

30277-6-III

**FILED**

JUN 27, 2012

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

TINA TAYLOR,

Appellant.

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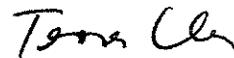
DIRECT APPEAL  
FROM THE SUPERIOR COURT  
OF WALLA WALLA COUNTY

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RESPONDENT'S BRIEF

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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 conviction and sentence of the Appellant.

### **III. ISSUES**

1. Was the Defendant correctly informed about her eligibility for a prison-based DOSA where the prosecutor advised that she was eligible for a prison-based DOSA, where the court advised her of her eligibility for the prison-based DOSA, where there was no indication on the record prior to her plea of any consideration of a residential-based DOSA, where the Defendant did not request a DOSA of any kind in her Statement, and where the Defendant affirmatively stated that the prosecutor's recommendation for a mid-range sentence was the only promise she had been made?
2. Does the record demonstrate that the Defendant understood the constitutional rights she was waiving which are set forth in her

Statement, which were discussed on the record, and which she stated both aloud and in writing that she understood?

3. Did the court believe that the Defendant was ineligible for a prison-based DOSA or merely unamenable to treatment as her attorney indicated?

#### **IV. STATEMENT OF THE CASE**

On March 2, 2011, the Defendant Tina Taylor was charged with two counts of delivering hydrocodone. CP 10-12. On March 28, 2011, the charges were amended to add school zone enhancements. 1RP<sup>1</sup> 1-5.

On June 10, 2011, Ms. Taylor was scheduled for a change of plea hearing. 1RP 8. However, her counsel informed the court that Ms. Taylor either decided that the state's offer was "not generous enough" or was hopeful that she could force a time-for-trial dismissal by changing her mind on the last day. 1RP 8, 10.

Two weeks before trial, the confidential informant was murdered. 2RP 19. Ms. Taylor expressed concern with her attorney, because the prosecutor intended to offer recorded conversations between the dead

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<sup>1</sup> As in the Appellant's brief, "2RP" refers to the transcript of trial on June 27 and 28, 2011. "1RP" refers to the transcript of other pretrial, plea, and sentencing hearings.

informant and Ms. Taylor. 2RP 2-9. However, she informed the court that she was satisfied that she could “work together [with her counsel] in providing effective representation.” 2RP 9. Her counsel repeatedly objected to the admission of the recorded statements. 2RP 15-16, 19, 90.

On June 27, 2011, the trial began. 2RP 21. A detective, a city police officer, two deputy sheriffs, a forensic scientist, and the transportation director for Walla Walla public schools all testified. 2RP 21-144. Part of the evidence admitted (over defense objection) was a recorded jail phone conversation between the Defendant and her mother, in which the Defendant suggests that, because she and her mother have similar voices, her mother should find witnesses to testify that it was the mother (not the Defendant) who was recorded conversing with the informant. 2RP 90-98.

On June 28, Ms. Taylor pled guilty to two counts of subsequent delivery of dehydrocodeinone within 1000 feet of a school bus route. CP 44-52, 73-74; 1RP 12-23.

Ms. Taylor affirmed that she was 41, an American citizen, and a high school graduate with some college studies. 1RP 12. She had no difficulty in reading, writing, or understanding. 1 RP 12-13. The court reviewed with the Defendant that in pleading guilty she was giving up certain rights including

the right to require the State prove the elements beyond a reasonable doubt and other constitutional rights. 1 RP 13-14. The court pointed the Defendant to her Statement:

THE COURT: Paragraph 5 on page 2 indicates that you have certain constitutional rights. One of which, of course is the going to trial, which we are presently in the middle of. When you plead guilty, you give up those rights and the trial would end at this point. Do you understand that?

THE DEFENDANT: Yes.

1RP 14.

While the court did not recite each and every right waived, the rights are printed in the Defendant's Statement. CP 44-45 (the right to trial where evidence must be found beyond a reasonable doubt, the right to confrontation, the right to appeal a finding of guilt). The Defendant told the judge that she read over the Statement with her attorney, understood it, and signed it. 1RP 12. *See also* CP 51-52.

The prosecutor noted that, because the enhancements ran consecutively, Ms. Taylor's standard range was 68-108 months and the state's recommendation was for 88 months. 1RP 22. Ms. Taylor said she understood. 1RP 23. Ms. Taylor understood that the prosecutor was recommending a mid-range sentence; that her attorney would be requesting a sentence at the low end of the range; and that the judge was not bound by any

recommendation. CP 47; 1RP 17. Ms. Taylor told the court that, other than the prosecutor's recommendations, no one had made her any promises as to how the cases would be handled. 1RP 19.

The court noted that Ms. Taylor was already serving a DOSA (drug offender sentencing alternative) when these new offenses occurred. 1RP 16. The court advised Ms. Taylor that the DOC would weigh in on whether she would be eligible for a prison-based DOSA. 1RP 18-19. Before the sentencing hearing, the court ordered the DOC to screen the Defendant for a DOSA, noting that the court was considering imposing a residential DOSA. CP 56. She was not eligible by law for the residential alternative. RP 62.

At her sentencing hearing, Ms. Taylor's counsel informed the court that DOC had found Ms. Taylor was not "amenable" to treatment. 1RP 24.

Sergeant Gary Bolster explained that Ms. Taylor was serving a DOSA for delivering methamphetamine at the time of the new offenses. 1RP 26. Despite the treatment she had received, Ms. Taylor continued to offend. 1RP 26. Police believed that she had delivered prescription narcotics to "multiple people." 1RP 26. The abuse of prescription drugs is "a big problem in our community right now." 1RP 26. Ms. Taylor did not appear remorseful. 1RP 26. The informant in her case had been murdered. 1RP 26. And Ms. Taylor

had been hopeful that her case would “go away.” 1RP 26. *See also* 2RP 3-9 (Defendant arguing that the witness’ murder should result in dropped charges). She only decided to plead guilty after the state had presented the whole case at trial. 1RP 26.

The court found that Ms. Taylor did not qualify for a sentencing alternative. 1RP 28. Nor was she deserving of a low range sentence. 1RP 29. She received 98 months. CP 79; 1RP 34.

## V. ARGUMENT

### A. THE DEFENDANT WAS NOT MISINFORMED ABOUT HER ELIGIBILITY FOR A DOSA.

The Defendant was properly advised that she was eligible for a prison-based DOSA. 1 RP 18-19. The Defendant’s claim to the contrary is based on several premises which are unsupported in the record. Because this is so, her claim of error fails.

First, Ms. Taylor was not “led to believe that she qualified for a **residential-based** DOSA.” Appellant’s Opening Brief at 7 (emphasis added). Nothing in the Defendant’s Statement of the Case suggests this occurred and the record is otherwise. Rather, in the Defendant’s presence during the guilty plea hearing, the court inquired of the prosecutor whether

Ms. Taylor was eligible for a prison-based DOSA. 1RP 18.

Second, the record does not support the Defendant's argument that "she was not informed about her ineligibility for residential-based DOSA." Appellant's Opening Brief at 9. While it is hard to prove a negative, the inferences in the record suggest that the Defendant had no expectations for a residential-based DOSA. The plea statement states that she would be requesting a low-end sentence, not a DOSA of any kind. CP 47. The low end was 68 months (1RP 22), which automatically disqualified her from a residential DOSA. RCW 9.94A.660(3) (midpoint must be 24 months or less). The court only advised her of the prison-based DOSA. 1RP 18-19. And the only mention of the residential DOSA appears in a request for a pre-sentencing evaluation entered after the change of plea. There is no indication that Ms. Taylor was aware of this July 8 order, which was created several days after her June 28 plea, or that it could possibly have informed her plea.

Third, Ms. Taylor was not misinformed about her eligibility for a prison-based DOSA. Appellant's Opening Brief at 7. The prosecutor correctly advised that she was not precluded from eligibility based merely on her participation in a previous DOSA. 1RP 18. *See also* RCW 9.94A.660(1)(g). The statute details the eligibility requirements. RCW

9.94A.660(1). And the court more fully advised her that DOC would have input into the court's final decision. 1RP 18. The DOC's input was that Ms. Taylor was not "amenable" to treatment. 1RP 24.

Because the record does not support the factual bases for the arguments, the court should not permit a withdrawal of the plea based on allegations that Ms. Taylor was misinformed about her eligibility for DOSA.

**B. THE DEFENDANT WAS INFORMED OF THE RIGHTS SHE WAS WAIVING THROUGH A GUILTY PLEA.**

The Defendant argues that she was "not informed that she was giving up her right to raise certain issues on appeal." Appellant's Opening Brief at 12. This is not the record.

The rights waived are clear in the Statement of Defendant. CP 45. The court directed the Defendant to this portion of her statement and explained it to her. 1RP 13. She said orally and in writing that she understood that she was giving up these rights by pleading guilty mid-trial. CP 51-52; 1RP 13.

The Defendant complains that the trial judge should have expanded on the plea colloquy. Appellant's Opening Brief at 15. The record shows that the court inquired about alleged conflicts between counsel and client and

that the Defendant assured the court that there were none. The record shows that the court engaged in a very thorough plea colloquy.

The Defendant argues that her choice was not an intelligent one. Appellant's Opening Brief at 15. The State disagrees. Ms. Taylor had seen the State's strong evidence, including her own statements to the murdered informant and to her mother. Both parties had received the court's rulings admitting the State's evidence. It would have been irrational for the Defendant to expect a generous offer mid-trial. The State had less and less incentive. And while the prosecutor never threatened an exceptional sentence, the Defendant still received benefits through her plea. She received a mid-range recommendation, which was less than what the court was inclined to grant as it turned out. And she ended the agony of trial. A criminal defendant can find value in simply putting an end to litigation, especially when the outcome appears certain.

Consider, too, that if the Defendant proceeded, she ran the risk of subjecting her loved ones to charges of perjury. While the Defendant suggests that she will accuse her attorney of coercing her plea by pointing this out to her, consideration of the ramification of her actions on others is not so coercive as to invalidate a plea. *State v. Osborne*, 102 Wn.2d 87, 684 P.2d

683 (1984) (defendant's spouse's threat to commit suicide did not render the plea involuntary due to coercion).

The Defendant suggests that the plea is inconsistent with her intent to challenge the confrontation ruling. But her letters indicate her challenge to the plea was based on allegations of coercion and not a desire to revisit the confrontation clause issue. CP 54-55, 63-66. This makes sense. After all, the prosecutor, her attorney, and a Yakima attorney consulted by her family (2RP 10-11) all indicated that the court's ruling on the confrontation was correct.

The record demonstrates that the Defendant was fully advised and understood which rights she was waiving by pleading guilty.

C. THE DEFENDANT WAS NOT DEEMED "INELIGIBLE" FOR A PRISON-BASED DOSA.

The Defendant argues that the sentencing court mistakenly believed that Ms. Taylor was ineligible for a prison-based DOSA. This seems unlikely. The record is that the prosecutor said she was eligible (1RP 18), but the DOC said she was not amenable to treatment (1RP 24). A finding that a defendant is not amenable to treatment does not speak to "eligibility" (RCW 9.94A.660(1)), but appropriateness of the alternative (RCW 9.94A.660(1)).

The discussion of her ineligibility for the residential-based DOSA has no bearing on her amenability to treatment. These are two separate matters. Nowhere does the court state that the Defendant was ineligible. The court notes that the Defendant does not “qualify” (1RP 28), which is fair to say considering her lack of amenability.

It is not surprising that there was a finding that she was not amenable to treatment. Following a previous methamphetamine conviction, Ms. Taylor had completed the prison-based portion of her treatment. And yet despite treatment and while under supervision in the community, she continued to deal drugs. She did not take responsibility for the offense, but looked for every trick to avoid punishment, whether by playing games with the time-for-trial rule, taking advantage of the informant’s murder, or encouraging her mother to solicit perjury or tamper with witnesses. While Ms. Taylor’s sentence is significant, the State could have argued aggravating factors of lack of remorse and rapid recidivism under the facts of this case. RCW 9.94A.535(3)(q) and (t). Her crime was not typical.

In granting a DOSA, the court must determine that the alternative is appropriate. RCW 9.94A.660(3). Part of that determination considers whether both the offender and community will benefit. RCW

9.94A.660(5)(a)(iv); *State v. Watson*, 120 Wn. App. 521, 529, 86 P.3d 158 (2004). Ms. Taylor was not an appropriate candidate.

To read the record as Defendant does is to presume the trial court did not know RCW 9.94A.660, disregarded the prosecutor's advisement regarding eligibility, and could not distinguish between requirements for a residential-based versus a prison-based sentencing alternative. It is also possible to read the record to see that the sentencing judge understood that the Defendant was eligible but also inappropriate for the alternative – based on what both attorneys said on the record. This latter reading of the record offers appropriate deference to the trial judge's experience.

However, if this Court disagrees with the State, the remedy is re-sentencing only – as the Defendant has stated. Appellant's Opening Brief at 20.



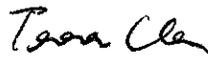
**VI. CONCLUSION**

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

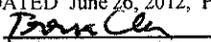
DATED: June 26, 2012.

Respectfully submitted:

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<p>Kristina Nichols &lt;wa.appeals@gmail.com&gt;</p> <p>Tina L. Taylor, DOC # 329061 Washington Corrections Center for Women 9601 Bujacich Rd. NW Gig Harbor, WA 98332-8300</p>	<p>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 26, 2012, Pasco, WA</p>  <p>Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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