IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALPHONSO LAVON GRAY, Appellant.	)	DIVISION ONE No. 65116-1-I UNPUBLISHED OPINION FILED: June 13, 2011

Dwyer, C.J. — Alphonso Gray appeals from his conviction of a violation of the Uniform Controlled Substances Act (VUCSA). Gray contends that the trial court erred by denying his request for an exceptional sentence pursuant to RCW 9.94A.660, the Drug Offender Sentencing Alternative (DOSA). Finding nothing in the record to support Gray's contention, we affirm.

I

Gray pleaded guilty to one count of delivery of substance in lieu of a controlled substance, a violation of RCW 69.50.4012. Under a different cause number, he also pleaded guilty to an unrelated charge of assault in the third degree. The trial court held a sentencing hearing for both offenses. At the hearing, the trial court informed Gray:

> 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.

Report of Proceedings (March 3, 2010) at 10-11. However, once the sentencing implications were made clear to Gray, he expressed reservations about receiving the DOSA. The following colloquy took place between the trial court and Gray:

> THE COURT: End of the day it's your decision. I—I'm giving you an opportunity to get some treatment free of charge from what I understand. And if you really—if that's really what you want, you can have it. If you don't, I'll be happy to sentence you to the—to the 60 months. What would you prefer?
>
> MR. GRAY: The 60 months.
>
> THE COURT: Okay. That's what you got.

RP (March 3, 2010) at 14-15.

Gray was subsequently sentenced to 60 months of confinement for delivery of substance in lieu of controlled substance, to be served concurrently with his 55-month sentence for assault in the third degree.

Gray appeals.

II

Gray contends that the trial court erred by denying him a DOSA for the charge of delivery of substance in lieu of controlled substance. He also claims that the trial court refused to consider a DOSA for the crime of assault in the third degree, thus erring. Neither contention is supported by the record.

The purpose of the DOSA program is to provide treatment for offenders

who are judged likely to benefit from it. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005). "As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable." Grayson, 154 Wn.2d at 338. However,

> [w]hile 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. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A trial court abuses discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." Id. at 330. The failure to consider an exceptional sentence is reversible error. Id. Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. Cf. Garcia-Martinez, 88 Wn. App. at 330.

Grayson, 154 Wn.2d at 342.

With regard to the assault in the third degree sentence, Gray's assignment of error is unavailing for several reasons. First, that charge was not brought in this proceeding. Gray pleaded guilty and was sentenced under a separate cause number. He did not appeal from the judgment and sentence in that case. Thus, he cannot obtain appellate relief on that charge in this case.

But Gray is also wrong on the merits. At sentencing, the prosecutor opposed a DOSA on the assault charge for several reasons: the charge was reduced from assault in the second degree, thus reducing the potential prison sentence to be imposed; by bargaining for the reduced charge, Gray avoided a "strike," thus not increasing his danger of some day becoming a persistent offender serving a life-without-parole term of confinement; and the assault victim

suffered serious injuries. The sentencing judge heard this presentation and referenced the benefits obtained by Gray in the negotiated settlement during the course of sentencing him to a standard range sentence. The record does not support Gray's contention that the sentencing court categorically refused to grant him a DOSA on this charge. Rather, the court had reasons, and its reasons are supported by the record.

After sentencing Gray on the assault charge, the court then proceeded to sentencing on the VUCSA. The record is clear that the trial court offered to impose a DOSA on this charge. The record is equally clear that Gray, having already been sentenced to 55 months on the assault charge, affirmatively chose a concurrent standard range sentence of 60 months on the VUCSA instead of the DOSA. If this decision was wrong, it was Gray's error—not the sentencing court's.

Affirmed.

Dwyer, C.J.

We concur:

Leach, A.C.J. Becker, J.