NO. 48238-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NEGLIA NETTLES,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR.

The trial court improperly denied Neglia Nettles a Drug Offender Sentence Alternative (DOSA).

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A sentencing court must consider a request for a DOSA sentence and may not deny such a request based on a misunderstanding of the law or by failing to consider mandatory statutory criteria. Here, although Ms. Nettles met the statutory eligibility requirements, the trial court refused to impose a DOSA. Did the court deny Ms. Nettles a DOSA on an impermissible basis?

C. STATEMENT OF THE CASE.

Ms. Nettles was pleaded guilty to one count each of forgery and second degree identity theft. CP 16. Because of her drug addiction, Ms. Nettles requested the court impose a DOSA. RP 15-17. Although Ms. Nettles met the statutory eligibility requirements, the trial court denied her request for a DOSA. RP 23.

D. ARGUMENT.

The court abused its discretion in denying Ms. Nettles's request for a DOSA and a new sentencing hearing is required.

1. The court must consider the mandatory sentencing criteria when determining whether to impose a DOSA.

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Consistent with this general limitation on a court's sentencing authority, the DOSA statute structures a court's authority when considering a DOSA. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The program authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. *See* RCW 9.94A.660.

If the court determines a DOSA is appropriate, the court must impose a sentence which is one-half the midpoint of the standard range in prison receiving chemical dependency treatment. RCW 9.94.660(3); RCW 9.94A.662(1)(a). Once the defendant has completed the custodial part of the sentence, she is released into closely monitored community supervision and treatment for the balance of the sentence. RCW

9.94A.662(1)(b). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.662(3); *Grayson*, 154 Wn.2d at 338.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660.

> (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.

Ms. Nettles satisfied these eligibility requirements. The State never argued Ms. Nettles failed to meet these statutory criteria. Nor did the trial court conclude she was ineligible. Nonetheless, the court denied the request for a DOSA. RP 19. The court offered only "I really don't see a basis for the DOSA." *Id.* To be sure, the denial was not based upon a conclusion that Ms. Nettles did not have a drug problem. As a condition of community custody. The court specifically ordered Ms. Nettles to undergo an evaluation for drug treatment. CP 28 The court did not explain what factual or legal requirement was absent in Ms. Nettles's request. There was plainly a "basis" for Ms. Nettles request.

Ms. Nettles met the statutory eligibility requirements for a DOSA. The decision to deny her request rested upon considerations already taken into account by the Legislature. Thus, the court erred in denying Ms. Nettles's request.

2. Because the trial court abused its discretion, this Court should reverse Ms. Nettles's sentence.

Generally, a trial court's decision to deny a DOSA is not reviewable. *Grayson*, 154 Wn.2d at 338. But every defendant is entitled to ask the trial court for meaningful consideration of a DOSA request. *Id.* at 342. A party may challenge a trial court's failure to exercise discretion where the trial court categorically or unreasonably denies a DOSA sentence. *Id.*; *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004).

A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)); *see also State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal). "[T]rial judges have considerable discretion under the SRA, [but] they are still required to act within its strictures and principles of due process of law." *Grayson*, 154 Wn.2d at 338.

In this case, the sentencing court did not find Ms. Nettles failed to satisfy the statutory criteria for a DOSA. Indeed, the court ordered an evaluation for treatment as a condition of community custody. There is no support for the trial court's conclusion, therefore, that there was no "basis for the DOSA." Ms. Nettles is entitled to resentencing at which a court gives proper consideration to the guidelines for imposing a DOSA sentence.

Finally, even if this Court affirms the trial court it should deny any claim for appellate costs. The trial court specifically considered Ms. Nettles' ability to pay legal financial obligations. RP 20. Based upon evidence that she lacked any assets from which to pay legal financial obligations, the trial court waived all discretionary costs. RP 20-21. Mr. Nettles is now incarcerated and was deemed unable to pay the costs of appeal. This Court should deny any claim for appellate costs.

E. CONCLUSION.

For the foregoing reasons, Ms. Nettles respectfully requests this Court remand her case for a new sentencing hearing.

Respectfully submitted this 5th day of March 2013.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. NEGLIA NETTLES, Appellant.	)))))))))	NO. 48238-0-II

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[X] NEGLIA NETTLES 839065 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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