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

STATE OF WASHINGTON,	)	No. 30277-6-III
Respondent,	)	
v.	)	UNPUBLISHED OPINION
TINA LYNN TAYLOR,	)	
Appellant.	)	

Sweeney, J. — The drug offender sentencing alternative (DOSA) is generally discretionary with the sentencing court. Here the defendant sold drugs following a previous conviction and while she was in a DOSA program. The court imposed a mid-range sentence and refused to impose another DOSA. We conclude that the defendant here was effectively represented and that the court had discretionary authority to deny a DOSA.

FACTS

Police arranged a controlled narcotics sale by Tina Taylor to a confidential

informant and then charged Ms. Taylor with two counts of delivery of a controlled substance, dihydrocodeinone, within 1,000 feet of a school bus stop. The court appointed a lawyer to represent Ms. Taylor.

The State offered to drop the bus stop enhancements in exchange for a guilty plea. It later offered to recommend a sentence at the low end of the standard range in exchange for a guilty plea. The offers expired the morning of trial. The prosecution then proceeded to trial. Sergeant Gary Bolster testified at trial that he twice recorded a confidential informant buying pills from Ms. Taylor. He played the audio recording for the jury.

Ms. Taylor entered an *Alford*[1] plea after she heard the recordings played at trial. During the plea proceedings she acknowledged that "the State will recommend the middle of the range[.] Defense requests low end of the range" in her guilty plea statement. Clerk's Papers (CP) at 47. The court confirmed, "Is that the plea agreement as you understand it?" Report of Proceedings (RP) (June 28, 2011) at 17. Ms. Taylor replied, "Yes." RP (June 28, 2011) at 17. She also acknowledged that "[t]he judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660." CP at 48. The court and counsel discussed the DOSA:

> THE COURT: Is she eligible for a prison based DOSA sentence?
> [THE STATE]: I understand that technically she would be because – I

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

> don't understand it, but apparently you can have two within a 5 or 10 year period or something like that. So she has had one or she was in the middle of one, so technically she would be eligible for that.
>
> THE COURT: Okay. You may be eligible for a prison based DOSA sentence. And if, in fact, the Department of Corrections found that you were eligible for that program, you would be ordered to serve one-half of the midpoint of the standard range in a state facility and serve the other half of that midpoint on community supervision or community custody.
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> . . . .
>
> [DEFENSE COUNSEL]: [W]e will – Well, if we are recommending anything like the DOSA prison sentence, there won't be a need for an evaluation.
>
> THE COURT: No. That is done within the institution.
>
> [DEFENSE COUNSEL]: That is correct.

RP (June 28, 2011) at 18-19, 21-22.

Ms. Taylor stated that she made her plea "freely and voluntarily" and that nobody made any promises outside the plea agreement. CP at 50; RP (June 28, 2011) at 19. The court found that her plea was knowingly, voluntarily, and intelligently entered and accepted it. Defense counsel later asked the court to screen Ms. Taylor for a residential treatment-based DOSA and a parent sentencing alternative. The court ordered that the Department of Corrections (DOC) screen for the residential treatment-based DOSA, but not a parent sentencing alternative.

DOC concluded that Ms. Taylor was not eligible for residential treatment-based DOSA because the midpoint of her sentence's standard range was more than 24 months. The record is unclear, but DOC may have recommended against a prison-based DOSA

because Ms. Taylor was not amenable to treatment.

Ms. Taylor moved pro se to withdraw her guilty plea after DOC filed its report: "I need the courts assistance please to help me to appeal my plea bargain on the grounds of misrepresentation. Also I felt threatened and forced into signing a plea bargain during my trial I did not want to sign." CP at 63. The court did not rule on the motion.

The court sentenced Ms. Taylor near the top of the standard range. It noted that she did not "qualify" for the sentencing alternatives it has considered. RP (Aug. 1, 2011) at 28. And the court concluded that "[b]ased upon your prior criminal history and the fact that you were on a DOSA sentence when these took place, and based upon the huge amount of pills that you apparently were receiving on a monthly basis, I do not believe you are entitled to a sentence at the low end of the range." RP (Aug. 1, 2011) at 29. The court also revoked a prior DOSA sentence. It ordered that the remainder of that sentence be served consecutive to the sentence in this case.

DISCUSSION

I. Plea Agreement

Whether a plea agreement was voluntarily and intelligently entered into appears to be treated as a question of law and reviewed de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006); *see State v. A.N.J.*, 168 Wn.2d 91, 117-20, 225 P.3d 956 (2010); *State v. Codiga*, 162 Wn.2d 912, 175 P.3d 1082 (2008); *State v. Marshall*, 144

Wn.2d 266, 27 P.3d 192 (2001), *abrogated on other grounds by State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012). We review an ineffective assistance of counsel claim de novo. *A.N.J.*, 168 Wn.2d at 109 (quoting *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

Ms. Taylor argues that she should be allowed to withdraw her guilty plea because she did not enter it knowingly and voluntarily. She contends that it was not knowing and voluntary because the court and defense counsel misinformed or affirmatively misled her about her DOSA eligibility. She also argues that her guilty plea should be withdrawn for reasons aside from the DOSA. Specifically, she contends that she did not know that she gave up certain appeal rights by pleading guilty and that her guilty plea was not an intelligent choice compared to the alternatives.

A. Misinformation about DOSA

A DOSA is a sentencing alternative that allows drug offenders to serve one-half of a prison sentence either in prison or in residential drug treatment. RCW 9.94A.660(1), (3). An offender is eligible for a DOSA 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.

RCW 9.94A.660(1). A person is eligible for a residential treatment-based DOSA only if the midpoint of the sentence's standard range is 24 months or less. RCW 9.94A.660(3).

Ms. Taylor argues that her right to due process of law was violated because she pleaded guilty under the belief that she was eligible for a residential treatment-based DOSA. She also argues that she received ineffective assistance because her lawyer failed to tell her that she did not qualify for a residential treatment-based DOSA and to make sure that she was referred for a prison-based DOSA.

Due process requires that a defendant enter a guilty plea knowingly, voluntarily, and intelligently. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 297, 88 P.3d 390 (2004). A guilty plea is not made knowingly if the defendant is misinformed about the direct consequences of sentencing. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122

(1988), *overruled on other grounds by State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011). A direct consequence of sentencing is "'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 822, 855 P.2d 1191 (1993) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

A guilty plea is involuntary when it is based on misinformation about eligibility for a sentencing alternative. *See In re Pers. Restraint of Fonseca*, 132 Wn. App. 464, 132 P.3d 154 (2006); *State v. Adams*, 119 Wn. App. 373, 82 P.3d 1195 (2003); *State v. Kissee*, 88 Wn. App. 817, 947 P.2d 262 (1997). In *Fonseca*, the defendant pleaded guilty to take advantage of a DOSA sentence. 132 Wn. App. at 466. However, the statute prohibited him from receiving a DOSA sentence because he had been convicted of a violent crime and was subject to deportation. *Id.* In *Adams* and *Kissee*, the defendants pleaded guilty to take advantage of the special sex offender sentencing alternative (SSOSA), but they were both ineligible for the program under statute. *Adams*, 119 Wn. App. at 376-77 (stating that the defendant was ineligible because the statute required the midpoint of his standard range sentence to be eight years or less); *Kissee*, 88 Wn. App. at 819-20 (stating that the defendant was ineligible because his crimes were not sex offenses). In each of these cases, the reviewing court held that the guilty pleas should be withdrawn or specifically enforced because the defendants were misinformed about the

direct consequences of their guilty pleas. *Fonseca*, 132 Wn. App. at 465; *Adams*, 119 Wn. App. at 380; *Kissee*, 88 Wn. App. at 822.

Ms. Taylor's case is distinguishable. In *Fonseca*, *Adams*, and *Kissee*, the plea agreements involved one of the parties agreeing to move for a DOSA or SSOSA sentence. That was not the case here. Ms. Taylor's guilty plea statement indicates that her lawyer would ask for a bottom-of-the-range sentence and the State would ask for a midpoint sentence. The terms of the plea agreement did not obligate anybody to move for a DOSA. The record does not show then that Ms. Taylor's guilty plea was based on misinformation about her DOSA eligibility. Misinformation is different from a claim of misunderstanding, and, at best, that is what we have here.

There is also nothing in the trial record that shows that Ms. Taylor was affirmatively misled. The court asked whether Ms. Taylor was eligible for a prison-based DOSA and the State correctly responded that she was. *See* RCW 9.94A.660(1). The court also referred her for a residential treatment-based DOSA screen, but indicated only that "[t]he court is considering imposing a sentence under the Residential Chemical Dependency Treatment-Based Alternative sentence." CP at 56. This record does not show that Ms. Taylor was told that she was eligible for a DOSA for which she was in fact ineligible.

B. Ineffective Assistance of Counsel

Ms. Taylor also contends that her counsel misinformed or misled her. There is nothing in the record that shows that defense counsel did either. We conclude that Ms. Taylor was effectively represented during these proceedings. The Sixth Amendment guarantee of effective assistance of counsel, of course, applies to the guilty plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). The test for ineffective assistance of counsel is set out in *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ms. Taylor must show that counsel's performance was objectively unreasonable. *Strickland*, 466 U.S. at 687-88. There is a strong presumption that counsel's conduct was reasonable. *State v. Knotek*, 136 Wn. App. 412, 431, 149 P.3d 676 (2006). Ms. Taylor must also show that she was prejudiced by counsel's shortcomings. *Strickland*, 466 U.S. at 691-92. In other words, she must show that, but for counsel's errors, the outcome here would have been different. *Knotek*, 136 Wn. App. at 431. In plea bargains, counsel is effective if counsel "actually and substantially assist[s]" the client in deciding whether to plead guilty. *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981).

Ms. Taylor had already failed to complete one DOSA and wanted to serve as little prison time as possible. And she had sold the drugs that prompted these charges while in

a DOSA program. It was therefore not unreasonable for her lawyer to urge a sentence at the bottom of the range instead of another DOSA sentence. Defense counsel was not ineffective because she did not do more to explore another DOSA.

Ms. Taylor also fails to show how the outcome would have been different had her attorney done more to pursue a DOSA. The sentencing court did not follow the State's recommendation; it punished Ms. Taylor more severely and one of the court's considerations was that Ms. Taylor was selling drugs while in a DOSA program.

C. Waiver of Appeal Right

Ms. Taylor next contends that she was not informed that a guilty plea would limit her right to appeal. A defendant who enters a voluntary guilty plea waives his or her right to appeal most issues. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). This is true even if the defendant did not explicitly agree to waive the right to appeal. *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). A guilty plea does not, however, waive the right to "rais[e] collateral questions such as the validity of the statute, sufficiency of the information, jurisdiction of the court, or the circumstances in which the plea was made." *Id.*

There is a strong presumption that a guilty plea is voluntary when the defendant reads, says she understands, and then signs a statement on plea of guilty. *Smith*, 134 Wn.2d at 852. In *Smith*, Mr. Smith said he read, understood, and signed a guilty plea

statement. *Id.* at 853. His attorney, however, said that Mr. Smith intended to appeal a suppression ruling. *Id.* Neither the court nor the State corrected the attorney on the record. *Id.* The Supreme Court allowed Mr. Smith to withdraw his guilty plea because, in light of the attorney's uncorrected statement, it was not clear that Mr. Smith understood his loss of appeal. *Id.*

Ms. Taylor argues that, like Mr. Smith, she did not understand that her guilty plea meant that she could not appeal her conviction. The facts here are different from those in *Smith*. Here, there was no indication that, after the guilty plea, Ms. Taylor wished to appeal issues that were no longer appealable. The record suggests that she wanted to file an appeal because of the circumstances in which it was made. She was free to do that. *See Majors*, 94 Wn.2d at 356.

D. Intelligent Choice Among Alternatives

Ms. Taylor contends that she should be allowed to withdraw her plea because it was not an intelligent choice compared to her other choices. Br. of Appellant at 13-14. An *Alford* plea is valid when there is strong evidence of the defendant's guilt, the plea is voluntary, and the plea is an intelligent choice compared to the defendant's other choices. *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976) (quoting *Alford*, 400 U.S. at 31).

Ms. Taylor's choice to plead guilty was intelligent given her situation. Her only

other choice was to put the question of her guilt to the jury and there was overwhelming evidence of guilt. If the jury found her guilty, the State could have recommended a top-of-the-range sentence. With the *Alford* plea, Ms. Taylor received a recommendation for a sentence in the middle of the range. The *Alford* plea was less risky than trial and ultimately a sensible choice.

II. Eligibility for DOSA

Statutory interpretation is a question of law that we review de novo. *State v. Guerrero*, 163 Wn. App. 773, 776, 261 P.3d 197 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012). A decision to not impose a DOSA is discretionary and normally not reviewable on appeal. *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519 (1998); *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003).

Ms. Taylor argues that she should be resentenced because the court mistakenly referred her for a residential treatment-based DOSA screening and incorrectly concluded that she was ineligible for a prison-based DOSA based on that screening. Br. of Appellant at 18. She also says that defense counsel contributed to the problem by failing to correct the court. Br. of Appellant at 19.

Somebody must ask for a DOSA before the court considers imposing one. *See* RCW 9.94A.660(2) (stating that either party or the court may move to impose a DOSA). If there is a motion for a DOSA sentence, the court may order DOC to screen, assess, or

examine the defendant to help the court decide whether to impose a DOSA. RCW 9.94A.660(4), (5)(a).

Here the parties discussed a prison-based DOSA at the guilty plea hearing, but nobody moved for one. Later, defense counsel moved for the court to screen Ms. Taylor for a residential treatment-based DOSA and the court granted that motion. The court did not mistakenly have Ms. Taylor screened for the wrong type of DOSA.

We affirm the conviction entered on the plea and the sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

_____ _____
Korsmo, C.J. Siddoway, J.