

No. 41609-3-II
Cowlitz Co. Cause No. 10-1-00904-1

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS DOUGLAS REYNOLDS,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. The trial court properly imposed a standard range sentence and exercised appropriate discretion.
2. Defense counsel was not ineffective when he did not ask for a Drug Offender Sentencing Alternative (“DOSA”).

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant’s recitation of the facts.

III. ARGUMENT

A. THE TRIAL COURT EXERCISED APPROPRIATE DISCRETION WHEN IT DENIED THE APPELLANT AN EXCEPTIONAL DOWNWARD SENTENCE

The trial court relied only on appropriate information, accepted by the appellant, when it denied his motion for an exceptional sentence downward. Ordinarily a standard range sentence is not reviewable on appeal, but where a court has “refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range,” review may be warranted. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997). The appellant does not argue that the court failed to exercise discretion and there is certainly nothing in the record to suggest the sort of categorical statements that would characterize such a failure. This leaves as the only basis for appeal the question of whether the court relied on an impermissible basis for denying the appellant’s motion. It did not.

The information the appellant cites as impermissible was acknowledged and accepted at sentencing and may not serve as a basis for review. Specifically, the appellant relies on the statements of the deputy prosecuting attorney regarding a previous exceptional downward sentence in a 2005 case. The appellant concedes that while prior convictions were appropriately considered, the additional information about the previous exceptional sentence downward and the circumstances of the prior plea were neither plead nor proven at trial or sentencing. This is true. That does not make them inappropriate.

The information was acknowledged and the appellant did not object. RCW 9.94A.530(2) indicates that the court may rely on information “admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.” Facts are acknowledged when they are presented or considered during sentencing and are not objected to by the parties. *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005); *citing State v. Handley*, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990); *see also* RCW 9.94A.530(2). If there was a factual dispute, the proper procedure would be to request an evidentiary hearing. RCW 9.94A.530. The appellant did not dispute the information the deputy prosecutor provided at sentencing, nor does he suggest now that the information was incorrect. The information provided was acknowledged at sentencing.

Because the trial court relied only on information acknowledge, plead, proven, or admitted to when sentencing the appellant to a standard range sentence, there is no basis for review. This court should affirm the sentence imposed by the trial court.

Even if there was a basis for review, the record does not show that the trial court relied on an impermissible basis for denying the appellant's motion for an exceptional downward departure. That the trial court *could* have relied on information is not sufficient, review is only warranted when the court *has* relied on an impermissible basis. *Garcia-Martinez*, 82 Wn.App. at 330. The trial court's comments that the appellant "sold then" and then "sold again" suggest that the biggest factor in the denial was simply that the appellant was a repeat offender. 2 RP 253. The trial court acknowledged that it was "really torn" specifically because sentences for repeat offenders in drug delivery cases are "really tough." *Id.* The trial court's statements indicate that the specific basis for the denial was that the appellant had previous convictions, a basis which is always permissible under RCW 9.94A.530.

The trial court's factual determination the amount of drugs was more than an "extraordinarily small" amount precluded an exceptional downward departure. The trial court specifically stated "I also don't give a ton of weight to this concept that it was a small amount." 2 RP 253. The trial court continued noting that "I think it's a normal amount..." *Id.* The court denied the appellant's motion for an exceptional downward

departure primarily because it did not believe that the amount was “an extraordinarily small amount” as contemplated in *State v. Alexander*, 125 Wn.2d 717, 727, 888 P.2d 1169 (1995). This court should affirm the original sentence of the trial court.

B. THE APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE FROM COUNSEL

The appellant received effective assistance from defense counsel at the time of his sentencing. In order for the court to consider an ineffective assistance of counsel claim, the appellant must show that (1) the representation was deficient and (2) that the deficiency prejudiced the defendant by affecting the outcome of the proceeding. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The appellant must overcome a strong presumption that the representation was effective. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot serve as the basis for an ineffective assistance of counsel claim. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Here, in order to find prejudice the court would have to find that absent his counsel’s deficient performance, there was a reasonable probability that his sentence would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The appellant’s claim does meet the burden and should be rejected.

The appellant’s decision to request an exceptional sentence downward in lieu of prison-based DOSA was a legitimate strategy.

Defense counsel requested an exceptional downward departure based on *Alexander* and asked for 25 months total. Given the appellant's standard range of 84 months to 144 months, a prison-based DOSA sentence would have resulted in 57 months in custody followed by 57 months of community custody. Defense counsel's sentencing recommendation was less than half of the time the appellant would have served if given a prison-based DOSA. It was part of the defense strategy to go all or nothing with regard to the exceptional sentence down. This becomes especially clear with the trial court asks defense counsel about the DOSA option and defense counsel replies that even a DOSA was too much time and disproportionate. 2 RP 247. This proportionality argument is the heart of the *Alexander* court's decision, and it was a legitimate strategy to use the idea that even a prison-based DOSA was too much time considering the conduct contemplated, which is precisely what defense counsel did. 2 RP 245.

Even if the court considers the performance of defense counsel deficient there is nothing in the record to suggest that the appellant was prejudiced. The appellant's argument for prejudice seems to revolve around the erroneous notion that an evaluation is required for a court to impose a DOSA sentence. The appellant was eligible for a DOSA sentence and this was made clear to the trial court. 2 RP 247. There is no language in the statute that suggests that an evaluation is necessary, only that a court "may" order one. RCW 9.94A.660(4). The statute lays out

specific criteria for an optional evaluation for residential DOSA alternatives in RCW 9.94A.660(5)(a). There is no requirement for an evaluation, thus the argument that defense counsel was deficient for failing to procure one, or for failing to request a continuance in order to get one, is erroneous.

Moreover, the record reveals that the court at least considered the possibility of a DOSA sentence when it specifically inquired about the appellant's eligibility. 2 RP 247. As the statute clearly provides, the court may consider the DOSA option on its own motion. RCW 9.94A.660(2). The court could have given the appellant a DOSA sentence. It did not. The appellant has not shown prejudice from defense counsel's failure to request a continuance to get a DOSA evaluation. There was no prejudice and the trial court's sentence should be affirmed.

IV. CONCLUSION

The trial court properly sentenced the appellant within the standard range. The trial court did not rely on any information that was not accepted, acknowledged, pleaded, or proven. Failure to object or dispute a fact at sentencing is equivalent to acknowledging it. The appellant did not register an objection or dispute the information provided about his plea to a delivery charge in 2005. More importantly, there is nothing in the record to suggest that the trial court relied on that information anyway. The trial court relied on its own observations and the trial testimony of

witnesses in finding that the amount of drugs was not the “extraordinarily small” amount contemplated in *Alexander* and then denying the appellant’s request for an exceptional downward sentence. The standard range sentence was not based on impermissible information and should be affirmed.

Nor was the appellant’s defense counsel ineffective. Counsel pursued a legitimate all-or-nothing request for an exceptional downward departure of 25 months and 12 months of community custody instead of 57 months of prison and 57 months of community custody, the statutory sentence for a prison-based DOSA. Defense counsel argued specifically that prison-DOSA sentence was disproportionate to the appellant’s actions. Even if the performance was ineffective, there is no evidence that the appellant was prejudiced. The trial court clearly considered a DOSA when it inquired about the appellant’s eligibility and no evaluation or continuance was necessary for the court to impose a DOSA sentence. The trial court could have imposed a DOSA sentence but it did not, instead looking to the fact of the appellant’s prior conviction for delivery and deciding a standard range sentence was appropriate. There was no prejudice and the trial court’s sentence should be affirmed.

Respectfully submitted this 6th day of September, 2011.

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APPENDIX

RCW 9.94A.530

Standard sentence range.

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for other adjustments as specified in RCW 9.94A.533 shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in RCW 9.94A.537. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(3)(d), (e), (g), and (h).

RCW 9.94A.537

Aggravating circumstances — Sentences above standard range.

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

RCW 9.94A.660

Drug offender sentencing alternative — Prison-based or residential alternative.

(1) An offender is eligible for the special drug offender sentencing alternative if:

(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 under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(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, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence 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.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and RCW 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

COWLITZ COUNTY PROSECUTOR

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