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COA 35216-1-III

No. 95992-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JAMES AUSTIN YANCEY,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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I. INTRODUCTION

The Legislature has provided for a treatment alternative sentence for offenders whose substance abuse contributes to criminal conduct. RCW 9.94A.660. Courts have discretion to impose the alternative where offenders meet eligibility requirements. RCW 9.94A.660(3) (the sentencing court determines if a DOSA is "appropriate"). However, whether that treatment is served in prison or in the community is not discretionary upon the sentencing court but dependent upon the offender's standard sentencing range. *Id.* (residential alternative only available if the midpoint of the standard range is twenty-four months or less). The sentencing court is not authorized to exclude sentencing enhancements in order to manufacture a standard range to permit the residential option.

II. ASSIGNMENT OF ERROR

The superior court erred in imposing a residential DOSA.

III. ISSUES PRESENTED FOR REVIEW

1. Under RCW 9.94A.660(3), "[t]he residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less." Did the

superior court err in imposing the residential option where the midpoint of the Defendant's standard range was 40 months?

2. Did the court of appeals err in holding that the superior court may, on remand, decide to waive the school zone enhancements, which the Defendant admitted in his guilty plea, in order to a fashion a standard sentencing range with a midpoint less than 24 months so as to permit the residential option?

- Does the decision violate the separation of powers doctrine by usurping legislative authority to determine the standard sentencing range?
- Does the Published Opinion misinterpret *State v. Mohamed*, 187 Wn. App. 630, 350 P.3d 671 (2015), which only held that the enhancements are included in the standard range which is waived when a sentencing alternative is imposed?
- Does the decision violate the rule on hybrid sentences by combining an exceptional sentence with a DOSA?

IV. STATEMENT OF THE CASE

The Defendant/Respondent James Yancey was charged with two counts of delivering buprenorphine with school zone

enhancements and faced a standard range sentence of 36+ to 44 months. CP 4-6, 62, 66.

Although the prosecutor considered that the charges were supported by "substantial physical and technological evidence" from controlled buys, he was also mindful of the dangers to a confidential informant if the matter proceeded to trial. CP 39. In recent years, there have been three murders and various assaults related to the identification of confidential informants in Walla Walla County. *Id.* The prosecutor offered to recommend a 20-month, prison-based Drug Offender Sentencing Alternative (DOSA) if the Defendant did not seek to unmask the confidential informant. CP 1-3, 20, 26, 38-39. The Defendant countered with an offer to plead guilty if the enhancements were removed. CP 26. Such a resolution would reduce the standard range making the residential DOSA an available outcome and leaving the drug dealer in the community. CP 26.

The parties were not able to agree, and the Defendant unmasked the informant. CP 39. The Defendant then pled guilty as charged. CP 9-19, 21.

A month later the Defendant indicated that he would be asking the court to grant a residential DOSA. CP 34. The prosecutor filed a

brief explaining that the Defendant's standard range required that a DOSA, if granted, would be prison-based. CP 61-63. "The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less." RCW 9.94A.660(3).

Notwithstanding the State's memorandum or the acknowledged standard range, the court ordered that the DOSA be served in the community, imposing 6 months of treatment and 24 months community custody. CP 69. The State appealed. CP 78-79. The published opinion affirmed the lower court in a split decision. *State v. Yancey*, 3 Wn.App.2d 735, 418 P.3d 157 (2018).

V. ARGUMENT

A. THE SENTENCING COURT HAS DISCRETION TO CHOOSE THE DOSA BUT MAY NOT USURP THE LEGISLATURE'S AUTHORITY TO DEFINE THE STANDARD SENTENCING RANGE.

1. The Legislature defines the standard sentencing range.

This Court "has consistently held" that the fixing of legal punishments for criminal offenses is a legislative, rather than a judicial, function. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (citing *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27

(1909)). The power of the legislature in that respect is plenary. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937).

If the judicial power does not follow the laws prescribed, it encroaches on the legislative authority. *State v. Le Pitre*, 54 Wash. at 629. When the activity of one branch threatens the independence or integrity or invades the prerogatives of another, there is a violation of the separation of powers doctrine. *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

The Sentencing Reform Act (SRA) accords the trial court limited discretion. *State v. Ammons*, 105 Wn.2d at 181; RCW 9.94A.010 (SRA "structures, but does not eliminate, discretionary decisions affecting sentences"). Generally, a trial judge is expected to impose a sentence within the standard range as determined by the defendant's offender score and the seriousness level of the offense. RCW 9.94A.505(2)(a)(i); RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.525; RCW 9.94A.589(1)(a).

Where, as here, there is a sentencing enhancement, "the enhancement is *added* to the range rather than treated as a separate sentencing provision." *Gutierrez v. Dep't of Corr.,* 146 Wn. App. 151, 155, 188 P.3d 546 (2008). *See also State v. Houston-Sconiers*, 188

Wn.2d 1, 35, 391 P.3d 409, 426 (2017) (Madsen, J., concurring) (explaining that a departure from the standard range includes departing from enhancements which are part of that range). Any sentence that a judge imposes within that range is unassailable. RCW 9.94A.585(1) ("shall not be appealed").

In Mr. Yancey's case, the presumption would be for a sentence between 36+ to 44 months in prison. CP 66. This is undisputed.

2. The sentencing court may impose a non-standard sentence within the structure and limitations of the SRA.

Mr. Yancey received a sentencing alternative for drug offenders which is an exemption from the standard range. With a DOSA, the offender agrees to treatment in exchange for a significantly reduced sentence.

When a sentencing court considers whether to impose a DOSA, first it considers statutory eligibility. RCW 9.94A.660(1). Eligibility is determined by the offense, the offender's criminal history, and the offender's availability for treatment and supervision. *Id.* An offender is not available if he or she is subject to deportation or if the standard range is one year or less, too short to provide a meaningful period of treatment and supervision. *Id.*

If the defendant is eligible and the court finds the treatment alternative is "appropriate," the defendant does not have to serve a standard range sentence, but must attend treatment. RCW 9.94A.660(3). The court's discretion to impose the residential option depends upon the defendant's legislatively defined standard sentencing range.

> If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of ***either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.***

RCW 9.94A.660(3) (emphasis added).

Where the standard range is long (having a midpoint greater than 24 months), the residential alternative is not available. There is no judicial discretion on the matter. The DOSA must be served in prison.

Where the standard range is short, having a midpoint range of 24 months or less, the DOSA may be served in the community, i.e. a

residential DOSA. However, as RCW 9.94A.662 indicates, offenses with smaller standard ranges may also be served in prison. A prison-based DOSA requires confinement for "**one-half** the midpoint of the standard range **or twelve months, whichever is greater**," indicating that the midpoint for a prison DOSA may be less than 24 months. RCW 9.94A.662(1)(a)(emphasis added); *see also* Final Bill Report SHB 1791 (providing an example in which the prison option may be imposed where the range is 13-17 months).

In analyzing the special sex offender sentencing alternative (SSOSA), this Court noted that a sentencing alternative "is indeed discretionary." *State v. Onefrey,* 119 Wn.2d 572, 577, 835 P.2d 213 (1992). But if the court does impose the alternative, the statute dictates the term of supervision. *Id.* The court's discretion is limited to choosing the alternative, not to shaping it.

> A court's fundamental objective in reading a statute is to ascertain and carry out the legislature's intent. If a statute's meaning is plain on its face, then the court must give effect to that plain meaning. Under the plain meaning rule, such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question. A court should not adopt an interpretation that renders any portion of the statute meaningless or superfluous. The meaning of a statute is a question of law that the court reviews de novo.

State v. Mohamed, 187 Wn. App. 630, 637, 350 P.3d 671 (2015).

B. THE SUPERIOR COURT ERRED IN ORDERING THAT THE DOSA BE SERVED IN THE COMMUNITY.

There is no dispute that the sentencing court had discretion to impose a DOSA in Mr. Yancey's case. The dispute regards where the DOSA is served. The superior court imposed a residential DOSA. CP 69. Based on the defendant's standard range, the court lacked authority to do so.

The midpoint of Mr. Yancey's 36+ to 44 month standard range is 40 months. "The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less." RCW 9.94A.660(3). Therefore, the sentencing court was not authorized to order that the DOSA be served in the community. It had to be based in the prison.

The court of appeals hypothesizes that the superior court judge may have waived the enhancements in order to manufacture a standard range of less than 24 months. *State v. Yancey*, 3 Wn. App. 2d at 741. Without the school zone enhancements, the Defendant's sentencing range would have been 12+ to 20 months, resulting in a midpoint of 16 months. CP 66. The Majority finds that this would be

permitted under *State v. Mohamed*, 187 Wn. App. 630, 350 P.3d 671 (2015). *Yancey*, 3 Wn. App. 2d at 740.

The court of appeals' decision must be reversed. It misinterprets both the statute and the case law.

1. The court of appeals' opinion misinterprets the statute.

A court's interpretation must give effect to all language in the statute and render no portion meaningless or superfluous. *State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Mohamed*, 187 Wn. App. 630, 637, 350 P.3d 671 (2015). The Majority's decision renders the last sentence in RCW 9.94A.660(3) superfluous.

When examining the plain language of a statute, the courts must consider "the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *State v. Evans,* 177 Wn.2d 186, 192, 298 P.3d 724 (2013). The text plainly prohibits the residential option.

A related provision would be RCW 9.94A.190 which outlines when sentences are served in state prisons versus county jails. *State v. Yancey*, 3 Wn.App.2d at 744 (Korsmo, J., dissenting). Terms of incarceration that are more than one year are designated "12+" in the sentencing grids and must be served in a state facility or facility under

state contract. RCW 9.94A.190; RCW 9.94A.510; RCW 9.94A.517.

Traditionally,[1] the DOSA was available when sentences exceeded 12 months and were exclusively served in prison. A Comprehensive Review and Evaluation of Sentencing Policy in Washington State, Sentencing Guidelines Commission (2000-2001) at 16 (the original DOSA statute of 1995 primarily applied to prison-bound offenders); *see also* A Decade of Sentencing Reform, Sentencing Guidelines Commission (1992) at 21-22 (first proposing a treatment alternative where eligibility depended on the offender having a sentence greater than 12 months). This fits the RCW 9.94A.120 principle, allocating costs between the county and state based on whether incarceration exceeded 12 months.

In 1999, a law was passed which allowed county jail time in nonviolent and nonsex cases to be converted to available community options. Comprehensive Review at 4; Laws of 1999, ch. 197, § 6; former RCW 9.94A.380(3). Although this would not apply to DOSAs because confinement remained at a state facility, the seed was planted.

---

[1] While offenders with shorter sentences were eligible, in practice they were less likely to request the alternative, because it required incarceration in a state facility. Laws of 1995, ch. 108, § 3; former RCW 9.94A.120(6).

The residential option was enacted six years later.

> After receipt of the examination report, if the court determines that a sentence under this section is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under subsection (5) of this section or a residential chemical dependency treatment-based alternative under subsection (6) of this section. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

Laws of 2005, ch. 460, § 1.[2]

The residential option is the county alternative. If an offender's midpoint is 24 months or less, then half the midpoint is no more than 365 days. And a sentence for a term of 12 months or less is served in a county jail. RCW 9.94A.190. County terms can be converted to community supervision. RCW 9.94A.680(3). Before the court may consider the residential option, a treatment plan and treatment provider in the community must be identified. RCW 9.94A.660(5).

When the midpoint is more than 24 months, halving the term results in a term of 12+, confinement which is allocated to the state. RCW 9.94A.190. There is no provision for converting time served in a

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[2] The current version of RCW 9.94A.660(3) came about under Laws of 2009, ch. 389, § 3 (SHB 1791).

state facility to community supervision.

It is plain from the language of the statute, related provisions, and historical context that the standard sentencing range determines whether the residential option is available.

2. The Published Opinion misinterprets *Mohamed* and conflicts with decisions of other courts.

The court of appeals interprets that *State v. Mohamed*, *supra* authorizes a sentencing court to waive the sentencing enhancements in order fashion a sentencing range which would permit the residential option. *Yancey*, 3 Wn.App.2d at 739-40. The opinion misperceives the analysis in *Mohamed*.

There the defendant was convicted of four counts of delivery with three school zone enhancements. *State v. Mohamed*, 187 Wn. App. at 635. He asked for both[3] an alternative sentence (PSA or DOSA) and a mitigated exceptional sentence. *Id.*

> At the sentencing hearing, the trial court made clear that it believed it had no authority to waive the enhancements if it chose to impose an alternative sentence, stating, "There has to be a 72–month sentence [enhancement]. I have no choice in the matter."

[3] Hybrid DOSA/exceptional sentences are not authorized under the SRA. *State v. Murray,* 128 Wn. App.718, 726, 116 P.3d 1072 (2005).

State v. Mohamed, 187 Wn. App. at 635–36. The superior court's denial evidenced several[4] errors. The appellate decision addressed only one of these, namely whether enhancements are or are not considered to be part of the "standard range." *Mohamed*, 187 Wn. App. at 636-37.

The lower court mistakenly believed that the sentencing enhancements were something separate and apart from the standard range. In fact, they are part of the standard range. *Gutierrez v. Dep't of Corr.,* 146 Wn. App. at 155; *Mohamed*, 187 Wn. App. at 640 ("We agree with and expressly adopt the reasoning of *Gutierrez.*"). Therefore, if the court decided to grant a DOSA, the court would be waiving the standard range *including enhancement* and then imposing only half that total as the term of incarceration. *State v. Mohamed*, 187 Wn. App. at 637 (quoting RCW 9.94A.660(3) ("shall waive")); RCW 9.94A.662(1)(a); RCW 9.94A.664(4)(c). When the court waives the standard range and imposes the midpoint of the standard range, it

[4] The law does not require that school zone enhancements run consecutively to each other but only consecutively to the base sentence. *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). The length of a defendant's sentence is only disqualifying of a DOSA insofar as it may be *too small* to accommodate meaningful treatment. RCW 9.94A.660(1)(f) (to be eligible, an offender's standard range must be greater than one year).

is cutting *everything* in half, i.e. halving both the base range and the enhancement.

The superior court had mistakenly believed that DOSA was not an option. Accordingly, the court of appeals remanded so that the sentencing court could reconsider its sentence with a better understanding of "the full range of available options." *Mohamed*, 187 Wn. App. at 646.

In our own case, the Majority misinterprets *Mohamed* to hold that the DOSA statute authorizes a court to *exclude a portion* of the standard range, specifically the enhancement.

> If we exclude James Yancey's sentence enhancements, the midpoint of his standard range is sixteen months. If we include the sentence enhancements, the midpoint rises to forty months.

State v. Yancey, 3 Wn.App.2d at 739. Neither the statute nor the case authorize a sentencing court to "exclude" any "portion" of the standard range. This would effectively result in dismissing the enhancement that Mr. Yancey pled guilty to. The statute conveys authority to choose an alternative sentence in lieu of a standard range sentence, not to tinker with portions of the standard sentence. *State v. Yancey*, 3 Wn.App.2d at 745-46 (Kormo, J., dissenting) ("nothing in

the emphasized language above conveys authority to alter a standard range sentence"). If the DOSA is imposed, the legislature has prescribed what the incarceration period under DOSA will be. It will be half the standard range. RCW 9.94A.662(1)(a) (prison-based DOSA is half the midpoint of the standard range); RCW 9.94A.664(4)(c) (a revocation of a residential DOSA results in a term of half the midpoint of the standard range).

The Majority misinterprets that the *Mohamed* decision authorized consideration of a *residential* DOSA.

> ***Despite*** the fact that Mohamed's midpoint range with the sentence enhancements ***exceeded twenty-four months***, the court remanded the case for resentencing so the trial court could explore a DOSA. We discern no reason to reject the ruling in *State v. Mohamed.*

Yancey, 3 Wn.App.2d at 740. The Majority's interpretation is not supported in the actual language of the *Mohamed* opinion. The word "residential" is used exactly once in *Mohamed* and only in quoting the full subsection. *Mohamed*, 187 Wn. App. at 637 (quoting RCW 9.94A.660(3)). The *Mohamed* court remanded for consideration of a DOSA, not a residential DOSA. In Mohamed's case, as here, it would necessarily be a prison-based DOSA as prescribed by statute.

The Majority remands for the sentencing court "to determine whether to expressly waive enhancements ***in order to*** impose a DOSA." *Yancey*, 3 Wn.App.2d at 741-42 (emphasis added). Again, this misperceives the holding in *Mohamed* – and the law. The court does not need to waive enhancements "in order to impose a DOSA." A court's authority to grant a DOSA is *not* limited by the high range resulting from an enhancement. RCW 9.94A.660(1)(f) (limited only by an excessively low range).

This language suggests that the Majority believes a sentencing court can first impose an exceptional sentence (to exclude the enhancement) in order to depart downward from the standard range. RCW 9.94A.535. With this departure, the court would then have authorized itself to impose the residential option of the sentencing alternative. This would be an impermissible hybrid of exemptions – applying both an exceptional sentence and a sentencing alternative. It conflicts with decisions from the Supreme Court and courts of appeals. *State v. Onefrey,* 119 Wn.2d at 576 (in imposing a sentencing alternative "the trial court is not permitted to fashion conditions" to circumvent statutory directive as to length of term);

State v. Murray, 128 Wn. App. 718, 726, 116 P.3d 1072 (2005); *State v. Goss,* 56 Wn. App.541, 544, 784 P.2d 194 (1990).

The Published Opinion's interpretation of *Mohamed* is error. Therefore, there is no precedent which supports the decision. It must be reversed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court reverse *State v. Yancey*, 3 Wn.App.2d 735, 418 P.3d 157 (2018) and hold that the sentencing court lacked discretion to impose the residential option.

DATED: November 2, 2018.

Respectfully submitted:

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Tanesha La Trelle Canzater Canz2@aol.com	A copy of this Supplemental 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 November 2, 2018, Pasco, WA **Original filed at the Supreme Court, P.O. Box 40929, Olympia, WA 98504-0929**

APPENDIX

A. *State v. Yancey*, 3 Wn.App.2d 735, 418 P.3d 157 (2018)

B. RCW 9.94A.660

C. Final Bill Report SHB 1791

KeyCite Yellow Flag - Negative Treatment
Review Granted by State v. Yancey, Wash., October 3, 2018

3 Wash.App.2d 735
Court of Appeals of Washington, Division 3.

STATE of Washington, Appellant,
v.
James Austin YANCEY, Respondent.

No. 35216-1-III
|
FILED MAY 24, 2018

Synopsis
Background: Defendant was convicted in the Superior Court, Walla Walla County, M. Scott Wolfram, J., of two counts of delivering a controlled substance, and received a residential drug offender alternative sentence (DOSA). The State appealed.

Holdings: The Court of Appeals, Fearing, J., held that:

[1] sentencing court had the authority to waive sentencing enhancements and impose an alternative sentence based on a DOSA, and

[2] remand was warranted to allow the trial court to correct the slight mistake in the seriousness level in the judgment and sentence.

Remanded.

Korsmo, J., filed dissenting opinion.

West Headnotes (3)

[1] **Sentencing and Punishment**
Drugs and narcotics

The statutory Drug Offender Sentencing Alternative (DOSA) provides meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes that the sentence would serve the best interests of the individual and the community, and it authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from addictions. Wash. Rev. Code Ann. § 9.94A.660.

Cases that cite this headnote

[2] **Sentencing and Punishment**
Drugs and narcotics

Trial court, in sentencing defendant convicted of two counts of delivering a controlled substance, each with a sentencing enhancement of selling within 1000 feet of a school bus stop, had the authority to waive the enhancements and impose an alternative sentence based on a Drug Offender Sentencing Alternative (DOSA). Wash. Rev. Code Ann. § 9.94A.660.

Cases that cite this headnote

[3] **Criminal Law**
Description of offense
Criminal Law
Sentence

The seriousness level for each count of delivering a controlled substance should have been a II, rather than a I, as indicated on the judgment and sentence, and thus remand was warranted to allow the trial court to correct the slight mistake, when the sentencing court calculated the correct standard range. Wash. Rev. Code Ann. §§ 9.94A.518, 69.50.401(2)(c).

Cases that cite this headnote

**158 Appeal from Walla Walla Superior Court, Docket No: 15-1-00332-9, Honorable M. Scott Wolfram, Judge

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PUBLISHED OPINION

Fearing, J.

***736** ¶ 1 The State appeals from the sentencing court's grant of James Yancey's request of a residential drug offender alternative sentence (DOSA). We remand for further consideration by the sentencing court of the sentencing alternative.

FACTS

¶ 2 James Yancey sold suboxone strips, for which he held a prescription, to a confidential informant. A day later, Yancey repeated his misconduct.

PROCEDURE

¶ 3 The State of Washington charged James Yancey with two counts of delivering a controlled substance, each with a sentence enhancement of selling within one thousand feet of a school bus stop. Yancey pled guilty to both counts and the enhancements.

¶ 4 During the sentencing process, James Yancey sought a residential drug offender sentencing alternative. The State registered its opposition and argued that Yancey ***737** lacked eligibility for a residential DOSA due to a high standard range.

¶ 5 RCW 9.94A.525(1) states that convictions entered or sentenced on the same date as the conviction, for which the sentencing court computes the offender score, shall be deemed "other current offenses" within the meaning of RCW 9.94A.589. Therefore, Yancey accrued an offender score of only one despite pleading guilty to two counts. The standard range for each charge was twelve to twenty months. The school zone enhancement added twenty-four months to the range, raising the total standard range to thirty-six to forty-four months. Under a Washington statute, an offender loses eligibility for a residential DOSA if the midpoint of his standard range exceeds twenty-four months.

¶ 6 James Yancey argued before the sentencing court that a judge may waive imposition of school zone enhancements if the defendant is otherwise eligible for a sentencing alternative. In a declaration submitted with the brief, defense counsel averred that he ****159** had attended court sessions where prosecutors removed enhancements on drug delivery cases involving methamphetamine so that the defendant might qualify for a residential DOSA. The State of Washington responded by arguing that Yancey lacked eligibility for the sentencing alternative because the mid-point of Yancey's standard range exceeded twenty-four months. The trial court granted Yancey's request for the residential DOSA.

LAW AND ANALYSIS

DOSA Sentence

¶ 7 The State of Washington appeals James Yancey's residential DOSA sentence. RCW 9.94A.660, a section of the historic Sentencing Reform Act of 1981, chapter 9.94A RCW, allows alternative sentences for drug offenders. ***738** *State v. Grayson*, 154 Wash.2d 333, 337, 111 P.3d 1183 (2005). The statute reads, in part:

> (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);

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(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.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) *If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and* ***739** *impose a sentence consisting of either* a prison-based alternative under RCW 9.94A.662 *or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.*

RCW 9.94A.660 (emphasis added).

[1]¶ 8 RCW 9.94A.660, known as DOSA, provides meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes that the sentence would serve the best interests of the individual and the community. *State v. Grayson*, 154 Wash.2d at 343, 111 P.3d 1183 (2005); *State v. Waldenberg*, 174 Wash. App. 163, 166 n.2, 301 P.3d 41 (2013). It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from addictions. *State v. Grayson*, 154 Wash.2d at 337, 111 P.3d 1183. The offender has significant incentive to comply with the conditions of a DOSA sentence, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.660(2); *State v. Grayson*, 154 Wash.2d at 338, 111 P.3d 1183.

****160** [2]¶ 9 RCW 9.94A.660 allows the offender to serve the DOSA sentence either in prison or in a residence. Nevertheless, the offender cannot serve his or her time in a residence if the midpoint of the standard range exceeds two years. If we exclude James Yancey's sentence enhancements, the midpoint of his standard range is sixteen months. If we include the sentence enhancements, the midpoint rises to forty months.

¶ 10 The State impliedly concedes that James Yancey qualifies for a DOSA, but not for a residential DOSA. The State, on appeal, contends the trial court lacked authority to grant the residential DOSA because the court must include the sentence enhancements in the calculation of the midpoint. In turn, Yancey argues that the trial court held authority to waive the sentence enhancements in order to impose a residential DOSA.

***740** ¶ 11 This court, in *State v. Mohamed*, 187 Wash. App. 630, 350 P.3d 671 (2015), adopted James Yancey's argument. A jury convicted Ali Mohamed of four counts of delivery of a controlled substance. The jury also found the special allegation for three of the counts that the crimes occurred within one thousand feet of a school. Based on the offender score and seriousness level, both parties agreed Mohamed's base standard range for the delivery charges was twenty to sixty months. Both parties also agreed the twenty-four months' school zone enhancement applied to three of the four charges. Mohamed asked the court to ignore a standard sentence and instead sentence him to a DOSA. The State argued the judge may waive the standard range part of the sentence, but that Mohamed must be sentenced to at least seventy-two months' confinement for the three school zone enhancements. The sentencing court deemed it lacked authority to award a DOSA and sentenced Mohamed to concurrent sentences of twenty months for the delivery charges and seventy-two months for the three enhancements for a total sentence of ninety-two months' confinement.

¶ 12 This court, in *State v. Mohamed*, held that the trial

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court mistakenly concluded that it lacked authority to waive the school zone enhancement if it chose to impose a DOSA and that the trial court erred when it failed to consider waiving the school zone enhancements to impose a DOSA. We explained that RCW 9.94A.660 permits waiver of a sentence within the standard sentence range. "Because standard sentence range means the base sentence range plus enhancement of such range, *a sentencing court may waive the enhancements as part of the standard sentence range under a DOSA* or [parenting sentencing alternative]." *State v. Mohamed*, 187 Wash. App. at 641, 350 P.3d 671 (internal quotation marks omitted) (emphasis added). Despite the fact that Mohamed's midpoint range with the sentence enhancements exceeded twenty-four months, the court remanded the case for resentencing so the trial court could explore a DOSA. We discern no reason to reject the ruling in *State v. Mohamed.*

***741** ¶ 13 In James Yancey's appeal, the State relies on *In re Post Sentencing Review of Gutierrez*, 146 Wash. App. 151, 188 P.3d 546 (2008) for support on how to accurately calculate James Yancey's standard and midpoint range. We find this decision unhelpful because our appeal does not ask how to calculate the standard range. *Gutierrez* does not address waiving imposition of the enhancement to return the midpoint range to within the twenty-four months' restriction stated in the statute.

¶ 14 Unfortunately, this reviewing court lacks a transcript of James Yancey's sentencing hearing. Therefore, we do not know if the trial court expressly waived the requirements of the sentence enhancements in order to grant a DOSA. Therefore, we remand to the sentencing court to either confirm or exercise waiver of the enhancements or to resentence Yancey if the court did not intend to waive the enhancements.

Scrivener Error

[3]¶ 15 Both parties concede the judgment and sentence contains an error as to the seriousness levels for both convictions. James Yancey pled guilty to delivery of a Schedule III non-narcotic controlled substance under RCW 69.50.401(2)(c). Thus, the seriousness level for each count should be a II, not a I as indicated on the judgment and sentence. RCW 9.94A.518. Despite this error, ****161** the sentencing court calculated the correct standard range. Yancey asks this court to remand the judgment and sentence to the trial court for correction of this slight mistake. We grant this request.

CONCLUSION

¶ 16 We remand this appeal to the sentencing court to determine whether to expressly waive sentence enhancements ***742** in order to impose a DOSA and to correct the seriousness level of the convictions.

I CONCUR:

Pennell, A.C.J.

Korsmo, J. (dissenting)

¶ 17 *State v. Mohamed*, 187 Wash. App. 630, 350 P.3d 671 (2015), misreads the drug offender sentencing alternative (DOSA) statute and should not be followed. *Mohamed* also conflicts with this court's decision in *State v. Murray*, 128 Wash. App. 718, 725-26, 116 P.3d 1072 (2005) and is inconsistent with other decisions. The statute's grant of permissive authority to impose a DOSA sentence instead of a standard range sentence is not a grant of authority to override the legislative eligibility determination. The sentence imposed by the trial court should be reversed.

¶ 18 Courts have no inherent sentencing authority, but can only exercise the authority granted by the legislature. *State v. Pillatos*, 159 Wash.2d 459, 469, 150 P.3d 1130 (2007) (no inherent authority for courts to adopt sentencing procedure necessary to comply with United States Supreme Court mandate); *State v. Ammons*, 105 Wash.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986) (legislature has plenary authority over setting punishments); *State v. Le Pitre*, 54 Wash. 166, 169, 103 P. 27 (1909) (similar).

¶ 19 Under our Sentencing Reform Act of 1981, chapter 9.94A RCW, a trial judge is expected to impose a standard range sentence. RCW 9.94A.505(2)(a)(i). The standard range sentence is computed by looking at the intersection of the seriousness level of the offense and the defendant's offender score. RCW 9.94A.510, .517. In cases where a sentencing enhancement was proved, the enhancement is added to the range specified by the seriousness level, resulting in a new (enhanced) standard

range. *Mohamed*, 187 Wash. App. at 638-45, 350 P.3d 671; *In re Post Sentencing Review of Gutierrez*, 146 Wash. App. 151, 154-55, 188 P.3d 546 (2008).

¶ 20 Exemptions from the requirement that felony offenders be sentenced within a standard range include ***743** persistent offenders, many sex offenders, exceptional sentences, and alternative sentences. RCW 9.94A.505(2)(a)(ii)-(xi). The only mechanism for altering a standard range sentence is the authority to declare an exceptional sentence when "substantial and compelling reasons" justify doing so. RCW 9.94A.535. The exceptional sentence authority cannot be used in conjunction with an alternative DOSA sentence. *State v. Onefrey*, 119 Wash.2d 572, 576-77, 835 P.2d 213 (1992); *Murray*, 128 Wash. App. at 726, 116 P.3d 1072; *State v. Goss*, 56 Wash. App. 541, 544, 784 P.2d 194 (1990). It likewise cannot be used to make someone eligible for an alternative sentence, since the legislature is the body with the power to determine eligibility. *Onefrey*, 119 Wash.2d at 577, 835 P.2d 213.

¶ 21 Alternative sentences typically follow the same requirements—the court must determine eligibility for the alternative sentence, determine that the defendant is a fit candidate for the alternative sentence, and determine whether or not to impose the alternative sentence. *E.g.*, RCW 9.94A.650 (first time offenders); RCW 9.94A.655 (custodial parents); RCW 9.94A.660 (drug offenders); RCW 9.94A.670 (sexual offenders). The decision to impose an alternative sentence typically is reviewed for abuse of discretion. *E.g.*, *Onefrey*, 119 Wash.2d at 575, 835 P.2d 213.

¶ 22 The DOSA sentence alternative follows this pattern. First, the trial court determines whether the statutory eligibility factors (sentence length, type of crime) are present and that disqualifying factors (previous serious offenses, prior DOSA sentences) are not present. RCW 9.94A.660(1). Upon motion, the court then considers the offender's fitness for the alternative sentence. RCW 9.94A.660(2), (4), (5)(a). The court then ****162** determines whether to impose the alternative sentence. RCW 9.94A.660(3). Whether the DOSA will be served in prison or the community is determined by the midpoint of the offender's standard range. *Id.* (last sentence). A midpoint of 24 months or less is served locally in residential treatment. RCW 9.94A.664. A midpoint of greater than 24 months dictates that the sentence is served in prison. ***744** RCW 9.94A.662. This approach parallels the jail-prison dichotomy in standard range sentences. Terms of greater than 12 months are served in prison, while terms less than that are served locally. RCW 9.94A.190(1).

¶ 23 Here, the trial court followed the statutory commands to a point, but then faltered. It determined that Mr. Yancey's current offense was eligible for DOSA and had a sufficiently long standard range to qualify for treatment. The court determined that Mr. Yancey's prior offenses and immigration status did not disqualify him from consideration. Thus, the court correctly determined Mr. Yancey was eligible for a DOSA sentence. RCW 9.94A.660(1). The court then determined Mr. Yancey would be an appropriate person for treatment under DOSA. RCW 9.94A.660(4), (5). The court then exercised its discretion to impose a DOSA sentence. RCW 9.94A.660(3).

¶ 24 So far, so good. However, the court then failed to follow the statute when it chose to ignore the legislative determination that offenders with long standard range terms, such as Mr. Yancey's, must serve their sentences in prison instead of in the local community: "The residential chemical dependency treatment-based alternative *is only available* if the midpoint of the standard range is twenty-four months or less." RCW 9.94A.660(3). At this point the court apparently turned to *Mohamed.*

¶ 25 The problem in *Mohamed* concerned the interplay of the DOSA statute and the stacking of enhancements required by RCW 9.94A.533(6).[1] *Mohamed* involved four sentences, three of which were partly concurrent and partly consecutive due to the stacking of enhancements. 187 Wash. App. at 633-34, 350 P.3d 671. Application of an alternative sentence such as DOSA in this context is problematic because eligibility for alternative sentences typically is concerned primarily ***745** with the standard range for a particular offense, while the total sentence range for all charges is dependent on other statutes governing the ordering and enhancement.[2] No statutory instruction has been given for how, or even whether,[3] consecutive sentencing impacts a decision to impose an alternative sentence.

1 Both the history and purpose of this provision were discussed in detail by *Mohamed*, 187 Wash. App. at 642-43, 350 P.3d 671, and *Gutierrez*, 146 Wash. App. at 155-57, 188 P.3d 546.

2 When it addressed the issue in *Gutierrez*, this court faced only a single count and, therefore, had a fairly straightforward issue in computing a single standard range. 146 Wash. App. at 153-57, 188 P.3d 546. Understandably, the State correctly argues *Gutierrez* as the more appropriate case to apply here rather than *Mohamed.*

3 Without briefing on legislative history, I would not want to express a firm opinion on the topic, but it appears that a strong argument can be made that an alternative sentence is not concerned with the order in which standard range sentences are to be served. The trial court's choice to select an alternative sentence arguably renders the ordering of standard range sentences irrelevant.

¶ 26 Instead, and without any discussion of legislative purpose, the *Mohamed* court found in the first sentence of RCW 9.94A.660(3) an ability to alter the standard range in order to make an offender fit within a residential DOSA rather than a prison DOSA. In my opinion, this was error. The statute read:

> If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, **the court shall waive imposition of a sentence within the standard sentence range** and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

****163** RCW 9.94A.660(3), with emphasis supplied by *Mohamed*, 187 Wash. App. at 637-38, 350 P.3d 671. Using this authority, the trial judge here altered the standard range in order to make Mr. Yancey fit in a local treatment program instead of the state prison program.

¶ 27 The error is three-fold. First, nothing in the emphasized language above conveys authority to alter a standard ***746** range sentence. Instead, it is the standard language used by the legislature in conveying the authority to trial judges to choose an alternative sentence in lieu of a standard range sentence. *See, e.g.*, RCW 9.94A.650(2) (first offenders: "may waive the imposition of a sentence within the standard sentence range"); RCW 9.94A.655(4) (parenting alternative: "shall waive imposition of a sentence within the standard sentence range").[4]

4 For special sexual offenders sentenced under RCW 9.94A.670(4), the language is a bit different, directing that the court "shall then impose" a sentence and granting permissive authority to suspend some of the sentences.

¶ 28 Second, the interpretation of the emphasized language is inconsistent with both parts of the remainder of the statute. The initial clause of the first sentence recognizes the trial court's role in finding the offender eligible and fit for an alternative sentence under the preceding provisions of the statute; it is incongruous and inconsistent to then read the next clause as empowering the trial judge to ignore and alter the standards governing the eligibility decision. It also is inconsistent to interpret the emphasized language as *Mohamed* did because the remainder of the statute expressly tells the court how to apply its decision to invoke the alternative sentence—it shall choose a local or a prison DOSA based on the length of the midpoint of the standard range sentence. It does not say "standard range as altered by the trial court" or otherwise suggest that the legislative directive is somehow limited by a discretionary choice of the judge to alter the eligibility standards.

¶ 29 Finally, the *Mohamed* interpretation is erroneous because it reads in an exceptional sentence authority that is inappropriate. First, our courts have long made clear that the exceptional sentence authority applies only to standard range sentences and does not apply to alternative sentences. *Onefrey*, 119 Wash.2d 572, 835 P.2d 213; *Murray*, 128 Wash. App. 718, 116 P.3d 1072; *Goss*, 56 Wash. App. 541, 784 P.2d 194. If the legislature was breaking with its longstanding approach, it did so in an oblique manner and in a strange location. Second, allowing the trial judge to ***747** change its eligibility criteria also would be a significant change for the legislature that has consistently exercised its power to define crimes and punishments rather than delegate that authority to the court. Third, if it intended to allow trial judges to change the eligibility criteria, the legislature likely would have placed that authority in the eligibility subsection in order to expressly acknowledge the possibility. It also could have greatly simplified the language of the eligibility section, RCW 9.94A.660(1), if it intended its criteria to be advisory rather than mandatory. Fourth, where the legislature has granted courts power to alter the standard range by declaring an exceptional sentence, it has expressly limited that authority to cases where compelling reasons exist. The

DOSA statute, as interpreted by *Mohamed*, sets forth no criteria on which its exceptional sentence authority is to be exercised.

¶ 30 For all of those reasons, the interpretation given by *Mohamed* should be rejected. The governing case here is actually *Murray*. There, this court overturned a similar effort by a trial judge to use the exceptional sentence authority to change the midpoint on which a DOSA sentence was based. 128 Wash. App. at 721-22, 116 P.3d 1072. This court expressly rejected the effort, noting that an exceptional sentence was not available when imposing an alternative DOSA sentence. Id. at 725-26, 116 P.3d 1072. Such "hybrid" sentences simply were not authorized. *Id.*

¶ 31 Although it is distinguishable in the context of a single conviction, *Mohamed* also was wrongly decided and should not be followed. The majority's decision effectively, although silently, overrules *Murray*.

¶ 32 The decision of the trial court should be reversed and the matter remanded for the ****164** trial court to consider either a prison-based DOSA or a standard range sentence. Thus, I respectfully dissent.

All Citations

3 Wash.App.2d 735, 418 P.3d 157

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RCW 9.94A.660

Drug offender sentencing alternative—Prison-based or residential alternative.

(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.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW **9.94A.662** or a residential chemical dependency treatment-based alternative under RCW **9.94A.664**. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) 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.500**.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future;

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the *department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW **9.94A.703** and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay

thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW **9.94A.704** and **9.94A.737**.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW **71.24.580**.

[**2016 sp.s. c 29 § 524; 2009 c 389 § 3;** (2009 c 389 § 2 expired August 1, 2009); **2008 c 231 § 30; 2006 c 339 § 302; 2006 c 73 § 10; 2005 c 460 § 1.** Prior: **2002 c 290 § 20; 2002 c 175 § 10; 2001 c 10 § 4; 2000 c 28 § 19.**]

NOTES:

***Reviser's note:** The powers, duties, and functions of the department of social and health services pertaining to licensing and certification of behavioral health provider agencies and facilities, except for state-run mental health institutions, were transferred to the department of health by chapter 201, Laws of 2018.

Effective dates—2016 sp.s. c 29: See note following RCW **71.05.760**.

Short title—Right of action—2016 sp.s. c 29: See notes following RCW **71.05.010**.

Effective date—2009 c 389 §§ 1 and 3-5: See note following RCW **9.94A.505**.

Effective date—2009 c 389 § 2: "Section 2 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 7, 2009]." [**2009 c 389 § 7.**]

Expiration date—2009 c 389 § 2: "Section 2 of this act expires August 1, 2009." [**2009 c 389 § 9.**]

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW **9.94A.701**.

Severability—2008 c 231: See note following RCW **9.94A.500**.

Intent—Part headings not law—2006 c 339: See notes following RCW **74.34.020**.

Effective date—2006 c 73: See note following RCW **46.61.502**.

Application—2005 c 460: "This act applies to sentences imposed on or after October 1, 2005." [**2005 c 460 § 2**.]

Effective date—2005 c 460: "This act takes effect October 1, 2005." [**2005 c 460 § 3**.]

Effective date—2002 c 290 §§ 7-11 and 14-23: See note following RCW **9.94A.515**.

Intent—2002 c 290: See note following RCW **9.94A.517**.

Effective date—2002 c 175: See note following RCW **7.80.130**.

Intent—Effective date—2001 c 10: See notes following RCW **9.94A.505**.

Technical correction bill—2000 c 28: See note following RCW **9.94A.015**.

FINAL BILL REPORT
SHB 1791

C 389 L 09
Synopsis as Enacted

Brief Description: Clarifying certain community custody and drug offender sentencing alternative sentencing provisions.

Sponsors: House Committee on Human Services (originally sponsored by Representatives Dickerson, O'Brien, Hurst, Green, Dammeier, Morrell, Orwall, Walsh and Wood; by request of Department of Corrections).

House Committee on Human Services
Senate Committee on Human Services & Corrections

Background:

Drug Offender Sentencing Alternative.
If a defendant is charged with an offense under the Violation of the Uniform Controlled Substances Act (VUCSA) or any other felony and the court finds that the offender has a chemical dependency that contributed to the crime, the offender may be eligible for and move the court for a Drug Offender Sentencing Alternative (DOSA), if the following criteria are met:

- the standard sentence range for the offense is more than one year;
- the offender has not previously received a DOSA more than once in the last ten years;
- the offender has no prior sex offenses and the current offense is not a sex offense;
- the current offense is not violent and the offender has no prior violent offenses in the past ten years;
- the current offense is not a felony offense of driving under the influence (DUI) or physical control (a DUI or physical control becomes a felony if the offender has four or more prior offenses within the past 10 years or if the defendant has a prior conviction of vehicular homicide or vehicular assault as a result of driving under the influence of alcohol);
- no deadly weapon or firearms enhancement applies to the current offense;
- the defendant is not subject to a federal immigration detainer or deportation order; and
- the offense involved a small amount of drugs as determined by the court.

The court must consider four factors in its determination of whether a DOSA is appropriate for the offender:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- whether the offender suffers from a drug addiction;
- whether that addiction makes it probable that criminal behavior will occur in the future;
- whether effective treatment for that addiction is available; and
- whether the offender and the community will benefit from the sentencing alternative.

If the court imposes a DOSA instead of the sentence range, the sentence consists of either a prison-based alternative or a residential chemical dependency treatment-based alternative. If the offender is sentenced to a prison-based alternative, he or she must spend a period of total confinement in a state facility equal to one-half the midpoint of the standard range, or 12 months, whichever is greater. For example, if the standard sentence range is 13 - 17 months, the midpoint of the standard range would be 15 months. One-half of the midpoint would be 7.5 months. Under a prison-based DOSA, the offender would be required to serve 12 months in total confinement. The offender would be placed on community custody for the "remainder of the midpoint."

Summary:

Community Custody for Prison-Based DOSA.
The length of an offender's term of community custody is clarified. Upon completion of a term of one-half of the midpoint or 12 months (whichever is greater) in total confinement, the offender must serve one-half of the midpoint of the standard range as a term of community custody.

To assist the court in determining whether it should impose community-based or prison-based treatment, the court may order the Department of Corrections (DOC) to complete a risk assessment or a chemical dependency screening report or both.

Residential Chemical Dependency Treatment-Based Alternative.
If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the DOC. If the court imposes a sentence under this provision, then the treatment provider will be required to send the treatment plan to the court within 30 days of the offender's arrival at the residential chemical dependency treatment program.

Community Custody for Exceptional Sentence for Unranked Offenses.
A term of community custody is established for an unranked felony offense for which there has not been an established standard sentence range, and for which the court has imposed a sentence that exceeds 12 months based upon a finding that such an exceptional sentence is justified pursuant to special allegations that have been pled and proven.

Votes on Final Passage:

House	94	0	
Senate	47	0	(Senate amended)
House	97	0	(House concurred)

Effective: August 1, 2009

May 7, 2009 (Section 2)

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