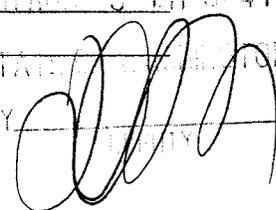


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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY 

STATE OF WASHINGTON, RESPONDENT

v.

REGINALD BELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Vicki Hogan, Trial
The Honorable Judge James Cayce, Suppression Motion

No. 08-1-00994-9

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court properly denied the defendant's motion to suppress evidence?

2. Whether the court's exceptional sentence was reasonable where two crimes otherwise would have gone unpunished and the total sentence was only double what it would have been had it not been an exceptional sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On February 25, 2008, Pierce County charged the defendant with one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (Count IV) based on an incident alleged to have occurred the preceding day.¹ CP 1-2.

On March 11, 2008, the defendant failed to appear for a pre-trial conference as ordered. CP 284-286. As a result, on June 30, 2008, the State filed an Amended Information adding Count V, Bail Jumping. CP 8-9.

¹ Because of the computer system Pierce County uses to generate its charging documents, a particular individual may be charged with higher numbered counts (here IV) where there are no lower numbered counts, e.g. I, as a result of multiple charges having been referred on the same incident, including charges against other persons out of the same police incident even if they are not filed as co-defendants. Here, initially Count IV was the only charge.

The defense filed a motion to suppress evidence under CrR 3.6, claiming that the defendant was unlawfully seized, and that the search of the motel room was unlawful. CP 10-20. A suppression hearing was later held on September 9, 2009. CP 99. The court denied the motion to suppress. CP 280.

The defendant again failed to appear for trial on August 14, 2008, as ordered. CP 287-289. On August 17, 2009, the State filed a Second Amended Information adding an additional count of Bail Jumping as Count VI Bail. CP 94-95.

On September 14, 2009, the case was assigned to the Honorable Judge Vicki Hogan for trial. CP 290. On September 23, 2009, the jury returned verdicts of Guilty as to all three counts. CP 123-125.

The court sentenced the defendant on October 5, 2009. CP 190-203. The defendant had an offender score of 15 on each count. CP 194. As to Count IV his standard range was 60+ to 120. CP 194. As to Count V and VI, his standard range was 51-60 months. CP 194. The court imposed the high end of the standard range on each count. CP 196. However, the court imposed an exceptional sentence based on the fact that some crimes would go unpunished, and ran the sentences consecutive to each other rather than concurrent. CP 186-89; 194, 197. As a result, the defendant's total sentence was for 240 months rather than for 120 months if the sentences had been imposed concurrent to each other. *See*, CP 196.

The notice of appeal was timely filed on October 5, 2009. CP 204.

2. Facts

The court entered the following findings of fact at the 3.6 hearing.

See, CP 269-280.

FINDINGS OF FACT

1. The court heard live testimony from Bonnie Baker, Officer Robert Eugley, Officer Ryan Micenko, and the defendant, Reginald Bell.
2. On February 24, 2008, at about 11:44 AM, Fife Police Officers Eugley and Micenko responded to the Bates Motel on 4221 Pacific Highway East in the city of Fife, Washington, to assist the motel manager, Bonnie Baker.
3. Ms. Baker had called for police assistance to help her with guests in room 25 that were violating the motel rules. Ms. Baker told the officers that there had been complaints of “heavy foot traffic” going in and out of room 25, and Ms. Baker believed that there was an unregistered overnight guest in room 25.
4. The Bates Motel has a posted policy requiring all overnight guests to register with the motel’s front desk, show identification, and pay a fee. This policy is posted in the front desk area of the motel. As per motel policy, unregistered guests are not permitted to remain. Shirley Butts was the only registered tenant of room 25, and no additional guests had been registered with the front desk. On February 24, 2009, Ms. Baker asked the officers to go to room 25 and confront Ms. Butts and her unregistered guest and get the unregistered guest to either register with the front desk and pay the fee or be expelled from the premises as a trespasser.
5. Ms. Baker believed that Ms. Butts had previously had unregistered overnight guests during her tenancy, and prior to February 24, 2008, Ms. Baker had reiterated the motel’s guest registration requirements with Ms. Butts during conversations they had had. Ms. Baker had told Ms. Butts that due to her previous instances of non-compliance with the motel rules, Ms. Butts was required to register all her guests with the front desk, overnight or otherwise. As the motel manager, Ms. Baker was vested with the authority and the responsibility to create and enforce the rules and policies of the motel.

6. Ms. Baker has seen the defendant on the motel premises in the past and believed that the defendant had been an unregistered overnight guest of Ms. Butts prior to February 24, 2008. The defendant had never registered as a guest and was not a registered guest on or about February 24, 2008.
7. After speaking with Ms. Baker, the officers went to room 25 to investigate whether Ms. Butts' guest was staying at the motel in violation of the motel rules and essentially trespassing.
8. Room 25 of the Bates Motel was accessible by only a single entrance door that opens directly to the open air exterior of the building.
9. Officer Eugley stood to one side of the door to room 25 and Officer Micenko stood on the other side of the door. One of the officers knocked on the door, but there was no response. The officers knocked again and loudly announced that they were police officers and asked the occupants to come to the door. Initially there was no response, but after a moment Ms. Butts opened the door and greeted the officers. The officers remained outside of the room as they spoke to Ms. Butts.
10. The officers asked if anyone else was in the room, and Ms. Butts initially told the officers that there wasn't but then stated that there was someone in the bathroom. Ms. Butts then walked over to the bathroom and requested the occupant to exit. A black male later identified as Reginald Bell, the Defendant, exited the bathroom. Officer Micenko immediately recognized the Defendant, having arrested him two weeks earlier for drug related offenses and an outstanding Department of Corrections warrant.
11. Officer Eugley asked Ms. Butts and the Defendant to sit on the bed. The officers remained outside the room by the doorway while Officer Eugley explained to Ms. Butts why the officers were there. Ms. Butts denied the foot traffic and having any overnight guests. The officers remained on either side of the door and were not blocking the entrance. At no point did the officers draw their weapons, threaten to use force, physically restrain Ms. Butts or the defendant, or otherwise indicate to Ms. Butts and the defendant that they were not free to leave. At no point during the entire incident did the defendant ask to leave, attempt to leave, get off the bed (until he was arrested at the conclusion of the incident), or otherwise indicate that he wanted to terminate his contact with the officers or leave the motel room.

12. As the officers spoke with Butts from outside the doorway, Officer Micenko viewed green vegetable matter in a clear plastic container along with a metal pipe lying on top of a nightstand that was next to the bed where Ms. Butts and the Defendant were sitting. Based on his training and experience as a police officer, Officer Micenko immediately recognized that the green vegetable matter was marijuana and that the pipe was a type used commonly for smoking marijuana. He informed Office Eugley of the suspected marijuana and drug paraphernalia.
13. Ms. Butts began reaching toward the nightstand; Officer Eugley asked her to keep her hands where he could see them. Ms. Butts did not comply and continued to reach slowly for the pipe, picking it up in an apparent attempt to hide it. When asked what she had picked up, Butts replied "It's a pipe." When asked what she smoked in the pipe, Butts reported "Marijuana." Butts denied having any marijuana in the room, but when asked if there was marijuana in the clear plastic container sitting on the nightstand, Ms. Butts picked up the container and replied "Yes." Despite being told twice to put the clear plastic container on the nightstand, Butts would not comply the officer's commands.
14. Fearing she would attempt to destroy the evidence the officers entered the room, placed Ms. Butts under arrest, removed her from the room, and read her Miranda warnings. Officer Micenko testified that the room was very cluttered, such that if Ms. Butts had scattered the marijuana on the floor it would be very difficult to recover. Ms. Butts reported that she understood her rights and that she was willing to talk with the officers. The defendant remained in the room, sitting on the bed and unrestrained. Officer Micenko stood in the doorway where he could watch both the defendant and Officer Eugley while he spoke with Ms. Butts outside of the room.
15. When asked if any other drugs or drug paraphernalia were in the room, Ms. Butts stated that there was and indicated that they were in a box on a shelf in the room. When asked if that was all, Ms. Butts stated "No, the rest is not mine." The Defendant stated immediately "Well it's not mine, I just got here and it's not my room." Officer Eugley asked Ms. Butts what she meant and Ms. Butts responded that the Defendant had "crack" and that she saw him put something on the shelf above the coat rack.

16. Officer Eugley asked Ms. Butts for consent to search the room, informing her that she could refuse consent, limit the area searched, and stop the search at any time. Ms. Butts gave verbal consent to a search of her motel room and agreed to sign a written consent to the search, which she did later that day after the search had taken place.
17. Officer Eugley went to the coat rack area identified by Ms. Butts and lifted up a sweat jacket, observing a plate with several small and large off-white rock type substances that he recognized from his police training and experience as crack cocaine and an open folding knife with a white residue on its tip. As he retrieved the plate, Officer Eugley observed a clear baggy protruding out of a shirt pocket hanging on the coat rack. He pulled out the baggie, which contained a large fist sized rock type substance that he recognized from his training and experience as crack cocaine. Officer Eugley showed the suspected crack cocaine to Ms. Butts and she stated that cocaine belonged to the Defendant.
18. Officer Eugley asked Ms. Butts to tell him about the crack cocaine. Ms. Butts responded that the Defendant came to her room asking if he could "hang out" and that she agreed. Ms. Butts then stated that he asked her if he could "cut up" some crack cocaine after giving her some to try. Ms. Butts agreed, and the defendant began to cut up crack cocaine on the plate that Officer Eugley found.
19. Officer Eugley then checked the box that Ms. Butts had told the officers about earlier and found three glass smoking devices, several other items used commonly in smoking crack cocaine and marijuana, and an off-white rock substance that Officer Eugley recognized from this police training and experience as crack cocaine. Ms. Butts told the officers that the contents of the box were hers, and that the small rock substance was the piece of crack cocaine that the Defendant gave her to try. Additionally, Officer Micenko found a plastic bottle containing several pieces of suspected crack cocaine on a table near the door.
20. Officer Micenko placed the Defendant under arrest, put him in handcuffs, and read him Miranda warnings. The Defendant stated that he did not wish to speak with the officers. A search incident to arrest of the defendant's person revealed \$964.00 cash in the pocket of his jeans.
21. The suspected crack cocaine and marijuana later field tested positive as being such substances.

22. Later that day, Ms. Butts gave a written statement consistent with her verbal statements.
23. After the defendant had been arrested, the officers asked police dispatch personnel to run his name through a records check. The police dispatch personnel advised the officers that there was a valid and active Stay Out of areas of Drug Activity (“SODA”) order out of Fife Municipal Court prohibiting the Defendant from being within a quarter mile of Pacific Highway East from the 2200 block to the 6500 block except for Interstate 5. The officers were very familiar with the off-limits area prohibited by the SODA order and knew that the Bates Motel was within the prohibited area. A certified copy of the defendant’s SODA court order and a certified copy of the SODA map provided to defendants by the municipal court were admitted by the court at the 3.6 hearing. The certified copy of the order bears all the appropriate signatures including the judge and a signature purporting to be the defendant’s.
24. The defendant testified that the SODA order was not valid and in effect at the time of the incident because it had been “dismissed.” However, the defendant admitted that he had been arrested by Officer Micenko for the charges detailed on the order, that charges had been filed, and that he had been before the Fife Municipal Court for a hearing on those charges on the date listed on the court order.
25. The court finds that the certified SODA order and map admitted at the 3.6 hearing is a true and correct copy of the documents created by the Fife Municipal Court at the hearing on the date listed on the order. The court finds that this defendant is the same Reginald Bell that was the before the Fife Municipal Court as a defendant on the date listed on the order admitted, that the Fife Municipal Court ordered the defendant to stay out of the SODA area detailed on the map, and that order was valid and in effect on February 24, 2008.
26. The officers testified that the Bates Motel is in an area that is well known to have a very high incidence of narcotics related criminal activity.
27. The court finds that Officer Eugley is an experienced and well trained law enforcement officer. The court finds that Officer Eugley’s testimony during this hearing was honest, credible, and reasonable.

28. The court finds that Officer Micenko is an experienced and well trained law enforcement officer. The court finds that Officer Micenko's testimony during this hearing was honest, credible, and reasonable.
29. The court finds that Officer Micenko and Officer Eugley had a significant amount of training and experience investigating crimes involving cocaine and marijuana, and thus the court finds that they could credibly recognize marijuana, cocaine, and drug paraphernalia by visual observation.
30. The court finds that the testimony of Bonnie Baker was honest, credible, and reasonable.
31. The court finds that the defendant's testimony was dishonest and unreasonable, and thus the court finds that the defendant's testimony was not credible. Therefore, in all instances where the defendant's testimony conflicted with the testimony provided by the officers and Ms. Baker, the court finds that the officer's and Ms. Baker's version of events was the truth.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of

evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also, State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. *Rickert v. Pub.Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See, Hoke v. Stevens-Norton, Inc*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); *See also, Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.*, 68

Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

The court reviews conclusions of law *de novo*. *State v. Smith*, 154 Wn. App. 695, 226 P.3d 195 (2010) (citing *State v. O'Neill*, 148 Wn.2d 464, 571, 62 p.3d 489 (2003); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).)

Here, the defendant did not assign error to any of the trial court's findings, accordingly they are verities on appeal.

a. The Defendant Did Not Have Automatic Standing.

The doctrine of automatic standing continues to apply in Washington even though it is no longer applicable under federal law. *State v. Jones*, 146 Wn.2d 328, 331-2; 45 P.3d 1062 (2002). The cases on automatic standing tend to focus on those aspects that are relevant to the decision in the case in light of the particular facts of the case. This has resulted in the Washington Supreme Court at different times identifying and applying different tests for automatic standing. Thus, some courts have held that the test for whether automatic standing applies is: 1) the defendant was legitimately on the premises where a search occurred, and 2) the fruits of the search are proposed to be used against the defendant.

State v. Williams, 142 Wn.2d 17, 22-23, 11 P.3rd 714 (2000); *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). The first element, while not often at issue, remains particularly important when it is because it limits the applicability of the automatic standing doctrine to only those defendants who might reasonably have a legitimate expectation of privacy. For example, without that limit defendants would be able to improperly claim automatic standing under a variety of factual scenarios where its application would be improper, i.e. a defendant committing a burglary with a stolen firearm; someone in possession of a stolen vehicle; or drug users trespassing in an abandoned building.

In other cases the court has applied a different two part test and determined that automatic standing applies when: 1) possession is an essential element of the crime charged; and 2) the defendant was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007) (citing *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980)). The court in *Williams* also noted that “[i]nherent in the conditions for automatic standing is the principle that the “fruits of the search” bear a direct relationship to the search the defendant seeks to contest. *Williams*, 142 Wn.2d at 23.

Putting all these elements together, the test for automatic standing should properly consist of the following: 1) the defendant was legitimately in the place to be searched; 2) at the time of the search the defendant was

allegedly in possession of the evidence found in the search; 3) the State intends to use the evidence found in the search against the defendant; and 4) possession is an essential element of the crime State seeks to prove with the evidence.

The motel manager was vested with the authority and responsibility to create and enforce the policies of the motel. CP 270 (Finding 5). Here, the motel manager had notified Butts that she was required to register all guests to her room. CP 270 (Finding 5). However, the defendant had not been registered. CP 270 (Findings 4-6).

Because the defendant was present in the room in violation of the motel policies, he was not there legitimately and cannot avail himself of automatic standing. Indeed, the manager asked the officers to remove him as a trespasser unless he was willing to register and pay a fee. CP 270 (Finding 4).

b. The Court Properly Denied The Suppression Motion On The Merits.

i. **The Initial Contact With The Motel Room And Its Occupants Was Lawful**

The officers contacted the room at the request of the motel manager because she believed that there were unregistered guests staying in the motel room who had not paid the required fee for additional persons. CP 270 (Findings 4-6). The officers were investigating possible

crime against the motel at the request of the manager, e.g. trespass or theft of services. So, unlike *State v. Jordan*, his case, did not involve a motel registry check. See, *State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007) (holding motel registry checks are unlawful unless the management voluntarily provides the information and the person who registered for the room received notice that management did so).

ii. **The Defendant Was Not Seized**

The Washington State Supreme Court has held that a “police officer’s conduct in engaging a defendant in conversation and asking for identification does not, alone, raise the encounter to an investigative detention.” *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). See also, *State v. Johnson*, 156 Wn App. 82, 92 n. 15, 231 P.3d 225 (2010) (officer may approach and speak with the occupants of a parked car on suspicion alone even though *Terry* threshold for investigative detention not met).

Thus, the initial contact at the door was not a seizure. Nor was it a seizure for the officers to talk to the occupants of the room. The defense alleges that the occupants were seized when the officers asked them to sit on the bed, at which point the officers were in the doorway. Br. App. 14.

The testimony was that the defendant came out of the bathroom and the officers asked both occupants to sit on the bed for the officer’s

safety because the room was cluttered and there was stuff all over. RP 09-09-09, p. 18, ln. 2 to p. 19, ln. 5. The officers explained why they were there. Officer Micenko also testified that when the defendant came out of the bathroom the occupants sat on the bed. RP 09-09-09, p. 43, ln. 13-20.

Nothing about this indicated that the occupants were not free to leave. CP 271-72, Finding 11; *See also*, RP 09-09-09, p. 18, ln. 19-22. The officers did ask Betts and Bell to sit where the officers could see them. CP 271, Finding 11; RP 09-09-09, p. 18, ln. 2-5. The officers requested this based on their safety concerns. RP 09-09-09, p. 18, ln. 2-5. But nothing supports the defense claim that the two were ordered to do this or had to do it, and the courts findings support the contrary. *See*, CP 271-72, Finding 11.

The fact that the occupants sat on the bed after the officers requested them to do so does not mean that their action was involuntary or that they were seized. It would have been sensible for the occupants to sit on the bed of their own volition because they would not have wanted to do anything that could lead to a misunderstanding and cause a perceived threat to officer safety.

The defense also tries to argue that the occupants were detained because the officers were in the doorway. However, it was the only doorway into the unit and standing in the doorway was the only way the

officers could effectively and safely communicate with the occupants. Under those circumstances, the fact of the officers standing in the doorway did not constitute a detention. The court's conclusion that asking the occupants to sit on the bed was not a detention is supported by the facts. *See*, CP 277, Conclusion 3.

iii. **Even If This Court Were To Conclude The Defendant Was Seized, It Was Pursuant To A Lawful Investigative Detention**

The Supreme Court held that where the court is reviewing the validity of an investigative detention (*Terry* stop), the inquiry is whether, considering the totality of the circumstances, there “is a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994) (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). This inquiry is directed at answering the question under the *Terry* standard of whether the officer had “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Garcia*, 125 Wn.2d at 242 (quoting *Kennedy*, 107 Wn.2d at 5 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1879, 20 L.Ed.2d 889 (1968))).

Here, what the defense claims was a detention did not arise until the officers told the occupants of the room to sit on the bed. However, as

soon as the defendant came out of the back room, there was a substantial possibility that criminal activity had occurred because the defendant was either trespassing or there was a possible theft of services where the defendant had not registered with the front desk or paid a fee as he was required to do. This is especially so where the motel manager had told the registered occupant of the room that she was required to register all her guests with the front desk.

The court's conclusion in the alternative that if there was a seizure it was lawful is also supported by the facts and was proper. *See*, CP 277, Conclusion 4.

iv. **The arrest of Butts was lawful**

While the officers spoke with Butts and Bell, they observed a metal pipe and a plastic container with green vegetable matter. CP 272, Finding 12. The officers then observed Butts handling something and asked her what it was, to which she responded that it was a pipe. CP 272, Finding 13. When asked what she smoked in the pipe, Butts said marijuana.

At that point, officers had probable cause to arrest Butts for unlawful possession of a controlled substance. (They arguably had the same probable cause as to Bell on a theory of constructive possession to the extent dominion and control could be imputed to him.) At the least, at

that point the officers had a second and separate basis to justify a *Terry* investigative detention based on Butts and the marijuana.

Finally, the officers then had another separate and independent basis to conduct a Terry investigative detention once Butts told them that the defendant had cocaine in the closet.

v. **The Search Of The Room Was
Lawful Where The Registered
Owner Consented.**

The search was lawful where the defendant was a guest of Butts and she consented to the search of the unit. *See, State v. Thang*, 145 Wn.2d 630, 41 P.3d 1159 (2002) (occupant's consent was lawful as to guest as well). In *State v. Williams* the court did hold that the consent of an occupant in whose name the room was registered was not valid as to second person in the room in whose name the room was not registered. *See, State v. Williams*, 148 Wn. App. 678, 201 P.3d 371, *review denied*, 166 Wn.2d 1020 (2009). However, in *Williams* the second person was not a guest but a co-occupant who was a traveling partner of the person in whose name the room was registered. Here, the defendant was required to be registered and pay a fee if he was a co-occupant, but had not. CP 270, Finding 4-5. Bell also told officers "...I just got here and it's not my room." CP 273, Finding 15.

In a separate case also entitled *State v. Williams*, the court held that the defendant could not challenge the officer's entry into a third

person's residence to serve an arrest warrant. *Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000). The evidence in *Williams* was ultimately found on the defendant's person. *Williams*, 142 Wn.2d at 23.

Finally, it should be mentioned that even if the court were to grant the defendant relief, the only relief to which he would be entitled would be the reversal of his conviction and the suppression of any illegally obtained evidence related to his conviction for Unlawful Possession of a Controlled Substance with intent to Deliver. His two convictions for Bail Jumping would remain because they are unrelated to the search.

2. THE TRIAL COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE WAS NOT EXCESSIVE.

The court may impose an exceptional sentence if there are substantial and compelling reasons justifying one. RCW 9.94A.535. One aggravating factor that may be considered and imposed by the court is where the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c). When that is the case, the court may impose the sentences on each count consecutive to each other. See, *State v. McNeal*, 156 Wn. App. 340, 231 P.3d 1266 (2010) (citing RCW 9.94A.535(2)(c); *State v. Vance*, 168 Wn.2d 754, 761-63, 230 P.3d 1055 (2010)).

The defendant argues, however, that under RCW 9.4A.585(4)(b) he may nonetheless challenge the sentence if it is clearly excessive. The reviewing court may not reverse a sentence as clearly excessive under RCW 9.4A.585(4)(b) unless the trial court abused its discretion. *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995). While the statute does not define “clearly excessive”, the courts have held that it means the action:

... “goes beyond the usual, reasonable, or lawful limit.”
Thus, for action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable ground or for untenable reasons, or an action that no reasonable person would have taken.

Ritchie, 126 Wn.2d at 393 (quoting *State v. Oxborrow*, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986) (quoting *State v. Strong*, 23 Wn. App. 789, 794, 599 P.2d 20 (1979))). That definition remains current. *State v. Sao*, 156 Wn. App. 67, 80, 230 P.3d 277 (2010).

Sentences that are double or quadruple the standard range have been held not to be clearly excessive. *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000) (holding sentence four times standard range was not clearly excessive); *State v. Sanchez*, 69 Wn. App. 195, 848 P.2d 735 (1993) (holding that sentence that exceeded twice the presumptive range was not clearly excessive); on the other hand, a sentence has been held to be clearly excessive where the aggravating factors were not so unusually

compelling to justify a sentence approximately six times the standard range. *State v. Delarosa-Flores*, 59 Wn. App. 514, 799 P.2d 736 (1990).

Here, the defendant's offender score was a 15, another two-thirds above nine, which is the effective maximum, insofar as the penalties do not increase above an offender score of nine. The defendant's bail jumping offenses would have been unpunished if they had not been imposed consecutive to Count I, and each other. Therefore, the court appropriately ran the sentences consecutive. Here, had the court not imposed an exceptional sentence and instead ran the counts concurrent to each other, the total sentence would have been 120 months, the amount of time imposed on Count IV, which was the count with the longest sentence. However, here the court imposed the exceptional sentence and ran the counts consecutive, for a total sentence of 240 months. This sentence is not clearly unreasonable where it is only double what the sentence would have been if the court had run the counts concurrent to each other. Moreover, the court actually showed the defendant some measure of

leniency insofar as the statutory maximum on Count IV was doubled to 240 months, so that the total sentence imposed was 120 months lower than the 360 month total the court could have imposed.²

Where two of the defendant's crimes would have been unpunished had the defendant not received an exceptional sentence; where the defendant's offender score of 15 was well above a 9; and where the sentence was only double what it would have been if it had not been imposed consecutive on each count, the court's sentence was not so unreasonable that it was an action no reasonable person would have taken. The sentence should be affirmed.

D. CONCLUSION.

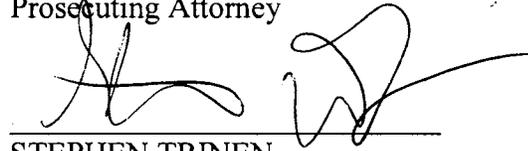
The court properly denied the defendant's motion to suppress evidence where the motel manager asked the officers to make contact with the room and investigate a possible trespass, they could see marijuana in the room, and Betts acknowledged it was such, and where Betts informed the officers the defendant had narcotics in the room.

² A possible 240 months On Count I, plus 60 months on Count II, and 60 months on Count III.

The trial court did not abuse its discretion when it imposed an exceptional sentence by running each count consecutive, where the defendant had an offender score of 15, two convictions would have gone unpunished, and the defendant's sentence was only double what it would have been had the court not imposed the exceptional sentence.

DATED: August 3, 2010.

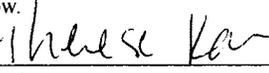
MARK LINDQUIST
Pierce County
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WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.3.10 
Date Signature

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