

NO. 45265-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT DOUG PIERCE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 12-1-00347-3

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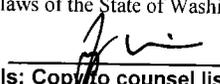
BRIEF OF RESPONDENT

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<b>SERVICE</b>	Lise Ellner Po Box 2711 Vashon, WA 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i> . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 5, 2014, Port Orchard, WA  <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b>
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the Defendant's claim that the charging document in the present case was insufficient is without merit when the charging document contained all of the essential elements of the charged offenses?

2. Whether the Defendant's claim that the trial court abused its discretion when it declined to impose an exceptional sentence downward is without merit when the trial court properly considered the facts and concluded that there was no basis for an exceptional sentence?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The Defendant, Robert Doug Pierce, was charged by an amended information filed in Kitsap County Superior Court with one count of possession of a controlled substance, three counts of bail jumping, and one count of theft in the third degree. CP 15-17. A jury found the Defendant guilty of the two counts of bail jumping and guilty of theft in the third degree, but was unable to reach a verdict on the possession of a controlled substance charge. CP 66-67; RP 435-36.<sup>1</sup> The trial court imposed a standard range sentence on each of the two bail jumping counts and ran the sentences concurrently. CP 298-300. On the theft in the third degree

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<sup>1</sup> The third count of bail jumping was dismissed at some point, and the jury was not instructed on this count.

count the trial imposed a sentence of 364 days with all 364 days suspended. CP 300. This appeal followed.

**B. FACTS**

The Defendant was charged by an information filed in the Kitsap Superior Court on March 30, 2012 in cause number 12-1-00347-3 with one count of possession of a controlled substance (methamphetamine). CP 1. After the Defendant failed to appear for court appearances in this same cause on April 9 and August 7, the State filed an amended information adding two counts of bail jumping and a count of theft in the third degree. CP 10-11. A second amended information was later filed which added a third count of bail jumping after the Defendant failed to appear for a court hearing on November 19, but this third count of bail jumping was later dismissed.

With respect to the April 9 and August 7 bail jumping charges, the charging language in both the First and the Second amended information read as follows:

**Count II**  
**Bail Jumping**

On or about April 9, 2012, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of

sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 12-1-00347-3; contrary to Revised Code of Washington 9A.76.170.

(MAXIMUM PENALTY (Failure to appear in Class B or Class C felony case)–Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 9A.76.170 and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.76.170.3C Bail Jumping-Felony B or C

**Count III**  
**Bail Jumping**

On or about August 7, 2012, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 12-1-00347-3; contrary to Revised Code of Washington 9A.76.170.

(MAXIMUM PENALTY (Failure to appear in Class B or Class C felony case)–Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 9A.76.170 and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.76.170.3C Bail Jumping-Felony B or C

CP 11, 16.

The evidence at trial showed that on October 17, 2011 the Defendant shoplifted a cell phone from a Port Orchard Wal-Mart store. RP 118-28. A Kitsap County Sheriff's Deputy arrived at the scene and arrested the Defendant. RP 184, 191. The Defendant was then

transported to the Kitsap County Jail. RP 193. Upon arrival at the “Sally port” of the jail the Deputy took the Defendant to an elevator that is used to transport people up into the jail. RP 193-94. Once inside the elevator, the Deputy noticed a small baggie on methamphetamine on the floor between the Defendant’s feet. RP 195.

The Defendant was initially charged by an information filed in the Kitsap Superior Court on March 30, 2012, in cause number 12-1-00347-3, with one count of possession of a controlled substance (methamphetamine). RP 331; CP 1. Despite having been ordered to appear, the Defendant later failed to appear for court hearings in this cause on April 9 and August 7. RP 335-36; 345-46.

At the conclusion of the trial the jury found the Defendant guilty on the two counts of bail jumping and on the theft in the third degree charge. CP 66-67.

At sentencing, the State explained that on the two bail jumping counts the Defendant’s offender score was an “11” and that the standard range was 51 to 60 months. RP (8/16/13) 5. The State further explained that because the Defendant’s offender score was higher than a “9,” the trial court had the ability to find that the high offender score resulted in one of the crimes going unpunished. RP (8/16/13) 6. Nevertheless, the State did not seek consecutive sentences, but rather only asked that the

court impose a sentence at the top of the standard range on these two counts with the sentences to be run concurrently. RP (8/16/13) 7.

Defense counsel asked the trial court to impose a sentence at the bottom of the standard range. RP (8/16/13) 9. When the Defendant addressed the court, he asked the court to impose an exceptional sentence downward. RP (8/16/13) 22. The Defendant asserted that shortly before his failure to appear on April 9, his car had been stolen and that his paperwork listing his future court dates had been inside the stolen car. RP (8/16/13) 19-21. The Defendant further claimed that he had gone onto a website to try to check his court dates, but that he had not seen the April 9 date listed. RP (8/16/13) 20. The Defendant, however, made no attempt to call the Superior court or the Clerk's Office. RP (8/16/13) 21. With respect to the August 7<sup>th</sup> failure to appear, the Defendant simply asserted that he wrote the date down on his calendar incorrectly. RP (8/16/13) 24.

The trial court ultimately imposed a standard range sentence near the middle of the standard range. RP (8/16/13) 27. The trial court denied the Defendant's request for an exceptional sentence, explaining,

The information you have given me, none of them are statutorily mitigating factors. There's not enough evidence for me to give you an exceptional sentence downward. So I'm denying that request.

RP (8/16/13) 27.

### III. ARGUMENT

**A. THE DEFENDANT’S CLAIM THAT THE CHARGING DOCUMENT IN THE PRESENT CASE WAS INSUFFICIENT IS WITHOUT MERIT BECAUSE THE CHARGING DOCUMENT CONTAINED ALL OF THE ESSENTIAL ELEMENTS OF THE CHARGES OFFENSES.**

The Defendant first argues that the language in the charging document regarding the two bail jumping charges was insufficient because the charging document did not specifically list the underlying charge. App.’s Br. at 6. This claim is without merit because this Court has previously approved of the charging language that was used in the present case.

As outlined above, the charging language for both of the bail jumping charges in the present case informed the defendant that the charge was based on his failure to appear in a case in which a “Class B or Class C felony” had been charged and further informed him that the failure to appear occurred in “Kitsap County Superior Court Cause No. 12-1-00347-3.” CP 11, 16. In addition, the Defendant failed to challenge this charging language below.

A charging document must contain “all essential elements of a crime.” *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When challenged post-verdict, an information is liberally construed. *State v. Spiers*, 119 Wn.App. 85, 89, 79 P.3d 30 (2003), citing *State v. Johnson*, 119 Wn.2d 143, 149–50, 829 P.2d 1078 (1992). “The court asks whether the necessary facts appear in any form in the charging document. If so, the defendant must show actual prejudice to obtain dismissal.” *Spiers*, 119 Wn.App. at 89-90, citing *State v. Ibsen*, 98 Wn.App. 214, 216, 989 P.2d 1184 (1999) (citing *State v. Kjorsvik*, 117 Wn.2d 93, 105–06, 812 P.2d 86 (1991)).

In *Spiers*, the State charged a defendant with, among other things, one count of bail jumping. *Spiers*, 119 Wn.App. at 88. The charging language in that case provided that:

That [Spiers] ... did unlawfully and feloniously, having been held for, charged with, or convicted of a class “B” or “C” felony, and been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court in this state, knowingly fail to appear as required, contrary to RCW 9A.76.170(1) and RCW 9A.76.170(3)(c).

*Spiers*, 119 Wn.App. at 90. On appeal, the defendant argued that the charging language was insufficient. *Id* at 91. This Court, however, rejected the defendant’s claim, noting that,

In *State v. Ibsen*, this court held that the underlying offense is an essential element of bail jumping, but only because it determines the penalty involved. In *Ibsen*, the information ignored the applicable degree and penalty of bail jumping. But here, the information, liberally construed, informed Spiers of all the elements of bail jumping, including the penalty that he faced. The information expressly states that Spiers failed to appear after being charged with a class B or C felony, which corresponds to class C felony bail jumping. Thus, the information was sufficient.

*Spiers*, 119 Wn.App. at 91 (citations omitted). The Washington Supreme Court later cited this holding, apparently with approval, in the case of *State v. Williams*. See, *State v. Williams*, 162 Wn.2d at 185 (“[S]ee also *State v. Spiers*, 119 Wn.App. 85, 89-90, 79 P.3d 30 (2003) (defendant received adequate notice when charging document only alleged he failed to appear for a ‘class B or C felony’).”

Although several Washington cases have found that other formulations of the charging language used in bail jumping counts were insufficient, those cases involved charging documents that did not specify the “class” of the underlying charge (which is, of course, dictated by the specific underlying felony). See, e.g., *State v. Ibsen*, 98 Wn.App. 214, 215, 989 P.2d 1184 (1999) (information only noted that the defendant had “been admitted to bail with the requirement of a subsequent personal appearance”); *State v. Pope*, 100 Wn.App. 624, 629-30, 999 P.2d 51 (2000) (information insufficient because it merely stated that defendant

had failed to appear “regarding a felony matter”); *State v. Green*, 101 Wn.App. 885, 6 P.3d 53 (2000) (where charging document did not list name or class of underlying felony but only listed cause number).

As outlined above, however, this Court in *Spiers* explained that the underlying offense is relevant because it is used to determine the penalty involved (as the penalty is based on whether the underlying crime was a class A, B, or C felony). *Spiers*, 119 Wn.App. at 91. Thus, an information that expressly states that the defendant failed to appear after being charged with a class B or C felony is sufficient. *Spiers*, 119 Wn.App. at 91 (citations omitted). This Court is not alone in this holding, as Division One in *State v. Gonzalez-Lopez*, 132 Wn.App. 622, 132 P.3d 1128 (2006) specifically held that with respect to bail jumping, “Pleading either the underlying charge or the class of the underlying offense would be sufficient.”<sup>2</sup>

Finally, an examination of the actual bail jumping statute further demonstrates that the Defendant’s claim is without merit. The bail jumping statute states in part:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional

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<sup>2</sup> Furthermore, the Washington Supreme Court held that it agreed with the reasoning of the *Gonzalez-Lopez* decision. *See, Williams*, 162 Wn.2d at 184.

facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

...

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

RCW 9A.76.170(1),(3). Other than the mention of “murder in the first degree” in section (3)(a), the statute does not include as an element of the crime the *specific name* of the underlying offense. Rather, the penalty depends on the *class* of the underlying crime.

In the present case the charging document alleged that the Defendant failed to appear after having been charged with a Class B or Class C felony in Kitsap County Superior Court Cause No. 12-1-00347-3. CP 11, 16. Liberally construed, read as a whole, and construed with common sense, the amended information adequately identified the crime charged and informed the Defendant of the elements of bail jumping such

that he received sufficient notice to prepare a defense. Nothing more was required.<sup>3</sup>

**B. THE DEFENDANT’S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DECLINED TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD IS WITHOUT MERIT BECAUSE THE TRIAL COURT BY PROPERLY CONSIDERED THE FACTS AND CONCLUDED THAT THERE WAS NO BASIS FOR AN EXCEPTIONAL SENTENCE.**

The Defendant next claims that the trial court abused its discretion by refusing to consider a non-statutory factor in support of an exceptional sentence downward. App.’s Br. at 10. Specifically, the Defendant claims that the fact that his car was stolen demonstrated an “external force” that played a role in his failure to appear for the April 9 court date and that the trial court refused to consider this fact because it was not a statutory factor. App.’s Br. at 15-18. This claim, however, is without merit because the record shows that the trial court acted well within its discretion when it listened to the Defendant’s arguments but ultimately decided that an exceptional sentence was not warranted. In addition, any potential error here was clearly harmless as the Defendant ultimately received a concurrent sentence on the two bail jumping convictions, thus his sentence

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<sup>3</sup> It is worth noting, of course, that the charging document also referenced “Kitsap County Superior Court Cause No. 12-1-00347-3,” which was the cause number in the present case. Thus, the Defendant was clearly aware since his arraignment that the original

would have been the same even if the trial court had imposed an exceptional sentence on the April 9 bail jumping charge.

Generally, a defendant may not appeal from a sentence within the standard range. RCW 9.94A.585(1); *State v. Cole*, 117 Wn.App. 870, 881, 73 P.3d 411 (2003). “[W]here a defendant has requested an exceptional sentence below the standard range[,] review is limited to circumstances 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). Such impermissible bases include refusing to do so under any circumstance or a categorical denial based on the type of crime committed, or based on the defendant's race, sex, or religion. *Garcia–Martinez*, 88 Wn.App. at 330. Under RCW 9.94A.585, a defendant who has requested a sentence below the standard range may not appeal if the court has considered the request, heard extensive argument on the subject, and then exercised its discretion by denying the request. *Cole*, 117 Wn.App. at 881. Similarly, a “trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” *Garcia–Martinez*, 88 Wn.App. at 330.

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felony was the charge of possession of methamphetamine.

The State acknowledges that although RCW 9.94A.535 sets out several examples of mitigating circumstances that may justify an exceptional sentence downward, the statute also specifically states the examples in the statute are “illustrative only and are not intended to be exclusive reasons for exceptional sentences.” RCW 9.94A.535(1). With respect to non-statutory mitigating factors, the Washington Supreme Court has employed the following two-part test:

First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be 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 the present case the Defendant argues that the trial court erred because it “erroneously believed that it could not consider non-statutory factors.” App.’s Br. at 18. The record, however, does not support the Defendant’s claim. While it is true that the trial court correctly noted that the Defendant’s claim (that the theft of his car contributed to his failure to appear) was not a statutory “mitigating factor,” the trial court did not say

that it could *only* consider statutory factors. RP (8/16/13) 27. Rather, the trial court explained that

There's not enough evidence for me to give you an exceptional sentence downward. So I'm denying that request.

RP (8/16/13) 27.

Given this record, the Defendant has failed to show that the trial court completely failed to exercise its discretion or that the trial court incorrectly believed that it was only allowed to consider the examples of mitigating circumstances listed in the statute. Rather, the trial court considered the facts and argument and declined to impose an exceptional sentence, noting that there was simply not enough evidence to warrant an exceptional sentence. In short, the Defendant has failed to show that the trial court based its decision on impermissible factors. This is not a case where the trial court failed to exercise its sentencing discretion, and the Defendant, therefore, may not appeal the trial court's sentence. *Garcia-Martinez*, 88 Wn.App. at 330.

Finally, even if this Court were to assume that: (1) the trial court had abused its discretion; and (2) that the Defendant's claim regarding the stolen car was sufficient to warrant an exceptional sentence, any error in

this regard would be harmless.<sup>4</sup> As the sentences for both bail jumping counts were run concurrently,<sup>5</sup> the overall sentence would not change even if the trial court had granted the Defendant an exceptional sentence on the April 9 bail jump.

#### IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

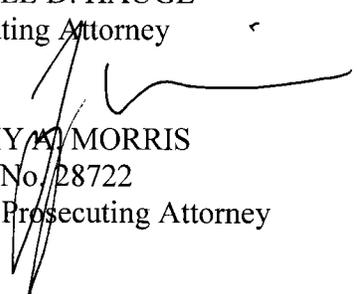
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<sup>4</sup> The Defendant argues that the situation involving the stolen car is analogous to the situation in *State v. Garcia*, 162 Wn.App. 678, 256 P.3d 379 (2011). App.'s Br. at 13. *Garcia*, however, is distinguishable. In *Garcia*, a fire had destroyed the closest sheriff's office to the defendant's place of residence, and the defendant had made arrangements for a third party to pick him up and drive him to Yakima so that he could fulfill his reporting obligations as a sex offender. *Garcia*, 162 Wn.App. at 681. On one occasion, however, the defendant's ride was 50 minutes late in picking him up, so the defendant contacted the sheriff's office by phone to inform them that he would not be able to report on time and that he would instead turn himself in to the jail as he also had an outstanding warrant. *Id.* at 682. Once he arrived at the jail, however, the defendant was turned away because it was after 5:00 p.m. *Id.* The defendant was charged with failure to register, and on appeal the court found that the defendant's transportation difficulties and efforts to comply with registration through contacting the sheriff's office and the jail were factors that justified an exceptional sentence. *Id.* at 686. In the present case, the Defendant did not contact the Superior Court, the Clerk's office, or the prosecuting attorney's office. Thus, the Defendant's actions in the present case fall far short of the sort circumstances found in *Garcia*.

<sup>5</sup> With respect to the August 7<sup>th</sup> bail jump, the record does not contain any facts that would have "distinguish[ed] the defendant's crime from others in the same category." See, *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002) (quoting *State v. Gaines*, 122 Wn.2d 502, 509, 859 P.2d 36 (1993)). Rather, it cannot seriously be argued that the Defendant's claim that he marked the date down wrong on his calendar would have warranted an exceptional sentence under Washington law.

DATED May 5, 2014.

Respectfully submitted,  
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**May 05, 2014 - 2:22 PM**

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