

71264-1

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NO. 71264-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEVIN L. FORD,

Appellant.

2014 AUG 11 11:53 AM
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court error in considering challenged facts of an uncharged subsequent offense when weighing the defendant's candidacy for a DOSA sentence?

2. The State concedes that the trial court erroneously considered the challenged facts of an uncharged subsequent offense without a real facts hearing. Are the facts in this case such that when it is remanded for real facts hearing and resentencing it must be before a different judge?

II. STATEMENT OF THE CASE

On September 23, 2013, pursuant to a plea agreement with the State, the defendant pleaded guilty to possession of controlled substance with intent to manufacture or deliver (methamphetamine) under Snohomish County Superior Court cause number 12-1-01990-2 and possession of controlled substance (heroin) under cause number 12-1-02077-3. Pursuant to the plea agreement, the State agreed to dismiss a second count under each cause number and make a mid-range sentencing recommendation on cause no. 12-1-01990-2 of 90 months to run concurrently with a high end, 24 month recommendation under cause no. 12-1-02077-3. The state reserved with regard to a potential DOSA sentence until a report

had been completed. CP 84-100; CP 150-166; 09/23/13 RP 14; 20; 26-29.

The defendant requested the court allow him one week from the entry of the plea to turn himself into the jail. The court agreed and ordered the defendant to report to the Snohomish County Jail September 30, 2013 at noon. The defendant did not appear on September 30, 2013, and a warrant issued for his arrest. 09/23/13 RP 20; 26-29; CP 35-83.

The state filed a sentencing brief as did the defendant. The State attached a copy of Spokane police reports to its sentencing brief. The reports showed that the defendant was arrested on the warrant in Spokane two days after it was issued. During the arrest and subsequent searches, Spokane law enforcement seized over 300 grams of methamphetamines, 73 grams of heroine, two semi-automatic rifles and ammunition. These were taken from the defendant or locations associated with him. The defendant was transported to the Snohomish County Jail and appeared for sentencing as scheduled. CP 35-40.

In his brief, the defendant acknowledged he had breached the plea agreement by failing to report to the jail as ordered and the subsequent criminal behavior; and, the state was no longer bound

to the plea agreement. Both parties argued from the facts of the cases before the court, the defendant's criminal history and the facts surrounding the defendant's Spokane arrest on this warrant. The defendant, despite arguing that the facts of the Spokane arrest supported his request for a DOSA, also objected to the court considering the facts of the uncharged offense when making its sentencing decision. CP 32-34; 11/13/13 RP 9.

At sentencing, the defendant exercised his right to allocution. He admitted he went to Spokane to flee from the potential prison sentence but made no other comments admitting or denying the new allegations. The defendant indicated that now that he was back in-custody, he requested the court impose a DOSA sentence. 11/13/13 RP 17-18.

The sentencing judge stated he did not feel the defendant was an appropriate candidate for a DOSA sentence based on the appropriate information of the defendant's failure to report to the jail as ordered, the offenses before the court for sentencing and the defendant's criminal history. However, the sentencing judge also referenced to the quantity of drugs in the defendant's possession at the time of the subsequent arrest on the warrant and that the

defendant was alleged to have guns in his possession at that time.

11/13/13 RP 18-19.

III. ARGUMENT

1. THE SENTENCING COURT ERRONEOUSLY CONSIDERED DISPUTED FACTS WITHOUT HOLDING AN EVIDENTIARY HEARING AT THE TIME OF SENTENCING.

Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. RCW 9.94A.530(2). In order to dispute any information presented at the sentencing hearing, the defendant must make a specific, timely challenge. State v. Garza, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994). The defendant need not move for an evidentiary hearing, however; it is the trial court's responsibility under RCW 9.94A.530(2) to hold an evidentiary hearing if it wants to consider disputed facts. State v. Talley, 83 Wn. App. 750, 759, 923 P.2d 721 (1996), *aff'd*, 134 Wn.2d 176, 949 P.2d 358 (1998).

Although the sentencing court stated a number of legitimate reasons for denying the defendant a DOSA sentence, he also referenced information in the challenged police reports. That information should not have been considered by the court without a real facts hearing. Therefore, the state concedes the matter should be remanded for resentencing.

2. THE MATTER SHOULD NOT BE REASSIGNED FOR SENTENCING IN FRONT OF A DIFFERENT JUDGE.

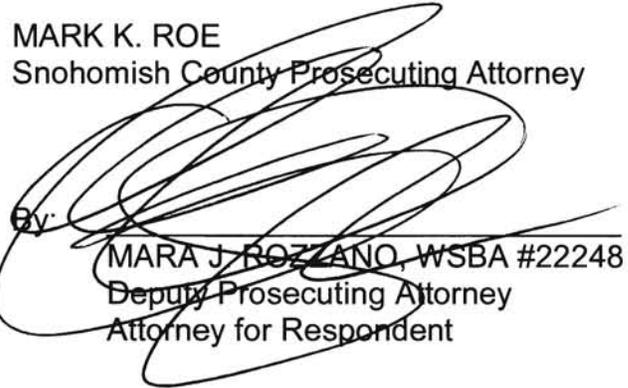
The state is opposes reassignment given the facts of this case. There is nothing in the record to indicate the sentencing judge could not be fair and open minded upon remand. Although reassignment has been ordered by Washington appellate courts across a wide spectrum of cases it is not common. Talley reassignment was appropriate because that judge's statement at the sentencing hearing suggests she had prejudged the matter. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996). There is nothing in the record to suggest the sentencing judge in this case had prejudged the matter. Contrary to the facts in Talley, Mr. Ford's trial attorney did not specifically indicate that he wanted the court to hold an evidentiary hearing. Talley at 755. And, although the defendant's attorney objected to the court considering facts from the Spokane arrest, he also argue from and concede some of those facts, making it unclear to the court which facts were being contested. Given the circumstances of this case, the matter should not be reassigned on remand.

IV. CONCLUSION

For the reasons stated above, the case should be remanded for a real facts hearing and resentencing before the sentencing judge.

Respectfully submitted on August 7, 2014.

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