

No. 42026-1-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON

Plaintiff/Respondent

v.

ERIC O. WALDENBERG

Defendant/Appellant

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

APPELLANT'S REPLY

Submitted by:

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ORIGINAL

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ARGUMENT

DRUG COURT

In its brief, the State repeats the factual arguments it made below, generally discusses the separation of powers doctrine, cites cases affirming the discretionary power of the prosecution to make charging decisions, and cites three cases discussing drug court issues, none of which address the central issue in this case, i.e. whether the prosecution has unfettered discretion to determine who can be admitted to drug court.¹

¹ Two of the six cases cited by the State as examples of the exclusive exercise of prosecutorial discretion are death penalty cases, one is a habitual criminal case and one is a juvenile case, all of which require the prosecutor to comply with strict legislative criteria. They do not exemplify instances of the exercise of unfettered prosecutorial discretion.

The State cites State v. Diluzio, 121 Wn.App. 822, 90 P.3d 1141 (Div. III 2004), for the assertion that the prosecution, not the trial court, “retains” “executive discretion to determine whether a defendant may be admitted to Drug Court. But the State does not does not mention that that assertion by the Diluzio court is dictum, and the State, like the court in Diluzio, cites no Washington statutory or decisional authority that supports or identifies the source of the “discretion” that the prosecution “retains.”

The State quotes without discussion the statutory language of RCW 2.28.010, but does not mention that Chapter 28 of Title 2 is titled Powers of Courts and General Provisions, that RCW 2.28.170 is titled “Courts”, that the paragraphs following RCW 2.28.170 refer to drug court in every paragraph and do not refer to or name the “prosecution” or “plea bargaining”, and that nowhere in Title 2, Chapter 28, or 2.28.170 is there any reference to powers “retained by the prosecution” which makes the prosecutor the gatekeeper for admission to drug court.

In addition, the State ignores the fact that drug court participation in Jefferson County is governed by a contract which has two parties: the Court and the Defendant. Nowhere in the “Drug Court Contract” is the prosecution named as a party. Or that the Jefferson County Drug Court policy allows for admission post-conviction, a time when plea bargaining is virtually non-existent. (See p. 31).

Finally, the State does not strengthen its position by citing State v. Moreno, 147 Wn.2d 500, 505 (2002) in support of its “separation of powers” argument. As quoted in the State’s brief, the test, as articulated by the court in Moreno, to wit:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

(p. 505, and see State's brief, p. 8)

Certainly to give the executive, through the prosecution, unfettered discretion to determine who receives the therapeutic benefits of the drug court experience and dismissal of the criminal charges upon successful completion of the drug court program invades the sentencing prerogatives of the judiciary.

The issues raised by this appeal are not, as the State mistakenly argues, about the facts which were fully developed during the trial testimony.² Judge Verser resolved these facts in Mr. Waldenberg's favor, finding that if he had the discretion to do so, he would sentence Mr. Waldenberg to Drug Court, and not impose a sentence upon him that was "manifestly unjust." The issues raised by this appeal are whether the law strips Judge Verser of his discretionary power to sentence Mr. Waldenberg to Drug Court and/or grant Mr. Waldenberg's request for a downward departure from the sentencing guidelines.

DOWNWARD DEPARTURE

In the Downward Departure section of its brief, the State relies on statements in case law that factors that justify an exceptional sentence must relate to the crime which brings the defendant before the court for sentencing, the defendant's culpability for that crime, and that factors personal and unique to the defendant, but unrelated to the crime, are not relevant, and that an exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes in the same statutory

² The State continues to argue that Mr. Waldenberg is not addicted to narcotics, despite the expert testimony of Mr. Waldenberg's psychiatrist, Judge Verser's finding that he is, and the state's recommendation that a prison-based DOSA would be an appropriate sentence for Mr. Waldenberg.

category, citing State v. Law, 154 Wn.2d 85 (Wash. 2005) and State v. Pennington, 112 Wn.2d 606 (1989).

But those cases do not involve subsection (g) of RCW 9.94A.535 which exemplifies situations which the court may impose a sentence below the standard range if:

The operation of the multiple offense policy of RCW 9.94.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in 9.94A.010.

Subsection (g) expressly describes the situations in which neither the “nature of the crime,” nor the manner in which the defendant committed the particular crime are required before the court can grant a request for a downward departure. Subsection (g) recognizes that the “operation of the multiple offense policy” of multiple convictions may result in an unjust sentence and that, in those cases, the court is to consider the “purpose expressed in 9.94A.010,” some of which are “unique to the defendant, but unrelated to the crime,” in considering whether to grant a request for a downward departure from the Guidelines.

CONCLUSION

The State leaves untouched both of the issues raised by Mr. Waldenberg in his appeal, i.e. whether State v. Diluzio compels Judge Verser to deny admission to drug court to Mr. Waldenberg, either pre- or post-conviction, and whether the law compels Judge Verser to refuse to grant Mr. Waldenberg’s motion for a downward departure, despite finding that the multiplier effect of the prior convictions results in a sentence in this case that is clearly excessive.

Accordingly, Mr. Waldenberg requests that this court find that Judge Verser was not compelled either by State v. Diluzio, or by the “nature of the crime” exception to the downward departure principle, and remand this case to the trial court for resentencing consistent with these findings.

Dated this 12th day of March, 2012.



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