Supreme Court No. ____
COA No. 85689-8-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NORRIAN B. PHILLIPS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Norrian Phillips, the petitioner here and appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review.

B. COURT OF APPEALS DECISION

Mr. Phillips seeks review of the Court of Appeals' decision dated March 17, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

A court may impose a drug offender sentencing alternative ("DOSA") if the defendant is eligible and appropriate for the program. Determining whether a DOSA is appropriate focuses on the defendant, not the offenses. Likewise, courts cannot categorically exclude a DOSA for a certain class of people. Seemingly all parties and the trial court agreed that Mr. Phillips was eligible for a DOSA. However, the court refused to impose a DOSA because it determined the offenses were too sophisticated to suggest a relationship with Mr. Phillips' substance addiction.

Because the court focused on the offenses and not Mr. Phillips, the court failed to properly consider whether a DOSA was appropriate. Likewise, the court categorically excluded a DOSA for "sophisticated" offenses. The Court of Appeals misread the statutory scheme and this Court's precedent in denying a DOSA for Mr. Phillips. Likewise, there is a striking lack of guidance from appellate courts on how to determine the appropriateness of a DOSA. This Court should grant review. RAP 13.4(b)(1), (b)(4).

D. STATEMENT OF THE CASE

Norrian Phillips has a "severe untreated polysubstance use disorder." CP 225. Prior to his arrest in this case, "he used methamphetamine and opioids daily." CP 225. Mr. Phillips also has a history of mental illness, specifically "major depressive disorder and generalized anxiety disorder." CP 225. According to Mr. Phillips' social worker, there is a "direct correlation" between Mr. Phillips'

"substance use disorder, his mental health conditions, and his legal system involvement." CP 225.

In 2004, when he was 24, Mr. Phillips began supporting his addiction by committing property crimes. RP 61. His criminal history, while lengthy, consists primarily of property offenses.[1] CP 161–64. Despite having acute substance abuse and mental health issues and "years of legal system involvement, [Mr. Phillips] has never been given the opportunity to attend inpatient treatment." CP 161–64, 225.

In this case, the State contended Mr. Phillips committed numerous second-degree burglaries throughout the Seattle area. CP 7–22. The State specifically alleged Mr. Phillips broke into businesses and stole computers and other technological equipment. CP 7–22.

After he was arrested, Mr. Phillips languished in pretrial detention for almost a year. RP 45, 50. During that

[1] He only has one non-property crime on his record: second-degree assault in 2002. CP 164.

period, Mr. Phillips said, "I was exposed to an environment with lots of drugs, drug use, inmates overdosing in their cells. I relapsed several times . . . while in jail." RP 67. On two separate occasions, he requested a temporary release to attend inpatient treatment. CP 226, 229, 231–32. The court granted the first request, permitting Mr. Phillips to temporarily attend treatment at the Valley Cities' Recovery Place. CP 231. Mr. Phillips was ultimately unable to be released because of a hold from Seattle Municipal Court. CP 233. After that hold was lifted, Mr. Phillips again moved for temporary release to attend treatment, but the court denied the request. CP 231–34. As a result, Mr. Phillips never received treatment during the pretrial phase of this case. RP 63–66.

Pursuant to an agreement with the State, Mr. Phillips pleaded guilty as charged to 14 counts of second-degree burglary and two counts of attempted second-degree

burglary. CP 94–114. That agreement permitted Mr. Phillips to request a DOSA. CP 98.

At sentencing, the parties agreed that Mr. Phillips was eligible for a DOSA. CP 167, 184. The State, however, argued that a DOSA was not appropriate because the case did not present a "nexus of drug addiction." CP 167.

In arguing for a DOSA, Mr. Phillips' counsel stressed that his "criminal activity is propelled by the substance abuse and will likely reoccur if not treated." CP 184. Counsel continued that, given Mr. Phillips' "relatively young age and the evidence of substance abuse that fueled this criminal activity, the community at large will be safer and better off if Mr. Phillips is to be treated effectively for the drug and alcohol problem that is at the core of the criminal activity." CP 184.

The defense also cited the reports from Mr. Phillips' social worker, Kathleen Leifer. RP 63–64. Ms. Leifer observed that Mr. Phillips had never received treatment and,

as a result, he "never had a viable chance for long term stability." CP 225. Ms. Leifer thought it was "imperative" that Mr. Phillips receive inpatient treatment given "the severity of [his] substance use disorder[.]" CP 226. She concluded:

> [Mr. Phillips] wants to break the cycle of incarceration and getting treatment will finally give him the tools to do that. Through treatment, [Mr. Phillips] will gain coping mechanisms and increased knowledge of his triggers. Treatment can have a long-term positive impact on his life. These tools will stay with him after he leaves treatment. . . . [Mr. Phillips] finally getting the help that he needs promotes public safety.

CP 229.

During his allocution at the sentencing hearing, Mr. Phillips said he has never been "given the chance to rehabilitate or receive treatment," and each time he was sent to prison in the past did not improve his substance abuse issue. RP 66. He "accept[ed] responsibility" for what he did

and personally asked the court for substance abuse treatment. RP 88–89.

The court declined to impose a DOSA because it did not "see a nexus" between Mr. Phillips' drug addiction and the offenses. RP 100. As the court reasoned, the offenses were "very sophisticated, well-planned, well-executed, in a short period of time breaches of sophisticated companies" which was "not consistent with being driven by drug addiction." RP 99. The court instead imposed the high end of the standard range, which was 68 months in prison. RP 100–01; CP 173.

The Court of Appeals affirmed, holding the court adequately considered Mr. Phillips' request for a DOSA. Slip Op. at 5–6. It held the trial court did not abuse its discretion by ruling the offenses were too sophisticated to warrant a DOSA. Slip Op. at 5.

E. LAW AND ARGUMENT

The Court of Appeals incorrectly affirmed Mr. Phillips' sentence even though the trial court categorically denied a DOSA and focused entirely on "the offense," not "the offender."

The trial court declined to impose a DOSA because it found Mr. Phillips' offenses were committed in a "very sophisticated, well-planned, [and] well-executed manner." RP 99. However, in determining whether a DOSA is appropriate, courts are supposed to consider the circumstances of the offender, not their offense. Likewise, courts cannot categorically exclude a DOSA for a class of people. The trial court flouted both limitations in denying a DOSA: it excluded a DOSA because, in its view, sophisticated offenses indicate the absence of a drug issue, and it focused entirely on the offenses and not Mr. Phillips. The court contravened this Court's precedent and the statutory scheme. This Court should grant review. RAP 13.4(b)(1), (b)(4).

1. *Courts can impose a DOSA if it is in the best interest of the defendant and the community, and a defendant can appeal a court's improper denial of a DOSA.*

"The DOSA statute authorizes a court to impose an alternative sentence, including substance abuse treatment and rehabilitation incentives, when this would be in the best interests of the defendant and the community." *State v. Ehlert*, 19 Wn. App. 2d 381, 384, 496 P.3d 738 (2021). Under a DOSA sentence, an individual serves about one-half of a standard range sentence in prison and receives substance abuse treatment while incarcerated. RCW 9.94A.660(3). "For the balance of the sentence, the offender receives supervised treatment in the community. A DOSA sentence may be revoked if the offender fails to comply with its conditions." *State v. Van Noy*, 3 Wn. App. 2d 494, 498, 416 P.3d 751 (2018) (citation omitted).

"As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable." *State v. Grayson*, 154

Wn.2d 333, 338, 111 P.3d 1183 (2005). "However, an offender may always challenge the procedure by which a sentence was imposed." *Id.* A defendant can also challenge "legal errors or abuses of discretion in the determination of what sentence applies." *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant *is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Hender*, 180 Wn. App. 895, 901, 324 P.3d 780 (2014) (emphasis in original). A court that fails to properly consider a DOSA abuses its discretion. *Id*.

2. In determining whether to impose a DOSA, courts consider eligibility and appropriateness based on the defendant, not their offenses.

The court, by focusing entirely on whether Mr. Phillips' offenses were too sophisticated to warrant a DOSA, ignored the statutory criteria that dictate whether a DOSA is

appropriate. The court needed to focus on Mr. Phillips himself, not his offenses. Likewise, the court categorically excluded a DOSA because the offenses were too "sophisticated." The court's rejection of a DOSA represented an abuse of its discretion.

In determining whether to grant a DOSA, courts consider two things: 1) whether a person is eligible for a DOSA and 2) whether a DOSA is appropriate. RCW 9.94A.660(1), (3), (5).

Eligibility for a DOSA is determined by statute. RCW 9.94A.660(1). The offender must meet certain criteria including, for example, that they have no violent felony convictions in the past 10 years and no convictions for sex offenses requiring registration. RCW 9.94A.660(1)(c), (d)(ii). Here, no one disputed that Mr. Phillips was statutorily eligible for a DOSA. CP 167, 184.

In determining whether a DOSA is appropriate, courts consider if the defendant has a substance use disorder and is

amenable to treatment. *State v. Olsen-Rasmussen*, 27 Wn. App. 2d 1057, 2023 WL 5282753, at *3 (Aug. 17, 2023) (*see* GR 14.1(a)). It is also important to consider whether the defendant "take[s] responsibility for his behavior[.]" *Hender*, 180 Wn. App. at 902. It was undisputed that Mr. Phillips was amenable to treatment, took responsibility, and had a long history of substance abuse issues. *E.g.*, 66, 88–89. But the trial court failed to consider Mr. Phillips' personal circumstances. Instead, it erroneously focused on how "sophisticated" his offenses were. RP 99–100.

Courts "must consider" the factors in RCW 9.94A.660(5) in determining "whether a DOSA is appropriate for the offender." *Final B. Rep. on Substitute H.B. 1791*, at 1–2, 61st Leg., Reg. Sess. (Wash. 2009);[2] *accord State*

[2] Available at: https://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/1791-S%20HBR%20FBR%2009.pdf?q=20250416102149 (last accessed April 16, 2025).

v. Hunt, 22 Wn. App. 2d 1035, 2022 WL 2236165, at *3 n.2 (June 22, 2022) (*see* GR 14.1(a)).

Throughout RCW 9.94A.660(5), the legislature repeatedly referred to "the offender" when it listed factors which determine whether a DOSA is appropriate. The factors in RCW 9.94A.660(5) indicate the appropriateness of a DOSA depends on the offender, not solely the offenses. *See In re Postsentence Review of Hardy*, 9 Wn. App. 2d 44, 45, 442 P.3d 14 (2019).

The portion of the statute that governs eligibility, RCW 9.94A.660(1)(a)–(g), contains similar language. *E.g.*, RCW 9.94A.660(1)(g) ("*An offender* is eligible for the special drug offender sentencing alternative if . . . *[t]he offender* has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense." (emphasis added)). Because this statutory language focuses on "the offender," and not "the offense," the eligibility

criteria are "offender-based, not offense-based[.]" *Hardy*, 9 Wn. App. 2d at 45.

The same language that focuses on the offender is present throughout RCW 9.94A.660(5). As a result, this Court should conclude the appropriateness for a DOSA is also "offender-based, not offense-based." *See Hardy*, 9 Wn. App. 2d at 45.

"Courts should assume the Legislature means exactly what it says." *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). In RCW 9.94A.660(5), the legislature only mentioned "the offender" when it created factors which determine whether someone is appropriate for a DOSA. If the legislature wanted courts to focus on the offense, it could have said so. *See State v. Dennis*, 191 Wn.2d 169, 177, 421 P.3d 944 (2018) ("If the legislature intended the five-year period to immediately precede a petition for restoration, it could have said so, but where the legislature omits language from a statute, we may not read language into the statute.").

Thus, just like for eligibility, whether someone is appropriate for a DOSA is an "offender-based, not [an] offense-based" determination. *See Hardy*, 9 Wn. App. 2d at 45. Indeed, the Court of Appeals has already suggested this conclusion.

In *State v. Olsen-Rasmussen*, the court observed, "A DOSA is appropriate for a defendant who has a substance use disorder and is amenable to treatment." 2023 WL 5282753, at *3. Likewise, the Court of Appeals has consistently cited RCW 9.94A.660(5) when it outlines the relevant factors for determining whether a DOSA is appropriate, even if it is not a residential-based DOSA. *State v. Bucko*, 180 Wn. App. 1043, 2014 WL 1711479, at *4 (April 28, 2014) (*see* GR 14.1(a)); *State v. Jackson*, 33 Wn. App. 2d 1006, 2024 WL 4853583, at *3 (Nov. 21, 2024) (*see* GR 14.1(a)).

The legislature's intent further supports this conclusion. The legislature created DOSA to provide

treatment to people "likely to benefit from it" and "help them recover from their addictions." *Grayson*, 154 Wn.2d at 337. The factors in RCW 9.94A.660(5) further this intent by ensuring a DOSA is given to the people that need it most, regardless of whether they commit "sophisticated" offenses.

Here, the trial court did not focus on Mr. Phillips in general nor the specific criteria in RCW 9.94A.660(5) in determining whether a DOSA was appropriate. Instead, it focused entirely on the offenses, finding them too sophisticated to suggest a relationship with Mr. Phillips' drug addiction. RP 96–97, 99–100. But this focus was misdirected since the appropriateness of a DOSA is determined by looking at the offender, not their offenses. *See Hardy*, 9 Wn. App. 2d at 45. By focusing on how sophisticated the offenses were, the Court of Appeals committed the same mistake. Slip Op. at 5–6.

It is incorrect to conclude that drug addicts are incapable of committing sophisticated offenses. Drug addicts

commit various types of crimes in various different manners. Robert L. Misner, *A Strategy for Mercy*, 41 Wm. & Mary L. Rev. 1303, 1386 (2000); Beth A. Colgan, *Teaching A Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 Seattle J. for Soc. Just. 293, 304, 304 n.96 (2006) (collecting studies). The one commonality among their crimes is that "drug users often commit crimes to support their habits[.]" Misner, at 1394.

There is no basis to conclude that people who commit sophisticated offenses cannot benefit from treatment, while "less sophisticated" offenders can. No matter the level of sophistication, "drug treatment programs appear to be much more effective than jail or prison sentences in reducing recidivism rates." *Id*. at 1393. It makes no sense to exclude people with crippling drug issues who commit "sophisticated" offenses from life-saving treatment.

The court also erred by categorically denying a DOSA for sophisticated offenders. Courts cannot categorically

exclude a DOSA for "a certain class of offenders." *State v. Williams*, 199 Wn. App. 99, 111, 398 P.3d 1150 (2017). But that is exactly what the court did here: it effectively held it would not impose a DOSA for "sophisticated" offenses.

In *Grayson*, this Court acknowledged the trial court declined a DOSA "mainly" because the program was underfunded. 154 Wn.2d at 342. The trial court, however, did not articulate any other reasons for denying a DOSA. *Id.* It was "clear that the judge's belief that the DOSA program was underfunded was the primary reason the DOSA was denied." *Id.* Thus, even though the lack of funding was not the "sole" reason, the Court held "the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error." *Id.*

The same is true here. The court did not articulate any other reason besides the sophistication of the offenses when it denied a DOSA for Mr. Phillips. This improper categorical basis "was the primary reason the DOSA was

denied." *See id.* As a result, "the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error." *See id.*

"[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community." *Id.* at 343. But excluding a whole class of people—those who commit seemingly "sophisticated" offenses—does not further this purpose. This applies especially to Mr. Phillips.

Mr. Phillips has long suffered from severe "polysubstance use disorder." CP 225. Yet, despite his involvement in the criminal legal system, Mr. Phillips has never been treated for his issues. CP 161–64, 225. Because his criminal conduct is correlated with his drug abuse, failing to treat his substance issues increases the likelihood of recidivism. CP 184, 228–29. Excluding people like Mr.

Phillips from a DOSA does not help the community, it harms it. CP 229; Misner, *A Strategy for Mercy*, at 1394.

The Court of Appeals largely sidestepped this issue. Instead, it found the trial court considered Mr. Phillips' personal circumstances. Slip Op. at 5–6. This holding ignores the facts in the record.

The trial court explained that, to determine whether a DOSA is appropriate, it considers "whether or not there is a nexus between the crimes to which Mr. Phillips has pled guilty and the – and any drug addiction." RP 96. This was erroneous as the proper focus is on whether the defendant accepts responsibility and has a substance abuse issue. *See Olsen-Rasmussen*, 2023 WL 5282753, at *3; *Hender*, 180 Wn. App. at 902 (observing a defendant's "accountability" is a critical consideration).

The trial court compounded this error by focusing entirely on whether Mr. Phillips' crimes were too "complex." During its brief ruling, it acknowledged that

people commit "complex" crimes while abusing drugs. RP 96. It then found Mr. Phillips' schemes were "complex" and even "brilliant." RP 96. Because these offenses were so "sophisticated," the court did not find a nexus between the offenses and drug addiction, and resultantly "den[ied] the request for a DOSA." RP 100.

The court did not focus on anything else in its ruling. The Court of Appeals held otherwise, but it failed to explain exactly how the trial court focused on Mr. Phillips or the correct factors under RCW 9.94A.660(5). Slip Op. at 5–6, 5 n.2.

Because the appropriateness for a DOSA sentence is "offender-based, not offense-based," the trial court erred. *See Hardy*, 9 Wn. App. 2d at 45. A court that bases its denial of a DOSA on legally incorrect reasoning abuses its discretion. *Smith*, 118 Wn. App. at 292. When that occurs, as it did here, remand and resentencing are required. *Van Noy*, 3 Wn. App. 2d at 503. Because the trial court failed to properly

exercise its discretion in determining whether to impose a DOSA, reversal of Mr. Phillips' sentence and remand for a resentencing are required.

This Court considered how courts examine a DOSA request in *State v. Grayson*, but that decision is now 25 years old. *Grayson* is the only time this court has considered this issue. Since then, the Court of Appeals has produced inconsistent results, and courts lack guidance about how they should consider whether a DOSA is appropriate (as opposed to whether a person is eligible for a DOSA).

Without guidance from this Court, trial courts will continue to produce radically different results. At the same time, individuals that sorely need substance abuse treatment—such as Mr. Phillips—will continue to languish in the system. This framework is counterproductive, contributes to a rising prison population, and harms the community. This Court should grant review. RAP 13.4(b)(1), (b)(4).

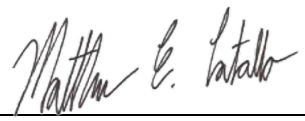
F. CONCLUSION

Mr. Phillips respectfully asks this Court to accept discretionary review.

This petition is 3,382 words long and complies with RAP 18.7.

DATED this 16th day of April 2025.

Respectfully Submitted



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

THE STATE OF WASHINGTON, Respondent, v. NORRIAN BERNARD PHILLIPS, Appellant.	No. 85689-8-I UNPUBLISHED OPINION

BOWMAN, J. — Norrian Bernard Phillips pleaded guilty to 14 counts of second degree burglary and 2 counts of attempted second degree burglary. He appeals the trial court's denial of his request for a prison-based drug offender sentencing alternative (DOSA). And he argues the court erred by imposing restitution at a hearing where neither he nor his attorney were present. We affirm the trial court's denial of Phillips' DOSA request but vacate the restitution order and remand for further proceedings.

FACTS

Over several months in 2022, Phillips repeatedly broke into numerous offices in the Seattle and Renton areas. The offices were mostly part of large technology, streaming service, and gaming companies housed in buildings with security systems and security personnel. Phillips stole hundreds of thousands of

dollars' worth of items, mostly laptops, from the companies and caused tens of thousands of dollars' worth of property damage.[1]

The State charged Phillips with 14 counts of second degree burglary and 2 counts of attempted second degree burglary. Phillips pleaded guilty to all 16 counts. As part of the plea, the State agreed not to file charges against Phillips for five other pending burglary cases from the Seattle, Bellevue, and Redmond police departments. And Phillips agreed to pay restitution in the charged and uncharged cases. The State also agreed not to ask for an exceptional sentence upward. Instead, it would request a high-end concurrent sentence of 68 months. The State would not recommend an alternative sentence but agreed Phillips could request a prison-based DOSA.

At sentencing, Phillips requested a DOSA and stressed that his "criminal activity is propelled by substance abuse and will likely reoccur if not treated." The State did not contest that Phillips was eligible for a DOSA but argued it was inappropriate because his crimes did not present a "nexus to drug addiction." In its colloquy with Phillips, the court noted that it read the probable cause certifications and the defense presentencing report "carefully." And it extensively discussed with Phillips the underlying facts of his convictions and his drug use. During the conversation, Phillips also asked the court to impose a "mental health alternative sentencing" and an exceptional sentence below the standard range.

[1] In one case, only 30 minutes after the jail released him on a different burglary charge, Phillips attempted to burglarize a company he had stolen from several times before.

The court declined to impose a DOSA because it did not "see a nexus" between Phillips' drug use and his offenses. It noted that "[d]rug addiction may have been a concurrent issue" but found that "this very sophisticated, well-planned, well-executed, in a short period of time breaches of sophisticated companies is not consistent with being driven by drug addiction." The court imposed a concurrent high-end sentence of 68 months. The court also ordered restitution to be determined at a later hearing, and Phillips waived his right to be present at the hearing.

Five months later, the State sent defense counsel a proposed restitution order totaling $97,161.88. Defense counsel did not sign the proposed order, so the State scheduled a restitution hearing for the following month. Neither Phillips nor his attorney appeared at the hearing. The court verified that defense counsel had received notice and explained that it had e-mailed and called him that morning. Having received no response, the court proceeded with the hearing. The court granted the State's request and issued an order of restitution for $97,161.86.

Phillips appeals.

ANALYSIS

Phillips argues the trial court erred by refusing to impose a prison-based DOSA and by ordering restitution at a hearing without his counsel present.

1. DOSA

Phillips contends the court abused its discretion by declining to impose a DOSA "simply because [he] committed the offenses in a sophisticated and well-executed manner." We disagree.

The DOSA program authorizes trial judges to sentence eligible, nonviolent drug users to reduced confinement time in exchange for their participation in substance use disorder (SUD) treatment and increased supervision to assist in addiction recovery. *State v. Grayson*, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005); *see* RCW 9.94A.660. The court may impose a DOSA if it determines that the defendant is eligible under RCW 9.94A.660(1) and that a DOSA is appropriate. RCW 9.94A.660(3). A defendant is not entitled to a DOSA, but he "*is* entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *Grayson*, 154 Wn.2d at 342.

We review a trial court's decision about whether to impose a DOSA for abuse of discretion. *State v. Smith*, 118 Wn. App. 288, 292, 75 P.3d 986 (2003). A trial court has broad discretion in determining whether to grant a DOSA. *Grayson*, 154 Wn.2d at 341-42. And, generally, that decision is not reviewable. *State v. Lemke*, 7 Wn. App. 2d 23, 27, 434 P.3d 551 (2018). But a defendant may seek appellate review "if the trial court refused to exercise discretion at all or relied on an impermissible basis in making the decision." *Id.*; *Grayson*, 154 Wn.2d at 342 (a categorical failure to consider a defendant's request of a sentencing alternative authorized by statute is an abuse of discretion). A trial court relies on an impermissible basis if, for example, it

refuses to consider the request because of the defendant's race, sex, or religion. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, the record shows that the court "actually considered" Phillips' request for a DOSA sentence. *Grayson*, 154 Wn.2d at 342. The court "carefully" considered Phillips' drug use in the context of the specific circumstances of his crimes, noting that the schemes were "complex" and "brilliant." Ultimately, the court concluded that his crimes were "very sophisticated, well-planned, well-executed," and committed in a way that differed from crimes driven by drug addiction. As a result, the court determined that there was no nexus between Phillips' drug use and his criminal enterprise.

Still, Phillips argues that the court abused its discretion because it categorically denied his DOSA request. According to Phillips, the trial court determined that it would never impose a DOSA sentence for defendants convicted of sophisticated crimes.[2] But the record shows the court determined that a DOSA was not appropriate for Phillips specifically under the circumstances of his sophisticated crimes. It pointed to the lack of evidence that drug use drove Phillips to commit his crimes, and its ruling implies that a DOSA would not protect

[2] Phillips also argues that the court needed to consider on the record the four factors listed in RCW 9.94A.660(5)—whether he suffers from SUD, whether the SUD is such that it is likely to cause future criminal behavior, whether SUD treatment is available, and whether Phillips and the community would benefit from a DOSA. And he emphasizes that those factors focus on " 'the offender' " and not " 'the offense.' " But RCW 9.94A.660(5) provides guidance for SUD evaluations "[i]f the court is considering imposing a sentence under the residential [SUD] treatment-based alternative." And the court here was considering a prison-based DOSA. In any event, the record shows that the court did consider the issues described in RCW 9.94A.660(5).

the community from Phillips because drug use did not appear to be the underlying cause of his criminal behavior.

Phillips fails to show that the trial court categorically denied his request for an alternative sentence.

2. Restitution

Phillips argues the trial court erred when it ordered restitution at a hearing without his lawyer present. The State concedes error. We accept the State's concession.

Under CrR 3.1(b)(2)(A), "[a] lawyer shall be provided at every stage of the proceedings, including sentencing." This rule applies to restitution hearings because " 'the setting of restitution is an integral part of sentencing.' " *State v. Milton*, 160 Wn. App. 656, 659, 252 P.3d 380 (2011) (quoting *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038 (1993)).

Here, neither Phillips nor his attorney were present at his restitution hearing. And while Phillips waived his right to be present at the hearing, he did not waive his right to have his attorney present. Still, the court proceeded with the hearing and ordered $97,161.86 in restitution. Because Phillips had a right to have his attorney present at his restitution hearing, we vacate the restitution order and remand for further proceedings.

We affirm Phillips' sentence but vacate the trial court's restitution order and remand for further proceedings.

Bowman, J.

WE CONCUR:

Chung, J.

Smith, C.J.

WASHINGTON APPELLATE PROJECT

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