30252-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

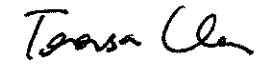
ALISSA M. VEGA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the sentencing of the Appellant.

III. ISSUES

Does *Gutierrez v. Dep't of Corrections*, 146 Wn. App. 151, 188 P.3d 546 (2008) control the definition of "standard range" in RCW 9.94A.660(3) in determining an offender's eligibility for a residential-based DOSA?

IV. STATEMENT OF THE CASE

The State agrees with the Defendant's Statement of the Case with the following addendum.

At the sentencing hearing, the parties acknowledged *Gutierrez v. Dep't of Corrections*, 146 Wn. App. 151, 188 P.3d 546 (2008), a Division Three case regarding a Walla Walla county DOSA sentencing. RP 22-25, 28. The sentencing court's decision relied on the case. RP 34.

The sentencing hearing was continued for the Defendant to prepare written orders denying the residential DOSA and for the Defendant to acquire materials related to the FOSA request. CP 104-07; RP 34-35. When the hearing resumed, the Honorable Judge John Lohrmann indicated that he had given more thought to the DOSA arguments and wanted to make a clearer record. RP 37.

The judge disagreed with the Defendant that RCW 9.94A.664(1) "clearly and unequivocally provides for sentences that exceed 24 months." RP 38. The judge found that it was RCW 9.94A.660(3), which was clear in limiting eligibility to sentences where the midpoint of the standard range is twenty-four months or less. RP 38. *See* RCW 9.94A.660(3). "The point of 9.94A.664 is that the period of community custody must be at least 24 months guaranteed." RP 38.

> The legislature did sort of an awkward job of making its point, but by reconciling the statutes and reading it consistent with 9.94A.660(3), and State v. Gutierrez, I don't believe that I am taking out the words "whichever is greater" from 9.94A.664. Those words just may or may not have any application under the present sentencing scheme.

RP 38-39. The judge also noted that he was bound to follow the precedent of *Gutierrez* as Divisions I and II have. RP 39.

The court's oral ruling was incorporated by reference into the written

decision. CP 106; RP 41. The written decision finds that, pursuant to *Gutierrez v. Dep't of Corrections*, 146 Wn. App. 151, 188 P.3d 546 (2008), the standard range includes the addition of the enhancement, so as to be 36-44 months. CP 105. Accordingly, the Defendant was ineligible for the residential DOSA. CP 105-06.

V. ARGUMENT

THE SENTENCING COURT DID NOT ERR IN FINDING THAT THE TERM "STANDARD SENTENCE RANGE" IS UNAMBIGUOUS IN THE STATUTE AND UNDER *GUTIERREZ* AND, THEREFORE, FINDING THE DEFENDANT INELIGIBLE FOR A RESIDENTIAL DOSA AS A MATTER OF LAW.

The Defendant's question on appeal is how to interpret "the midpoint of the standard range" in RCW 9.94A.660(3) when there are enhancements. An offender is only eligible for the residential DOSA "if the midpoint of the standard range is twenty-four months or less." RCW 9.94A.660(3).

Judge Lohrmann relied on *Gutierrez v. Dep't of Corrections*, 146 Wn. App. 151, 188 P.3d 546 (2008) to find that the Defendant's standard range was 36 to 44 months, i.e. (12 to 20 months) plus the 24 month school zone enhancement. CP 104-07. This case is not referenced in the Appellant's Brief, although it appears the Defendant is seeking to overturn or at the very least distinguish this case.

In *Gutierrez*, the defendant was convicted of delivering a controlled substance in a school zone in Walla Walla county. *Gutierrez*, 146 Wn. App. at 153. [Ms. Vega is also convicted of delivering a controlled substance in a school zone in Walla Walla county. CP 6.] Like Ms. Vega, Mr. Gutierrez has a standard range of 12+ - 20 on the delivery plus the 24 month enhancement. *Id.* Like Ms. Vega, Mr. Gutierrez received a prison-based DOSA. The sentencing court imposed a 40 month sentence and suspended half the time, pursuant to RCW 9.94A.662(1)(a) (a prison-based DOSA sentence " shall include a period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater"). The DOC petitioned, arguing that the entire 24 month enhancement term must be served in confinement. *Id.*

The Department argued that "the standard sentence range" means the base standard range, exclusive of enhancements. *Gutierrez*, 146 Wn. App. at 154. The Court of Appeals acknowledged "some facial appeal" to this construction, but ultimately ruled against the Department. *Id.* The court noted that the term is defined in the SRA.

> "Standard sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

RCW 9.94A.030(48). The court reviewed other statutes and cases of the

Washington Court of Appeals and Washington Supreme Court. *Gutierrez*, 146 Wn. App. at 155. The court ruled that there is no ambiguity in the DOSA statute as to the meaning of standard sentence range; the enhancement is included. *Gutierrez*, 146 Wn. App. at157.

In this appeal, the Defendant looks at the term in a different provision of the DOSA statute: RCW 9.94A.660, rather than RCW 9.94A.662. However, the analysis in *Gutierrez* remains relevant. The term is explicitly defined in the SRA. The Defendant's enhancement is part and parcel of her sentence. A residential DOSA is limited by a defendant's sentence, such that only those who are facing relatively short terms of confinement may be considered. Ms. Vega was not facing a relatively short term of confinement. We cannot ignore the enhancement which is not only part of her sentence, but is also applied without allowance for judicial discretion. (Enhancements may not be imposed concurrently to one another and are for a definite term rather than a range. RCW 9.94A.533(6).)

Judge Lohrmann's reasoning is persuasive. The clear legislative intent is that community custody terms for residential DOSA's are for a *minimum* term of two years. The statute allows that the community custody term may be greater if the eligibility requirements for a residential DOSA

were to change in the future.

Because the eligibility requirements in RCW 9.94A.660(3) are unambiguous, there is no convincing reason to distinguish *Gutierrez* in this context.

The Defendant notes that when both provisions were enacted simultaneously, as they were here, "[i]n such cases the statutory provision that appears latest in order of position prevails *unless the first provision is more clear and explicit than the last.*" Appellant's Brief (emphasis added), *citing State ex rel. Graham v. San Juan Cy.*, 102 Wn.2d 311, 320, 686 P.2d 1073 (1984). The eligibility provision is first in order; the community custody provision comes later. The eligibility provision is unambiguous.

The Defendant's confusion arises in the community custody provision. The Defendant queries, when will one-half the midpoint be greater than two years? Judge Lohrmann has answered, potentially in the future. For now, it is clear that two years is the minimum community custody term. That the legislature has drafted this provision to anticipate changes in the eligibility requirement in the future – does not render this provision ambiguous.

In any case, the former provision is unmistakably clear. Therefore,

even were a court to find the latter confusing, the clear language in the former prevails.

The Defendant references the rule of lenity. This only applies where there is ambiguity. Because the term is defined in the statute and repeatedly in case law, there is no ambiguity.

> Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation. *See Armijo v. Wesselius,* 73 Wash.2d 716, 720, 440 P.2d 471 (1968) ("Whether done liberally or strictly, judicial interpretation is necessary."). Strict construction is simply a requirement that, where two interpretations are equally consistent with legislative intent, the court opts for the narrower interpretation of the statute. *See State v. Johnson,* 119 Wash.2d 167, 172, 829 P.2d 1082 (1992); *cf. State v. Ervin,* 169 Wash.2d 815, 823 n. 1, 239 P.3d 354 (2010) ("[T]he rule of lenity ... is applicable only *after* employing tools of statutory construction." ...

Estate of Bunch v. McGraw Residential Center, -- Wn.2d --, 275 P.3d 1119 (2012).

Judge Lohrmann made no error in relying on *Gutierrez.*

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's sentence.

DATED: June 27, 2012.

Respectfully submitted:

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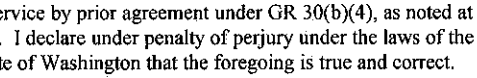
Janet Gemberling <jan@gemberlaw.com> <admin@gemberlaw.com> Alissa M. Vega, DOC# 8412255 Tri-Cities Work Release 524 E Bruneau Kennewick, WA 99336	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 27, 2012, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**