

No. 289711

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CESAR BRIBIESCA GUERRERO, Appellant

APPEAL FROM THE SUPERIOR COURT OF
CHELAN COUNTY

THE HONORABLE LESLEY A. ALLEN

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred by failing to order the chemical dependency screening report required under RCW 9.94A.500 prior to imposing sentence on Mr. Guerrero.
2. The sentencing court failed to meaningfully consider Mr. Guerrero's request for a DOSA, RCW 9.94A.660. (4/12/10 RP 147).
3. The sentencing court abused its discretion by failing to exercise discretion in the imposition of a methamphetamine lab clean up fine. (4/12/10 RP 147).

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Where the sentencing court failed to order the statutorily required pre-sentence chemical dependency screening report and later denied defendant's request for a DOSA, did the court violate RCW 9.94.500 and commit reversible error for failure to meaningfully consider defendant's request for a DOSA? (Assignments of Error 1,2)
2. Did the court abuse its discretion by failing to exercise discretion in the imposition of a methamphetamine lab clean up fine? (Assignment of Error 3).

B. STATEMENT OF FACTS

Cesar Bribiesca Guerrero was charged by information with violation of RCW 69.50.401, unlawful delivery of a controlled substance, methamphetamine, with a school zone enhancement. He was convicted after a jury trial. In pertinent part, the State presented the following evidence.

On July 23, 2009, officers from the Columbia River Drug Task Force, working with confidential informant Dan Dailing, conducted a "controlled buy" in the courtyard of Mr. Dailing's residence. (4/6/10 RP 23, 24).

Officers met Mr. Dailing at his apartment. Mr. Guerrero telephoned Mr. Dailing and agreed to sell him drugs. (4/6/10 RP 32). Officers strip-searched Mr. Dailing and gave him \$50 in pre-recorded "buy money". (4/6/10 RP 35-36). Officers walked Mr. Dailing down the stairwell and observed him as he entered the courtyard and sat. (4/6/10 RP 38, 77).

Mr. Guerrero entered the area and walked behind Dailing's chair. Mr. Dailing testified he put his hand behind his chair and exchanged the money for 2 packets from Mr. Guerrero. (4/6/10 RP 80). Both baggies together weighed 0.9g. Only one bag was field tested for methamphetamine. (CP 3). One packet, later laboratory

tested, showed a residue of methamphetamine but did not include a quantitative amount. (4/6/10 RP 66).

Three months later, after all attempts to again target Mr. Guerrero had failed, Officer Keith Kellogg prepared an affidavit of probable cause on October 30, 2009. (CP 3-8). A warrant for his arrest was issued on November 13, 2009. (CP 9).

At sentencing, defense counsel requested a DOSA arguing Mr. Guerrero met the statutory requirements for consideration for a DOSA. (4/12/10 RP 142-145). The court inquired: "If the request is for a prison-based DOSA, do we not need to have an evaluation of some kind done?" The State and defense counsel answered in the negative, saying a prison-based residential evaluation was sufficient. (4/12/10 RP 145). The court denied a DOSA, stating: "I am not overly impressed that Mr. Bribiesca is a candidate for prison-based DOSA and I am not going to impose that. I am going to accept the State's recommendation and impose the middle of the range of 40 months ... It looks like \$4,975 in court costs and fines..." (4/12/10 RP 147). That sum was later discovered to have been miscalculated and the total amount was amended to \$5,075. (CP 86). The court went on to say, "I guess I would recommend that if you think you have a drug problem, that you seek some

treatment while you are in DOC custody.” (4/12/10 RP 147). Mr. Guerrero appeals. (CP 71).

C. ARGUMENT

1. The Sentencing Court Failed To Order A Chemical Dependency Screening Report Violating RCW 9.94.500 And Failed to Meaningfully Consider Defendant’s Request For A DOSA.

A defendant is entitled to appellate review of the denial of a request for a Drug Offender Sentencing Alternative (DOSA) in order to correct a legal error or an abuse of discretion. *State v. White*, 123 Wn.App. 106,114, 97 P.3d 34 (2004) (quoting *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003)). Mr. Guerrero was convicted of a violation of the Uniform Controlled Substances Act (UCSA) under RCW chapter 69.50. At sentencing, the court denied Mr. Guerrero’s request for a prison-based DOSA. (4/12/10 RP 142). The decision whether to impose a DOSA sentence is left to the court’s discretion, but a court’s refusal to exercise its discretion or its choice to sentence on an improper basis is appealable. *State v. Garcia-Martinez*, 88 Wn.App.322, 328, 944 P.2d 1104 (1997). The process by which the sentence was imposed may be challenged. *State v. Grayson*, 154 Wn.2d 333,335,338, 111 P.3d 1183 (2005). A procedure-based challenge

must point to the failure of the trial court to follow a specific procedure required by the Sentencing Reform Act. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); *Williams*, 149 Wn.2d at 147. Mr. Guerrero challenges the procedure by which his DOSA sentence was denied.

a. The Court Erred By Failing To Order A Chemical Dependency Screening Report Before Imposing Sentence As Required Under RCW 9.94A.500 (1).

When interpreting a statute, the court is required to give the words of the statute their plain meaning. *City of Seattle v. State*, 136 Wn.2d 693,701, 695 P.2d 619 (1998). Here, RCW 9.94A.500(1) provides in pertinent part:

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense. (Emphasis added).

The statute defines the obligation of the court whenever there is a clear indication of drug involvement: that is, a conviction of a violation of the UCSA under chapter 69.50, a conviction of a criminal solicitation to commit a violation of UCSA 69.50 or the

court itself has found the offender has a chemical dependency that contributed to the offense. It is incumbent on the court, *prior to sentencing*, to either order a chemical dependency screening report or, to specifically waive one.

The sentencing court here did not specifically waive an evaluation nor did it order one prior to sentencing. Rather, it relied on the advice of the State, which indicated no evaluation was necessary, “just the residential one” and the assurance of defense counsel that the Department of Corrections would conduct such an evaluation once Mr. Guerrero was incarcerated. (4/12/10 RP 145). Counsel were correct in that once a defendant is sentenced to the prison-based DOSA the department of corrections is required to do a comprehensive substance abuse assessment. RCW 9.94A.662. However, that is a post-sentence event and unrelated to the evaluation required under RCW 9.94A.500.

Seemingly contradictory language is used in the DOSA statute, RCW 9.94A.660. That statute addresses eligibility for a sentencing alternative, sentencing requirements, and the resources the court may use to make a determination of eligibility. The permissive language of RCW 9.94A.660 (4) states:

“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.660.

Such language does not relieve the court of its duty under RCW 9.94A.500 to order a chemical dependency screening report before imposing sentence upon a defendant who has been convicted of a violation of UCSA. Had the court followed the statutory requirements of RCW 9.94A.500, it would have had an accurate chemical dependency screening report. The court could then have made an informed decision on the issue of chemical dependency and the appropriateness of a DOSA. The court erred when it did not order the statutorily required chemical dependency screening report prior to imposing sentence.

b. The Court’s Failure To Meaningfully Consider The Drug Offender Sentencing Alternative Is Reversible Error.

A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision. The program permits trial judges to give a reduced sentence to eligible nonviolent drug offenders who are likely to benefit from treatment, and added supervision to aid them in chemical addiction recovery. *See generally* RCW 9.94A.662.

A defendant is not entitled to this exceptional sentence, but he is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *Garcia-Martinez*, 88 Wn.App. at 330.

To meaningfully consider whether to impose a DOSA sentence, the court must examine two components. First, it must determine whether the offender met the statutory requirements of eligibility and second, whether the sentencing alternative is appropriate. RCW 9.94A.660 (1),(3).

By statute, an offender is eligible for a DOSA if:

- (a) The current felony offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon enhancement;
- (b) the conviction is not a felony of 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) he 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) the current offense of a violation of UCSA under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, involved only a small

quantity of the particular controlled substance; (e) he 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 standard sentence range for the current offense is greater than one year; and (g) he has not received a DOSA more than once in the prior ten years before the current offense. RCW 9.94A.660(1).

Mr. Guerrero met the statutory eligibility requirements for DOSA consideration. At sentencing, defense counsel told the court Mr. Guerrero had a drug problem; had not undergone treatment; only a small amount of drugs was involved in the criminal sale; although he had a green card, there was no immigration hold on him; and the standard range sentence was over one year. (4/12/10 RP 142-145). Additionally, there was no evidence of commission of a violent offense, sex offense, weapons enhancements, or driving under the influence by the defendant.

In determining appropriateness, the court asked, "As far as I can tell, there isn't any evidence before the court that Mr. Bribiesca [Guerrero] is himself a drug user?" (4/12/10 RP 144). Defense counsel stated, "We would also make an offer of proof that he has

spoken to me about his drug history... he is addicted to those substances and wants treatment.” (4/12/10 RP 144-45). By statute, a trial judge may rely on facts that are admitted, proved or acknowledged to determine any sentence, which includes whether to sentence a defendant to a DOSA. RCW 9.94A.530(2). An “acknowledged” fact is a fact that is presented or considered during sentencing that was not objected to by the parties. *Grayson*, 154 Wn.2d at 339.

The *Grayson* court was asked to determine whether the defendant received adequate consideration of his request for a DOSA as part of his sentence. *Grayson*, 154 Wn.2d at 335. There, the trial court declined to give a DOSA because it believed the program was underfunded. It neither articulated any other reasons for denial of the DOSA, nor addressed any reasons why the defendant would not be a good candidate for a DOSA. *Grayson*, 154 Wn.2d at 342. While acknowledging the court has wide discretion whether to impose a DOSA, the reviewing court reversed on the limited grounds that the trial judge appeared to have not meaningfully considered whether a sentencing alternative was appropriate. *Grayson*, 154 Wn.2d at 343.

Here, the sentencing court simply stated, "I am not overly impressed that Mr. Bribiesca [Guerrero] is a candidate for prison-based DOSA and I am not going to impose that." (4/12/10 RP 147). The court announced its decision without any articulated reasons for denying the DOSA request. Unlike *Grayson*, where there were ample grounds to find the defendant an unsuitable candidate for DOSA, here Mr. Guerrero in fact met all the statutory requirements for eligibility for a DOSA. Moreover, the court commented, "...[I] recommend that if you think you have a drug problem, that you seek some treatment while you are in DOC custody." (4/12/10 RP 147). Had the court had before it a chemical dependency screening report it could have meaningfully considered whether Mr. Guerrero's admitted addiction and statutory eligibility made him an appropriate candidate for a DOSA.

Based on failure of the court to order the pre-sentencing chemical dependency screening report combined with failure to meaningfully consider whether a DOSA was an appropriate sentencing alternative for Mr. Guerrero, this court should reverse Mr. Guerrero's sentence on procedural grounds and abuse of the court's discretion.

2. The Court Abused Its Discretion By Failing To Exercise Discretion In The Imposition Of A Methamphetamine Lab Clean Up Fine.

RCW 69.50.401(2)(b) authorizes a court to impose a fine on defendants convicted of drug related crimes. The statute states in relevant part:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to deliver, a controlled substance.

(2) Any person who violates this section with respect to...: (b)Amphetamines...or methamphetamine, ... is guilty of a class B felony and upon conviction *may be imprisoned* for not more than ten years, *or*, (i) *fined* not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, *or both such imprisonment and fine*...Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for clean up of laboratories, sites, or substances used in the manufacture of methamphetamine. The fine moneys deposited with that agency must be used for such clean up cost[.] (Emphasis added).

A defendant convicted under that statute may be punished by imprisonment or a fine or both. The imposition of a fine and authorization of a contribution to a drug clean up fund is discretionary with the trial court. *State v. Hunter*, 102 Wn.App. 630, 640-42, 9 P.3d 872 (2000), *review denied* 142 Wn.2d 1026 (2001); *State v. Wood*, 117 Wn.App. 207, 212, 70 P.3d 147 (2003). An abuse of discretion occurs when the trial court's exercise of its

discretion is manifestly unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.3d 1239 (1997). The failure to exercise discretion may itself be an abuse of discretion. *State v. Pettit*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

Here, the State wrongly advised the court, “By statute there is a \$3,000 methamphetamine fine.” (4/12/10 RP 141). The *Wood* court disagreed with this same claim by the State. *Wood*, 117 Wn.App at 210. There, interpreting the statute, the court held RCW 69.50.401 did not require a mandatory \$3,000 fine. Rather, the statute authorized that a “contribution” to the drug clean- up fund was discretionary with the court. *Wood*, at 212. Here, the court did not question whether the fine or amount was mandatory, but merely said, “It looks like \$4,975 in court costs and fines payable at \$50...” (4/12/10 RP 147).

Imposition of a \$3,000 fine is not mandatory. Rather, the statute indicates a defendant convicted of UCSA *may* have a fine imposed, of which the first \$3,000 must go to a meth lab clean up fund. *Wood*, at 212; RCW 60.50.401(2)(b). The trial court’s failure to exercise discretion in imposing the fine was itself an abuse of discretion.

D. CONCLUSION

Based on the foregoing facts and authorities, this Court should remand for resentencing for a statutorily proper consideration of a DOSA and the imposition of a fine.

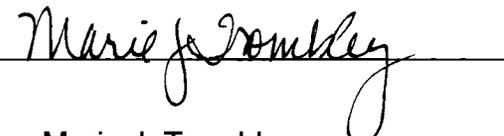
Respectfully submitted this 20th day of August 2010.

A handwritten signature in cursive script, reading "Marie J. Trombley", is written over a horizontal line.

Marie J. Trombley, WSBA # 41410
Attorney for Appellant Guerrero

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Guerrero, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on August 20, 2010, to Cesar Bribiesca Guerrero, DOC # 339761, Coyote Ridge Correction Center, PO Box 769, Camas C-16, Connell, WA 99326; and Gary A. Riesen, PO Box 2596, Wenatchee, WA 98807-2596


Marie J. Trombley