

Original

Court of Appeals No. 36295-3-II

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

STATE OF WASHINGTON, Respondent

v.

DONALD DUANE STULTZ, JR., Appellant

FILED  
BY [Signature]  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION II  
PORT ORCHARD, WA  
JAN 11 2006

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KITSAP COUNTY  
Cause No. 06-1-01847-6

BRIEF OF APPELLANT

Roger A. Hunko, WSBA# 9295  
The Law Office of Wecker Hunko Bougher  
569 Division Street, Suite E  
Port Orchard, Washington 98366  
(360) 876-1001 / Fax (360) 895-1932  
*Counsel for Appellant*

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. ASSIGNMENT OF ERROR..... 1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

III. STATEMENT OF THE CASE ..... 2

IV. ARGUMENT..... 6

V. CONCLUSION..... 16

## TABLE OF AUTHORITIES

### United States Supreme Court

<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 101 (1967).....	7
<i>Davis v. Alaska</i> , 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	7
<i>Campbell v. Wood</i> , 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994).....	7

### Washington State Supreme Court

<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	7
<i>State v. Burri</i> , 87 Wn.2d 175, 181, 550 P.2d 507 (1976).....	7
<i>State v. Campbell</i> , 103 Wn.2d 1, 21 P.2d 929, (1984), <u>cert. denied</u> .....	7
<i>State v. Blackwell</i> , 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).....	7
<i>State v. Smith</i> , 130 Wn.2d 215, 227, 922 P.2d 811 (1996).....	7
<i>State v. Hutchinson</i> , 135 Wn.2d 863, 881-82, 959 P.2d 1061 (1998).....	8
<i>State v. Thacker</i> , 94 Wn.2d 276, 280, 616 P.2d 655 (1980).....	8
<i>State v. Salarelli</i> , 98 Wn.2d 358, 362, 655 P.2d 576 (1999).....	9,10
<i>State v. Goebel</i> , 40 Wn.2d 18, 21, 240 P.2d 251 (1952).....	10
<i>State v. Laureano</i> , 101 Wn.2d 745, 764, 682 P.2d 889 (1984).....	10
<i>State v. Jackson</i> , 102 Wn.2d 689, 695, 689 P.2d 76 (1984).....	11
<i>State v. Grayson</i> , 154 Wn.2d 333, 338, 111 P.3d 1183 (2005).....	12,15
<i>State v. Williams</i> , 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003).....	12

**Washington State Court of Appeals**

*State v. Linden*, 89 Wn.App. 184, 196, 947 P.2d 1284 (1997).....8

*State v. Falk*, 17 Wn. App. 905, 909, 567 P.2d 235 (1977).....9

*State v. McBride*, 74 Wn. App. 460; 873 P.2d 589 (1994).....10

*State v. Thomas*, 68 Wn. App. 268, 843 P.2d 540 (1992).....10

*State v. Medical*, 58 Wn. App. 817, 823-24, 795 P.2d 158(1990).....11

*State v. Conners*, 90 Wn.App. 48, 53, 950 P.2d 519, rev. denied,  
136 Wn.2d 1004 (1998).....13

*State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).....15

**Constitutional Provisions**

U.S. Const. Amendment 6 ..... 6

**Washington State Constitutional Provisions**

Article I, Subsection 22.....6

**Statutes**

RCW 9.94A.660.....13, 14

RCW 9.94A.505(2)(a)(viii).....12

RCW 69.50.....13

RCW 9A.58.....13

RCW 9.94A.715.....14

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DONALD DUANE STULTZ, JR.**

**Appellant.**

**NO. 36295-3-II**

**OPENING BRIEF OF APPELLANT**

**I. ASSIGNMENT OF ERROR**

- A. The trial court erred when it excluded defense witnesses.**
- B. The trial court erred when it permitted evidence of prior bad acts under ER 404(b).**
- C. The trial court erred when it denied Mr. Stultz a DOSA sentence.**

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Did the trial court err when it refused to permit two defense witnesses, added after trial began, when it gave no basis for its denial?**
- B. Did the trial court err when it permitted confidential informant, Ralph Beckhorn to testify concerning other alleged drug transactions, when the only witness to those alleged transactions was Beckhorn himself, and when the court failed to balance probative value and prejudice on the record.**

**C. Did the trial court err when it failed to exercise its discretion in sentencing because of a change of procedure by DOC, and refused to consider a DOSA sentence for Mr. Stultz?**

**III. SUBSTANTIVE FACTS**

On December 27, 2006 a confidential informant, Ralph Beckhorn, contacted Detective Elton by cell phone. Beckhorn advised Elton that he was with Mr. Stultz, they were driving in a car, and could supply him some methamphetamine. RP 124. Beckhorn and Elton dickered over the price and agreed on \$200.00 for an eight ball. RP 127. Elton stated he could hear a male in the background. Elton and Beckhorn agreed to meet inside the Blockbuster in Bremerton. RP 128. Beckhorn met Elton in the back of the blockbuster, delivered the drugs to Elton, and Elton gave Beckhorn the money. Beckhorn returned to the vehicle in the parking lot. RP 130. The vehicle drove further into the shopping center. RP 130. Elton gave a signal to the surveillance team and marked officers that the deal was good. RP 131. The cars went in and made a felony stop. RP 131. Mr. Stultz was driving the vehicle when it was stopped. Beckhorn was in the passenger seat, and a female was in the back seat. RP 132. All three were taken out of the car and placed into handcuffs. RP 132. Beckhorn advised Elton that when he got back in the car, he gave the money to Stultz, and that Stultz had shoved it under the seat when they were stopped. RP 134. Beckhorn also advised that a bank bag with additional methamphetamine would be located under the driver seat. RP 135. A search of Mr. Stultz revealed a small baggie similar to the one Elton had received the methamphetamine in, in Stultz's pants pocket. The baggie contained five unknown pills. RP 135. A search of the car revealed bank bags, additional

bags of methamphetamine, and baggies from under the seat. RP 136. The buy money was found within the car, along with additional money and a digital scale. RP 136. Stultz admitted to using methamphetamine by needle. RP 138. He also stated that the needles in the car belonged to him. There were needles found in the bank bag. RP 138. Stultz denied any drug dealing.

Over defense objection, Beckhorn testified that he had contacted Stultz by phone on December 27, 2006 to get some of his tools from him. RP 208. He also testified that Stultz picked him up and that Stultz had to make a couple stops, in which he did three deals; a 20, a 50 and a 90. RP 208. Beckhorn provided details of two of the deals. RP 210. Finally, Beckhorn testified that Stultz said he had an eight ball of chrys left and did he know of anyone who might be interested. RP 210-11. At that time, Beckhorn contacted Elton to set up the deal.

Although Beckhorn had previously worked as an informant to work off drug charges, he was currently paid for his work as an informant. RP 123-124

#### **IV. PROCEDURAL FACTS**

Mr. Stultz was charged with one count of Delivery of Methamphetamine on December 28, 2006. CP 1. Trial was set for February 20, 2007 and time for trial expired on February 27, 2007. CP 9. On February 8, 2007 trial was reset to February 27, 2007, the last date allowed under speedy trial rules. CP 16. On February 27, 2007 the state amended the information to include one count of Delivery of Methamphetamine and one count of Possession of Methamphetamine with Intent to manufacture and Deliver, both with the special allegation of School, Bus Stop, or Other Protected Zone. CP 23. In addition,

motions in limine were heard and decided; prospective jurors were brought in and preliminary voir dire was completed. On February 28, 2007 voir dire continued. After a morning recess the state informed the court that the confidential informant would not be available due to a medical emergency. RP 31. Defense objected to any continuance. RP 33-34. Detective Elton, under oath, informed the court that Beckhorn went to the emergency room about 11:00 p.m. the previous night; that he had spoken with the nurse and Beckhorn was being admitted and may require surgery. RP 40-41. The state requested a continuance. RP 42. Over defense objection, the court granted a continuance to March 12, 2007. RP 48.

On March 12, 2007, the day of trial, defense filed a defense witness list, and the state objected. RP 62. The state argued that it would be at a disadvantage to allow these witnesses now, on the eve of trial. RP 62. Defense stated the witnesses would be for rebuttal purposes only, and the state was aware of witnesses as they were interviewed by the police at the time Stultz was arrested. Defense stated the witnesses were not earlier listed because the location of the witnesses was not previously known. One of the witnesses was in the vehicle at the time of the arrest. The testimony would not be outside the scope of the law enforcement questions at the time of the arrest. RP 63. Without noting any basis for its decision, the court did not allow the witnesses. RP 64.

Beckhorn testified that he contacted Stultz about some tools and that after Stultz picked him up they rode around and Stultz made a couple of deals. Defense objected. RP 196. A recess was taken in order for the court to address the issue. The state argued that testimony concerning the events of the day, which according to Beckhorn, involved Stultz

selling methamphetamine to several other persons prior to the sale to Elton, were part of a common scheme or plan and motive and opportunity. RP 199-200. The court permitted the state to make an offer of proof. RP 201 -205. Beckhorn stated that he and Stultz drove around stopping at several locations, and that Stultz measured out methamphetamine on the dashboard and sold to different people different amounts. Defense objected to the testimony going to the jury because it was irrelevant and prejudicial. RP 207. The court permitted the testimony on the basis of common scheme and plan and knowledge. RP 206, 207. The court did not address prejudice in making its decision.

On March 14, 2007 the jury found Stultz guilty on all counts and returned a special verdict that both counts occurred within 1000 feet of a school bus route stop. CP 43.

### **Sentencing**

A sentencing hearing was held on May 11, 2007. Defense informed the court that he had requested a pre-sentence investigation (PSI) for purposes of a Drug Offender Sentencing Alternative (DOSA) sentence. RP 3. Defense counsel informed the court that apparently DOC does not do PSIs for DOSA recommendations any longer. RP 4 According to defense counsel, DOC stated that due to budget cuts and staffing reasons, DOC is now outsourcing PSIs and no longer doing them themselves. RP 4. One of the agencies that PSIs are outsourcing to is West Sound Treatment Center. RP 4 West Sound Treatment Center did complete a chemical dependency assessment of Mr. Stultz and presented a treatment letter. RP 4 The author of the report, Daniel Mitchell, appeared at the hearing and addressed the court. RP 16. The court questioned Mitchell concerning his qualifications and his knowledge of the statutory requirements for the court in making a

decision on DOSA. RP 18. Mitchell stated that West Sound Treatment Center had a DOSA contract, and that his role was to determine if the person was substance dependent, and if the dependence correlates with the offenses, past and present. RP 17 He stated that he did not have any training in statutory requirements for the courts on DOSA determinations. RP 18

The court stated, “the court wants a pre-sentence investigation. If they don’t exist anymore, then they’re basically saying they’re either requiring the Court make the DOSA decisions without investigatory basis, which seems ridiculous to me, or they’re making a decision they don’t go along with DOSAs anymore... without a normal presentence investigation, I don’t feel very comfortable doing a DOSA.” RP 6-7 When the court sentenced Stultz, it stated: “If I had a DOSA and I had a recommendation and I saw you qualified, maybe I would give it to you, because I think treatment is your only way out.” RP 25.

The court sentenced Stultz to 94 months on each count concurrent, plus concurrent school zone enhancements. RP 24, CP 49.

#### IV. ARGUMENT

A. **THE TRIAL COURT ERRED WHEN IT DENIED TWO OF DEFENSE WITNESSES, WHICH WERE ADDED LATE, CITING NO REASON OTHER THAN NOT GIVING AN UNFAIR ADVANTAGE TO EITHER PARTY DUE TO DELAY OF THE TRIAL, WHICH WAS AT THE STATE’S REQUEST.**

A criminal defendant’s right to present a defense is fundamental. The Sixth Amendment of the United States Constitution and Art. I, § 22 of the Washington

Constitution guarantee the right to compulsory process which includes the right to offer the testimony of witnesses. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 101 (1967); see also, State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (holding that exclusion of eyewitness testimony implicating another suspect violated the defendant's constitutional rights and was not harmless error).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies... This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19. The jury is "entitled to have the benefit of the defense theory before them so that they can make an informed judgment as to the weight to place on" the evidence. Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). This is a fundamental right, "which the courts should safeguard with meticulous care." State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21 P.2d 929, (1984), cert. denied, Campbell v. Wood, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996).

Here, although evidence was found in the car that Stultz was driving, Beckhorn was also in the vehicle and Beckhorn also drove the vehicle at some point. Therefore, the case stood or fell based on the jury's belief of essentially one witness, Beckhorn, and his credibility or motive was subject to close scrutiny. Furthermore, the court had indicated that it would reserve ruling on whether testimony concerning prior bad acts would be permitted. Based on that defense was prepared to call rebuttal witnesses concerning that testimony. Defense had not provided the names of the witnesses until the eve of the continuation of the trial, and the state objected.

The court simply stated it was not prepared to give either party an advantage due to the delay of the trial. The trial was delayed, due to the state's request. The trial court listened to argument, and then simply stated, "I'm not going to allow the witnesses." It appears from the record, with no reason stated other than not allowing an unfair advantage, that the court made its decision based on the fact that the witnesses were not previously identified. However, [v]iolations [involving the failure to produce evidence or identify witnesses in a timely manner] are appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address the new evidence...Exclusion or suppression of the evidence is an extraordinary remedy and should be applied narrowly. State v. Hutchinson, 135 Wn.2d 863, 881-82, 959 P.2d 1061 (1998); see also State v. Thacker, 94 Wn.2d 276, 280, 616 P.2d 655 (1980) (trial court abused discretion in excluding a witness as a sanction for failure to list witnesses); State v. Linden, 89 Wn.App. 184, 196, 947 P.2d 1284 (1997) (trial court properly granted continuance to allow the defense to respond to new evidence previously not disclosed by the prosecution);

State v. Falk, 17 Wn. App. 905, 909, 567 P.2d 235 (1977) (trial court properly granted continuance to allow the defense to respond to new evidence of defendant's admission's, which the prosecution had learned of only the day before).

Because it appears the only reason the witnesses were excluded was because of the late disclosure, it was error to exclude the witnesses. The state was not prejudiced by the late disclosure, as the witnesses were mentioned in the police reports; the state was aware of the witnesses; and it was expected that the testimony would not be outside the scope of what law enforcement included in its reports. Therefore, the appropriate remedy would have been to permit the state the opportunity to interview the witnesses prior to any testimony.

Therefore, because the case was primarily based on the credibility of one witness, it was error to exclude the defense witnesses, and the conviction should be reversed, and remanded for a new trial.

**B. THE TRIAL COURT ERRED WHEN IT PERMITTED TESTIMONY CONCERNING OTHER PRIOR BAD ACTS ON THE BASIS OF COMMON SCHEME OR PLAN AND KNOWLEDGE WITHOUT WEIGHING ON THE RECORD, ITS PREJUDICIAL EFFECT.**

Under ER 404(b), evidence of a defendant's prior crimes cannot be introduced "to prove his character in order to show that he acted in conformity therewith." State v. Salarelli, 98 Wn.2d 358, 362, 655 P.2d 576 (1999). Evidence of prior crimes may be introduced only to establish such facts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

Before evidence of prior crimes or bad acts can be introduced for some purpose other than to establish character, however, the court must determine “whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged.” Satarelli, 98 Wn.2d at 362 (quoting State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952)).

In making this relevance determination, the trial court must first identify the purpose for which the evidence is to be admitted, and this purpose should be one similar to those set out in ER 404(b). Satarelli, at 362. That purpose or fact must be of consequence to the action. Id. The evidence of prior crimes also make the fact to be established at trial more probable than not. Id. at 363.

Even if the relevance test is met, the court must balance on the record the probative value of the evidence against its prejudicial effect. Id. Whether to admit or refuse evidence is a discretionary decision of the trial court that will not be reversed on appeal absent an abuse of discretion. State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

Here, the evidence admitted was the testimony of the confidential informant, Beckhorn, concerning alleged transactions earlier in the day. There were no other witnesses to those alleged transactions. The court permitted the testimony based on the state’s reference to State v. McBride, 74 Wn. App. 460; 873 P.2d 589 (1994) and State v. Thomas, 68 Wn. App. 268, 843 P.2d 540 (1992). The court stated that these cases seemed to permit the evidence under 404(b) to show common scheme or plan and knowledge. However, both of those cases involved transactions observed by the police officers which

led to the arrest of the defendants. Furthermore, the trial courts in both cases balanced the relevance of the evidence against its prejudicial effect.

Here, the alleged transactions were not witnessed by any police officers and were not relevant to the transaction which led to the arrest of Mr. Stultz. The evidence was based solely on the unsubstantiated testimony of Beckhorn. Because credibility was certainly an issue in this cases, this unsubstantiated evidence was highly prejudicial, and only served to bolster Beckhorn's testimony. Furthermore, the court, although it determined the evidence was relevant to knowledge and common scheme or plan, failed to weigh the probative value against prejudicial effect.

The admission of the prior delivery evidence requires reversal. The test is whether, within reasonable probabilities, the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). In those instances where the weight of the evidence against the defendant is great, the court is more likely to find "harmless error". See, State v. Medical, 58 Wn. App. 817, 823-24, 795 P.2d 158(1990). In Medical, the admission of X-rated video tapes was harmless error in light of the strong physical evidence against the defendant. Id.

By contrast, the evidence against Stultz was not particularly strong. This was not a controlled buy in which the informant was searched and observed going to meet the suspect. Police officers did not observe any of the other alleged transactions. Absent the testimony concerning the prior unsubstantiated drug transactions, there is only evidence that Beckhorn, not Stultz, delivered drugs to Elton and received the money from Elton. While the money along with other items were found in the car, Beckhorn is the one who

identified where it would be found. It is highly possible the items could have been placed there by Beckhorn. Furthermore, Beckhorn had allegedly been in the car for several hours with Stultz. Although Elton testified that he heard a voice in the background, the dealing was done between Beckhorn and Elton. There is a reasonable probability that the jury's determination of credibility was improperly influenced by consideration of the other "bad acts", and the admission of those bad acts constitutes prejudicial error. Therefore the conviction should be reversed, and the case remanded for a new trial.

**C. THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER A DOSA SENTENCE FOR MR. STULTZ BECAUSE OF NEW DOC PROCEDURES.**

Generally, a trial court's decision to deny a DOSA sentence is not reviewable. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Because a DOSA sentence falls within the standard sentence range set by the legislature in the sentencing statute, there is a presumption that the trial court did not abuse its discretion. State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). However, a party may challenge a trial court's legal error in determining which sentencing provision applies to a specific case. Williams, 149 Wn.2d at 147. A party may also challenge a trial court's failure to exercise any discretion where the trial court categorically denies a DOSA sentence. Grayson, 154 Wn.2d at 342.

The Sentencing Reform Act requires the sentencing court to determine a defendant's eligibility for a DOSA and then use its discretion in imposing a DOSA if the defendant meets the criteria. RCW 9.94A.505(2)(a)(viii) authorizes a sentencing court to impose a

DOSA sentence if the criteria under RCW 9.94A.660 is satisfied. The Sentencing Reform Act of 1981 (SRA) gives sentencing courts discretion to impose a DOSA sentence if the offender meets certain eligibility requirements and if the court determines that the offender and the community will benefit from using the sentencing alternative. RCW 9.94A.660(2); see State v. Conners, 90 Wn.App. 48, 53, 950 P.2d 519, rev. denied, 136 Wn.2d 1004 (1998).

The purpose of the DOSA act was to provide "treatment-oriented sentences" for drug offenders. Conners, 90 Wn. App. At 53. Under RCW 9.94A.660(1), a defendant is eligible for DOSA if (1) his current offense is not a violent offense or a sex offense and does not involve a firearm or deadly weapon sentence enhancement; (2) his prior convictions do not include violent or sex offenses; (3) his current offense is a violation of chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.58 RCW and involved only a small quantity of drugs; and (4) he or she is not subject to deportation. If all these criteria are met, the offender is eligible for the special drug offender sentencing alternative.

Once eligibility is determined under RCW 9.94A.660(1), the trial court may waive imposition of a standard range sentence and impose a sentence a DOSA sentence if the court finds that the defendant and the community would benefit from the treatment alternative under RCW 9.94A.660(2). If so, the offender serves one half of his standard range sentence in total confinement in a state facility and serves the other half of his sentence as a term of community custody, with appropriate substance abuse treatment,

crime-related prohibitions (no use of illegal controlled substances); urinalysis monitoring, and a term of community custody to be served upon failure to complete the DOSA program under RCW 9.94A.715.

Under RCW 9.94A.660(2) the sentencing court makes a determination as to whether an offender is eligible for a DOSA sentence based on the criteria set out in RCW 9.94A.660(1) as listed above. Once the court makes that determination, the court "may" order an examination of the offender. If an examination is ordered, the examination shall address (1) whether the offender suffers from a drug addiction; (2) whether there is a probability the criminal behavior will occur in the future; (3) whether effective treatment is available; and (4) whether the offender and community will benefit from the use of the alternative. RCW 9.94A.660 (2) (a)-(d).

Here, based on the criminal history of Mr. Stultz and the facts of this case, he was eligible for a DOSA sentence. The court ordered a pre-sentence investigation (PSI). At sentencing, all parties became aware of a change in DOC procedure, in that it was outsourcing the PSI. A report was provided by Mr. Mitchell of West Sound Treatment Center, one of the contracted DOSA providers. Mr. Mitchell addressed the court. He informed the court that Stultz was chemical dependent, and that his past and present criminal activities were related to his chemical dependency. Furthermore, Mitchell stated that Stultz would benefit from treatment. The court asked Mr. Mitchell if he was trained in the statutory requirements of DOSA, to which he stated he was not. Because of this, the Court refused to consider Stultz for a DOSA. The court believed it should get a report like

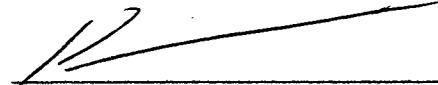
DOC had provided, and if they weren't providing it, the court did not have "sufficient evaluation and factors to make a DOSA decision." RP 21. Furthermore, the court stated it felt "hamstrung at this point to even continue this." and went forward with sentencing. RP 21. Furthermore, the court stated: "If I had a DOSA and I had a recommendation and I saw you qualified, maybe I would give it to you, because I think treatment is your only way out." RP 25. Finally, the court stated: "I'm sorry that the lack of money apparently has not given me the opportunity to look at a broader scheme that the law basically says I have available to do." RP 25

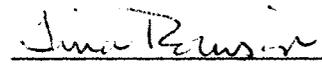
In Grayson, the trial court denied a DOSA stating "because of the fact that the State no longer has money available to treat people who go through a DOSA program." The Supreme Court of Washington vacated the sentence and remanded because the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate. Grayson, 154 Wn. 2d at 343. 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. Grayson, at 342, quoting, State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). In Grayson, the trial judge declined to give a DOSA "mainly" because he believed there was not adequate funding, but did not state it was the sole reason. But the trial judge did not articulate any other reason for denying the DOSA. Grayson, at 342. The Supreme Court found this to be a categorical refusal to consider a statutorily authorized sentencing alternative, and thus was reversible error. Id.

Similarly here, the trial judge refused to consider a DOSA sentence primarily on the grounds that DOC did not provide the report he was use to receiving, apparently because of a lack of funds. This is a categorical refusal to consider the statutorily authorized sentencing alternative, and is therefore reversible error. The court should vacate the sentence and remand to the trial court for sentencing.

## VI. CONCLUSION

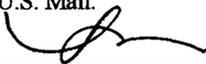
Because the trial court erred when it exclude defense witnesses without any reason for doing so, and because the court admitted irrelevant and prejudicial testimony concerning alleged prior bad acts, the convictions should be reversed, and the case remanded for a new trial. Furthermore, should the convictions be upheld, the sentence should be vacated, and the case remanded to the trial court for sentencing, because the trial judge failed to exercise its discretion when it categorically denied Stultz a DOSA sentence. Respectfully Submitted this 8<sup>TH</sup> day of October, 2007.

  
\_\_\_\_\_  
Roger A. Hunko, WSBA# 9295  
Attorney for Appellant

  
\_\_\_\_\_  
Tina R. Robinson, WSBA# 37965  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 8th day of October, 2007, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated: David Ponzoha, Clerk, Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, via U.S. Mail and Facsimile; Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366, via hand-delivery; Donald Stultz, Appellant, DOC# 806232, WCC-Shelton, P.O. Box 900, Shelton, WA 98584, via U.S. Mail.

By:   
\_\_\_\_\_  
Loni Dulas, Legal Assistant

07 OCT 10 PM 1:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY