

65116-1

65116-1

NO. 65116-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO GRAY,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION ONE  
2010 SEP 22 PM 4:46  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina Cahan

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APPELLANT'S OPENING BRIEF

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**A. SUMMARY OF ARGUMENT**

Alphonso Gray pled guilty to delivery of cocaine in connection with his sale of an imitation controlled substance to an undercover police officer. At sentencing, he requested a drug offender sentencing alternative (“DOSA”). The State agreed that he was eligible for a DOSA, and that treatment under a DOSA would properly address his substance abuse problem. The trial court, however, denied Mr. Gray’s request for a DOSA, due to the fact that Mr. Gray was also sentenced concurrently on an unrelated assault. Mr. Gray appeals.

**B. ASSIGNMENTS OF ERROR.**

1. The sentencing court abused its discretion in denying Mr. Gray a DOSA when he satisfied the criteria and the evidence showed he would benefit from such a sentence.

2. The sentencing court abused its discretion in ruling that Mr. Gray could not receive a DOSA on his assault in the third degree case, when the State had already agreed that Mr. Gray had a drug dependency problem that treatment could address.

**C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.**

Under the Sentencing Reform Act of 1981, a sentencing court must consider a defendant’s eligibility for a DOSA and then

use its discretion in imposing or not imposing a DOSA. In the instant case, Mr. Gray was eligible for a DOSA, but the sentencing court denied his request based only on the fact that Mr. Gray had another matter pending before the court. Did the sentencing court err in ruling a DOSA was not an option for Mr. Gray? (Assignments of Error 1 & 2)

D. STATEMENT OF THE CASE.

On October 29, 2008, Alphonso Gray sold a substance resembling cocaine to an individual who was ultimately revealed to be an undercover police officer. CP 1-3.

Although the substance that Mr. Gray sold to the officer was not, in fact, cocaine, but rather “bunk,” Mr. Gray entered a plea to VUCSA delivery of cocaine. 1/25/10 RP 10-12.<sup>1</sup> The trial court found the plea was entered knowingly, voluntarily, and intelligently, and accepted the plea of guilty. CP 4-24; 1/25/10 RP 12-13.

On the same date, Mr. Gray entered a guilty plea to resolve an assault case stemming from an incident on April 19, 2009. 1/25/09 RP 1. This earlier matter was resolved on the same date as Mr. Gray’s VUCSA plea with his allocution to an assault in the third degree. 1/25/09 RP 8-13.

At sentencing, Mr. Gray requested a DOSA, arguing he was eligible because of his long history with drug abuse and would benefit from the program. 3/3/10 RP 7-9. The State agreed, stating that Mr. Gray clearly suffered from an addiction, noting his many previous drug possession cases. 3/3/10 RP 6. However, the State did not support Mr. Gray's request for a DOSA on the assault charge. 3/3/10 RP 4-6.

The sentencing court denied Mr. Gray's request for a DOSA, due to the assault case. 3/3/10 RP 10-11. The sentencing court found that Mr. Gray had an offender score of 11 and imposed concurrent sentences of 60 months for the VUCSA conviction and 55 months for the third degree assault. CP 25-34; 3/3/10 RP 12-13. Mr. Gray appeals. CP 35-45.

#### E. ARGUMENT

THE SENTENCING COURT ERRED BY FAILING TO EXERCISE ITS DISCRETION IN DENYING MR. GRAY A DOSA.

At sentencing, Mr. Gray requested a DOSA. 3/3/10 RP 7-9. The record shows that Mr. Gray met the criteria and was accordingly eligible for a DOSA. 3/3/10 RP 6. Mr. Gray argued that his criminal history indicated that he suffered from an addiction

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<sup>1</sup> The Verbatim Report of Proceedings consists of two volumes, which will

to drugs, and that he could benefit from the treatment available through a DOSA. Id. at 7-8. Mr. Gray told the court that he had a “long history with drug abuse,” for which he had never received any formal treatment, but had “kind of slipped through the cracks.” Id. at 8-9. Mr. Gray’s defense attorney noted that clearly the State had acknowledged Mr. Gray’s addiction and need for treatment, or it would not have recommended a DOSA on the VUCSA case. Id.

The State did agree that Mr. Gray’s history of substance abuse showed a need for treatment. 3/3/10 RP 6. The prosecutor acknowledged that Mr. Gray’s many prior drug possession convictions indicated a history of addiction and noted that the State did not object to a DOSA on the VUCSA cause number. Id. However, the State objected to the DOSA on Mr. Gray’s assault case. 3/3/10 RP 4.

The trial court ultimately denied Mr. Gray’s request for a DOSA on both cases. 3/3/10 RP 10-11. The court ruled:

I am willing to give a – a DOSA on the drug crime because I want you to get treatment. If you’re serious about wanting treatment and bettering yourself, then I’m happy to give it to you on the drug case. I will not give it to you on the Assault. What – does the Defense want that? I mean, if you really want treatment, here’s an opportunity to get it.

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be referred to by their date, followed by “RP” and the page number.

3/3/10 RP 10-11.<sup>2</sup>

1. This Court should review the sentencing court's ruling denying Mr. Gray a DOSA. Sentencing errors may be raised for the first time on appeal. State v. Paine, 69 Wn. App. 873, 881, 850 P.2d 1369 (1993). A defendant may appeal a standard range sentence if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. State v. J.W., 84 Wn. App. 808, 811, 929 P.2d 1197 (1997) (citing State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). This Court may reverse a sentencing court's decision if it finds a clear abuse of discretion or misapplication of the law. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997) (citing State v. Elliott, 144 Wn.2d 6, 17, 785 P.2d 440 (1990)). A defendant is not barred from appealing a standard range sentence when the appeal raises a challenge to the sentencing court's determination of eligibility for a sentencing alternative. See State v. Mail, 121 Wn.2d at 712; State v. McNeair, 88 Wn. App. 331, 336-37, 944 P.2d 1099 (1997); State v. Garcia-Martinez, 88 Wn. App. 322, 328-30, 944 P.2d 1104 (1997).

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<sup>2</sup> The DOSA referred to by the trial court was a prison-based DOSA, not the outpatient program which Mr. Gray had requested. 3/3/10 7-9.

As a general rule, a reviewing court will not reverse a trial court's decision not to grant a DOSA sentence. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005) (citing RCW 9.94A.585(1); State v. Bramme, 115 Wn.2d 844, 850, 64 P.3d 60 (2003)). Nevertheless, a defendant may challenge the procedure by which the sentence was imposed, as every defendant is entitled to request the trial court to properly consider such a sentence and give the request meaningful consideration. 154 Wn.2d at 342. Moreover, a defendant is entitled to a review of the denial of a DOSA request in order to correct a legal error or the trial court's abuse of discretion. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); State v. White, 123 Wn.App. 106, 114, 97 P.3d 34 (2004).

A sentencing court abuses its discretion by refusing to exercise its discretion or by relying on an impermissible basis for its sentencing decisions. State v. Garcia-Martinez, 88 Wn. App. at 330. Here, the sentencing court erred by refusing to consider the defense request for a DOSA sentence based on its erroneous determination that treatment was not available due to the fact that Mr. Gray had another matter pending before the court. Mr. Gray requests that this Court review the trial court's denial of a DOSA

below. RAP 2.4; Garcia-Martinez, 88 Wn. App. at 330 (appellate review appropriate “where a defendant has requested an exceptional sentence below the standard range” and the trial court “has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.”)

2. The Sentencing Reform Act requires the sentencing court determine a defendant’s eligibility for a DOSA and then use its discretion in imposing a DOSA if the defendant meets the criteria.

The purpose of the DOSA statute was to provide “treatment-oriented sentences” for drug offenders. State v. Conners, 90 Wn. App. 48, 53, 950 P.2d 519, rev. denied, 136 Wn.2d 1004 (1998).

The Sentencing Reform Act required the sentencing judge determine Mr. Gray’s eligibility for a DOSA and use her discretion to determine whether to impose the DOSA. RCW

9.94A.505(2)(a)(viii). Under the Sentencing Reform Act, the sentencing court is given discretion to impose a DOSA under RCW 9.94A.660 if certain eligibility requirements are met. State v. Williams, 112 Wn. App. 171, 177, 48 P.2d 354 (2002).

Under RCW 9.94A.660(1), a defendant is eligible for a DOSA if (1) his current offense is not a violent offense or a sex

offense and does not involve a firearm or deadly weapon sentence enhancement; (2) his prior convictions do not include violent offenses or sex offenses; (3) his current offense is a violation of chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.58 RCW and involved only a small quantity of drugs; and (4) he or she is not subject to deportation.

3. Because Mr. Gray was eligible for a DOSA, the sentencing court had a duty to exercise its discretion and either grant or deny the request under the criteria set forth by the Legislature. The legislature enacted RCW 9.94A.660 to address offender's substance abuse problems. RCW 9.94A.660(1) provides only that the person requesting a DOSA have a felony conviction that is not a violent or sex offense and demonstrate he or she has a chemical dependency problem such that he or she would likely benefit from the sentencing alternative. In fact, under RCW 9.94A.660(2), the statute provides during incarceration, the offender

shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

Following the period of incarceration, the statute contemplates the offender be released on community custody with the provision that the terms of release include “appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services.” RCW 9.94A.660(2)(a).

In 1999, the Legislature expanded the underutilized DOSA program to include not only first time offenders but all felony drug and property offenders. E2SHB 1006. The Legislature stated, “This is a measure that gets tough on those who have a substance abuse problem, but also stops the revolving door to the prisons. It gives the offender the treatment he needs so he is less likely to offend again, while still requiring confinement.” Senate Bill Report. E2SGB 1006, at 3. The general intention of alternative sentencing programs, such as the DOSA, is to provide offenders with drug and alcohol treatment in order to reduce recidivism. See, e.g., Jean Soliz-Conklin, Washington State Department of Corrections, Washington State Drug Offender Sentencing Alternative Statistical Summary, Jan. 2010. Because the DOSA program was enacted to treat offenders with chemical dependency issues, Mr. Gray was

eligible for a DOSA -- on both his VUCSA case, as well as his assault in the third degree case -- and the record showed he would benefit from DOSA treatment.

It was disingenuous for the State to argue that Mr. Gray was eligible for a DOSA on only his VUCSA case, but not his assault case. 3/3/10 RP 4. The trial court's denial of Mr. Gray's DOSA request was legally erroneous, because a DOSA was an option for the trial court to consider for Mr. Gray under the DOSA statute. First, Mr. Gray was eligible for a DOSA under RCW 9.94A.660(1): Mr. Gray's crime was a delivery of bunk, his prior convictions did not include any violent or sex offenses, and he was not subject to deportation. CP 1-3; CP 25-34.

Instead of properly considering Mr. Gray's eligibility for a DOSA and exercising its discretion, the sentencing court merely decided the DOSA program was not an option, due to Mr. Gray's other criminal matter. 3/3/10 RP at 10-11. The sentencing court did no balancing test whatsoever, refusing to consider a DOSA because of its apparent belief that the DOSA program was not available to Mr. Gray on his assault in the third degree case. Id. The sentencing court committed error as a matter of law in ruling a DOSA sentence was not an option for Mr. Gray's concurrent

sentence. State v. Williams, 149 Wn.2d 143, 148, 65 P.3d 1214 (2003).

Because the record sufficiently demonstrated Mr. Gray was eligible for a DOSA and would benefit from treatment, the sentencing court erroneously denied his request for a DOSA. Accordingly, the evidence presented was sufficient to demonstrate Mr. Gray had a substance abuse addiction and would benefit from a DOSA.

4. Reversal and remand for resentencing is required.

This Court must reverse and remand for resentencing because the sentencing court abused its discretion by relying on an improper and unsupported basis in denying a DOSA and imposing the standard range sentence. Garcia-Martinez, 88 Wn. App. at 330. Accordingly, this Court must reverse so that the sentencing court may consider Mr. Gray's eligibility for a DOSA sentence and sentence him accordingly.

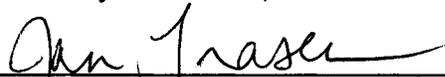
F. CONCLUSION

Mr. Gray was eligible for a DOSA and the record showed he would benefit from substance abuse treatment. Because the sentencing court improperly denied his DOSA request on an improper basis, Mr. Gray requests this Court reverse the

sentencing court ruling and remand for resentencing for the court to properly consider his request.

DATED this 22<sup>nd</sup> day of September, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jan Trasen", written over a horizontal line.

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DIVISION ONE**

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	)	
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v.	)	NO. 65116-1-I
	)	
ALPHONSO GRAY,	)	
	)	
Appellant.	)	

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STATE OF WASHINGTON  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] ALPHONSO GRAY<br>976129<br>OLYMPIC CORRECTIONS CENTER<br>11235 HOH MAINLINE<br>FORKS, WA 98331                               | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2010.

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