

NO. 43593-4-II

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

STATE OF WASHINGTON, RESPONDENT

v.

SHAWN SHELBY TEETER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 11-1-01978-2 and 11-1-04010-2

BRIEF OF RESPONDENT

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

1. Whether the trial court properly ordered consecutive sentences under RCW 9.94A.589(3), where the crimes sentenced were committed while Defendant was not under sentence for conviction of a felony and the consecutive sentences were imposed subsequent to the commission of the crimes being sentenced.
2. Whether the trial court properly exercised its discretion in denying Defendant's motion for DOSA sentences where it based its denial on the law and the facts of the cases, as proven at trial.

B. STATEMENT OF THE CASE.

1. Procedure
 - a. 11-1-01978-2:

On May 11, 2011, Shawn Shelby Teeter, hereinafter referred to as the "defendant" or "Defendant," was charged by information with residential burglary and second degree theft. CP 1-2. *See* CP 3-4.

On July 11, 2011, the State filed an amended information, which added count III, unlawful possession of a controlled substance, methamphetamine. CP 6-8.

Finally, on August 2, 2011, the State filed a second amended information, which added count IV, intimidating a witness. CP 9-11.

The case was called for trial on April 18, 2012, and the parties argued motions in limine. RP (11-1-01978-2) 2-56, 120-30¹. The defendant moved to sever trial of count IV from trial of counts I through III, but that motion was denied. RP (11-1-01978-2) 56-63.

The court conducted a Criminal Rule (CrR 3.5) hearing, at which Tacoma Police Officer Christopher Yglesias and the defendant testified. RP (11-1-01978-2) 67-109. The court thereafter ruled that “all of the statements by [the defendant] are admissible at trial.” RP (11-1-01978-2) 119.

The parties selected a jury on April 23, 2012. RP (11-1-01978-2) 139-53.

The State gave its opening statement, RP (11-1-01978-2) 153, and called Thea Hopkins, RP (11-1-01978-2) 153-267, Gordon Hall, RP (11-1-01978-2) 267-97, Tacoma Police Officer Douglas Billman, RP (11-1-

¹ The verbatim report of proceedings in 11-1-04010-2 consists of 5 volumes, and that in 11-1-01978-2 consists of 6 volumes, the first 4 of which are consecutively paginated. References to these consecutively paginated volumes take the form of RP (11-1-01978-2) [Page No.]. References to the remaining volumes take the form of [Date] RP [Page No.].

01978-2) 301-33, Maureen Dudschus, RP (11-1-01978-2) 333-46, Corrections Officer Emanel Jackson, RP (11-1-01978-2) 349-59, Tacoma Police Officer Christopher Yglesias, RP (11-1-01978-2) 360-401, Officer Jared Williams, RP (11-1-01978-2) 405-09, and Toni Martin, RP (11-1-01978-2) 409-29. The State then rested. RP (11-1-01978-2) 433.

The defendant moved for mistrial and to dismiss count II, but both motions were denied. RP (11-1-01978-2) 435-46.

The parties discussed jury instructions. RP (11-1-01978-2) 446-64, 467-71, and the court took formal exceptions to its instructions. RP (11-1-01978-2) 471-73.

The defendant rested without presenting a case. RP (11-1-01978-2) 476.

The court instructed the jury, RP (11-1-01978-2) 480, and the parties gave their closing arguments. RP (11-1-01978-2) 484-501 (State's closing argument), 501-22 (Defendant's closing argument), 524-36 (State's rebuttal argument).

On April 30, 2012, a jury found the defendant not guilty of first degree criminal trespass, a lesser included offense of count I, not guilty of second degree theft as charged in count II, guilty of unlawful possession of a controlled substance as charged in count III, and guilty of attempting

to intimidate a witness, a lesser included of count IV. CP 168-73; RP (11-1-01978-2-04/30/2012) 7-10.

On May 25, 2012, the court sentenced the defendant to 24 months on count III and 60 months on count IV. 05/25/2012 RP 355; CP

On June 14, 2012, the defendant filed a timely notice of appeal. CP 205.

b. 11-1-04010-2:

On September 30, 2011, the State filed an information in cause number 11-1-04010-2, charging the defendant with custodial assault for allegedly throwing a cup of urine on a corrections officer while in custody awaiting trial in cause number 11-1-01978-2. CP (11-1-04010-2) 2-3. RP (11-1-01978-2) 1-2.

The case was called for trial on April 25, 2012, but recessed until May 7, 2012, after the conclusion of the trial in cause number 11-1-01978-2. RP (11-1-01978-2) 347-49. The court heard motions in limine on May 7, 2012. 05-07-2012 RP 4-5.

A jury was selected, and the parties gave their opening statements. 05-07-2012 RP 6-7, 8-9.

The State called Corrections Officer Dana Lynam, 05-07-2012 RP 9-32, 05-08-2012 RP 187-233, and Sergeant David Schultz, 05-08-2012 RP 235-53, 05-09-2012 RP 270-78, and rested. 05-09-2012 RP 278.

The defendant rested without presenting a case. 05-09-2012 RP 280.

The parties discussed jury instructions. 05-09-2012 RP 281-89, and the court instructed the jury. 05-09-2012 RP 291.

The parties gave their closing arguments. 05-09-2012 RP 292-99 (State's closing argument), 299-315 (Defendant's closing argument), 316-19 (State's rebuttal argument).

On May 9, 2012, the jury found the defendant guilty as charged of custodial assault. 05-09-2012 RP 324-27; CP (11-1-04010-2) 52.

On May 25, 2012, the court sentenced the defendant "to 60 months consecutive to the sentences on 11-1-01978-2." 05/25/2012 RP 355; CP (11-1-04010-2) 58-72. *See* 06/11/2012 RP 359-60.

On June 14, 2012, the defendant filed a timely notice of appeal. CP (11-1-04010-2) 89.

2. Facts

a. 11-1-01978-2:

In May, 2011, Thea Hopkins lived alone with her cat in a ground-level apartment at the Royal Pacific Apartments on Pacific Avenue in Tacoma, Washington. RP (11-1-01978-2) 154-55, 268-69. Hopkins has difficulty hearing and has worn hearing aids since 1980. RP (11-1-01978-2) 156-57.

She testified that although the defendant is her nephew, he was not allowed in her apartment. RP (11-1-01978-2) 157-58. In fact, Hopkins told the defendant approximately one month before May 10, 2011 incident not to come to her apartment. RP (11-1-01978-2) 165-66.

Gordon Hall is a landscaper and the assistant property manager for the Royal Pacific Apartments in Tacoma, Washintgon, where Hopkins lived. RP (11-1-01978-2) 268-69. On May 10, 2011 at about 6:45 a.m., as he was preparing to leave for his landscaping job, he saw the defendant at the front door of Hopkins apartment, RP (11-1-01978-2) 271-43.

Hall described the defendant as very anxious, and noted that he was carrying a backpack. RP (11-1-01978-2) 272, 274. The defendant intermittently tried calling Hopkins on his cell phone and pounding on her front door. RP (11-1-01978-2) 274. Hall testified that he could hear the telephone ringing inside of Hopkins' apartment. RP (11-1-01978-2) 294.

The defendant then walked around to the back side of the apartment. RP (11-1-01978-2) 274-75. Hall followed him, and noticed that the defendant was looking at the screen on the bathroom window of Hopkins' apartment. RP (11-1-01978-2) 275. The defendant was trying to figure out how to open it. RP (11-1-01978-2) 275. Hall indicated that he went away and came back again, but that the defendant was still at the window. RP (11-1-01978-2) 278. The defendant was "real[ly] anxious." RP (11-1-01978-2) 278. Hall testified that he had to go to work, but that he called the police on the way. RP (11-1-01978-2) 279.

Tacoma Police Officers Douglas Billman and Yglesias were dispatched to the scene in response to that call. RP (11-1-01978-2) 303-04, 361-62. Billman approached Hopkins apartment from the front and Yglesias from the back. RP (11-1-01978-2) 304-05.

While Officer Yglesias was behind the apartment, he noticed that the bathroom window screen had been removed and placed on the ground beneath the window, and that there was a backpack sitting next to it. RP (11-1-01978-2) 364.

Officer Billman knocked on the front door of Hopkins' apartment for about a minute without response, RP (11-1-01978-2) 305. After that minute of knocking, the defendant came around from the back of the apartment and approached the officers. RP (11-1-01978-2) 306, 366. The

defendant was “jittery,” “sweating a great deal,” and his speech was “very rapid.” RP (11-1-01978-2) 369.

The officers patted down the defendant, and found two credit cards, a set of keys, an address book, and a candy bar. RP (11-1-01978-2) 308-09, 370. The credit cards were issued to Colleen Begallia. RP (11-1-01978-2) 373. The defendant stated that he had found the credit cards lying on the ground. RP (11-1-01978-2) 374. However, Hopkins later identified the items found on the defendant as having come from her apartment. RP (11-1-01978-2) 380-81.

When the defendant was subsequently placed in handcuffs, Officer Yglesias noticed that the defendant had bits of beauty bark on his hands. RP (11-1-01978-2) 369. There was beauty bark of the same type underneath the bathroom window of Hopkins apartment, where Yglesias saw the backpack and window screen. RP (11-1-01978-2) 369-70.

Officer Yglesias went around the back of the apartment and noticed that the bag he had seen underneath the bathroom window had been moved to the sidewalk and that there was a red bag sitting next to it. RP (11-1-01978-2) 374. After being read the *Miranda*² warnings, the defendant stated that both bags were his. RP (11-1-01978-2) 377.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Officer Yglesias also noticed that the bathroom window was then open, but the screen which had been on the ground underneath it, had been again placed in the window. RP (11-1-01978-2) 375.

Officer Billman obtained a key to the apartment from the manager, tried knocking several more times without response, and then entered the apartment to conduct a welfare check. RP (11-1-01978-2) 310. Once inside, he was able to verbally contact Hopkins, who indicated that she was alright and met the officers outside the apartment. RP (11-1-01978-2) 311-12.

Hopkins testified that, on the morning of May 10, 2011 she was sleeping, without her hearing aids, on the couch in the front room of her apartment. RP (11-1-01978-2) 166. She testified that without her hearing aids she is "stone deaf." RP (11-1-01978-2) 167. The defendant was aware that she required the hearing aids and that she did not wear them when she slept. RP (11-1-01978-2) 167.

When Hopkins woke up on the morning of May 10, 2011, she noticed that her purse was missing. RP (11-1-01978-2) 167. She looked throughout the apartment for it, and then went outside, where she found a police officer. RP (11-1-01978-2) 167, 237. Hopkins testified that her wallet, which contained \$10.00, keys, a phone or address book, and comb and/or brush were in her purse. RP (11-1-01978-2) 171-75. Some credit or

debit cards in the name of Hopkins' daughter Colleen, were also missing from the apartment. RP (11-1-01978-2) 173-76. Hopkins testified that she never gave the defendant permission to come to her apartment on May 10, 2011. RP (11-1-01978-2) 183.

After receiving subpoenas to testify in this case, Hopkins received letters from the defendant. RP (11-1-01978-2) 188. In one such letter, the defendant told Hopkins, "I don't... care if you got a subpoena. All you have to do is take off for a couple of days" or stay home. RP (11-1-01978-2) 224. He told her not to show up for court and that "[t]hey are not going to throw [her] in jail for not testifying against [her] nephew." RP (11-1-01978-2) 224. He wrote, "[i]f you do come to court you better take the fifth. That means you don't say anything." RP (11-1-01978-2) 224. The defendant went on to tell Hopkins that if he was convicted she had better go into hiding. RP (11-1-01978-2) 196-97. He wrote, *inter alia*,

God bless you. Mean, God bless you're gonna get me put in prison for the next 10 years. Do you know what for? Gonna do to you when I get the F out, so better say your F'ing prayers if I do 10 years 'cause of your punk ass. When I cause of your -- where—where I get out you -- you're history. You F'ing through. Get that through your head.

....

Just keep your mouth shut when you're on the stand 'cause if I get convicted of this you better, um, up like hiding. I mean that with my life.

RP (11-1-01978-2) 225-26.

Hopkins indicated that she was scared of the defendant when she was alone with him. RP (11-1-01978-2) 226.

During a search of the defendant at the jail, Corrections Officer Jackson found a small baggy containing a substance. RP (11-1-01978-2) 316-17, 354-55. Washington State Patrol Crime Laboratory Forensic Scientist Maureena Dudschus analyzed that substance and found that it contained methamphetamine. RP (11-1-01978-2) 338-42.

b. 11-1-04010-2:

On September 17, 2011, Pierce County Corrections Officer Dana Lynam was inspecting cells in the maximum security unit of the jail, Three South, when the defendant, who was housed there, asked for a roll of toilet paper. 05-07-2012 RP 12-17. Officer Lynam had the defendant back away from the door so that he could place the toilet paper through a small trapdoor to the cell. 05-07-2012 RP 17-18. The defendant then sat on his bed. 05-07-2012 RP 18.

Officer Lynam dropped the toilet paper through the trapdoor. 05-07-2012 RP (11-1-04010-2) 18. As he did so, the defendant jumped up,

charged the door, grabbed a cup, and threw fluid from that cup, out the trapdoor and onto Officer Lynam. 05-07-2012 RP 18-19. Officer Lynam testified that he smelled urine as soon as the liquid splashed onto him, and testified that he believed the defendant had indeed thrown urine onto him. 05-07-2012 RP 21.

The defendant's cell also smelled of urine. 05-07-2012 RP 21-22.

The defendant was verbally abusive to the officer for the rest of the night. 05-07-2012 RP 24.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ORDERED CONSECUTIVE SENTENCES UNDER RCW 9.94A.589(3) BECAUSE THE CRIMES SENTENCED WERE COMMITTED WHILE DEFENDANT WAS NOT UNDER SENTENCE FOR CONVICTION OF A FELONY AND THE CONSECUTIVE SENTENCES WERE EACH IMPOSED SUBSEQUENT TO THE COMMISSION OF THE CRIMES BEING SENTENCED.

“RCW 9.94A.589(1) deals with sentencing for two or more current offenses” and “RCW 9.94A.589(2) deals with sentencing for a felony committed while under sentence for a different felony.” *State v. Champion*, 134 Wn. App. 483, 487, 140 P.3d 633 (2006). However, RCW 9.94A.589(3) provides, in relevant part, that

whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with *any felony sentence which has been imposed by any court... subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.*

RCW 9.94A.589(3) (emphasis added).

“RCW 9.94A.589(3) is clear and unambiguous and plainly allows the trial court to impose a consecutive sentence if the trial court expressly orders a consecutive sentence.” *State v. Champion*, 134 Wn. App. 483, 487, 140 P.3d 633 (2006). Moreover, “[n]o additional fact finding is necessary” to impose such a consecutive sentence. *Champion*, 134 Wn. App. at 487.

In the present case, the defendant was sentenced in two cause numbers, 11-1-01978-2 and 11-1-04010-2, on the same day, May 25, 2012. At that sentencing hearing, the State argued that it was within the trial court’s discretion to run the sentences in these two matters consecutively under RCW 9.94A.589(3) and asked that it do so. RP 343-44.

The trial court followed the State’s recommendation:

based on that lack of being able to get a real thorough report from anybody about his –the root causes of his behavioral problems, based on the statues and case law cited by [the deputy prosecutor], based on the evidence set

forth at the trials, [it] f[ou]nd that these sentences in these cases should run consecutively.

05/25/2012 RP 355.

The defendant committed the crimes in cause number 11-1-01978-2 on May 10, 2011 and the crime in cause number 11-1-04010-2 on September 17, 2011. CP 1-2. He was sentenced in both cases on May 25, 2012. CP; RP 336-58. Hence, the sentence in 11-1-4010-2 was a “felony sentence which [was] imposed... subsequent to the commission of the crime[s] being sentenced” in cause number 11-1-04010-2. Similarly, the sentence in 11-1-01978-2 was a “felony sentence which [was] imposed... subsequent to the commission of the crime[s] being sentenced” in cause number 11-1-04010-2. Because the crimes in both cause numbers were “committed while the [defendant] was not under sentence for conviction of a felony,” RCW 9.94A.589(3) was applicable to the sentencing in both cause numbers.

Given that RCW 9.94A.589(3) “allows the trial court to impose a consecutive sentence if the trial court expressly orders a consecutive sentence,” *Champion*, 134 Wn. App. at 487, and the trial court expressly ordered consecutive sentences here, the trial court did not err in doing so.

Therefore, the defendant’s sentences in both cause numbers should be affirmed.

2. THE SENTENCING COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT’S MOTION FOR DOSA SENTENCES BECAUSE IT BASED ITS DENIAL ON THE LAW AND THE FACTS OF THE CASES AS PROVEN AT TRIAL.

The Drug Offender Sentencing Alternative or “DOSA” program “is an attempt to provide treatment for some offenders judged likely to benefit from it.” *State v. Grayson*. 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). “Under a DOSA sentence, the defendant serves only about one-half of a standard range sentence in prison and receives substance abuse treatment while incarcerated.” *Grayson*. 154 Wn.2d at 337-38. After prison, “he or she is released into closely monitored community supervision and treatment for the balance of the sentence.” *Id.* at 338.

A defendant is eligible for DOSA 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.

RCW 9.94A.660(1).

Nevertheless, to grant a DOSA, the court must not only find that the offender is eligible but also “*that the alternative sentence is appropriate.*” RCW 9.94A.660(3) (emphasis added). Thus, it must decide “whether a DOSA will benefit both the offender *and the community.*” *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) (emphasis added).

Generally, “[a] criminal defendant may not appeal a trial court’s decision to impose a standard-range sentence instead of the Drug Offender Sentencing Alternative under RCW 9.94A.660.” *State v. Jones*, 171 Wn. App. 52, 55, 286 P.3d 83 (2012). However, “every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative

actually considered.” *Jones*, 171 Wn. App. at 55 (quoting *Grayson*, 154 Wn.2d at 342).

“[W]hether to give a DOSA is a decision left to the discretion of the trial judge, and [an appellate court’s] review of that exercise of discretion is limited.” *Grayson*, 154 Wn.2d at 335. “[A] trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

“[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence ... is effectively a failure to exercise discretion and is subject to reversal.”

Jones, 171 Wn. App. at 55 (quoting *Grayson*, 154 Wn.2d at 342).

Moreover, “while the SRA vests broad discretion in the hands of the trial judge, the trial judge must still exercise this discretion in conformity with the law.” *Grayson*, 154 Wn.2d at 335.

In the present case, the defendant asked the court to impose a DOSA sentence in both cause numbers. RP 349-51. The State objected, arguing that “it’s not in the community’s best interest that the Court grant [the defendant] a DOSA sentence.” RP 352-53. The Court declined to

impose a DOSA sentence and instead imposed consecutive standard range sentences. RP 355.

The defendant now argues that “[t]he trial court abused its discretion in denying [his] motion for a DOSA sentence where the trial court based its denial of [his] request on the fact that the trial court did not have a presentence report³.” Brief of Appellant, p. 10-15. The defendant argues that “[b]y failing to order alternative reports to the PSR the trial court shirked its duty to determine whether or not a DOSA would benefit [him].” Brief of Appellant, p. 15. The record shows otherwise.

First, it shows that the trial court’s decision was not based solely on the lack of a report:

[B]ased on that lack of being able to get a real thorough report from anybody about his –the root causes of his behavioral problems, *based on the statutes and case law cited by [the deputy prosecutor], based on the evidence set forth at the trials*, I find that these sentences in these cases should run consecutively.

And, accordingly, I’m sentencing on Cause Number 11-1-01978-2, Count 3, 24 months; and Count 4, 60 months. And on 11-1-04010-2, on Count I, I’m sentencing [the defendant] to 60 months consecutive to the sentences on 11-1-01978-2.

05/25/2012 RP 355. Hence the court did not base its decision solely on the lack of a report. In fact, it decided that a DOSA sentence was inappropriate even without a report “based on the statutes and case law

cited by [the deputy prosecutor],” and “the evidence set forth at the trials.” RP 355. That evidence included testimony that the defendant threatened to kill his own aunt if she testified against him, RP (11-1-01978-2) 225-26, and evidence that the defendant threw urine on a corrections officer, who did nothing more than respond to his request. 05-07-2012 RP 21.

A decision not to grant a DOSA sentence based on the law and the facts of a case as proved at trial cannot be considered “manifestly unreasonable or based upon untenable grounds or reasons.” *White*, 123 Wn. App. at 114. Therefore, the trial court cannot have abused its discretion in deciding not to impose DOSA sentences in the present cases, and its decision not to do so should be affirmed.

D. CONCLUSION.

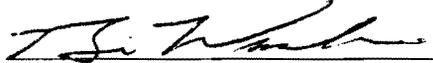
The trial court properly ordered consecutive sentences in these cases under RCW 9.94A.589(3) because the crimes sentenced were committed while Defendant was not under sentence for conviction of a felony and the consecutive sentences were imposed subsequent to the commission of the crimes being sentenced.

³ Or “PSR”

The trial court properly exercised its discretion in denying Defendant's motion for DOSA sentences because it based its denial on the law and the facts of the cases as proven at trial.

DATED: May 22, 2013

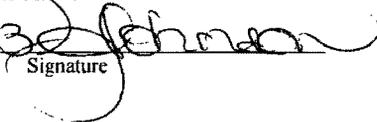
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