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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29681-4-III
)	
Respondent,)	
)	Division Three
v.)	
)	
TERRIL JAMES WALLACE,)	UNPUBLISHED OPINION
)	
Appellant.)	
)	

Kulik, C.J. — Terril Wallace was arrested during a controlled drug buy conducted by the Quad Cities Drug Task Force. After the buy was completed, L.H., a 17-year-old participant, told detectives that Mr. Wallace had injected her with methamphetamine. Mr. Wallace admitted to detectives that he injected L.H. with a syringe of methamphetamine. Mr. Wallace pleaded guilty to delivery of methamphetamine and to involving a minor in the delivery of methamphetamine. The court denied Mr. Wallace’s drug offender sentencing alternative (DOSA) request and sentenced him to the top of the range on both counts. Mr. Wallace appeals the court’s denial of his DOSA request. We affirm the court’s denial of a DOSA.

FACTS

Mr. Wallace is an artist who has won statewide awards. During his life, Mr. Wallace has been diagnosed with attention deficit hyperactivity disorder (ADHD), bipolar disorder, and post-traumatic stress disorder. In 2009, Mr. Wallace was diagnosed with glaucoma.

On September 29, 2010, Mr. Wallace was arrested for his involvement in a controlled drug buy conducted by the Quad Cities Drug Task Force. The confidential informant (CI) contacted H.H. about purchasing methamphetamine. H.H. told the CI that she did not have any methamphetamine but that she would contact her 17-year-old sister, L.H. H.H. informed the CI that L.H. was with Mr. Wallace, who was in possession of methamphetamine.

The CI contacted L.H. and together they arranged a time and place to meet Mr. Wallace. Detectives watched the CI make contact with L.H. and Mr. Wallace. In the debriefing, the detectives learned that Mr. Wallace had provided the methamphetamine and taken the money during the transaction. Additionally, at some point, L.H. told detectives that Mr. Wallace had injected her with methamphetamine. The detectives observed a needle mark near the underside of her elbow. Mr. Wallace also admitted that

he injected L.H. in the crook of L.H.'s arm with a syringe of methamphetamine because he wanted her to have it done right.

Mr. Wallace was charged with three felony counts: delivery of methamphetamine, involving a minor in the delivery of methamphetamine, and distribution of methamphetamine. Mr. Wallace pleaded guilty to the first two counts and the State dismissed the third count pursuant to a plea agreement. In the plea form, the State stated its opposition to Mr. Wallace's request for a DOSA. The State recommended a sentence at the top of the range. The court ordered a presentence examination by the Department of Corrections (DOC) to determine if Mr. Wallace was eligible for a DOSA.

At sentencing, the court considered whether Mr. Wallace was eligible for a DOSA and whether it was appropriate to grant the DOSA. The parties stipulated that Mr. Wallace was eligible for a DOSA. The court agreed. But the court concluded that a DOSA was not appropriate here and sentenced Mr. Wallace to the top of the range on both counts.

ANALYSIS

Review of a court's ruling on the imposition of a DOSA is not automatic because "a standard range sentence, of which a DOSA is an alternate form, may not be appealed.'" *State v. White*, 123 Wn. App. 106, 113, 97 P.3d 34 (2004) (quoting *State v.*

Smith, 118 Wn. App. 288, 292, 75 P.3d 986 (2003)). However, “it is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies.” *State Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Discretion is abused if a sentencing court’s decision is “‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Mr. Wallace contends that the court abused its discretion by denying his request for a DOSA. Mr. Wallace argues that it was inappropriate for the court to consider his risk to the community.

Under RCW 9.94A.660(3), a trial court can impose an exceptional sentence on an offender seeking a residential-based DOSA or a prison-based DOSA, as long as the offender is eligible and the alternative sentence is appropriate. Here, the court found and the parties stipulated that Mr. Wallace was qualified for a DOSA. Because Mr. Wallace was found eligible for a prison-based DOSA, the sentencing court had the discretion to impose a DOSA sentence if it determined that a DOSA sentence was appropriate. *See State v. Smith*, 142 Wn. App. 122, 129, 173 P.3d 973 (2007).

To support his argument that a DOSA was appropriate, Mr. Wallace points to

changes made in RCW 9.94A.660. In former RCW 9.94A.660 (2008), a trial court could order the examination of an offender. This examination would include an inquiry into whether the offender and the community would benefit from the DOSA sentence. Former RCW 9.94A.660(2)(d). 2009 amendments removed the DOC examination option for offenders seeking a prison-based DOSA. *See* RCW 9.94A.660(5)(a); RCW 9.94A.662. Mr. Wallace asserts that this change means that it is now inappropriate for a court to consider the risk to the community when considering a prison-based DOSA.

Mr. Wallace is incorrect regarding the court's option to request a DOC examination when considering a prison-based DOSA. Eliminating the option to request a DOC examination cannot be interpreted as a directive limiting the court's discretion to consider the appropriateness of the consideration of a prison-based DOSA.

Mr. Wallace's argument concerning risk to the community ignores the purpose of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A.RCW, and the practicalities of a DOSA. Under the DOSA program, the prison-based offender receives substance abuse treatment in prison and serves in confinement only one-half the midpoint of a standard range sentence, or 12 months, whichever is greater. RCW 9.94A.662(1)(a). The SRA was enacted to, among other things, offer offenders an opportunity to improve themselves and reduce the risk that offenders will reoffend in the community. RCW 9.94A.010(5),

(7). Here, the court had the discretion to consider risk to the community along with other factors when considering the appropriateness of the DOSA.

Mr. Wallace next contends the court abused its discretion by refusing to consider the DOSA alternative for an entire class of offenders. According to Mr. Wallace, the court did not consider whether a DOSA was proper for Mr. Wallace, but, instead, focused on the broader judicial policy as to whether a DOSA is appropriate when there is a conviction for involving a minor in the delivery of methamphetamine.

In *State v. Grayson*, the court concluded that the sentencing court abused its discretion by refusing to consider a DOSA for an entire class of offenders. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). In contrast, in *State v. Gronnert*, 122 Wn. App. 214, 225-26, 93 P.3d 200 (2004), the court found no abuse of discretion where the court was opposed to the entire DOSA alternative but then specifically stated why a DOSA did not apply under the circumstances of that particular case.

Here, the court did not abuse its discretion by refusing to impose a DOSA based solely on Mr. Wallace's conviction for involving a minor in a delivery. The record demonstrates that the court thoughtfully considered Mr. Wallace's DOSA request before exercising its discretion and making its decision. The court explained that "it's necessary in making the decision here, for [the court] to take a look at what did you do here that led

to this conviction.” Report of Proceedings (RP) at 30. The court noted that a charge involving a minor was a “particularly dangerous type of crime.” RP at 33. But the record does not show that the court denied the DOSA based solely on the court’s concern regarding a minor in a delivery. In fact, the court explained that in other cases involving a conviction for involving a minor in a delivery, perhaps a case where a mother involved her own child, the court might decide to grant a DOSA request.

Mr. Wallace next argues that the court did not limit its consideration to the particular circumstances of his case. Mr. Wallace argues that the court’s primary reason for denying the DOSA was the court’s belief that a charge for distribution of methamphetamine to a minor is a “particularly dangerous type of crime” and that Mr. Wallace needed to be incarcerated “as a means of protecting the community.” RP at 33. A reading of the entire record shows that the court considered many facts specific to Mr. Wallace’s DOSA request.

During the sentencing hearing, the court heard from defense counsel, the prosecutor, Mr. Wallace, and Ms. Wallace. The court thoroughly reviewed the letters supplied to the court by Mr. Wallace. The court studied the applicable statute, the letters, the basis for the charges, and Mr. Wallace’s art work.

After returning to the courtroom, the court read the statute and noted which types

of crimes precluded a DOSA and included that analysis “specifically in this particular case here.” RP at 30. The court noted that none of the letters vouching for Mr. Wallace mentioned the circumstances involving L.H. The court questioned whether those vouching for Mr. Wallace would have written a letter had they known of those circumstances. The court stressed Mr. Wallace’s age, 44, and L.H.’s age, 17.

The court clearly recognized that Mr. Wallace had a problem that could lead to selling drugs or stealing to feed his habit. The court stated that while Mr. Wallace was clearly addicted, and that may have had an effect on his other criminal activity, the court saw no correlation between the addiction and the involving a minor charge. The court made particular mention of Mr. Wallace’s glaucoma diagnosis and how this did not make sense as the cause of the addiction. While the court indicated that involving a minor in a delivery was a particularly dangerous crime, the record shows that, overall, the court properly exercised its discretion in making its decision.

In short, the record demonstrates that the court properly exercised its discretion in denying Mr. Wallace’s request for a prison-based DOSA. Here, there was no categorical denial and no class of offenders was precluded. The court considered the facts specific to this case. Moreover, even if we construe the court’s statements as a comment on one group of offenders, there is sufficient analysis to show that the court exercised its

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discretion when denying Mr. Wallace's request for a DOSA. *See Gronnert*, 122 Wn. App. at 225-26.

The court properly exercised its discretion in concluding that a DOSA was not appropriate here. Accordingly, we affirm.

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.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.