IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28971-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CESAR BRIBIESCA GUERRERO,	)	**OPINION PUBLISHED IN PART**
Appellant.	)	

Siddoway, J. — Cesar Bribiesca Guerrero requested, but was denied, sentencing under the drug offender sentencing alternative (DOSA), RCW 9.94A.660. He appeals, arguing procedural error, that the trial court failed to meaningfully consider his request, and that the court abused its discretion by imposing a $3,000 methamphetamine lab clean-up fine. We find no error or abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

Mr. Bribiesca[1] was convicted of unlawful delivery of a controlled substance, with

[1] Mr. Bribiesca prefers to go by this surname, which was used in the trial court. Report of Proceedings (Apr. 6, 2010) at 6.

a school zone enhancement, based on his July 2009 sale of methamphetamine to a confidential informant in a controlled buy. At sentencing, defense counsel asked that Mr. Bribiesca receive a DOSA sentence, for which he was eligible. The court responded, "If the request is for a prison-based DOSA, do we not need to have an evaluation of some kind done?" to which both the State and defense counsel answered no, saying a prison-based residential evaluation was sufficient. Report of Proceedings (Apr. 12, 2010) (RP) at 145. The court went on to deny the request for a DOSA sentence, stating, "I am not overly impressed that Mr. Bribiesca is a candidate for prison-based DOSA and I am not going to impose that. I am going to accept the State's recommendation and impose the middle of the range of 40 months." *Id.* at 146-47. Addressing Mr. Bribiesca, the court said, "I would recommend that if you think you have a drug problem, that you seek some treatment while you are in [Department of Corrections] custody." *Id.* The court imposed approximately $5,000 in court costs and fines, an amount that included a $3,000 methamphetamine lab clean-up fine.

Mr. Bribiesca appealed and assigns as error (1) the court's failure to order a chemical dependency screening report prior to imposing sentence, (2) the court's alleged failure to meaningfully consider Mr. Bribiesca's request for a DOSA, and (3) the court's alleged failure to exercise discretion in imposing the methamphetamine lab clean-up fine.

ANALYSIS

I

Mr. Bribiesca argues that he must be resentenced because the trial court failed to order and consider a chemical dependency screening report as required by RCW 9.94A.500(1). The State responds that a more specific statute, RCW 9.94A.660, controls, and does not require the court to order such a report.

We review questions of statutory construction de novo. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006). When interpreting a statute, the court's fundamental objective is to ascertain and carry out the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Statutes on the same subject matter must be read together to give each effect and to harmonize each with the other. *US West Commc'ns, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 74, 118, 949 P.2d 1337 (1997). Conflicts are to be reconciled and effect given to each if this can be achieved with no distortion of the language used. *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Only when two statutes dealing with the same subject matter conflict to the extent that they "cannot be harmonized" will a more specific statute supersede a general statute. *State v. Becker*, 59 Wn. App. 848, 852-53, 801 P.2d 1015 (1990).

Mr. Bribiesca relies on the following language in RCW 9.94A.500(1):

> *Unless specifically waived by the court, the court shall order* the department to complete a chemical dependency screening report before

> imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense.

(Emphasis added.) Mr. Bribiesca was convicted of violating RCW 69.50.401, unlawful delivery of a controlled substance. It is undisputed that the trial court neither ordered a chemical dependency screening report nor expressly waived preparation of a report prior to imposing its sentence.

The State points to provisions of the DOSA statute, RCW 9.94A.660, as the more specific and thereby controlling law; as of the time of the commission of Mr. Bribiesca's crime the statute treated the preparation of chemical dependency assessments as permissive, providing that

> [i]f the court is considering the residential chemical dependency treatment-based alternative under subsection (5) of this section, then the court may order an examination of the offender as described in subsection (5) of this section. To assist the court in making its determination, the court *may* order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

Former RCW 9.94A.660 (Laws of 2009, ch. 389, § 2) (emphasis added). The language relied upon by the State was added by this amendment in 2009, effective in the form set forth above immediately. Laws of 2009, ch. 389, § 7. A modified version of the amendment became effective August 1, 2009. Laws of 2009, ch. 389, §§ 3, 8.

Mr. Bribiesca concedes that language of RCW 9.94A.660 treating the screening as permissive "[s]eemingly contradict[s]" his reading of RCW 9.94A.500, but nonetheless insists that it "does not relieve the court of its duty . . . to order a chemical dependency screening report before imposing sentence." Br. of Appellant at 6-7. He would reconcile the provisions by reading them to provide that a court is not required to order a chemical dependency report to assist it in deciding whether to impose a DOSA sentence, but (absent specific waiver) is nonetheless obliged to order a chemical dependency report under RCW 9.94A.500—for what purpose, we do not know. This is a strained and unrealistic interpretation.

RCW 9.94A.660 is clear: a trial court need not order or consider any report in deciding whether an offender is an appropriate candidate for an alternative sentence. RCW 9.94A.500, on the other hand, is not clear how a court "specifically waives" ordering a chemical dependency screening report. The most reasonable reading of the statutes together is that, following the 2009 amendment of the DOSA statute, a court waives the report by declining to order one. To the extent this reading can be criticized as distorting the concept of a specific waiver, then we agree with the State that the later-adopted and more specific language of RCW 9.94A.660 controls.

Finally, even if we read RCW 9.94A.500 to require an express waiver of a chemical dependency report following the 2009 amendment to the DOSA statute, the

sentencing court's technical failure to expressly waive preparation of a report was harmless. *State v. Gonzales*, 90 Wn. App. 852, 854-55, 954 P.2d 360 (employing a harmless error test when reviewing a procedural oversight committed by a sentencing court), *review denied*, 136 Wn.2d 1024 (1998). In light of the fact that the court was aware of the possibility of securing a report but expressed no interest in receiving one and its stated unwillingness to grant the DOSA request, any oversight in failing to expressly waive a report was trivial and in no way affected Mr. Bribiesca's sentence.

We affirm.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

II

Mr. Bribiesca next argues that the trial court did not articulate any reasons for denying a DOSA sentence, could have made a more informed decision had it reviewed a chemical dependency screening report, and therefore did not give adequate consideration to his request for a DOSA sentence.

Decisions regarding DOSA sentences rest within the trial court's discretion. *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519, *review denied*, 136 Wn.2d 1004 (1998). Ordinarily, a trial court's decision not to impose a DOSA sentence is not reviewable on

appeal. *State v. Bramme*, 115 Wn. App. 844, 850, 64 P.3d 60 (2003). However, a court's "categorical refusal to consider [a DOSA] sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). In *Grayson*, the sentencing court's only stated reason for denying a DOSA request was because it thought the program was underfunded. *Id*. Our Supreme Court held that the sentencing court needed to consider whether an offender is an appropriate candidate for DOSA. *Id*.

The record reveals that the sentencing judge, who also presided over Mr. Bribiesca's trial, did not categorically refuse to consider his DOSA request. To the contrary, it inquired about the appropriateness of a DOSA sentence:

> THE COURT: As far as I can tell, there isn't any evidence before the Court that Mr. Bribiesca is himself a drug user?
> THE DEFENDANT: I am on probation right now for that.
> THE COURT: Do you have some other conviction that I don't know about?
> THE DEFENDANT: Trespassing for some theft on February—
> THE COURT: That's in District Court?
> THE DEFENDANT: February 17, yeah.
> THE COURT: I don't have any—
> THE DEFENDANT: I have court tomorrow for that.
> THE COURT: I don't have any information about the District Court and whether drugs were involved with that.
> [DEFENSE COUNSEL]: We would also make an offer of proof that he has spoken to me about his drug history. This was a drug crime, a delivery, obviously to somebody else. But my client has experience with that substance; and as he stated to me, he is addicted to those substances and wants treatment.

RP at 144-45. It also inquired whether Mr. Bribiesca was eligible for a DOSA sentence and considered the State's argument that there was no indication that Mr. Bribiesca even uses drugs. In ruling on the request, the trial court stated that it was "not overly impressed that Mr. Bribiesca is a candidate for prison-based DOSA." *Id.* at 146-47. Mr. Bribiesca has failed to demonstrate a failure of the trial court to exercise discretion.

III

Mr. Bribiesca next argues that the trial court failed to exercise its discretion when imposing a $3,000 meth lab clean-up fine. The trial court has the discretion to impose prison time, a fine, or both, following a defendant's conviction for delivery of methamphetamine. RCW 69.50.401(2)(b); *State v. Wood*, 117 Wn. App. 207, 212, 70 P.3d 151 (2003). Mr. Bribiesca contends that the court acted under the mistaken belief that imposition of the fine was mandatory, pointing to the State's representation at sentencing that "[b]y statute there is a $3,000 methamphetamine fine." RP at 141.

We review the sentencing court's decision to impose a fine under RCW 69.50.401(2)(b) for abuse of discretion. *Wood*, 117 Wn. App. at 210. The appellant bears the burden of showing an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Nothing in the record suggests that the trial court, or for that matter, Mr. Bribiesca's counsel, understood the State's remarks during sentencing to suggest that the

clean-up fine was mandatory. For its part, the court simply stated, "It looks like $4,975 in court costs and fines." RP at 147. Mr. Bribiesca has not met his burden of demonstrating that the trial court failed to recognize its discretion.

STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds, Mr. Bribiesca suggests that the evidence supporting his conviction was insufficient because there was no video recording, pictures, cash, or notes offered at trial regarding the drug transaction underlying his conviction. This argument is unsupported by citation to the record and authority, and as such we need not consider it. RAP 10.3(a)(6). Even if we were to consider this claim, the evidence presented at trial was sufficient to support the conviction.

His only other contention is that the confidential informant's testimony constituted hearsay. Again, we need not consider arguments that do not cite to the record or authority. Regardless, the informant's testimony conveying what Mr. Bribiesca said during the controlled buy was not hearsay. ER 801(d)(2).

His last claim, that the "[j]ury has no way to prove guilt beyond a reasonable dou[b]t," is not a cognizable legal claim. Statement of Additional Grounds for Review. At best, it could be construed as a sufficiency of the evidence challenge, which we have already rejected.

We affirm.

Siddoway, J.

WE CONCUR:

Kulik, C.J.

Korsmo, J.