SUPREME COURT NO. _____

NO. 75528-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD DAVIDSEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce Weiss, Judge

PETITION FOR REVIEW

DONALD DAVIDSEN
Pro Se

A. IDENTITY OF PETITIONER

Petitioner DONALD WAYNE DAVIDSEN, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

DONALD WAYNE DAVIDSEN seeks review of the Court of Appeals published decision in State v. DONALD WAYNE DAVIDSEN No. 75528–5–I (FILED: November 13, 2017.) A copy of the decision is attached as Appendix A. On December 21, 2017, the Court of Appeal denied DONALD WAYNE DAVIDSEN's pro se motion to reconsider. A copy of the Order denying the motion to reconsider is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

The issues presented for review in this case are as follows:

a. Do broader definitions of force and compulsion, including questions of the pressure that social, economic, and legal relationships bring to bear have relevance in sentencing?;

b. Do aggressive sentencing practices in cases with established drug recovery workers benefit the public good amidst the opioid crisis?;

E. STATEMENT OF THE CASE

The issues presented in this case are twofold.

The primary is a discussion of the sentencing practice of the trial court and the appellate courts decision that the sentencing court did not

misconstrue the extent of its discretion in not allowing the consideration of an exceptional reduction in the sentence. This court held that the prescription of a narcotic pain killer by DONALD WAYNE DAVIDSEN'S physician did not construe force as defined and referenced by this Court, and as such, the Appellant was groundless in his assertion that a drug relapse justified a mitigated exceptional sentence.

The secondary is a question of substantial public interest.

DONALD WAYNE DAVIDSEN is a devoted, respected, and recognized leader in drug recovery circles in Snohomish County. He works within and leads in multiple recovery ministries, volunteers at the Everett Gospel Mission, and serves as a frontline worker in the midst of what has emerged in the public mind as the opioid crisis.

F. REASONS WHY REVIEW SHOULD BE ACCEPTED

1. A WASHINGTON RESIDENT SUBJECTED TO FORCE REGARDING THE INGESTION OF DRUGS CONSTRUES AN EXCEPTIONAL CIRCUMSTANCE NOT EXPRESSLEY STATED IN RCW 9.94A.535.

In the case of the primary question, the appellate court held that the prescription of a narcotic pain killer by DONALD WAYNE DAVIDSEN'S physician did not construe force as defined and referenced by this Court, and as such, the Appellant was groundless in his assertion that a drug relapse justified a mitigated exceptional sentence.

DONALD WAYNE DAVIDSEN'S experienced in the recommendation of the doctor to use a pain killer to treat the pain caused

by the dental work a series of forces that were external to him and not characteristics of himself.

This court in its examination of force and compulsion failed to consider what the expert and perceivably – to the Appellant - legally authorized ability to make determinations as to who should and should not use such dangerous medications did in fact construe a force which acted upon him to enable a compulsion to use the medication.

Our supposition is that such a force acted against the Appellant as he wrestled with yet another force, though one internal – that of extreme pain. DONALD WAYNE DAVIDSEN found himself under immense pressure, the active force of which was the legally authorized and licensed professional recommendation of his physician.

This Court's decision does not investigate the relationship between the Appellant and the force of the perceived authority of the prescribing physician. Instead the decision describes,

> "Nor did the doctor force **Davidsen** to ingest the painkillers by prescribing them, so as would render his intoxication involuntary. "Force" as a legal term, connotes "[p]ower, violence, or pressure directed against a person."[29] As a verb, it means "[t]o compel by physical means or by legal requirement."[30]

The doctor did not physically or legally require **Davidsen** to ingest the specific painkillers."

The refutation relies solely upon the use of 'force' as a verb by speaking to only two types of force: physical and legal. This is a limited refutation. Force such that it applies power or pressure against another person is not limited to compulsion by physical means or legal requirement.

It does not consider the power and pressure that the education, expertise, licensing, and social standing had on the Appellant. A pressure that acted as a force upon a weak constitution, leading to an innocent but tragic decision to take a doctor recommended medication, releasing a later, internal compulsion of addiction, leading quickly and directly to his offense.

It was noted before but is worth noting again, that having learned of the unfortunate and terrible power this force had in his life the Appellant immediately had himself placed on pharmacy watchlists and red flagged so that he would not be vulnerable in such circumstances again.

The doctor's orders did constitute force, power, and pressure as described in this Court's decision and as such were exceptional circumstances not expressly stated in RCW 9.94A.535 which should have been considered by the sentencing court, which failed to recognize its own

authority to impose a mitigated exceptional sentence and incorrectly cited a restriction to do so.

2. THE REMOVAL FROM THE PUBLIC (AND SENTENCING OF) AGENTS FIGHTING THE OPIOID CRISIS IS OF SUBSTANTIAL PUBLIC INTEREST.

Our nation is in a state of emergency due to the ineffectiveness of our response to what has become known as the Opioid Crisis. The city of Everett, in which DONALD WAYNE DAVIDSEN lives, is notable for being engaged in a legal matter with Perdue Pharma over the issue. This is a front line subject in our media, in our local community, and is of acute public interest.

In the midst of this it does not serve the public interest to take public servants like DONALD WAYNE DAVIDSEN off the streets where they perform, consistently, acts for the public good, enabling the addicted to find recovery from substance abuse, homelessness, and addiction. DONALD WAYNE DAVIDSEN, who serves in leadership capacities within Celebrate Recovery and at The Everett Gospel Mission, should be given the most lenient of interpretations of case law and sentencing guidelines as he is an actor of the public good, promoting the public interest – with no hope of reward other than his own continued recovery – in a space where we are far short of workers, our society is nonplussed for answers, and the situation is worsening.

Removing DONALD WAYNE DAVIDSEN from public causes harm to that public, which is in dire need of men like him who are willing

to work with the broken and disaffected, and at the same time in no way does it benefit him or the cause of his life which has seen tremendous strides of rehabilitation and growth to take him away from that growth and into the harsh and caustic experience of prison. We are in the position of removing our noses to spite our faces and it is without question the wrong decision, no matter how grounded in precedent it may seem to be.

G. CONCLUSION

For the reasons stated herein, this Court should accept review.

DATED this 16th day of January, 2018

Respectfully submitted,

DONALD WAYNE DAVIDSEN
Pro Se Petitioner

Appendix A

2017 WL 5291667

Court of Appeals of Washington,

Division 1.

STATE of Washington, Respondent,

v.

Donald Wayne **DAVIDSEN**, Appellant.

No. 75528–5–I

FILED: November 13, 2017

Appeal from Snohomish Superior Court, 15–1–01963–0, Bruce I. Weiss, J.

Attorneys and Law Firms

J. Scott Halloran, Snohomish Co. Prosecuting Atty–Criminal, 3000 Rockefeller Ave # Ms504, Everett, WA, 98201–4046, for Respondent.

Christopher Gibson, Attorney at Law, Nielsen Broman & Koch PLLC, 1908 E. Madison St., Seattle, WA, 98122–2842, for Appellant.

UNPUBLISHED

Cox, J.

*1 **Donald Davidsen** appeals his judgment and sentence, arguing that the trial court abused its discretion by inadequately considering his request for a mitigated exceptional sentence. We hold that the trial court adequately considered **Davidsen's** request. As such, it did not abuse its discretion. Thus, we affirm the judgment and sentence.

The State charged **Davidsen** with failing to update his sex offender registration upon changing addresses. He pleaded guilty as charged and sought a mitigated exceptional sentence.

The sentencing court engaged in two days of colloquy and reviewed the parties' briefs. **Davidsen** requested an exceptional sentence based on improvements he had made in his life. He explained that he had found employment, entered treatment, become active in his community, and was expecting his first child soon. He had begun to overcome a long term drug addiction. But he had recently relapsed, based on a narcotic pain medication he was prescribed. Allegedly, that relapse factored into his failure to register.

The sentencing court concluded that these arguments did not provide legal grounds to justify a mitigated exceptional sentence. Accordingly, it denied **Davidsen's** request and imposed a standard range sentence of 17 months confinement and 36 months community custody.

MITIGATED EXCEPTIONAL SENTENCE

Davidsen argues that the trial court abused its discretion by failing to recognize its own authority to impose a mitigated exceptional sentence based on circumstances not expressly stated in RCW 9.94A.535. We disagree.

A defendant generally cannot appeal a standard range sentence.[1] But every "defendant is entitled to ask the trial court to consider [an exceptional] sentence and to have the alternative actually considered."[2] Thus, a trial court that refuses categorically to consider such a request abuses its discretion.[3] The trial court also abuses its discretion when it sentences based on a legal misunderstanding of its own discretion.[4]

We review for abuse of discretion the trial court's consideration of a request for a mitigated exceptional sentence.[5]

In re Personal Restraint of Mulholland[6] is instructive on the exercise of discretion in this regard. The trial court had sentenced Daniel Mulholland for six counts of first degree assault, and one count of drive-by shooting. Despite Mulholland's request, the trial court declined to impose concurrent sentences, concluding that it lacked the discretion to do so.[7]

The supreme court reversed this conclusion, noting that the trial court had "made statements on the record which indicated some openness toward an exceptional sentence."[8] Although this did "not show that it was a certainty that the trial court would have imposed a mitigated exceptional sentence if it had been aware that such a sentence was an option ... [its] remarks indicate that it was a possibility."[9] Remand was proper when it could not be said that the sentence would have been the same had the trial court better understood its own discretion.[10]

*2 RCW 9.94A.535 governs the trial court's consideration in determining whether to grant an exceptional sentence. Under that statute, the trial court may impose an exceptional sentence if justified by "substantial and compelling reasons."[11] The defendant can provide these reasons by proving certain mitigating circumstances by a preponderance of the evidence.[12] These circumstances are those that "distinguish [the crime] from other crimes of the same statutory category."[13] They are not "personal characteristics" of the defendant.[14] The statute provides a list of illustrative circumstances and clarifies that these are not exhaustive.[15]

Here, the sentencing court did not fail to recognize the scope of its discretion. Nor did it abuse the discretion it had. **Davidsen** and the State both acknowledged to the sentencing court that RCW 9.94A.535's list of enumerated circumstances was not exhaustive. The record does not suggest that the sentencing court concluded otherwise.

Davidsen presented as mitigating circumstances that he had found stable housing and employment, and had a child on the way. Recognizing that he had a "significant drug and alcohol problem," he explained that he was making progress, and after 30 days of inpatient treatment, had reached sobriety.[16]

Instead of rejecting these arguments, the sentencing court considered them at length. It expressed some concern whether these grounds provided a legal basis for a mitigated exceptional sentence. In this, the sentencing court correctly adhered to the principle that an exceptional mitigated sentence cannot be justified by the defendant's personal characteristics.

The sentencing court further expressed concern that "almost every defendant could probably argue" the same.[17] It elaborated that were it to grant a mitigated exceptional sentence, "every ... defendant that's had time, between the time they committed the offense and the time they come in to sentencing, if they've made improvements in their life can ask for an exceptional sentence below the standard range."[18]

The sentencing court also discussed a previous mitigated exceptional sentence that **Davidsen** had received, based on the "same exact" grounds he presented now.[19] Given that precedent, the sentencing court wondered "how many chances" **Davidsen** should get.[20] It concluded that it did not "think the fact that [**Davidsen** had] modified his life and ... made these significant changes is an appropriate basis for an exceptional sentence."[21]

The sentencing court did not misconstrue the extent of its discretion. It considered the bases presented and discussed them with counsel and **Davidsen**. It provided reasons for rejecting them, specifically whether they were relevant under the Sentencing Reform Act, and whether **Davidsen** should be granted another mitigated exceptional sentence for arguments he had made in the past, only to reoffend again. This was not an abuse of discretion.

Davidsen further argues that the trial court abused its discretion in failing to adequately consider his claim that a drug relapse justified a mitigated exceptional sentence. This argument is unpersuasive. Two illustrative circumstances identified in RCW 9.94A.535 are relevant here. RCW 9.94A.535(1)(c) arises when "[t]he defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct." RCW 9.94A.535(1)(e) arises when "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded."

*3 State v. Hutsell[22] assists our understanding of these two circumstances. The sentencing court had granted Allen Hutsell a mitigated exceptional sentence on his forgery conviction.[23] It based that decision on Hutsell's cocaine use, rendered involuntary by psychological addiction.[24] The State appealed.

Hutsell argued to the supreme court that the downward departure had been justified based on the two circumstances we listed above.[25] But the court disagreed. Regarding RCW 9.94A.535(1)(c), it held that the terms "duress, coercion, threat, or compulsion" connote the influence of some force coming from outside the defendant.[26] Addiction was not such a force.[27]

Regarding RCW 9.94A.535(1)(e), the court held that intoxication was only involuntary if forced or fraudulently induced, not caused by addiction.[28] Thus, any intoxication caused by Hutsell's addiction was voluntary.

Here, **Davidsen's** relapse argument fails for the same reasons. A doctor had recently prescribed him narcotic pain medications, which triggered his addiction. He claimed that although his addiction was a "personal" characteristic, it was also related to his crime. Specifically, he alleged that this relapse caused him to neglect his obligation to update his registration.

The doctor's prescription did not constitute "duress, coercion, threat, or compulsion" within the meaning of RCW 9.94A.535(1)(c)

. Whatever its effect upon **Davidsen's** addiction, that addiction was an internal force within **Davidsen**.

Nor did the doctor force **Davidsen** to ingest the painkillers by prescribing them, so as would render his intoxication involuntary. "Force" as a legal term, connotes "[p]ower, violence, or pressure directed against a person."[29] As a verb, it means "[t]o compel by physical means or by legal requirement."[30]

The doctor did not physically or legally require **Davidsen** to ingest the specific painkillers. As the sentencing court suggested, **Davidsen** may have been able to tell "his doctor he has a substance abuse problem and he needs non-narcotics."[31] After his relapse, **Davidsen** "red-flagged" himself to avoid receiving such prescriptions in the future. Presumably he could have done so when originally prescribed. Any intoxication that followed was "voluntary" under Hutsell.

APPELLATE COSTS

Davidsen asks this court to deny the State its costs. The State has responded that it is not seeking costs on appeal. Accordingly, no costs shall be awarded to the State.

We affirm the judgment and sentence.

WE CONCUR:

Trickey, ACJ.

Dwyer, J.

All Citations

Not Reported in P.3d, 2017 WL 5291667

Appendix B

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

STATE OF WASHINGTON, Respondent, v. DONALD WAYNE DAVIDSEN, Appellant.	)	No. 75528-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Donald Davidsen, has moved for reconsideration of the opinion filed in this case on November 13, 2017. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

For the Court:

Cox, J.

Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

January 16, 2018 - 12:47 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	75528-5
Appellate Court Case Title:	State of Washington, Respondent / Cross- App. v. Donald Wayne Davidsen, Appellant / Cross-Res.
Superior Court Case Number:	15-1-01963-0

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