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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 30168-1-III
Appellant,	)	
v.	)	UNPUBLISHED OPINION
CHARLES ROBERT TUCKER,	)	
Respondent.	)	

Kulik, J. — The State appeals the trial court's sentence under the drug offender sentencing alternative (DOSA), arguing that chemical dependency did not contribute to Charles Tucker's offense. Mr. Tucker argues that the State may not appeal a standard range sentence where there is no legal error. The State replies that, on appeal, it may challenge the underlying legal conclusions of the trial court's imposition of an alternative sentence. Mr. Tucker was sentenced to 12.75 months in prison and 12.75 months in community custody, rather than a standard range sentence of 22 to 29 months.

We conclude that the State may appeal the imposition of the DOSA sentence. But we also conclude that the court was not clearly erroneous in finding that a chemical

dependency contributed to Mr. Tucker's offense. We affirm the sentence.

FACTS

On December 18, 2010, Charles Tucker drove through a stop sign at Broadway and Ella, struck a car driven by Kathy Johnson, and drove away from the scene. Ms. Johnson was injured as a result of the collision. A witness followed Mr. Tucker's car to his home and informed police of its whereabouts.

Police arrived about six minutes after the accident. Mr. Tucker told the officers he had left the scene of the accident because his license was suspended and the vehicle was uninsured. A drug recognition expert at the scene indicated that Mr. Tucker was not under the influence of either alcohol or a central nervous system stimulant. Mr. Tucker was arrested and placed in Spokane County Jail. He was charged with one count of failure to remain at the scene of an accident—injured person.

Mr. Tucker entered a guilty plea on July 18, 2011. With an offender score of 5, his undisputed standard range sentence was 22 to 29 months. Mr. Tucker's sentencing hearing occurred immediately after he pleaded guilty. The State recommended a sentence of 25 months. Mr. Tucker's counsel asked the court to impose a sentence under DOSA. Mr. Tucker has two prior convictions for drug-related offenses but was not under the influence of drugs or alcohol at the time the accident occurred. An evaluation from May

2011 indicated that Mr. Tucker had prior amphetamine, alcohol, and cocaine addictions. Mr. Tucker testified that he had left the scene after the accident because he was "going after drugs." Report of Proceedings (RP) at 26. His girl friend also testified that he struggled with addiction, had relapsed multiple times, and was "definitely on his way to get drugs." RP at 25.

The trial court found that chemical dependency had contributed to Mr. Tucker's offense and imposed a sentence under DOSA. Mr. Tucker was sentenced to 12.75 months in jail and 12.75 months in community custody. The State appeals.

ANALYSIS

Whether to impose a DOSA sentence is a decision left to the discretion of the trial court, and this court's review of that exercise of discretion is limited. *State v. Grayson*, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005). A trial court abuses its discretion when "'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'" *Id*. at 342 (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). 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. *Id*.

There can be no abuse of discretion as a matter of law as to sentence length, so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature. *See State v. Ammons*, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986). "However, this prohibition does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003).

For factual determinations, we apply a "clearly erroneous" standard of review and "reverse the trial court's findings only if no substantial evidence supports its conclusion." *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (citing *Burba v. Vancouver*, 113 Wn.2d 800, 807, 783 P.2d 1056 (1989); *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986)).

Generally, the State can only appeal a sentence in a criminal case outside the standard range of the offense or a sentence which the state or local government believes involves a miscalculation of the standard range. RAP 2.2(b)(6); RCW 9.94A.585(1). 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." *Williams*, 149 Wn.2d at 147. Accordingly, the State may not appeal where it challenges a

standard range sentence as such, but may appeal where it claims legal errors in the determination of which sentencing provision applies. *Id*.

The State may challenge the underlying legal conclusions and determinations of a trial court's application of an alternative sentence. *Id.* In *Williams*, the State sought appellate review of the defendant's sentence on the grounds that the trial court had improperly given retroactive effect to the DOSA eligibility provisions of prior statutes. *Id*. Those challenges were concluded to be "challenges to claimed legal errors" and subject to appeal. *Id*.

The State challenges the underlying legal conclusions and determinations by which the trial court came to apply the DOSA. Thus, the issues in this case can be reached on appeal because the State is challenging the determinations of the trial court in applying an alternative sentence.

In determining whether to impose a DOSA sentence, the court must conclude that the offender is eligible for an alternative sentence and that the alternative sentence is appropriate. RCW 9.94A.660(3). "[T]he purpose of DOSA is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community." *Grayson*, 154 Wn.2d at 343; *see* RCW 9.94A.660. An alternative sentence may be

appropriate when there is a finding of chemical dependency pursuant to RCW 9.94A.607(1), which states:

> Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

Ultimately, the statute gives the trial court broad discretion to impose a DOSA sentence. *See* RCW 9.94A.660(3); *State v. Smith*, 142 Wn. App. 122, 129, 173 P.3d 973 (2007) ("[I]f a defendant is eligible for DOSA, the decision to impose a DOSA rests in the sentencing court's discretion.").

In its language, RCW 9.94A.607(1) requires neither possession nor intoxication in order to apply a DOSA sentence. Thus, a finding of chemical dependency satisfies the statutory requirements for the application of DOSA. And we "reverse the trial court's findings only if no substantial evidence supports its conclusion." *Grewe*, 117 Wn.2d at 218.

The elements of a failure to remain at the scene of an accident-injured person offense include the defendant's knowledge that he was in an accident, that the accident resulted in injury to another person, and that the defendant did not remain at the scene

and failed to comply with the remaining requirements of RCW 46.52.020(3). An offender's prior chemical dependency must have contributed to the offense in order for a DOSA sentence to be applicable. *See* RCW 9.94A.607(1).

Here, we afford the trial court broad deference. RCW 9.94A.607(1) requires that an offender's chemical dependency merely "contributed to" the current offense. The Supreme Court has reiterated that the purpose of DOSA is "to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, when the trial judge concludes it would be in the best interests of the individual and the community." *Grayson*, 154 Wn.2d at 343. The current case tenuously connects Mr. Tucker's "failure to remain at the scene of an accident" offense with his prior history of chemical dependency. Although the connection is tenuous, it exists. That is all the statute requires.

The State is convincing in its argument that Mr. Tucker's "crime" was committed when he left the scene of the accident and that events before or after the offense are of no consequence. However, Mr. Tucker testified that he left the scene of the accident because he was "going after drugs." RP at 26. His girl friend testified that he had struggled with addiction and was "definitely on his way to get drugs." RP at 25. Mr. Tucker has two prior convictions for drug offenses and one assessment on record after his

arrest indicated that he had prior amphetamine, alcohol, and cocaine addictions. The application of an alternative sentence is reviewed for substantial evidence; here, the trial court was not clearly erroneous in finding that chemical dependency contributed to Mr. Tucker's offense.

Although the offense itself did not directly involve drugs, the plain language of the statute grants the trial court discretion when imposing a DOSA sentence. *See* RCW 9.94A.660(3). Mr. Tucker has provided enough evidence to meet the standard required by statute.

The trial court was not clearly erroneous in finding that chemical dependency "contributed to" Mr. Tucker's offense. Granting the trial court the broad deference required by law, we affirm 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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Kulik, J.

WE CONCUR:

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Sweeney, J. Brown, J.