

NO. 42026-1-II

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

STATE OF WASHINGTON

Respondent,

vs.

ERIC O. WALDENBERG

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 10-1-00075-1

BRIEF OF RESPONDENT

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Date: February 17, 2012

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. RESTATEMENT OF ISSUES	2
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	6
A. The trial court correctly determined that entry into drug court was the responsibility of the executive branch	6
B. The trial court correctly determined Mr. Waldenberg’s sentence	14
V. CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
Washington State Supreme Court Cases	
<i>City of Spokane v. Spokane County</i> , 158 Wn.2d 661, 673, 146 P.3d 893 (2006).....	14,15
<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 181, 142 P.3d 162 (2006).....	14
<i>Skamania County v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 45, 26 P.3d 241 (2001)	14
<i>Smith v. Bates Technical College</i> , 139 Wn.2d 793, 800, 991 P.2d 1135 (2000) (citing <i>Dep't of Labor & Indus. v. Fankhauser</i> , 121 Wn.2d 304, 308, 849 P.2d 1209 (1993))	7
<i>State v. Finch</i> , 137 Wn.2d 792, 809, 975 P.2d 967 (1999) (quoting <i>State v. Lee</i> , 87 Wn.2d 932, 934, 558 P.2d 236 (1976))	9
<i>State v. Friederich–Tibbets</i> , 123 Wn.2d 250, 252, 866 P.2d 1257 (1994).....	19,20
<i>State v. Judge</i> , 100 Wn.2d 706, 713, 675 P.2d 219 (1984)	9
<i>State v. Law</i> , 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting <i>State v. Ha'mim</i> , 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); RCW 9.94A.585(4).	15,16,17,18
<i>State v. Lidge</i> , 111 Wn.2d 845, 850, 765 P.2d 1292 (1989)	8
<i>State v. Mail</i> , 121 Wn.2d 707, 713, 854 P.2d 1042 (1993)	19
<i>State v. McDowell</i> , 102 Wn.2d 341, 345, 685 P.2d 595 (1984)	9
<i>State v. Moreno</i> , 147 Wn.2d 500, 505, 58 P.3d 265 (2002).....	7,8,12
<i>State v. Pennington</i> , 112 Wn.2d 606, 610, 772 P.2d 1009 (1989).....	20
<i>State v. Pirtle</i> , 127 Wn.2d 628, 642, 904 P.2d 245 (1995).....	9
<i>State v. Vargas</i> , 151 Wn.2d 179, 193, 86 P.3d 139 (2004).....	15
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).....	14,15

Washington Court of Appeals Cases

State v. Barnett, 17 Wn.App. 53,55, 561 P.2d 234 (1977)..... 11
State v. DiLuzio, 121 Wn.App. 822, 90 P.3d 1141 (2004).....5,12,13
State v. Drum, 143 Wn.App. 608, 181 P.3d 18 (2008)..... 11
State v. Duke, 77 Wn.App. 532, 536, 892 P.2d 120 (1995) 19
State v. Hodges, 70 Wn.App. 621, 625, 855 P.2d 291 (1993) 20
State v. Johnson, 29 Wn.App. 638, 641, 630 P.2d 448 (1981) 11
State v. Little, 116 Wn.App. 346, 349, 66 P.3d 1099, review
denied, 150 Wn.2d 1019, 81 P.3d 119 (2003)..... 10,11,12

Foreign Jurisdictions

State v. Taylor, 769 So.2d 535, 537 (La.2000) 13
Woodward v. Morrissey, 991 P.2d 1042, 1045 (Ok.App.1999) 13

STATUTES

RCW 2.28.170 (Drug Court) 2,8
RCW 9.94A.210(1) (Sentencing Discretion) 19
RCW 9.94A.460 (Sentence Recommendation) 10
RCW 9.94A.505 (Sentences)..... 2
RCW 9.94A.535 (Departures from Sentencing Guidelines) 2,16
RCW 9.94A.585 (Grounds for Reversal)..... 15

RULES OF PROFESSIONAL CONDUCT

Rule 3.8 (Special Responsibilities of a Prosecutor, Comment 1).. 10

I. INTRODUCTION

Mr. Waldenberg raises no question of guilt, rather he argues that his crime was too severely punished because he was not admitted to drug court and was entitled to an exceptional sentence downward. He asserts his prior crimes in Montana were all done in a summer when he was addicted to drugs and his burglary in Washington was yet another manifestation of his addiction.

However the record does not support his assertions. The Montana records show the crimes covered a two-year span with the filing of four Informations with the first offense committed on January 12, 2003 and the last offense committed on December 2, 2004; (CP 88-152) he received treatment for his addiction in prison; when he was paroled to Washington in 2009, he was placed under Department of Corrections (DOC) supervision and entered in treatment; he did not follow his treatment and was terminated; testimony of his witnesses showed that his addiction was a thing of the past; and he told a DOC officer that he committed the burglary solely to get money for a trip to see his girlfriend.

The Prosecutor correctly determined Mr. Waldenberg did not commit his crime due to an addiction, he was adverse to

treatment, and that drug court would not help him. Mr. Waldenberg had an offender score of 40 and he was on DOC supervision when he committed the instant offense. He does not assert that he met any of the criteria for a downward exception to the standard sentencing range specified in RCW 9.94A.535(1).

Mr. Waldenberg was guilty, did not qualify for nor would have been helped by drug court, and was given a sentence within the standard range. His standard range was 51 to 68 months yet the court followed the recommendation of the State assessing his punishment at a prison based Drug Offender Sentencing Alternative whereby his confinement was 29.75 months with an equal amount of community custody. CP 213, 214. He was treated fairly.

II. RESTATEMENT OF ISSUES

Defendant's appeal presents two issues:

- A. RCW 2.28.170 authorizes counties to establish drug courts and determine who should be admitted into them. Did the trial court err when it determined it did not have the authority to order Mr. Waldenberg admitted to the Jefferson County drug court?
- B. A sentencing judge has discretion to deviate from the sentencing guidelines established by RCW 9.94A.505. Did the trial judge err when he decided not to give Mr. Waldenberg an exceptionally low sentence?

III. STATEMENT OF THE CASE

Waldenberg states he became addicted to narcotics as a juvenile in Montana. VRP 12. He asserts he subsequently became addicted to gambling and abused alcohol. CP 46,64-70. He was arrested in Montana in 2003 for burglary and subsequently confessed to 15 other burglaries over a two year period. CP 46. All were at night in unoccupied businesses. CP 46. (This was the modus operandi used in the instant case.) A Montana court sentenced Mr. Waldenberg to concurrent sentences for the burglaries of 20 years incarceration with fifteen years suspended. CP 46. Montana paroled Mr. Waldenberg to Jefferson County in 2009. CP 46. Additionally, Mr. Waldenberg was also convicted in Montana during this same time period for the felony offenses of Issue Bad Checks by Common Scheme and Theft of Property valued at over \$1,000.00.

Washington Department of Corrections (DOC) supervision of Mr. Waldenberg began in June 2009. Mr. Waldenberg submitted to an Alcohol/Drug Evaluation at Assessment and Treatment Associates in Port Townsend on July 6, 2009. On October 28, 2009, Mr. Waldenberg underwent an Alcohol/Drug Assessment at Safe Harbor in Port Townsend that resulted in an intensive

outpatient and aftercare program and he was also referred to the Co-occurring Disorder Intensive Treatment (CODIT) program. On November 3, 2009, the DOC also referred Mr. Waldenberg to CODIT. On January 20, 2010, Mr. Waldenberg was discharged from the CODIT program due to non-compliance with treatment. CP 61 (Sentencing Memo).

Mr. Waldenberg was caught in the act of burglarizing a beauty salon in Port Hadlock on April 28, 2010. At the time of his arrest he told Deputy Menday, "I was desperate for a little money. I felt desperate about needing money. I've been pretty successful at putting my life back together. I'm in school full time and I'm staying sober." VRP 4/6/11, 35-36. He was released on bail in June 2010.

On June 28, 2010, Mr Waldenberg had another assessment at Safe Harbor, which resulted in a recommended intensive outpatient program and aftercare. On October 4, 2010, Mr. Waldenberg was suspended from treatment for not titrating off opiates. On November 1, 2010, Mr. Waldenberg was terminated from treatment for not titrating off opiates. CP 62 (Sentencing Memo).

Washington Department of Corrections Officer Kevin Isett met with Mr. Waldenberg and interviewed him about the burglary. Mr. Waldenberg told Officer Isett that he had become involved with a woman from Walla Walla who was in the wine business. He explained that she was in the process of moving to Jefferson County to open her own business locally and that he had met her while she was in the area. She subsequently invited him to visit her in Walla Walla and assist her in the moving process. He stated he did not have the money to travel there and was ashamed to admit that to her. He stated the reason he committed the burglary was to obtain the money to make the trip. CP 63 (Sentencing Memo).

Pre-trial, over the objection of the prosecutor, Mr. Waldenberg moved the court to permit him entry to the drug court program. The trial court, citing *State v. DiLuzio*, 121 Wn.App. 822, denied the motion, stating, “the judicial branch of government can’t force the executive branch, or override a decision by the executive branch in terms of negotiating with people charged with crimes.” VRP 2/4/11, 21-22.

After conviction, Mr. Waldenberg again moved the court for entry into drug court. The trial court again denied the motion stating, “In *State v. DiLuzio* at 121 Wn.App. 822, a judicial branch of

the government doesn't control whether you go into drug court. That's a decision made by the executive branch, and that's the prosecutor's office, whether it's pre-conviction or post-conviction..." VRP 4/6/11, 6.

The Prosecutor's Sentencing Memo showed Mr. Waldenberg to have at least 14 prior burglary convictions out of Montana, was being supervised by the Department of Corrections for the State of Montana at the time of his arrest and that his standard range would have been between 51 to 68 months. CP 55 (Sentencing Memo). The amended Judgment and sentence reflects 17 convictions for Burglary, CP 211-212, for a total of 20 final felony convictions.

Mr. Waldenberg moved the court for a downward departure from the sentencing guidelines. The trial court gave a detailed explanation of its extensive research into the sentencing statutes and case law and concluded that there were no grounds for other than the standard range of sentencing. VRP 4/6/11, 58-69.

IV. ARGUMENT

- A. The trial court correctly determined that entry into drug court was the responsibility of the executive branch.**

While issues involving drug court eligibility are largely discretionary, the trial court's ruling on who has the authority to refer a defendant to drug court is a legal question we review de novo. *Smith v. Bates Technical College*, 139 Wn.2d 793, 800, 991 P.2d 1135 (2000) (citing *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993)).

Mr. Waldenberg argues, without citing any authority, that the trial court erred by refusing to order him admitted into drug court and is essentially asking the Court to decide against previous cases that have clearly settled the issue.

The separation of powers doctrine is derived from the constitution's distribution of governmental authority into three branches. *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Each branch of government may only exercise the powers it is given. One branch is not permitted to encroach upon the fundamental function of another. *Id.* *Article IV, section 1* of the Washington Constitution states, “[t]he judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.” Section 6 states: “[t]he superior court shall have original jurisdiction

... in all criminal cases amounting to felony.” The Court in *Moreno* observed that the test for determining whether separation of powers is violated reflects the concern for the independence of each branch as well as the fact that some overlap is allowed: “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.*” (emphasis added) In short, the voters have given the executive branch (the prosecuting attorney) the power to exercise his or her discretion on how a case should proceed within the bounds of the law as established by the legislative branch and interpreted by the judicial branch.

RCW 2.28.170 (1) states “Counties may establish and operate drug courts.”

Prosecutors are given a great deal of discretion in making prosecuting decisions. *State v. Lidge*, 111 Wn.2d 845, 850, 765 P.2d 1292 (1989). The Court in *Lidge* observed: As the Supreme Court has recognized, this principle is mandated by the limits on judicial decision making: The Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor’s judgment as to when to seek an indictment.

Judges are not free, in defining “due process,” to impose on law enforcement officials our “personal and private notions” of fairness and to “disregard the limits that bind judges in their judicial function.” This is essentially what Mr. Waldenberg is asking the court to do in this case.

The Supreme Court in *State v. Judge*, 100 Wash.2d 706, 713, 675 P.2d 219 (1984) stated that prosecutors are vested with wide discretion in determining whether to charge suspects with criminal offenses and that the exercise of this discretion involves consideration of factors such as the public interest as well as the strength of the case which could be proven. “ ‘The decision to prosecute [is] based on the prosecutor's ability to meet the proof required by the statute.’ ” *State v. Finch*, 137 Wn.2d 792, 809, 975 P.2d 967 (1999) (quoting *State v. Lee*, 87 Wn.2d 932, 934, 558 P.2d 236 (1976)). “[I]t remains a prosecutorial duty to determine the extent of society's interest in prosecuting an offense.” *State v. McDowell*, 102 Wn.2d 341, 345, 685 P.2d 595 (1984). Indeed, we give prosecutors discretion to decide whether to seek the death penalty. *State v. Pirtle*, 127 Wn.2d 628, 642, 904 P.2d 245 (1995). In *Pirtle* the court stated that the prosecutor must perform

individualized weighing of mitigating factors and that an inflexible policy is not permitted.

A further example of a statutory provision of prosecutorial discretion can be found in RCW 9.94A.460, Sentence Recommendations, where it is stated that the prosecutor may reach an agreement regarding sentence recommendations. The only restriction on this exercise of discretion is that the prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement. Another example of prosecutorial discretion can be found in Comment 1 of RPC 3.8, Special Responsibilities of a Prosecutor, which states: A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. As “ministers of justice” we are allowed to exercise our discretion in determining how best to proceed on a particular case weighing the severity of the crime, the defendant, the criminal history of the defendant and the needs of society in holding law breakers accountable.

The drug court statute “does not create ... a ‘court’ to which all state citizens have a right of access.” *State v. Little*, 116

Wn.App. 346, 349, 66 P.3d 1099, review denied, 150 Wn.2d 1019, 81 P.3d 119 (2003). The court in *Little* also stated that there is no fundamental right to treatment, in lieu of prosecution, once a person has violated the law citing *State v. Johnson*, 29 Wash.App. 638, 641, 630 P.2d 448 (1981) and rehabilitation is a goal but not a fundamental right citing *State v. Barnett*, 17 Wash.App. 53, 55, 561 P.2d 234 (1977).

Drug court is designed to encourage treatment of culpable people whose wrongful conduct is caused by a treatable condition, and gives these defendants the opportunity to avoid conviction if they successfully complete treatment. *State v. Drum*, 143 Wn.App. 608, 181 P.3d 18 (2008). *Barnett* at 55 stated that while the law does not criminalize the status of drug addiction, society can utilize punishment to protect itself from those who commit crimes to support their addiction to the use of narcotic drugs.

The problem for Mr. Waldenberg is that he told two separate individuals that the crime for which he is being prosecuted was committed to get money because he had none and wanted to go visit a new lady friend in Walla Walla. At least the defendant in *Drum* was highly intoxicated when he committed his crime. Even if Waldenberg had or has a drug addiction, as *Barrett* says, society

can still utilize punishment to protect itself from a burglar who has, under the Sentencing Reform Act, an offender score of at least 40 points.

The prosecutor has executive discretion to decide whether to recommend referral to drug court. *State v. DiLuzio*, 121 Wn.App. 822, 90 P.3d 1141 (2004). The sole issue on appeal in *DiLuzio* was whether the prosecutor or the trial court retained the power to refer a defendant to drug court. The court agreed with the trial court that the prosecutor retains executive discretion to decide whether to recommend referral to drug court. *DiLuzio* contended that the drug court was a court and that only the judiciary has power over courts. The court cited *Moreno* stating that each branch of government may only exercise the powers it is given and one branch is not permitted to encroach upon the fundamental function of another. The court in *DiLuzio* at 828 stated that Division Two has previously held that the drug court statute “does not create a ‘court’ to which all state citizens have a right of access” citing *Little* at 349. *DiLuzio* went on to state that their holding is in harmony with other jurisdictions that have tackled this issue and noted that the Supreme Court of Louisiana held that a defendant may only be considered for a drug court program upon

recommendation of the district attorney. *State v. Taylor*, 769 So.2d 535, 537 (La.2000). *DiLuzio* at 829 also observed that the Court of Criminal Appeals in Oklahoma held that the legislative restrictions contained within the Drug Court statute neither violate the separation of powers clause nor deny Petitioner access to the courts. The issue in this case is not one of separation of powers and whether the courts have the power to hear a particular matter. Rather, it is a question of prosecutorial discretion in charging a defendant with a particular crime and trying him/her in a particular forum. *Woodward v. Morrissey*, 991 P.2d 1042, 1045 (Ok.App.1999).

In the instant case, the prosecutor did not recommend Mr. Waldenberg for admission to drug court, in fact, the prosecutor actively opposed Mr. Waldenberg's motion to the court for admission. The evidence clearly shows Mr. Waldenberg was not amenable to treatment; he did not commit his crime because of any addiction, but rather to further a relationship; he was under DOC supervision for burglary when he committed this crime; and he had an offender score of 40. Drug Court would not have helped him, and was beyond the court's authority to order.

Waldenberg would have this court intrude on the authority of the executive branch to determine who should be punished and who should be admitted to drug court, solely because he undeservedly desires not to return to prison. This appeal is without merit and should be denied.

B. The trial court correctly determined Mr. Waldenberg's sentence

The courts review issues of statutory interpretation *de novo*. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). Our purpose when interpreting a statute is to determine and enforce the intent of the legislature. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Id.*; see also *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006) (holding that plain language does not require construction). In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *City of Spokane*, at 673; see also *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 45, 26 P.3d 241 (2001). Commonsense informs our analysis, as we avoid absurd

results in statutory interpretation. *Tingey*, 159 Wn.2d at 664, 152 P.3d 1020. When a term has a well-accepted, ordinary meaning, we may consult a dictionary to ascertain the term's meaning. *Id.* at 658, 152 P.3d 1020.

An appellate court analyzes the appropriateness of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the de novo review standard? and (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard? *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); RCW 9.94A.585(4). The court held in *Law* that the Sentencing Reform Act requires factors that serve as justification for an exceptional sentence to relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant. Factors which are personal and unique to the particular defendant, but unrelated to the crime, are not relevant under the SRA. In their analysis the court cited *State v. Vargas*, 151 Wash.2d 179, 193, 86 P.3d 139 (2004) stating that the determination of crimes and punishment has traditionally been a legislative

prerogative, subject to only very limited review in the courts. In short, it is settled law that the fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions. The issue in *Law* is the same as it is in the case at bar: Do the reasons justify a departure from the standard range?

RCW 9.94A.535 states in relevant part:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

RCW 9.94A.535(1) Departures from the Guidelines, Mitigating Circumstances, states:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

The Sentencing Reform Act does permit departures from the standard range but the underlying purpose for the Act is to insure that a defendant receives a punishment commensurate with the crime he or she is charged with committing and their criminal history. The court in *Law* stated that while the statutory mitigating

factors listed are “illustrative” only it should be noted that all the examples relate directly to the crime or the defendant’s culpability for the crime committed. At 94. The defendant in *Law* felt she was deserving of an exceptional sentence because of her volunteer work, her participation in a 12-step program, testimony of numerous witnesses as to her post-charging adjustments and improvements, church activities, her positive impact on others in recovery, the building of a strong bond with her son, her involvement in her daughter’s life and her strengthening support system. In the case at bar Waldenberg makes many of the same claims regarding his personal situation. The trial court in *Law* found the reasons compelling and granted an exceptional sentence and the State appealed asserting as error that the trial court’s imposition of an exceptional sentence was based on facts that were unrelated to the offense. The court in *Law* stated: “In sum, this court has consistently interpreted the SRA to require mitigating and aggravating factors to relate to the crime and distinguish it from others in the same category.” At 98. The court went on to say that the SRA was designed to provide proportionate punishment, protect the public and provide rehabilitation, and the presumptive ranges established for each crime represent the Legislature’s judgment as to how best to accommodate those interests. At 101.

The court held that it must enforce the will of the legislature and the consideration of personal factors such as those presented by the defendant were in many ways the very impetus behind the enactment of sentencing reform in Washington. At 102. The court concluded that because such a consideration is contrary to the will and intention of the legislature, the trial court's justifications were insufficient as a matter of law. At 103.

Sentencing Discretion. “[A] sentence within the standard range for the offense shall not be appealed.” RCW 9.94A.210(1); *State v. Friederich–Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994) (refusing to consider an appeal of a standard range sentence when the challenge is to whether the trial court failed to consider a mitigating factor). Accordingly, as a matter of law, there can be no abuse of discretion in the trial court's sentence if the sentence is within the standard range. *State v. Duke*, 77 Wn.App. 532, 536, 892 P.2d 120 (1995). The only statutory basis for appeal of a standard range sentence is failure to comply with applicable procedures mandated by RCW 9.94A.110 and RCW 9.94A.370(2). *State v. Mail*, 121 Wn.2d 707, 713, 854 P.2d 1042 (1993).

“An exceptional sentence is appropriate only when the circumstances of the crime distinguish it from other crimes of the

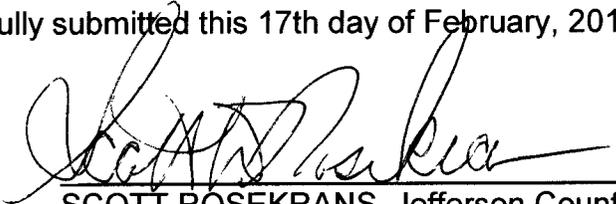
same statutory category.” *State v. Pennington*, 112 Wn.2d 606, 610, 772 P.2d 1009 (1989); see also *State v. Hodges*, 70 Wn.App. 621, 625, 855 P.2d 291 (1993) (declining to follow the court of appeals' decision in *Friederich–Tibbets*, 70 Wn.App. 93, 853 P.2d 457), review denied, 124 Wn.2d 1013, 879 P.2d 293 (1994). The factors cited by Mr. Waldenberg do not relate to the circumstances of the crime but to his behavior after his conviction and do not therefore warrant an exceptional sentence downward. *Hodges*, 70 Wn.App. at 625–26, 855 P.2d 291.

None of the factors cited by Mr. Waldenberg relate to the crime for which he was convicted, he had an offender score of 40, and he was under DOC supervision for the same crime when he committed the offense therefore the trial court was correct in imposing a sentence within the standard range. This appeal is without merit and should be denied.

V. CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 17th day of February, 2012



SCOTT ROSEKRANS, Jefferson County
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PROOF OF SERVICE

I, Janice N. Chadbourne, certify that on this date:

I filed the State's Brief of Respondent electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the brief, using the Court's filing portal, to:

James Gilmore
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I mailed a copy of the Brief of Respondent, postage prepaid, to:

Eric O. Waldenberg
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on February 17, 2012.



Janice N. Chadbourne
Lead Legal Assistant

JEFFERSON COUNTY PROSECUTOR

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