

**FILED**

**MAY 11 2012**

NO. 303420

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

STATE OF WASHINGTON, COURT OF APPEALS  
DIVISION III

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STATE OF WASHINGTON,

Appellee

vs

JAMES STEPHEN DUVALL, JR.

Appellant

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BRIEF OF APPELLANT, JAMES STEPHEN DUVALL, JR.

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EWING ANDERSON, P.S.

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## **I. INTRODUCTION**

The Trial Court sentenced Appellant to an exceptional sentence after a finding of guilty by a jury to the crime of Assault III with deliberate cruelty. The Trial Court's written Findings and Fact provide little to no "substantial and compelling" reasons for the issuance of the sentence as required by statute and case law. Therefore, the exceptional sentence should be reversed and the case remanded to the trial court for resentencing.

## **II. ASSIGNMENTS OF ERROR/ISSUES**

### **A. Assignments Of Error.**

1. The trial court erred in issuing an exceptional sentence to Appellant when it entered written Findings of Fact and Conclusions of Law that failed to contain a "substantial and compelling" reason(s) for imposing the sentence as required by statute and established case law.

### **B. Issues Pertaining To Assignments Of Error.**

1. Did the trial court err when it failed to include "substantial and compelling" reasons for imposing an exceptional sentence upward upon Appellant in its written Findings of Fact and Conclusions of Law?

[Assignment of Error 1.]

2. Did the trial court prejudice Appellants ability to argue that his sentence was clearly excessive when it failed to issue “substantial and compelling” reasons for imposing an exceptional sentence upward upon Appellant in its written Findings of Fact and Conclusions of Law? [Assignment of Error 1].

### **III. STATEMENT OF THE CASE**

#### **Facts and Procedure**

On August 25, 2011, Appellant was found guilty of Assault in the Third Degree by a jury of his peers. CP 36. By special verdict, the jury also found that Appellant had committed the crime with Deliberate Cruelty. CP 38. On September 30, 2011, a sentencing hearing for Appellant was held before Judge Robert G. Swisher of the Benton County Superior Court. At the sentencing hearing, Judge Swisher issued Appellant an exceptional sentence of eighteen (18) months, above the standard range of one (1) to three (3) months for a conviction of Assault in the Third Degree. CP 39-49. On November 15, 2011, the trial court entered Findings of Fact and Conclusions of Law Regarding Exceptional Sentence, which in pertinent part, stated, “Based upon the finding of the jury that the defendant acted with deliberate cruelty in committing the acts

of which he was convicted, and the court finding that such a finding was appropriate, the court concludes that an exceptional sentence upward is appropriate and best serves the interests of justice.” CP 55. A timely notice of appeal of the exceptional sentence was filed by Appellant on October 20, 2011. CP 53-54.

#### **IV. SUMMARY OF THE ARGUMENT**

Washington law requires that when a trial court sentences a defendant to an exceptional sentence, the court must provide written Findings of Fact and Conclusions of Law which include “substantial and compelling” reasons for imposing such a sentence. The trial court erred by failing to offer “substantial and compelling” reasons to justify the imposition of an exceptional sentence against Appellant. In addition, it deprived Appellant of his right to have the exceptional sentence adequately reviewed by this Court. As a result, this Court is respectfully requested to reverse the trial court’s imposition of an exceptional sentence against Appellant and remand the case back to the trial court for resentencing.

## V. ARGUMENT

### A. Standard Of Review.

Appellate review of a sentence outside the range is governed by RCW 9.94A.585(4). Under that statute, the appellate court is to engage in a three-part analysis. First, the court must determine if the record supports the reasons given by the sentencing court for imposing an exceptional sentence. *State v. Nordby*, 106 Wn.2d 514, 517-18, 723 P.2d 1117 (1986). As this is a factual inquiry, the trial court's reasons will be upheld unless they are clearly erroneous. *Id.* at 517-18. The appellate court must next determine, as a matter of law, whether the reasons given justify the imposition of an exceptional sentence. *Id.* at 518. The sentencing court's reasons must be "substantial and compelling." RCW 9.94A.120. Finally, the court is to examine whether the sentence is clearly excessive or clearly lenient under the "abuse of discretion" standard. RCW 9.94A.210(4); *State v. Jeannotte*, 133 Wn.2d 847, 855-56, 947 P.2d 1192 (1997) (citing *State v. Allert*, 117 Wn.2d 156, 163, 815 P.2d 752 (1991)).

As the crux of Appellant's argument focuses on whether the reasons given by the trial court for the exceptional sentence, as a matter of law,

justify the imposition of an exceptional sentence, the standard of review in this case is primarily *de novo*.

**B. Legal Argument.**

**1. The Trial Court Failed to Include Sufficient “Substantial and Compelling” Reasons Within Its Findings of Fact and Conclusions of Law Which Are Required to Justify an Exceptional Sentence.**

An exceptional sentence may be imposed if the trial court finds there are “substantial and compelling” reasons to go outside the standard range. RCW 9.94A.535. If an exceptional sentence is imposed, the trial court must enter written findings of facts and conclusions of law. Id.

Review of an exceptional sentence is governed by well-settled statutory and case law standards. To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or *that those reasons do not justify a sentence outside the standard range for that offense*, or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4) (*emphasis added*). Specific “substantial and compelling” justification for the exceptional sentence must be provided by the trial court to withstand appellate review. “Without comprehensive, specific

written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts.” *State v. Greco*, 57 Wn.App. 196, 204, 787 P.2d 940 (1990). Where the findings of fact are insufficient to support the trial court's ultimate decision remand for proper findings and conclusions is required. *State v. Head*, 136 Wn.2d 619, 620-21, 964 P.2d 1187 (1998). Regardless of whether an aggravated factor is found by the jury, the trial court must still “make a judgment that [the facts] present a *compelling ground* for departure from the standard sentence. *Blakely v. Washington*, 542 U.S. 296, 309, 124 S.Ct. 2531, 2541 (2004) (*emphasis added*).

In this case, the jury found Appellant guilty of Assault in the Third Degree and that, by special verdict, he committed the crime with deliberate cruelty, a recognized aggravating factor under RCW 9.94A.535(3)(a). Admittedly, per RCW 9.94A.537, if a jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, “the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are

*substantial and compelling reasons* justifying an exceptional sentence.  
RCW 9.94A.537(6) (*emphasis added*).

The trial court's Findings of Facts and Conclusions of Law provide no "substantial and compelling" reasons for imposition of the exceptional sentence beyond stating that a finding of deliberate cruelty was made by the jury and that "such a finding was appropriate." CP 55. The trial court provides no other reasons or justifications that can even be reviewed by this Court to determine if they are "substantial and compelling." The one sentence Conclusions of Law offered by the trial court is wholly lacking the required comprehensive, specific findings required to justify the exceptional sentence, let alone withstand appellate review.

In addition, at the sentencing hearing held on September 30, 2011, the trial court acknowledged that written Findings of Fact and Conclusions of Law are required for the imposition of an exceptional sentence and goes as far as instructing the prosecutor, who stated that she would be drafting the document, that certain specific facts need to be in the document to support the exceptional sentence finding (Transcript of Sentencing Hearing, p. 12, lines 1-11). Yet the Findings of Fact and Conclusions of Law entered on November 15, 2011 is devoid of any such facts.

Therefore, the exceptional sentence imposed by the trial court should be reversed.

**2. Without Proper Findings of Fact and Conclusions of Law to Support the Trial Court's Imposition of the Exceptional Sentence, There is No Way For the Appellate Court to Determine if the Sentence Was Clearly Excessive.**

While Appellant believes that the imposition of an eighteen (18) month exceptional sentence in this case is clearly excessive given all of the relevant factors, it is impossible for Appellant to argue that the imposition of the sentence was an abusive of discretion without sufficient Facts and Findings and Conclusions of Law. Appellant has been prejudiced by the trial court's omissions of the required facts relied upon by the trial court. Therefore, the exceptional sentence imposed by the trial court should be reversed.

**VI. CONCLUSION**

The trial court erred by failing to offer "substantial and compelling" reasons to justify the imposition of an exceptional sentence against Appellant. Such omission is in contradiction to well established statute and case law. In addition, it deprived Appellant of his right to have the exceptional sentence adequately reviewed by this Court. As a result, this Court is respectfully requested to reverse the trial court's imposition of an

exceptional sentence against Appellant and remand the case back to the trial court for resentencing.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2012.

EWING ANDERSON, P.S.

By:   
NOEL J. PITNER, WSBA 36158  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 11<sup>th</sup> day of May, 2012, a true and correct copy of the foregoing document was served on the following in the manner set forth herein by agreement of the parties:

Megan Whitmire	<input type="checkbox"/>	U.S. Mail
Benton County Prosecuting Attorney	<input type="checkbox"/>	Hand Delivery
7122 West Okanogan, Bldg A	<input type="checkbox"/>	Overnight Courier
Kennewick, WA 99336	<input type="checkbox"/>	Fax
prosecuting@co.benton.wa.us	<input checked="" type="checkbox"/>	E-Mail

  
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Shelly Gleason, Paralegal