

NO. 41609-3-II

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

FILED  
11/27/09 11:07:07  
BY 

---

STATE OF WASHINGTON,

Respondent,

v.

THOMAS DOUGLAS REYNOLDS

Appellant.

---

ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable Jill Johanson, Judge

OPENING BRIEF OF APPELLANT

---

Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

*P.M. 6/2/2011*

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural Facts:</u> .....	2
2. <u>Testimony At Trial:</u> .....	6
D. ARGUMENT .....	10
1. <u>THE TRIAL COURT ERRED WHEN IT DENIED MR. REYNOLDS A SENTENCE BELOW THE STANDARD RANGE</u> .....	10
2. <u>MR. REYNOLDS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING</u> .....	13
E. CONCLUSION.....	18
F. APPENDIX.....	18-27

**TABLE OF AUTHORITIES**

**WASHINGTON CASES** **Page**

*State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999).....15  
*State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995).....5, 12,13,15  
*State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), cert. denied, 516 U.S.  
1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996)..... 15  
*Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).... 14  
*State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) .....11  
*State v. Callahan*, 2d 1199 (1980) .....11  
*State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 14  
*State v. Garcia-Martinez*, 88 Wn. App. 322, 944 P.2d 1104 (1997) .....11  
*State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) .....16,17  
*State v. Grewe*, 117 Wn.2d 211, 813 P.2d 1238 (1991) .....12  
*State v. Herzog*, 112 Wn.2d 419, 771 P.2d 739 (1989) .....10  
*State v. McFarland*, 127 Wn.2d 332, 899 P.2d 1251 (1995).....15  
*In re Morris*, 34 Wn.App. 23, 658 P.2d 1279 (1983) .....14  
*State v. Saunders*, 120 Wn.App. 800, 86 P.3d 323 (2004) .....14  
*State v. Smith*, 123 Wn.2d 51, 864 P.2d 1371 (1993).....12  
*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) .....14  
*State v. White*, 81 Wn.2d 223, 500 P.2d 1242 (1972).....14,15  
*State v. White*, 44 Wn. App. 276, 722 P.2d 118, reviewed denied, 107  
Wn.2d 1006 (1986).....14  
*State v. Williams*, 112 Wn. App. 171, 177, 48 P.2d 354 (2002) .....17  
*State v. Williams*, 142 Wn.2d 17, 11 P.3d 714 (2000).....17  
*State v. Worth*, 37 Wn. App. 889, 683 P.2d 622 (1984) .....13

**UNITED STATES CASES** **Page**

*Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674,  
104 S. Ct. 2052 (1984) .....14,15

**REVISED CODE OF WASHINGTON** **Page**

RCW 5.60.050 .....8  
RCW 9A.58 .....17  
RCW 9.94A.210(1).....10

RCW 9.94A.505(2)(a)(viii) .....	17
RCW 9.94A.530(2).....	11
RCW 9.94A.585(1) .....	10
RCW 9.94A.660 .....	16,17
RCW 9.94A.660(1).....	17
RCW 9.94A.662 .....	17
RCW 9.94A.662(1).....	17
RCW 9.94A.662(3).....	2,17
RCW 69.50.401(1) .....	17
RCW 69.50.4013(1).....	3
RCW 69.50.435(1)(c) .....	2

**CONSTITUTIONAL PROVISIONS** Page

Wash. Const. art. 1, § 3.....	14
Wash. Const. art. 1, § 22.....	14
U. S. Const. Amend. IV .....	13
U. S. Const. Amend. XIV .....	13

**COURT RULES** Page

CrR 3.5.....	3
CrR 3.6.....	3

**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied the appellant's request for a sentence below the standard range due to the extraordinarily small amount of heroin involved in the case.

2. Defense counsel denied the appellant his Sixth Amendment right to the effective assistance of counsel by failing to have him evaluated for a sentence under the Drug Offender Sentencing Alternative (DOSA).

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where a defendant has requested an exceptional sentence below the standard range, review of a sentence within the standard range is warranted where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. Appellant Thomas Douglas Reynolds, Jr. requested a sentence below the standard range due to the extraordinarily small amount of heroin involved. Where the trial court denied this request on an impermissible basis, is review of Mr. Reynolds' sentence warranted? (Assignment of Error 1)

2. An "extraordinarily small amount" of a controlled substance is a substantial and compelling reason for downward departure from the

standard sentencing range. Where Mr. Reynolds was alleged to have delivered to a confidential informant approximately .12 of a gram of heroin, did the trial court err when it denied Mr. Reynolds's request for a sentence below the standard range? (Assignment of Error 1)

3. A criminal defendant's right to counsel includes the right to effective assistance of counsel at sentencing. Mr. Reynolds met the statutory eligibility requirements to be considered for a Drug Offender Sentencing Alternative (DOSA), but his attorney did not have Mr. Reynolds evaluated for a DOSA. Did trial counsel's failure to obtain a DOSA evaluation amount to deficient performance, and was Mr. Reynolds prejudiced thereby? (Assignment of Error 2)

### **C. STATEMENT OF THE CASE**

#### **1. Procedural Facts:**

Thomas Reynolds was charged by information filed in Cowlitz County Superior Court with one count of delivery of a controlled substance (heroin), in violation of RCW 69.50.401(1). Clerk's Papers [CP] 5-6. The information contained a special allegation under RCW 69.50.435(1)(c) that the offense was committed within 1000 feet of a school bus route stop. CP 6.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Trial was set to start November 17, 2010. On November 16,

2010, the State asked for a continuance due to unavailability of Ed Fairman, its “confidential informant,” who was hospitalized. 1Report of Proceedings [RP] at 9, 10.<sup>1</sup> The court found good cause and rescheduled the trial to start on November 29, 2010. 1RP at 13. At a trial readiness hearing on November 24, 2010, the State moved for a continuance on the basis that at the time the trial was set on November 16, 2010, the prosecution was unaware that Detective Brian Streissguth was subpoenaed to testify in federal court during the time this case was scheduled for trial. 1RP at 15. Over defense objection, the court reset the trial to December 6, 2010. 1RP at 16.

The matter came on for jury trial on December 6 and 7, 2010, the Honorable Jill Johanson presiding. The State filed amended information the morning of trial. 1RP at 19; CP 8-9. The defense did not note exceptions to requested jury instructions not given or object to instructions given. 2RP at 180. The jury returned a verdict of guilty to the offense as charged and also found that it was committed within 1000 feet of a school bus route stop. CP 53, 54: 2RP at 217.

Following reading of the verdict on December 7, 2010, defense counsel moved for mistrial, arguing that while Mr. Reynolds was being

---

<sup>1</sup> The record of proceedings is designated as follows: 1RP – September 21, 2010, October 19, November 10, November 16, November 24, December 2, December 6, 2010 (jury trial); 2RP --- December 7, 2010 (jury trial), December 14, 2010; December 21, 2010 (sentencing).

brought by uniformed guards to the courtroom that morning, he was taken down a hallway by the jury room and that jurors had an opportunity to see him being escorted by the officers through an open door. 2RP at 221. The jurors were brought back into the courtroom and asked if any of them had seen the defendant that morning prior to being brought into the courtroom. 2RP at 226. The record does not indicate that any jurors stated that they had seen Mr. Reynolds before being brought to court, and the jury was excused. 2RP at 227. Mr. Reynolds was placed under oath and stated that when he was being taken down the hall to the courtroom, the door to the jury room was open and he had “eye-to-eye contact, with the second juror in –in the back row.” 2RP at 229. The court denied the motion for mistrial. 2RP at 231-32.

Counsel moved for reconsideration of the court’s ruling regarding the motion for mistrial. 2RP at 233; CP 60-61. Counsel filed a declaration by Cowlitz County Deputy Sheriff Erik Weber, which stated in relevant part:

I then walked with Mr. Reynolds down the hall. He was walking about five feet in front of me. He was wearing civilian clothes and was not handcuffed. As we passed the jury room the bailiff had opened the door and looked like she was saying something to the jurors. I really was not paying attention to the jurors but two to three of them may have been visible with the door open.

CP 56-57.

The court denied the motion for reconsideration, finding that the door was probably open to the jury room, but that Mr. Reynolds did not know if jurors saw him or if they realized who he was, and that he was dressed in civilian clothing. 2RP at 238-39.

At sentencing, Mr. Reynolds requested an exceptional sentence below the standard range based on *State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995), due to the small amount of heroin involved. 2RP 245-247. Counsel argued that the amount of heroin in this case was .12 of a gram. 2RP at 245.

Although Mr. Reynolds was eligible for sentencing under the Drug Offender Sentencing Alternative (DOSA), defense counsel did not obtain a DOSA evaluation for his client, stating that DOSA would involve a sentence of 100 months, and that it “was still disproportionate with what he was convicted of doing.” 2RP at 247.

The court denied the motion for an exceptional downward sentence and imposed a standard range sentence of 60 months and a 24 month school bus route stop enhancement, for a total of 84 months. 2RP at 254, CP 69-81.

The court stated:

And, as you know, I am torn. I’m definitely not interested in doing a maximum sentence, but I’m really not interested in doing an exceptional sentence below the

standard range. So I'm going to impose the—and it does seem like a lot of time, seven years, but I look it and go, well, he did 40 months before and he didn't learn. He sold then and he sold again. And I heard the evidence myself, and I believe he participated in the sale.

And so I'm going to give the low end of 84 months, which I know is still a substantial amount of time to be given for the---and for you to serve. And I don't do that lightly.

2RP at 253-54.

Timely notice of appeal was filed on December 21, 2010. CP 82.

This appeal follows.

**2. Testimony At Trial:**

Ed Fairman testified that on February 18, 2010, he participated in a “controlled buy” of drugs while working as confidential informant for the Cowlitz County Sheriff's Office. 1RP at 106. Mr. Fairman had been arrested previously and entered into a contact with the police to buy drugs. 1RP at 105. He stated that in exchange for acting as a police informant and purchasing drugs from selected “targets,” he would not be charged with two counts of delivery of a controlled substance in a school zone. 1RP at 105, 132.

Mr. Fairman stated that he tried to contact Thomas Reynolds, Jr. or Shelly Green by telephone on February 18, 2010, but was unable to do so. 1RP at 133. After being searched by law enforcement and provided with

\$40.00 in “buy money,” Mr. Fairman was dropped off near the apartment building where Mr. Reynolds lived. 1RP at 111. He knocked on the door and Ms. Green let him into the apartment. 1RP at 111. He stated that he talked with Ms. Green about buying \$40.00 of heroin, and that Mr. Reynolds was sleeping in the back bedroom at the time. 1RP at 134. He stated that Ms. Green said that she only had twenty dollar’s worth of heroin. 1RP at 134. He testified that Ms. Green went to get Mr. Reynolds and that he came into the kitchen. 1RP at 111. He stated that he gave the money to Mr. Reynolds and he handed him \$20 worth of heroin. RP at 111, 112, 134.

Detective Brian Streissguth of the Longview Police Department stated that he receives a list of potential “targets” from informants from which to make a drug buy, and that he cross-references that with information about potential “targets” that he had already received from other informants. 1RP at 37. Det. Streissguth stated that he had previously received information regarding Mr. Reynolds and that he was regarded as a potential “target.” 1RP at 37, 38.

On the afternoon of February 18, 2010, Det. Streissguth searched Mr. Fairman and gave him \$40.00 and he was provided with a wire recorder. 1RP at 43, 48. Police transported Mr. Fairman to a location behind Mr. Reynolds’ apartment in Longview, Washington, and he walked down the

street to the apartment complex. 1RP at 44, 67. Det. Streissguth stated that he observed Mr. Fairman entering the apartment and that he was inside the building for about nine minutes. 1RP at 49. He returned from the apartment and Det. Streissguth stated that Mr. Fairman gave him the body wire recorder, a bindle of tar-like substance, and \$20.00. 1RP at 50, 51. He was searched again and police found no additional drugs. 1RP at 51.

An employee of the Washington State Patrol Laboratory identified the substance given to police as heroin. 1RP at 83, 89.

Defense counsel objected to Mr. Fairman's testimony pursuant to RCW 5.60.050. 1RP at 92. During *voir dire*, Mr. Fairman stated that he was a heroin addict and that he had used heroin at 10:00 a.m. that morning. 1RP at 96. He stated that he generally uses a tenth of a gram at a time, and that the amount he uses is "just keeps you from getting sick," and that "[y]ou really don't get high . . . ." 1RP at 97. He stated that he did not feel that he was under the effects of heroin at the time he was questioned. 1RP at 98. The court found that Mr. Fairman could testify that "he's probably better than some witnesses we've had." 1RP at 103.

Ms. Green stated that Mr. Reynolds is her boyfriend, and that they lived together in the apartment, which is located at 357 Oregon Way, Apt. D in Longview. 2RP at 162-63, 164. She stated that she had known Mr.

Fairman for approximately eleven months, and had used drugs with him and bought drugs from him. 2RP at 165. She testified that in February he came to the apartment and told her that he was sick and asked if she had any heroin. 2RP at 165. She said that Mr. Reynolds was in the bedroom at the time Mr. Fairman was in the apartment and that she did not recall if he came into the living room where she and Mr. Fairman were talking. 2RP at 168. She stated that she gave Mr. Fairman \$20 worth of heroin. 2RP at 169. She testified that Mr. Reynolds had nothing to do with the drug deal, that she did not believe that he ever came into the living room and that he was yelling from the bedroom in the background of the wire recording. 2RP at 170, 172.

Ms. Green had already pleaded guilty to drug delivery from the incident. 2RP at 171.

Richard Lecker, transportation manager for the Longview School District, testified that there is a designated school bus stop for the Longview School District at Oregon Way and Alaska Street. 2RP at 143. He stated that the bus that stops there is regularly used to transport students to and from school. 2RP at 143. Ruth Bunch, a City of Longview employee, drew on a map a one thousand foot radius around the bus stop identified by Mr. Lecker. 2RP at 148. Exhibit 3. Det. Streissguth testified that the drug delivery alleged by the State took place in what appeared in Exhibit 3 as a vacant lot,

and that Mr. Reynolds' apartment had been built on the lot subsequent to the date of the photograph. 2RP at 157. He stated that the area shown as a vacant lot is within the one thousand foot circle denoted on the map by a red circle. 2RP at 158.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED WHEN IT DENIED MR. REYNOLDS A SENTENCE BELOW THE STANDARD RANGE**

Generally, RCW 9.94A.585(1) precludes an appeal of a sentence within the standard range. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (citing former RCW 9.94A.210(1)). However, where a defendant has requested an exceptional sentence below the standard range, review is warranted "where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, Mr. Reynolds requested a sentence below the standard range because the amount of heroin involved in the case was extremely small-- .12 of a gram. 2RP at 242. The trial court denied the request and sentenced Mr. Reynolds to a total of 84 months incarceration. 2RP at 254. Although Mr. Reynolds' sentence is within the standard range, review is appropriate

because the trial court relied on an impermissible basis in denying his request for a sentence below the standard range. The trial court reasoned that Mr. Reynolds had previously served 40 months, that “he didn’t learn” and that “[h]e sold then and he sold again.” 2RP at 253. This was based upon the argument of the deputy prosecutor, who stated:

The reason the State’s requesting the high end has do with a couple of things, but I think mostly importantly is that Mr. Reynolds has previously been—had previously been the beneficiary of an exceptional sentence reduction, and exceptional sentence downward. That was in his last trial—or, excuse me, his last delivery charge. This was back in 2005. It was a hand-to-hand delivery, uh, with Detective Watson for, I think, about \$5 worth of methamphetamine, a very small amount. And in that case the State extended a plea offer on the day of trial that allowed him to take advantage of an exceptional sentence downward.

2RP at 240.

The trial court clearly relied on the circumstances of his 2005 plea agreement in finding that Mr. Reynolds did not learn from his prior conviction and therefore did not merit an exceptional downward sentence. Although the sentencing court can certainly rely on prior history, in this case the State clearly propounded circumstances of the 2005 conviction that were not proven at trial or sentencing. RCW 9.94A.530(2) provides in relevant part,

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more

information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537.

The trial court denied Mr. Reynolds' request for a sentence below the standard range on an impermissible basis, and this Court may review Mr. Reynolds' sentence.

A factor may support a sentence outside the standard range if the factor (1) was not considered by the Legislature in establishing the standard sentence range, and (2) is "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (citing *State v. Smith*, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993) (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991)).

In *Alexander*, the Washington Supreme Court held that "a trial court may treat an 'extraordinarily small amount' of a controlled substance as a substantial and compelling reason for downward departure from the standard sentence range." *Alexander*, 125 Wn.2d at 727. The Court reasoned that the Legislature did not contemplate the inclusion of extraordinarily small amounts when it established the standard sentencing range for delivery of a controlled substance, and "an extraordinarily small amount of controlled substance [. . .] distinguishes Alexander's crime from others in the same category." *Id.* at 726. The Court added, "By permitting judges to tailor the

sentence in this manner, we also promote proportionality between the punishment and the seriousness of the offense.” *Id.* at 727-28.

Here, the trial court in this case should have granted Mr. Reynolds’ request for a sentence below the standard range because he was convicted for delivery of an extraordinarily small amount of heroin. Therefore, the trial court should have granted Mr. Reynolds’ request for a sentence below the standard range, and this Court should remand Mr. Reynolds’ case for re-sentencing.

2. **MR. REYNOLDS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING**

The federal and state constitutions provide the accused with the right to representation of counsel and to due process of law. U.S. Const., amends. 6, 14; Wash. Const., art. 1, § 3, 22. Sentencing is a critical stage of the proceeding where the Defendant is entitled to counsel. *State v. Saunders*, 120 Wn.App. 800, 825, 86 P.3d 323 (2004); *In re Morris*, 34 Wn.App. 23, 658 P.2d 1279 (1983). See *State v. Ford*, 137 Wn.2d 472, 484, 973 P.2d 452 (1999) (“Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process.”). The right to counsel necessarily includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Personal*

*Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Courts engage in a strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). However, where there is no conceivable legitimate tactic explaining counsel's performance, the presumption is rebutted. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Representation is constitutionally deficient if it falls below an objective standard of reasonableness. *State v. Brett*, 126 Wn.2d 136, 198-99, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L.Ed.2d 858, 116 S.Ct. 931 (1996); *Strickland*, 466 U.S. 668. Here, when asked by the court why

Mr. Reynolds did not qualify for DOSA, counsel responded:

Well, your honor, he does. But that would actually involve a sentence of, you know, a hundred months. And I personally feel, and I've advised my client to this, that that is still disproportionate with what he was convicted of doing.

...

You know, a DOSA sentence, if he was eligible for residential DOSA at any point, we would have likely asked for that. But a prison-based DOSA, he would do, you know, half the mid-range of, you know, basically 105 months or a 104 months.

2RP at 247.

Counsel did not request a continuance to obtain an evaluation. There is no sound strategic reason to fail to request a DOSA evaluation. Counsel appears to have relied entirely on the assumption that the court would grant an exceptional sentence below the standard range based on *State v. Alexander* and upon counsel's personal belief that a standard range sentence was disproportionate and too long. It cannot be reasonably argued that counsel's failure to obtain a DOSA evaluation based on a personal belief that prison-based DOSA was "disproportionate" with the offense was a legitimate strategy. Counsel's performance clearly falls below the objective standard of reasonableness.

In addition, Mr. Reynolds was prejudiced by counsel's deficient performance. If Mr. Reynolds had obtained a DOSA evaluation, or if a continuance had been granted at counsel's request allowing Mr. Reynolds to

undergo an evaluation before the continued hearing, the court would have had to consider Mr. Reynolds for DOSA treatment. See *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

A DOSA is a form of standard range sentence consisting of total confinement for one-half of the mid-standard range followed by community supervision. DOSA authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. See generally RCW 9.94A.660.

Mr. Reynolds met the statutory eligibility requirements of RCW 9.94A.660(1). Under that section, a defendant is eligible for a 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 offenses 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; (4) he or she is not subject to deportation; (5) the standard sentence for the current offense is greater than one year; and (6) he has not received a DOSA more than once in the prior ten years.

If a defendant is eligible, the sentencing judge is given discretion to

impose a DOSA. RCW 9.94A.505(2)(a)(viii); *State v. Williams*, 112 Wn. App. 171, 177, 48 P.2d 354 (2002). Although denial of a DOSA is within the court's discretion, the court must exercise discretion; it must at least consider the possibility of a DOSA for the eligible defendant. *Grayson*, 154 Wn.2d at 342.

The statute provides the court with mandatory criteria to evaluate in determining eligibility. RCW 9.94A.660. In considering a prison-based DOSA, if the court determines a DOSA is appropriate, the court shall waive a standard range sentence and impose a sentence which is one-half the midpoint of the standard range sentence in prison or twelve months, whichever is greater. RCW 9.94A.662. Once the defendant has completed the custodial part of the sentence, he or she is released into closely monitored community custody and appropriate substance abuse treatment in a program that has been approved by the Department of Social and Health Services for the balance of the sentence. RCW 9.94A.662(1). The defendant has a significant incentive to comply with the conditions of a DOSA, since failure may result in serving the remainder of the sentence in prison. RCW 9.94A.662(3); *Grayson*, 154 Wn.2d at 338.

Because Mr. Reynolds was not evaluated, the judge did not consider him for a DOSA. If he had been evaluated, the judge would have been

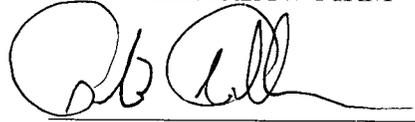
required to consider the option. Therefore, defense counsel's deficient performance completely foreclosed the possibility of treatment and a shorter sentence than the 84 months he received. Clearly this amounts to prejudice requiring a reversal of the sentence remand for resentencing.

**E. CONCLUSION**

For the above reasons, Mr. Reynolds respectfully requests this Court to remand for resentencing, consistent with the arguments presented herein.

DATED: June 2, 2011.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Thomas Reynolds

## APPENDIX A

### ***RCW 9.94A.660***

Drug offender sentencing alternative — Prison-based or residential alternative.

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61.502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

(2) A motion for a special drug offender sentencing alternative may be made by the court, the offender, or the state.

(3) If the sentencing court determines that the offender is eligible for an alternative sentence under this section and that the alternative sentence is appropriate, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of either a prison-based alternative under RCW 9.94A.662 or a residential chemical dependency treatment-based alternative under RCW 9.94A.664. The residential chemical dependency treatment-based alternative is only available if the midpoint of the standard range is twenty-four months or less.

(4) To assist the court in making its determination, the court may order the department to complete either or both a risk assessment report and a chemical dependency screening report as provided in RCW 9.94A.500.

(5)(a) If the court is considering imposing a sentence under the residential chemical dependency treatment-based alternative, the court may order an examination of the offender by the department. The examination shall, at a minimum, address the following issues:

(i) Whether the offender suffers from drug addiction;

(ii) Whether the addiction is such that there is a probability that criminal behavior will occur in the future.

(iii) Whether effective treatment for the offender's addiction is available from a provider that has been licensed or certified by the division of alcohol and substance abuse of the department of social and health services; and

(iv) Whether the offender and the community will benefit from the use of the alternative.

(b) The examination report must contain:

(i) A proposed monitoring plan, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others; and

(ii) Recommended crime-related prohibitions and affirmative conditions.

(6) When a court imposes a sentence of community custody under this section:

(a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate. In addition, an offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring for alcohol or controlled substances.

(b) The department may impose conditions and sanctions as authorized in RCW 9.94A.704 and RCW 9.94A.737.

(7)(a) The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.

(d) An offender ordered to serve a term of total confinement under (c) of this subsection shall receive credit for any time previously served under this section.

(8) In serving a term of community custody imposed upon failure to complete, or administrative termination from, the special drug offender sentencing alternative program, the offender shall receive no credit for time served in community custody prior to termination of the offender's participation in the program.

(9) An offender sentenced under this section shall be subject to all rules relating to earned release time with respect to any period served in total confinement.

(10) Costs of examinations and preparing treatment plans under a special drug offender sentencing alternative may be paid, at the option of the county, from funds provided to the county from the criminal justice treatment account under RCW 70.96A.350.

***RCW 9.94A.662***

Prison-based drug offender sentencing alternative.

(1) A sentence for a prison-based special drug offender sentencing alternative shall include:

(a) A period of total confinement in a state facility for one-half the midpoint of the standard sentence range or twelve months, whichever is greater;

(b) One-half the midpoint of the standard sentence range as a term of community custody, which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services;

(c) Crime-related prohibitions, including a condition not to use illegal controlled substances;

(d) A requirement to submit to urinalysis or other testing to monitor that status; and

(e) A term of community custody pursuant to RCW 9.94A.701 to be imposed upon the failure to complete or administrative termination from the special drug offender sentencing alternative program.

(2) During incarceration in the state facility, offenders sentenced under this section shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

(3) If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the

remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.

(4) If an offender sentenced to the prison-based alternative under this section is found by the United States attorney general to be subject to a deportation order, a hearing shall be held by the department unless waived by the offender, and, if the department finds that the offender is subject to a valid deportation order, the department may administratively terminate the offender from the program and reclassify the offender to serve the remaining balance of the original sentence.

***RCW 69.50.401***

Prohibited acts: A — Penalties.

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine, including its salts, isomers, and salts of isomers, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or

both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine, including its salts, isomers, and salts of isomers. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

(d) A substance classified in Schedule IV, except flunitrazepam, including its salts, isomers, and salts of isomers, is guilty of a class C felony punishable according to chapter 9A.20 RCW; or

(e) A substance classified in Schedule V, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

***RCW 69.50.435***

Violations committed in or on certain public places or facilities — Additional penalty — Defenses — Construction — Definitions.

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as

a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter

may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

(2) It is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, in a public housing project designated by a local governing authority as a drug-free zone, on a public transit vehicle, in a public transit stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter.

(3) It is not a defense to a prosecution for a violation of this section or any other prosecution under this chapter that persons under the age of eighteen were not present in the school, the school bus, the public park, the public housing project designated by a local governing authority as a drug-free zone, or the public transit vehicle, or at the school bus route stop, the public transit vehicle stop shelter, at a civic center designated as a drug-free zone by the local governing authority, or within one thousand feet of the perimeter of a facility designated under subsection (1)(i) of this section, if the local governing authority specifically designates the one thousand foot perimeter at

the time of the offense or that school was not in session.

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

(5) In a prosecution under this section, a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or a civic center designated as a drug-free zone by a local governing authority, or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of those areas if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school, school bus route stop, public park, public housing project designated by a local governing authority as a drug-free zone, public transit vehicle stop shelter, or civic center designated as a drug-free zone by a local governing authority. Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court

rule.

(6) As used in this section the following terms have the meanings indicated unless the context clearly requires otherwise:

(a) "School" has the meaning under RCW 28A.150.010 or 28A.150.020. The term "school" also includes a private school approved under RCW 28A.195.010;

(b) "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system;

(c) "School bus route stop" means a school bus stop as designated by a school district;

(d) "Public park" means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government;

(e) "Public transit vehicle" means any motor vehicle, streetcar, train, trolley vehicle, or any other device, vessel, or vehicle which is owned or operated by a transit authority and which is used for the purpose of carrying passengers on a regular schedule;

(f) "Transit authority" means a city, county, or state transportation system, transportation authority, public transportation benefit area, public transit authority, or metropolitan municipal corporation within the state that operates public transit vehicles;

(g) "Stop shelter" means a passenger shelter designated by a transit authority;

(h) "Civic center" means a publicly owned or publicly operated place or facility used for recreational, educational, or cultural activities;

(i) "Public housing project" means the same as "housing project" as defined in RCW 35.82.020.

RECEIVED  
JUN 2 11 51 AM '11  
STATE OF WASHINGTON  
BY *DM*

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  Respondent,  vs.  THOMAS DOUGLAS REYNOLDS,  Appellant.	COURT OF APPEALS NO. 41609-3-II  COWLITZ COUNTY NO. 10-1-00904-1  CERTIFICATE OF MAILING
---	--

The undersigned attorney for the Appellant hereby certifies that one original Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Thomas Douglas Reynolds, Jr., Appellant, and Mr. David Phelan, Cowlitz County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on June 2, 2011, at the Centralia, Washington post office addressed as follows:

Mr. David Phelan  
Deputy Prosecuting Attorney  
Cowlitz County Prosecutor's Office  
312 SW 1<sup>st</sup> Ave.  
Kelso, WA98626

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

CERTIFICATE OF MAILING 1

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P O BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Thomas Douglas Reynolds, Jr.  
DOC #725362  
W.C.C.  
PO Box 900  
Shelton, WA 98584

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line. The signature is enclosed within a large, hand-drawn circle.

PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF  
MAILING

2

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE – P O BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828