IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEX A. CHAVEZ Aka Alejandro A. Chavez-Varela, Appellant.	)	No. 67529-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2013

Schindler, J. — Alex A. Chavez pleaded guilty to four counts of domestic violence felony violation of a court order. Chavez contends the plea was involuntary and the court abused its discretion by not imposing a drug offender sentencing alternative (DOSA). We affirm.

FACTS

Protection Order

Alex A. Chavez and Kyla Wilson dated for five years. After Chavez assaulted Wilson, she obtained an order of protection. The May 10, 2004, order prohibits Chavez from " 'coming near and from having any contact [with Wilson] whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by respondent's

lawyer(s).' " The order is in effect until May 4, 2015.

Criminal Charges

On April 16 and April 19, 2010, Chavez contacted Wilson in violation of the court order.[1] On May 13, the State charged Chavez with two counts of domestic violence felony violation of a court order. On May 18, Chavez called Wilson on her cell phone. On May 21 and 22, Chavez sent Wilson e-mails.

In March 2011, the State obtained transcripts of telephone calls Chavez made to a friend while in jail. Chavez asks his friend to tell the State that she, not Chavez, made the calls to Wilson, and asks the friend to delete the e-mails he sent to Wilson.

Trial began on April 13. The State filed an amended information charging Chavez with four counts of domestic violence felony violation of a court order and one count of tampering with a witness. Following other pretrial motions, the parties conducted voir dire and the court empanelled a jury to hear the trial.

Guilty Plea

The next day, Chavez agreed to plead guilty to four counts of domestic violence felony violation of the protection order. Chavez also agreed to the facts as set forth in the certification for determination of probable cause. The State agreed to dismiss the charge of witness tampering.

With an offender score of 7, the standard range was 51 to 60 months. The "State's Sentence Recommendation" for "Non-DOSA Sentences" is for 51 months of confinement for each of the four counts to be served concurrently. The

[1] Chavez pleaded to real facts, so these facts are taken from the certification for determination of probable cause.

recommendation also states that "[d]efense may seek [a] prison-based DOSA."

At the plea hearing on April 14, 2011, the prosecutor informed the court that Chavez "wishes to take advantage of that agreement to plead guilty to the four counts of violation of a No Contact Order," and provided the court with the "Statement of Defendant on Plea of Guilty," the "Felony Plea Agreement," the "Prosecutor's Understanding of Defendant's Criminal History," and the State's Sentence Recommendation. The plea agreement expressly states that "no one can appeal the sentence" if it is a standard-range sentence. During the plea colloquy, the prosecutor reiterated the State's sentencing recommendation for 51 months of confinement but noted "the defense, you and your attorney, may seek a prison-based . . . DOSA."[2] However, the prosecutor asked Chavez whether he understood that he could not appeal a standard-range sentence.

> [PROSECUTOR]: Okay. Do you also understand that if the judge sentences you to within that standard range, 51 to 60 months, that no one can appeal the sentence?
> [CHAVEZ]: Yes.

The prosecutor also emphasized that "the judge does not have to follow anyone's recommendation, that the judge may -- must impose a sentence within the standard range."

Before the court questioned Chavez, his attorney told the court that Chavez was knowingly, intelligently, and voluntarily entering into the plea:

> [O]n multiple occasions, Mr. Chavez and I have had discussions about his rights, including right to trial and right to plead guilty. I believe at this point that he's making a knowing, intelligent, and voluntary decision, and I would ask the Court to accept his plea of guilty to these four counts.

[2] Chavez then asked his attorney a question off the record, which his attorney answered.

The court found Chavez's plea to be knowingly, intelligently, and voluntarily made.

May 20 Sentencing Hearing

Before the sentencing hearing on May 20, the defense submitted a presentence report asking that the court to impose a DOSA, and a report from a social worker describing Chavez's family history and substance abuse. In the report, the social worker states that Chavez has a "genetic predisposition for alcohol and drug dependence" and wants to engage in treatment.

At the sentencing hearing, Chavez told the court he wanted to withdraw his guilty plea: "I feel like I was coerced into this, promised different things and, um, I will appreciate it if this hearing would be continued because I feel like my counsel was ineffective in representing me, and I also feel that my interest was not in this." The court continued the sentencing hearing in order to "appoint a new counsel to look at that issue." New counsel did not file a motion to withdraw the guilty plea.

August 5 Sentencing Hearing

At the sentencing hearing on August 5, the State opposed the defense request for a DOSA. The prosecutor conceded Chavez was eligible for a DOSA, but argued his criminal history showed he repeatedly violated court orders and chemical dependency was not "the overriding motivations in his criminal behavior." Wilson also opposed the request for a DOSA. Wilson told the court that "drugs and alcohol never played a part in all of the abuse and all of [Chavez]'s abuse."

The court did not impose a DOSA, stating, "I am not imposing a DOSA because I

don't think it's appropriate for this case." The court imposed a standard-range concurrent sentence of 55 months of confinement on the four counts of domestic violence felony violation of a no contact order and no contact with Wilson for 5 years. The court ordered Chavez to obtain a "drug[and]alcohol evaluation and follow all recommended treatment within 30 days of release" as a condition of community custody.

At the end of the sentencing hearing, defense counsel told the court that Chavez planned to file an appeal: "I am also directed to file a Notice of Appeal. There were some pretrial issues and other things that he would like to address on appeal." Neither the court nor counsel responded.

ANALYSIS

Relying on State v. Smith, 134 Wn.2d 849, 953 P.2d 810 (1998), Chavez claims he is entitled to withdraw his guilty plea. Chavez argues his guilty plea was not entered into knowingly, intelligently, and voluntarily because his attorney erroneously stated that he retained his right to appeal the pretrial rulings.[3]

Due process requires that a defendant enter into a plea agreement knowingly, intelligently, and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. Chervenell, 99 Wn.2d 309, 312, 662 P.2d 836 (1983). "When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary." Smith, 134 Wn.2d at 852.

[3] Preliminarily, Chavez may raise this error for the first time on appeal. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (holding claim that guilty plea was involuntary could be raised for first time on appeal under RAP 2.5(a)(3)).

In Smith, the defendant acknowledged as part of the plea agreement that he understood he was giving up the right to appeal. Smith, 134 Wn.2d at 851, 852-53. But defense counsel told the court that while Smith was waiving some rights on appeal, Smith retained the right to appeal the trial court's suppression ruling, stating: " '[H]is plea of guilty itself is not appealable,' " but Smith " 'reserved the right to appeal the court's ruling on the pre-trial motion.' " Smith, 134 Wn.2d at 852-53. Neither the court nor the State corrected defense counsel's inaccurate representation. Smith, 134 Wn.2d at 853.

The Washington Supreme Court held that because "Smith and everyone else in the courtroom had the same understanding" that under the plea statement, Smith could appeal the suppression ruling, he did not enter his plea agreement knowingly, voluntarily, and intelligently. Smith, 134 Wn.2d at 853. The court concluded that "[u]nder these circumstances, it is clear that Smith voluntarily relinquished certain rights, but it is not clear that he knowingly, voluntarily, and intelligently relinquished the right to appeal the suppression ruling." Smith, 134 Wn.2d at 853.

Here, unlike in Smith, Chavez does not point to anything from the record of the plea hearing to support his contention. The record shows that neither the State nor defense counsel made any erroneous or misleading statements about Chavez's right to appeal during the plea hearing. To the contrary, Chavez's attorney told the court his client was making a knowing, intelligent, and voluntary decision, and the court found Chavez entered into the plea freely and with full knowledge of the consequences. Chavez's argument—that the erroneous statement his attorney made at the end of the

August sentencing hearing demonstrates that he did not knowingly give up his right to appeal—is without merit.

In the alternative, Chavez contends the court abused its discretion in denying his request for a DOSA. A DOSA is "a treatment-oriented alternative to a standard range sentence of confinement." State v. Kane, 101 Wn. App. 607, 609, 5 P.3d 741 (2000). See RCW 9.94A.660. Absent a procedural error or categorical refusal to consider the alternative sentence, an appellate court does not review a judge's decision to impose a standard-range sentence instead of a DOSA. State v. Grayson, 154 Wn.2d 333, 338, 342, 111 P.3d 1183 (2005). Because Chavez does not allege that the court categorically failed to consider the DOSA or followed an incorrect procedure, we decline to review this issue.[4]

In his statement of additional grounds, Chavez asserts the court violated his speedy trial rights by granting a continuance. But because he expressly waived the "right to a speedy and public trial," Chavez cannot challenge his speedy trial rights. State v. Wilson, 25 Wn. App. 891, 895, 611 P.2d 1312 (1980) (citing Woods v. Rhay, 68 Wn.2d 601, 606-07, 414 P.2d 601 (1966)); State v. Phelps, 113 Wn. App. 347, 352, 57 P.3d 624 (2002).

Chavez also argues that the State acted "maliciously in its Part in leading me to

[4] Nonetheless, the court did not abuse its discretion in denying the request for a DOSA. Grayson, 154 Wn.2d at 335. "To hold that a trial court has abused its discretion, the record must show that the discretion exercised by the court was predicated upon grounds clearly untenable or manifestly unreasonable." State v. Olmsted, 70 Wn.2d 116, 119, 422 P.2d 312 (1966). The court determines whether the alternative sentence is "appropriate" and considers whether the offender and the community will benefit from the sentencing alternative. RCW 9.94A.660(3), (5)(a)(iv); State v. Watson, 120 Wn. App. 521, 529, 86 P.3d 158 (2004). Here, the State argued his criminal history and "chemical dependency issues" were not the "overriding motivations in [Chavez's] criminal behavior," and the community would not benefit. The victim also told the court that drugs and alcohol did not contribute to his criminal behavior.

believe that I may seek a [DOSA] if I Pled guilty then arguing against it at sentencing."

It is clear from the record the State did not agree to recommend a DOSA, but agreed

that Chavez was eligible and could request a DOSA.

Affirmed.

WE CONCUR: