

**NO. 48225-8
48238-0**

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

STATE OF WASHINGTON, RESPONDENT

v.

NEGLIA MARIAN NETTLES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 15-1-00517-2
15-1-01965-3

Brief of Respondent

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

1. Did the trial court abuse its discretion by considering but rejecting alternative drug offender sentencing when the defendant had been recently terminated from a prior alternative drug sentence, and where there was a little evidence that the crimes were drug-motivated?

B. STATEMENT OF THE CASE.

1. *Procedural History.*

On February 6, 2015, under Pierce County cause number 15-1-00517-2, the defendant was charged with two felony property offenses. CP (48225-8) 1-2. Count one charged the defendant with second degree identity theft, while count two charged her with forgery of a check. *Id.* The charges were later amended to add a count of bail jumping alleged to have been committed on June 4, 2015. CP (48225-8) 4-5.

Meanwhile on May 21, 2015, while free on bail, the defendant was charged under cause number 15-1-01965-3 with two additional felonies. CP (48238-0) 1-2. Count one charged her with second degree identity theft and count two with forgery. *Id.* A third case under cause number 15-1-02895-4 was charged during July 2015, but dismissed as part of a plea agreement. RP Sentencing 9¹.

¹ The verbatim reports in these cases consist of two consecutive paginated volumes for the trial proceedings and one volume for the plea and sentence hearing held on October 16, 2015. Citations to the trial proceeding and sentencing proceedings will include a designation as such and the page numbers. Furthermore, citations to the clerk's papers will include a designation of the case number assigned by this court as well as page numbers.

The defendant's first case was assigned to a trial department for a CrR 3.5 voluntariness hearing on August 4, 2015. RP Trial 3. The defendant elected to waive jury and the court combined the voluntariness hearing and bench trial into one proceeding. RP Trial 5-6. After hearing testimony from four witnesses for the State, and after the defense rested without presenting a case [RP Trial 98.], the defendant was convicted of all three counts. RP Trial 107-08. Sentencing was eventually set for October 16, 2015, and combined with a plea and sentence hearing for the other two cause numbers. RP Sentencing 1.

At the plea and sentence hearing, the court accepted the defendant's guilty plea (as charged) to the two crimes charged under cause number 15-1-01965-3. RP Sentencing 6. The third case, number 15-1-02895-4, was dismissed as part of the plea agreement. RP Sentencing 9. The defendant made a motion to continue the sentencing for reasons not related to substance abuse treatment. RP Sentencing 6. That motion was denied.

The State recommended an exceptional consecutive sentence. RP Sentencing 10. The defendant's recommendation included a request for sentencing under the Drug Offender Sentencing Alternative, RCW 9.94A.660 and 662 ("DOSA"). The Court declined both recommendations and sentenced the defendant instead to a one-day consecutive, exceptional sentence that enabled the court to order

community custody supervision. RP Sentencing 19-21. The defendant filed these timely appeals on November 13, 2015.

2. *Statement of Facts.*

The facts in both cases were similar. Concerning the evidence in the first case, cause number 15-1-00517-2, testimony at trial established that the defendant had presented a forged check for payment at a Wells Fargo bank. RP Trial 23. The check was drawn on an account of an elderly woman who had passed away approximately a year before. RP Trial 24-26, 30-31, 56-57, 67. The Wells Fargo teller was alerted to possible fraud by a hold on the account and the police were summoned. RP 30-31.

Officer Joshua McKenzie responded to the call. RP Trial 35. His investigation included contact with the deceased account holder's son and questioning of the defendant. RP Trial 45. The defendant's statements were admitted after a CrR 3.5 hearing held at the same time as the bench trial. RP Trial 98. During Officer McKenzie's questioning, the defendant gave two accounts of her actions at the bank. First, she claimed that she had been given the check (by the deceased victim) as part of a furniture sales transaction two days previously. RP Trial 46-47. This was inconsistent not only with the death of the deceased account holder a year earlier but also with the face of the check which recited that it was for "SSI backpay". RP Trial 53.

Officer McKenzie dutifully investigated the defendant's first, false claim by contacting the deceased account holder's son. He learned that the check had actually been stolen from the son's vehicle. RP Trial 56. The officer confronted the defendant with his investigation and was then told that she had been given the check by an acquaintance whose full name she did not know. RP Trial 57-58.

The defendant was arrested and subsequently charged with identity theft and forgery. CP (48225-8) 1-2. While she was released pending trial on those charges, she failed to appear for a hearing on June 4, 2015. RP Trial 83. At the bench trial she was found guilty beyond a reasonable doubt as charged of the identity theft charge, forgery and bail jumping. RP Trial 107-08.

While on release, the defendant also committed the offenses for which she was charged in the second case under cause number 15-1-01965-3. CP 6-15. In that case, cause number 15-1-01965-3, the facts were established by her guilty plea statement. She admitted that, "On 5/4/15 in Pierce County WA I did offer a check, knowing it was forged and put off as a true written instrument and did use the financial information of [the victim] with the intent to commit a crime but did not gain anything of value." CP (48238-0) 14.

The trial court accepted the guilty plea and moved immediately to sentencing on both cases. As part of the plea agreement on the second

case, a third case was dismissed. RP Sentencing 9. This appeal followed the imposition of an exceptional one day consecutive sentence.

CP (48225-8) 13-25. CP (48238-0) 20-34.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING AND REJECTING THE DEFENDANT’S SENTENCING RECOMMENDATION FOR DOSA WHERE THE DEFENDANT HAD BEEN TERMINATED FROM A PRIOR DOSA AND HAD COMMITTED MULTIPLE PROPERTY CRIME OFFENSES FOR WHICH THERE WAS LITTLE EVIDENCE OF DRUG MOTIVATION.

In these cases, although the trial court correctly deemed the defendant eligible for DOSA, she reasonably concluded that DOSA was not appropriate. RP Sentencing 19. Although a “criminal defendant may not appeal a trial court's decision to impose a standard-range sentence instead of the Drug Offender Sentencing Alternative”, a defendant may appeal an exceptional sentence and may appeal a trial court’s failure to meaningfully consider a DOSA sentence. *State v. Jones*, 171 Wn. App. 52, 55, 286 P.3d 83 (2012), *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183(2005)(The trial court “abused his discretion by categorically refusing to consider a DOSA sentence”). RCW 9.94A.585(1) and (2). Just as a trial court would abuse its discretion by failing “under any circumstances” to consider an exceptional sentence below the standard range, a trial court also abuses its discretion by categorically refusing to

consider DOSA. *State v. Grayson*, 154 Wn.2d at 342, quoting *State v. Garcia–Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Apart from a categorical refusal, a sentencing court’s decision to impose or not impose DOSA is reviewable for an abuse of discretion.

State v. Hender, 180 Wn. App. 895, 900-01, 324 P.3d 780, 783 (2014)(“The legislature entrusted sentencing courts with considerable discretion under the SRA, including the discretion to determine if the offender is eligible for an alternative sentence and, significantly, whether the alternative is appropriate.”), citing *State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). Under the deferential abuse of discretion standard, an appellate court “does not substitute its judgment for that of the [trial] court” but rather “will reverse only if we have ‘a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.’” *United States v. Schlette*, 842 F.2d 1574, 1577 (9th Cir.1988), citing *Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.*, 824 F.2d 710, 724 (9th Cir.1987), and *United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir.1987).

An abuse of discretion occurs “only if no reasonable person would adopt the view espoused by the trial court.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278, 1281 (2001), citing *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970). “Where reasonable persons could take

differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.” *Id.* “The trial court's ruling, therefore, will not be disturbed unless this court believes that no reasonable judge would have made the same ruling.” *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970, 986 (2004), citing *State v. Woods*, 143 Wn.2d 561, 595–96, 23 P.3d 1046 (2001).

In this case, the trial court did not categorically refuse to consider DOSA and at no time said that the defendant was not eligible. It considered the DOSA option after having heard all of the evidence presented during the trial and sentencing hearings, but ultimately decided that DOSA was not appropriate. RP Sentencing 19. Instead the court elected to utilize a minimal, one day exceptional sentence together with community custody as a means to an end, namely the balancing of community safety against the defendant’s individual needs. Such a carefully thought out decision is the antithesis of an abuse of discretion. *Id.*

The available evidence supported the trial court’s judgement. This was not a case where the defendant was high on drugs when arrested. RP Trial 42-44. She showed no signs or symptoms of intoxication and did not ask for help with addiction. *Id.* Rather she put forth several contradictory excuses for the forged check. Her first excuse was that the

victim gave her the check as part of a furniture transaction. RP Trial 45-47. She only admitted the check was forged when the officer confronted her with the fact that the victim had passed away a year earlier. RP Trial 45, 57-58.

After abandoning the furniture excuse, the defendant decided to blame acquaintances. RP Trial 58-59. She claimed that people that she had known for a very short period of time gave her the check which she knew to be stolen. She needed money. *Id.* In this story the defendant again said nothing about her own addiction, she just needed money and accepted a stolen check in order to get it.

The two stories given to the arresting police officer did not support a DOSA sentence. The experienced trial court could be forgiven for expecting that a repeat criminal who had hit rock bottom but was genuinely interested in substance abuse assistance might have made some mention of it during the police investigation. In any event under no circumstances can it be said “that no reasonable judge would have made the same ruling.” *State v. Thomas*, 150 Wn.2d at 854. At the very least the trial court was justified in drawing the reasonable inference that the defendant was not genuinely concerned about substance abuse treatment, but was instead trying excuse after excuse after having been caught red-handed passing a stolen check from a deceased stranger.

The trial testimony was not the only evidence available to the court at sentencing. The defense was somewhat inconsistent about what tactic it planned to use at sentencing. The defense first asked for a continuance related to an alleged broken ankle. RP Sentencing 6-8. During the continuance motion there was no mention of the need for time to prepare a substance abuse treatment and aftercare plan. *Id.* As with the changing stories during the arrest, the defendant's conduct at sentencing did not at first even have a substance abuse-related focus.

After denying the continuance motion, the trial court was presented with a number of reasons both supportive and in opposition to a DOSA sentence. The prosecution reasonably pointed out that the defendant's history included (1) that the defendant had been "maxed out since 2009" (that is before her first DOSA) insofar as her offender score and standard ranges were concerned [RP Sentencing 11.]; (2) that the defendant had committed two of the cases while on pre-trial release for the others [RP Sentencing 12.]; and (3) that after having been revoked from her first DOSA, she committed a total of seven felony property crime offenses under three cause numbers [RP Sentencing 13]. Considering the lack of drug crimes in her history, the recent failure in treatment, and the lack of a treatment or aftercare plan, the trial court would have been naïve to think that the defendant was a good candidate for treatment. CP (48238-0)

16-19. As the prosecution put it, the picture presented to the trial court is that of “a prolific identity thief” who “has no intention of complying” and who inflicts financial injury on “real people whose financial information is being compromised.” RP Sentencing 12-13.

The defendant provided a counter argument. Her recommendation was supported by a September 21, 2015, letter to the court [CP (48225-8) 62-68], a September 11, 2015, DOC Drug Dependence Screen [CP 48225-8 57-61.], and her statements during allocution [RP Sentencing 17-18.] The defendant’s letter described mental health issues and crack cocaine addiction, but offered no explanation for why she failed at her first DOSA. CP (48225-8) 62-68. Instead it included a bald admission that, “I was released in January of 2014. I relapsed on drugs and began to abuse Meth.” *Id.*, p. 4. Far from showing that she was a good candidate for substance abuse treatment, the defendant’s letter supported the inference that when released from custody she abuses drugs and commits property crimes.

The last information presented to the trial court was the defense attorney’s recommendation and the defendant’s allocution. The defense attorney did not offer an optimistic outlook saying, “if she is given a DOSA, it’s on her as to whether or not she complies with it.” RP Sentencing 16. The defendant’s own account was no better. She

minimized her own responsibility for the crimes saying, “I don’t go out looking for checks, these checks came to me and I just do it.”

RP Sentencing 18. The defendant was not blaming addiction, she was blaming the people she hangs out with and mostly just how easy it is to commit property crimes such as these.

After considering all of the foregoing, the trial court decided against a repeat of the failed DOSA. RP Sentencing 18-21. Even so the court did not categorically refuse to consider the request for DOSA. RP Sentencing 19. It expressly considered the request especially as it was articulated in the defendant’s letter: “Well I read your letter, so I am aware of some of what you’ve told the Court about your background which you’ve indicated causes mental issues, but I really don’t see the basis here for the DOSA. . . .” *Id.* In context the court used the term basis as a synonym for circumstances. The circumstances, the facts established at trial and during the plea and sentencing hearing, did not show that DOSA was appropriate. Instead the court imposed an exceptional sentence that included only one day extra incarceration but that struck a better balance of community safety versus the defendant’s individual needs: “I would like to sentence you on the other case not to run consecutive except for is there some way I can run one day consecutive so I can give her the 12 months of community custody because I would like

her followed when she get out?” *Id.* The court reasonably believed that the defendant should serve her time but also that she should be followed by a community corrections officer once she was released.

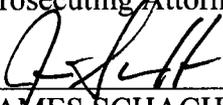
As any trial court would know, a community corrections officer can be a resource for a newly released inmate. RCW 9.94A.704. As a resource, the community corrections officer would be in a position to facilitate inpatient or out-patient treatment for an inmate truly interested in leaving behind a life of drugs and crime. A decision to make such resources available to the defendant is not an abuse of discretion but is rather an example of sound sentencing discretion in the best tradition of felony trial courts. This appeal should be denied.

D. CONCLUSION.

For the foregoing reasons the State urges the Court to affirm the defendant’s sentence.

DATED: Monday, May 02, 2016

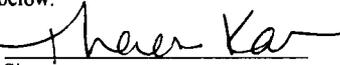
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Certificate of Service:

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

5.3.16 
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