missed something. SRP 16.

Counsel pointed out that Kasbaum admitted to having a drug problem and, while Kasbaum had not testified at trial that he slept in and missed court one of the dates because of that problem, it was actually pretty typical of someone with drug problems to do so. SRP 17. Counsel also pointed out that Kasbaum had the right to have rejected the plea offers in order to go to trial. SRP 19. He asked the court to impose an exceptional sentence downward for “time served” or, in the alternative, to impose a DOSA, for which Kasbaum was eligible. SRP 19.

Kasbaum addressed the court, explaining that he had a “long history of drugs.” SRP 20. He told the court about coming to the courthouse once he realized he had missed a court date, saying that was “where no drug addict ever wants to go” because there were officers and people who could put you in custody at the courthouse. SRP 20. He also said that when he got out of prison he had been “real strong” in his conviction of trying to stay away from drugs but that he then had been around people who were still doing them and ended up letting it back into his life. SRP 21.

The court agreed with the prosecution that Kasbaum had “made a choice to go to trial on this matter” and knew the risks. SRP 21. It also acknowledged, however, that Kasbaum had a constitutional right to go to trial. SRP 21.

The court noted that the underlying offenses had involved substance abuse issues, and that Kasbaum had participated in the 2007

evaluation and the more recent evaluation. SPR 21. The court pointed out that, while the 2007 evaluation had been inconclusive because Kasbaum had not been out of custody very long, the more recent evaluation done on January 7 had indicated there was “some chemical dependency.” SRP 22. The court stated its conclusion that “based on the purposes of the Sentencing Reform Act” the DOSA sentence was “what is appropriate in this case,” in order to give Kasbaum “an opportunity to deal with this drug issue” that it had found Kasbaum had. SRP 22.

Kasbaum appealed the convictions and filed an opening brief. Opening Arief of Appellant/Cross-Respondent (hereinafter “BOA”). The prosecution cross-appealed, filing a brief of respondent/cross-appellant after Kasbaum filed his opening brief on appeal. See CP 80-82; Brief of Respondent/Cross-Appellant (hereinafter “BOR”). This brief of appellant/cross-respondent follows.

C. ARGUMENT ON CROSS-RESPONSE

THE PROSECUTION’S REQUEST FOR RELIEF ON CROSS-APPEAL SHOULD BE DENIED BECAUSE THE PROSECUTION HAS FAILED TO ESTABLISH THAT THE SENTENCING COURT ABUSED ITS CONSIDERABLE DISCRETION IN GRANTING A DRUG OFFENDER SENTENCING ALTERNATIVE SENTENCE

In its cross-appeal, the prosecution raises a single issue: the sentencing court’s decision to order Mr. Kasbaum to serve a Drug Offender Sentencing Alternative (“DOSA”). BOR at 16-19. The prosecution argues that the sentencing court abused its discretion in granting that sentence because there was “insufficient evidence” that Kasbaum had a chemical dependency and “no evidence” that a

dependency contributed to the bail jumping. BOR at 16.

Both of these arguments fall with the barest scrutiny.

At the outset, although the prosecution does not emphasize this point, it is important to note the standard of review. Because of the considerable discretion the sentencing court enjoys in deciding whether to grant or deny a request for a DOSA, the standard this Court employs on review is “abuse of discretion.” See State v. Gronnert, 122 Wn. App. 214, 93 P.3d 200 (2004). As a result, this Court will uphold the sentencing court’s decision unless the prosecution can prove that the court abused its discretion in rendering that decision. See id.

To show an abuse of discretion, however, the prosecution must show that the sentencing court’s decision was manifestly unreasonable or based on untenable grounds or untenable reasons. See In re Marriage of Kovacs, 121 Wn.2d 795, 801-802, 854 P.2 629 (1993). The prosecution cannot meet that heavy burden unless it shows that no reasonable court could or would have possibly have reached the same decision. See State v. Castellanos, 132 Wn.2d 94, 97, 935 P.3d 1353 (1997).

Further, the discretion given trial courts in granting or denying a DOSA is extremely broad. See, e.g., Gronnert, supra. For example, in Gronnert, no abuse of discretion was found when the sentencing court denied a request for a DOSA even though the court issuing that denial declared it did not “at this point in time impose” DOSA sentences and that the DOSA program was a “scam” and a “sham[.]” 122 Wn. App. at 225-26. Because the sentencing court had also specifically referred to the defendant’s particular case and its belief that DOSA sentences were not

effective and provided little or no benefit to the community, the appellate court found, the lower court had properly “exercised its discretion, determined that the program would not benefit either the defendant or the community, and denied the request for DOSA.” 122 Wn. App. at 226-26. And this denial, thinly supported as it was, was still not an abuse of discretion. Id.

Indeed, the prosecution itself notes the forgiving nature of this standard of review when it tries to apply that standard to the issues Kasbaum raised in his opening brief on appeal. See BOR at 5. The prosecution admits that abuse of discretion “exists only when no reasonable person would have taken the position adopted by the trial court.” BOR at 5. And the prosecution further notes that a court “cannot be said to have abused its discretion” if it “considered the law and arguments and made a reasonable ruling.” BOR at 5, 8.

That is exactly what the sentencing court did in this case. It heard the testimony from the CCO. It examined the documents. It heard from Kasbaum. It considered the prosecutor’s claims about what the law required and the arguments the prosecution had about why an exceptional “down” or a DOSA should not be granted. It considered Kasbaum’s arguments that an exceptional “down” or a DOSA should be imposed. And then the court made a reasonable ruling, rejecting the exceptional “down” Kasbaum had asked for and rejecting the 5 year sentence the prosecution asked for, instead imposing a DOSA after first finding that there was “some chemical dependency” and that “based on the purposes of the Sentencing Reform Act” the DOSA sentence was “what is appropriate

in this case,” in order to give Kasbaum “an opportunity to deal with this drug issue.” SRP 22.

The prosecution has not - and cannot - show that this decision was manifestly unreasonable or based on untenable grounds or untenable reasons i.e., that no reasonable court could possibly have reached this decision. In arguing to the contrary, the prosecution first misstates crucial facts then applies irrelevant law, arriving at a conclusion completely unencumbered by factual or legal support. See BOR at 16-19.

Taking the second issue first, both below and on appeal, the prosecution cites to the wrong statute and, as a result, argues based on the wrong law. See BOR at 16-17; SRP 6-8. The argument is that RCW 9.94A.607 requires that a court find that chemical dependency “contributed” to the offense and there was no evidence of that here, so there was no authority under RCW 9.94A.607 to impose a DOSA in this case. See BOR at 17-20; SRP 6-8.

The prosecution is partially right. There is no authority under RCW 9.94A.607 to impose a DOSA here. But that is true in **every** case, because RCW 9.94A.607 is not, in fact, the statute which provides the authority for a sentencing court to order a DOSA.

Instead, RCW 9.94A.607 is the statute “which authorizes the [sentencing] court to impose certain sentence conditions” for the term of community custody if the court “finds the offender has a chemical dependency that contributed to the offense.” In re Sentence of Jones, 129 Wn. App. 626, 631, 120 P.3d 84 (2005); see In re Childers, 135 Wn. App.

37, 41, 143 P.3d 831 (2006) (same). It deals with terms of community custody, not the requirements for a DOSA, which are different. See, e.g., State v. Powell, 139 Wn. App. 808, 820, 162 P.3d 1180 (2007) (where the defendant was not eligible for DOSA under the DOSA statute but there was an issue whether substance abuse treatment should be ordered under RCW 9.94A.607 as a condition of community custody).

Thus, while the prosecution is correct that RCW 9.94A.607 requires the sentencing court to make a finding that the offender has a chemical dependency that has contributed to his or her offense before the court has any authority under RCW 9.94A.607, that is irrelevant here. The prosecution's cross-appeal is not challenging a condition of community custody imposed under RCW 9.94A.607. It is challenging the imposition of a DOSA sentence. See BOR at 16-19. RCW 9.94A.607 simply does not control.

In fact, it is RCW 9.94A.660 which provides the DOSA option and lists the requirements for when "[a]n offender is eligible for the special drug offender sentencing alternative." RCW 9.94A.660(1). See, e.g., Powell, 139 Wn. App. at 820. For both crimes here, the same statutory provisions applied, establishing that an offender is eligible for a DOSA if they meet the following standards, in relevant part:

- (a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);
- (b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug. . . or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug. . . ;

- (c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense. . .
- (d) For violations of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation. . .the offense involved only a small quantity of the particular controlled substance as determined by the judge. . . ;
- (e) The offender has not be found. . . to be subject to deportation and does not become [so]. . . ;
- (f) The end of the standard range for the current offense is greater than one year; and
- (g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

See Laws of 2009, ch. 389, §§ 2, 3. If the sentencing court determines that the offender meets the requirements and that a DOSA sentence would be “appropriate,” it is then authorized to order a DOSA sentence, either with a “residential” option or a “prison based” alternative where there defendant spends some time in prison and some time in treatment in the community.

Kasbaum met the qualifications of RCW 9.94A.660. He was convicted of offenses for which the option was eligible, had the right standard range length, had not received a DOSA in the requisite time, had no sex offenses, was not subject to deportation and otherwise, as the prosecutor admitted below, “technically” qualified for the DOSA option. See SRP 9. As a result, all that was required was for the sentencing court to find that it was “appropriate” to impose a DOSA sentence. See RCW 9.94A.660(3). Nothing in the statute prevents the sentencing court from using the DOSA option the Legislature created by requiring that court to

make additional findings as the prosecution here claims, i.e., that the crimes were themselves caused by the defendant's chemical dependence or that they involved drugs. RCW 9.94A.660; see BOR at 17-18. Nor does it authorize denying a DOSA, as the prosecution urged below, because the defendant chose to exercise his constitutional right to go to trial. See RCW 9.94A.660.

The prosecution's arguments below and on appeal that the sentencing court cannot order a DOSA sentence unless the court finds that the crimes were caused by or involved issues of drugs is completely without merit. RCW 9.94A.660 contains no such requirement, instead allowing a sentencing court the discretion to use the DOSA alternative when the court deems it "appropriate," if certain eligibility requirements are met. The trial prosecutor was right when he said that Mr. Kasbaum was "technically" completely eligible for a DOSA. See SRP 9. The prosecution's argument that the sentencing court somehow failed to make a required finding is based upon an inapplicable statute and should be summarily rejected.

Notably, even if such a finding had been required, counsel provided an argument on that point, noting that the reasons for Kasbaum missing the court date could well have been based on the substance abuse issues he suffered as they involved things like sleeping in too late, etc.

This Court should also reject the prosecution's claim that there was "no evidence" to support the trial court's finding that Kasbaum had "substance abuse issues" or the court's conclusion that a DOSA was appropriate, for several reasons. See BOR 18-19.

First, the prosecution has completely failed to follow the requirements for raising a challenge to the lower court's findings. Under RAP 10.3(g) and this Court's General Order No. 98-2, while an appellant may use one assignment of error for all of the findings of fact or conclusions of law it claims to be erroneous on appeal, that party is still required to make that assignment of error. See State v. Ross, 141 Wn. 2d 304, 4 P.3d 130 (2000). Here, although it presents argument that the trial court's written finding, on page 1 of the Judgment and Sentence, was "not supported by any evidence in the record," or that the court's oral findings are equally unsupported, the prosecution failed to assign error to those findings as required. See BOR at 1, 19. But such a failure is not a mere "technical flaw[]" in the appellant's compliance with the Rules of Appellate Procedure" which can be overlooked if the "challenge is clear." Ross, 141 Wn.2d at 311. Instead, unchallenged findings of fact are "verities on appeal" and an appellate court "will review only those facts to which error has been assigned." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

In any event, even if the prosecution had properly assigned error to the court's finding, however, the prosecution could not meet the burden required to successfully challenge the lower court's findings here. This Court's review of a trial court's finding is "limited to determining whether the challenged fact is supported in the record by substantial evidence." Hill, 123 Wn.2d at 647. A finding is supported by substantial evidence in the record when a rational, fair-minded person could be convinced by it, even if there are several other reasonable interpretations of the evidence.

Rogers Potato Service, L.L.C. v. Countrywide Potato, L.L.C., 152 Wn.2d 387, 97 P.3d 745 (2004). Further, “a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.” Sunnyside Valley Irr. Dist. v. Kickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). And it is well-settled that decisions such as the weight or consideration to give evidence or testimony are the province of the trier of fact, in this case the sentencing court. See State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973).

The prosecution’s brief ignores all of these standards, citing none even though it has asked this Court to reverse based on an insufficiency claim. BOR at 16-19. Instead, the prosecution simply declares that there was “no evidence in the record before the trial court that defendant had a chemical dependency problem,” because “the supposed evaluation that showed that defendant was chemically dependent consisted of answers” Kasbaum gave himself, there was no evidence from a “treatment provider who conducted an evaluation,” and the CCO’s testimony that she believed Kasbaum had chemical dependency issues was because he had “self-admitted” them to her in the past. BOR at 18-19.

The prosecution is simply wrong. There was more than ample evidence in the record to support the court’s finding, although the prosecution’s brief neglects to mention it all and misstates an important part of it. At the outset, the prosecution tries to minimize the CCO’s testimony by claiming that she only believed that Kasbaum had a drug problem “because defendant had self-admitted issues in the past.” See BOR at 18; SRP 12. The apparent inference is that the CCO had no

independent knowledge of Kasbaum's drug problems.

But that is a misstatement of the record. The testimony, which occurred after Saxon explained to the court about the DOC screening form, speaks for itself. Saxon said:

You know, **from my understanding and my knowledge of Mr. Kasbaum, he does have a history of chemical dependency** and he has self-admitted to myself that he has had issues with drugs in the past, but as far as this form, it's just informational for the Court based off what Mr. Kasbaum reports to us.

SRP 12 (emphasis added).

Saxon was Kasbaum's CCO. SRP 4-5. She had been the one to release him from work release. SRP 4-7. She had worked with him in the past. SRP 2-7. And she testified not only that he had self-admitted to her of his issues in the past but **also** that, based upon that prior experience with him and her own "knowledge of" him, he had "a history of chemical dependency." SRP 12. Taken in the light most favorable to the prevailing party on the issue on appeal - here, Kasbaum - and giving him the benefit of all reasonable inferences from the evidence, the record establishes that the CCO had independent, personal knowledge of Kasbaum's history of chemical dependency beyond just him self-reporting it. See e.g., Weyerhauser v. Tacoma-Pierce County Health Dept., 123 Wn. App. 59, 65, 96 P.3d 460 (2004) (evidence is taken in the light most favorable to the prevailing party).

Notably, even if it had just been Kasbaum self-reporting, that would not actually mean as the prosecution here implies - that the CCO's testimony should be given no weight. See BOR at 19. Again, it was the

lower court's province to decide what weight to give that testimony, and this Court will not reweigh evidence or credibility on appeal, even if the prosecution presented conflicting evidence or argument. See State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005).

And in fact, the fact that Kasbaum had admitted his drug problems to his CCO at some time in the past when she worked with him prior to this case supports the conclusion that Kasbaum did have a drug problem - because obviously the drug problem could not be something Kasbaum suddenly made up and then self-reported only in order to avoid having to serve a standard-range sentence in this case.

Finally, the prosecution's other arguments about the insufficiency of the evidence are without merit. The prosecution faults the weight the sentencing court gave to the DOC screening because the form contained information which came from Kasbaum himself. BOR at 19. And the prosecution finds significant that "[t]here was no evidence admitted from any treatment provider who conducted an evaluation." BOR at 19.

But again, the prosecution is asking this Court to reweigh the evidence because it does not like how the weighing was done below. The court was entitled to give the screening form the weight it chose. It was well aware of how the information got onto the DOC form. See SRP 12. Indeed, it was the court itself which asked the CCO the questions about that process, because the prosecutor did not. See SRP 12.

The court was also well aware that Kasbaum had absolutely no control over the procedure DOC chose to use to fulfill the request the court had made for a DOSA screening. SRP 11-2. And it is likely the court -

unlike the prosecution here - recognized that such screening procedures are almost always, by their very nature, going to involve information gathered from the defendant and that **no** defendant should be penalized for perceived problems with DOC's form and "screening" process when it is DOC which chose to use that procedure, obviously deciding it was sufficient to satisfy the court's order that DOC conduct a screening. Nor should a defendant be faulted for DOC's policy decision not to do anything which might be perceived as a "chemical dependency provider's aspect" in its report. SRP 11-14.

There is no question that the report is not a full blown therapeutic examination of Kasbaum's life and tribulations over drugs. But again, that will be true in **every** case , because DOC is now using this particular form in every case. And it is doing so apparently in an effort to *avoid* providing the kind of treatment/diagnosis evaluation the absence of which the prosecution here bemoans.

Further, there is no requirement for such an evaluation or even any report from DOC to support the sentencing court's decision to impose a DOSA. Indeed, the Legislature rewrote the DOSA statute on this very point after Division One found that some of the language in the statute appeared to make such an evaluation mandatory. See State v. Harkness, 145 Wn. App. 678, 186 P.3d 1182 (2008). In Harkness, the Court recognized that some language in the 2008 statutory language "appears to render the evaluation discretionary." 145 Wn. App. at 679-81. Division One nevertheless held that, because the statute said the court could impose

a DOSA “[a]fter receipt of the examination report,” that implied receipt was mandatory in all cases before imposition of the sentence.

The next year, the Legislature then deleted the “after receipt of the report” clause and established instead that the court “may” but is not required to order an examination by DOC, if the court so desires in order to assist it in making “its determination.” See Laws of 2009, ch. 389, §§ 2, 3.

Despite the prosecutor’s suggestion that it is somehow crucial that there was not a treatment provider evaluation or that the DOC report was in some way insufficient, the sentencing court was not required to have either such an evaluation or report in order to support its decision to exercise its discretion and order a DOSA under RCW 9.94A.660.

In addition, the prosecution’s brief fails to present an accurate picture of the actual evidence before the court, leaving out several crucial points. See BOR at 16-19. The prosecution cites only to the DOC screening and the CCO’s testimony, as if that was all the evidence before the lower court. BOR at 18-19.

As noted, *infra*, the prosecution misstates and omits some of the CCO’s crucial testimony in its brief. And in fact, the court heard much more than the prosecution claims. From Kasbaum’s former CCO, who knew him, worked with him and had made the decision to release him into the community in the past, the court heard

- 1) that from her knowledge of and experience with Kasbaum, he had chemical dependency problems in the past;
- 2) that he had admitted those problems to his CCO well before the events leading to the charges in this case (thus neatly rebutting the

prosecution's intimation that the drug issues were something made up in order to "avoid responsibility" in this case (SRP 11-12);

3) that Kasbaum had, in late 2007, before this case, acquired, filled out and submitted paper work to his CCO in order to get a chemical dependency evaluation for possible treatment, etc.;

4) that Kasbaum had followed through and gone to the evaluation at Milam Recovery Center; and

5) that the evaluator had recommended a one-day antidrug course for Kasbaum, although Kasbaum's having been in prison prevented the evaluator from being able to reach a full diagnosis.

And while the CCO could not remember whether Kasbaum had gone to that one-day program, she had nothing in her records indicating that he had not and admitted that, at that time, he was deemed to be "doing what he was supposed to on supervision." 3RP 5.

Not only that, the court heard about Kasbaum's criminal history, which included several drug offenses. 3RP 2-4. And the DOC report provided evidence, *inter alia*, that Kasbaum had "spent a lot of time getting drugs/alcohol, using them, or recovering from their use," tried to "cut down" on use and been unable to do so, put himself or others in danger or caused an accident because he was so high or sick from drugs or alcohol and had problems with family, friends, work or police as a result. CP 60-62. It also provided evidence that Kasbaum was using marijuana/hashish and methamphetamine or other "uppers" and shooting up daily. CP 60-62.

And the court heard from Kasbaum, who talked about having struggled with drugs, staying away from them when he first got out of prison but falling back into them.

Taking the evidence in the light most favorable to the prevailing

party - here, Kasbaum - and making all reasonable inferences in his favor therefrom as required, that evidence was more than ample to support the sentencing court's discretionary decision to impose a DOSA in this case. See Weyerhauser, 123 Wn. App. at 65. Regardless whether the prosecution thinks the lower court should have given the DOC screening particular weight, or given less credibility to the testimony of the CCO or Kasbaum, it was the sentencing court's province to decide weight and credibility. And this Court "will not substitute its judgment for that of the trial court" even if it might have reached a different conclusion, nor will it reweigh evidence or redetermine credibility on appeal, the prosecution's invitation here notwithstanding. See Sunnyside, 149 Wn.2d at 879-80; Ladely, 82 Wn.2d at 175.

In sum, the prosecution's arguments on appeal are all a reiteration of what the prosecutor argued below - as the brief itself shows. See BOR at 18 (pointing out that it had made the same arguments below and that the trial court had nevertheless imposed the DOSA). But the sentencing court listened to those arguments, considered them and entered a reasonable ruling, denying the prosecution's request but also denying Kasbaum's request for an exceptional sentence of credit for time served. The prosecution has not and cannot show that it was an abuse of discretion for the sentencing court to decide to impose a DOSA in this case.

Finally, it important to note another reason the court might have been uncomfortable with the prosecutor's arguments below. Not only did the prosecution rely on a statute which did not apply, he also argued in such a way as to urge the sentencing court to effectively punish Kasbaum

for refusing to take a plea, refusing to “take responsibility,” and instead deciding to exercise his right to go to trial, declaring:

I make an offer to defense counsel that wraps up this case in a fashion that’s much less than what was given here. Defendant rejects that offer, then bail jumps a second time. I extend the offer again when he comes back, and again, I’m told he rejects it.

He wants trial. He wants to proceed on the bail jumps alone knowing that’s all I’m going to ever proceed on and knowing that what he’s looking at, based on his offender score, is 51 to 60, and that’s what the defendant did. It was his wish to go forward to trial. It was his wish to proceed on these charges, knowing all along he was looking at 51 to 60.

Now, now that he’s been convicted, what I have is, well, that’s clearly excessive. That shocks the conscience. I don’t see how that shocks any conscience. That’s the standard range. It’s the standard range he was informed of. It’s the standard range the legislature set. This is not shock the conscience. **If the defendant wanted something else, he had that offer. He wanted trial. Now, he doesn’t want what he asked for. He asked for this. It was given to him. Now he wants less.**

I’m asking you to impose the 60 months. I’m asking you to reject defense counsel’s offer or inclination for to you [sic] seek an exceptional down or a DOSA. **This defendant has never taken responsibility and all he wants is less time. He now made his choice; he has to live with it. He doesn’t like it. And what he’s asking this Court to do is give him something better. I’m asking you to hold him responsible for the choices he makes. He wanted this. He got it.**

SRP 11-12 (emphasis added).

Given that the prosecutor relied on a statute which did not apply, given the prosecutor’s obvious bias against Mr. Kasbaum for having refused to enter a plea, given the prosecutor’s improper suggestions that the court deny Kasbaum a legally available sentencing alternative because of his decision to exercise his rights to refuse to admit guilt and to go to trial, it is perhaps not surprising that the court was hesitant to follow the prosecution’s sentencing recommendation below. Instead, the sentencing

court heard the testimony, asked questions itself, examined the evidence, heard from Kasbaum, looked at Kasbaum's background and the other evidence and decided that a DOSA was the best option for Kasbaum and the community in light of the purposes of the SRA. There was more than substantial evidence to support that decision, the prosecution has failed to show any abuse of the sentencing court's considerable discretion in imposing a DOSA and this Court should reject the prosecution's claims as unfounded, unsupported and without merit. The DOSA should be affirmed.

D. ARGUMENT IN REPLY

THE PROSECUTION'S ATTEMPTS TO ARGUE THAT THE EXCLUDED EVIDENCE WAS NOT RELEVANT AND TO MINIMIZE THE CONSTITUTIONAL ERROR IN EXCLUDING IT SHOULD BE SUMMARILY REJECTED

In its brief, the prosecution agrees that defendants in a criminal case have the constitutional right to present a defense. BOR at 5-6. The prosecution claims, however, that no violation of this right occurred here because the documents were not admissible as business records or records relevant to medical treatment or diagnosis. BOR at 5-10. The prosecution then declares that the exclusion of the evidence "did not limit defendant's defense" because he was still allowed to present his own testimony, argue his theory of the case, and have the jury instructed on the "unforeseen circumstances" defense. BOR at 8-9. In addition, the prosecution declares, the prosecutor's repeatedly drawing negative attention to Kasbaum's "failure" to present evidence other than this testimony to support that defense was not misconduct, because the prosecutor did not

explicitly refer to the excluded documents and there was “nothing wrong” with pointing out that “the defendant had failed to meet his burden.” BOR at 13-14.

These arguments miss the point. It is irrelevant that the prosecutor did not specifically refer to the records Kasbaum had been precluded from presenting, in either cross-examination or closing, because the prosecutor’s theme was clear: Kasbaum’s defense should not be believed because he failed to present any evidence other than his own word to support it. In cross-examination, the prosecutor questioned that failure, asking who had treated Kasbaum and why there was no evidence from them. 2RP 111. And in initial closing argument, the prosecutor specifically asked, “[w]here’s the evidence” to support Kasbaum’s claim that he had been seen for a medical issue on September 21st. 2RP 131-32.

Further, the prosecutor’s comments were not limited to Kasbaum’s “failure” to present testimony from a nurse or doctor. Instead, the prosecutor specifically declared, “[w]e saw no **medical records.**” 2RP 133 (emphasis added). And in rebuttal closing argument, the prosecutor again argued that Kasbaum’s defense should be rejected because Kasbaum had not provided “**any medical information whatsoever**” and “provided [the jury] . . . with **no documentation or proof**” of any injuries. 2RP 139 (emphasis added).

Thus, contrary to the prosecution’s claims on appeal, the misconduct here clearly drew attention to the absence of the very evidence which the prosecution itself had successfully moved to exclude. And the

prosecutor below clearly exploited his success in excluding that evidence, implying that it did not exist because otherwise Kasbaum would have brought it. But at the time the prosecutor made those arguments, he **knew** there was evidence which would have at least minimally supported Kasbaum's defense. The only reason the jury did not see it or hear about it was because the prosecutor prevented that from happening.

Notably, the prosecution has not even acknowledged - let alone discussed and distinguished - either State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), or State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995). See BOR at 1-6. Yet those cases are essentially on point and Kasbaum discussed them at length in his opening brief. See AOB at 15-16.

The prosecution's failure to discuss these cases is telling. In Kassahun, like here, the prosecutor first moved successfully to exclude evidence and then exploited the fact that such evidence had not been admitted in arguing that the defense should not be believed. 78 Wn. App. at 952. And in that case, the Court found that it was serious misconduct for the prosecutor to argue such an inference from the defendant's "failure" to present evidence **when the prosecution itself successfully prevented him from doing so.** Id.

Here, the prosecutor repeatedly faulted Kasbaum and argued the jury should not believe his defense because Kasbaum presented nothing but his own testimony to support his defense. But Kasbaum **would** have presented that evidence, if the prosecution had not prevented it. This case,

like Kassahun, compels reversal.

Similarly, in Jones, the Supreme Court clarified that the right to present a defense does not exclude even evidence which is inadmissible under the “rape shield” law where it has a “high probative value” to the defendant’s defense. 168 Wn.2d at 720-21. In such cases, the Court declared, the evidence “could not be restricted regardless of how compelling” the state’s interest in exclusion without violating the defendant’s constitutional rights to present a defense. Id.

Here, the evidence similarly had “high probative value” to Kasbaum’s defense. While the prosecution argues about the potential weight the jury might have given the excluded evidence, that is not the point. The documents did not have to be full blown “medical records” with diagnoses and doctor’s names and treatment information in order to have high probative value to Kasbaum’s defense. The point was that Kasbaum had documents from a medical provider on the date he said he had gone to a medical provider and thus could not make his court date. The excluded evidence would have supported Kasbaum’s defense and, in fact, would have been the only thing other than Kasbaum’s testimony to do so. It was clearly of “high probative value to the defense,” and “no state interest” was compelling enough to exclude it. Jones, 168 Wn.2d at 723-24.

Finally, the prosecution again focuses on the rules of evidence, essentially arguing that evidence need not be admitted to vindicate Kasbaum’s rights to present a defense if the evidence was not shown admissible under the specifics of an evidence rule. BOR at 6-7. But the

evidence rules are not dispositive, and evidence which is relevant and material to a defendant's defense cannot be excluded under an evidentiary rule or statute unless the governmental interests the rule or statute furthers outweigh the defendant's interests in his rights. State v. Baird, 83 Wn. App. 477, 482-83, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997); see also Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed.2d 504 (2006) (rules excluding evidence may violate the right to present a defense if the rules are disproportionate to the purposes they are designed to serve). And where evidence has high probative value to the defense, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22" rights to present a defense. Jones, 168 Wn.2d at 723-24. Those rights were violated and the prosecutor committed misconduct here. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein and in appellant's opening brief, reversal of the conviction for the September 21, 2009, alleged bail jump is required. In addition, because the prosecution has not shown that the sentencing court abused its discretion or erred in ordering a DOSA, that sentence should be affirmed and the prosecution's cross-appeal denied.

DATED this 15th day of September, 2011.

Respectfully submitted,



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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 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, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Jay Kasbaum, 15109-87th St. Ct. E., Puyallup, WA. 98372.

DATED this 10th day of September, 2011.


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