

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 AMENDED OPENING BRIEF

Submitted by:

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ORIGINAL

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INTRODUCTION

Eric Waldenberg was convicted of Second Degree Burglary on April 8, 2011. Because he had committed a series of Burglaries over a period of three months in Montana in 2003, his offender score was in excess of nine, and his presumptive sentence under the Guidelines was 54 months. Mr. Waldenberg filed a motion pre-trial for entry into Drug Court. After conviction, he filed a motion for a downward departure from the sentence mandated by the guidelines, and renewed his motion for entry into Drug Court.

Judge Verser found that, if he had the power to do so, he would admit Mr. Waldenberg to Drug Court, but held that the decision of Division III in State v. DiLuzio, 121 Wash.App. 822 (Div. III, 2004) compelled him to deny the motion. Judge Verser also denied Mr. Waldenberg's motion for downward departure despite finding that the operation of the multiplier effect of RCW 9.94.889 would result in a sentence that was "manifestly unjust".

Judge Verser erred on both counts. DiLuzio cited no statutes or Washington decisional authority and found support for its authority in its interpretation of the Drug Court policy of Spokane County. Similarly, no statutory authority compelled Judge Verser to deny of Mr. Waldenberg's motion for downward departure.

ASSIGNMENTS OF ERROR

1. The court erred in holding that it did not have the power to sentence Mr. Waldenberg to Drug Court. The issues pertaining to this assignment of error are:
 - a. Does the prosecution have exclusive discretion to determine admissibility to a Drug Court?

No. Neither the Washington State Constitution nor RCW 2.28.170 place exclusive control over admissibility to Drug Court in the executive branch. Title 2 of RCW is title Courts of Record. Chapter 28 of Title 2 is titled Powers of Courts and General Provisions. It describes courts performing judicial functions. Nowhere in it does the word "prosecution" appear. Similarly, admission to and operation of the Drug Court program is governed by a contract between the defendant and the court. The executive branch is not a party to the contract, and nowhere within its provisions does the term "prosecution" appear.

- b. Did State v. DiLuzio, 121 Wn.App. 822, 90 P.3d 1181 (Div. III, 2004) compel the court in this case to deny Mr. Waldenberg admission to Drug Court?

No. The language in DiLuzio that admission to Drug Court rests exclusively with the prosecution is dicta. DiLuzio cites no Washington constitutional authority for its decision, and places primary reliance on its interpretation of the Drug Court policy of Spokane County, not Jefferson County.

2. The court erred in denying Mr. Waldenberg's motion for a downward departure from the Sentencing Guidelines. The issues pertaining to this assignment of error are:

a. Do the Sentencing Guidelines compel imposition of a sentence that is "manifestly unjust" if the injustice results from operation of the multiplier effect of RCW 9.94A.889 if the manifest injustice results from prior convictions rather than concurrent or consecutive convictions?

No. The examples of mitigating circumstances identified in RCW 9.94A.535 are illustrative only. If a sentencing judge finds that application of the Sentencing Guidelines will result in a sentence that is "manifestly unjust", he or she should not be precluded from granting a downward departure because the injustice results from prior convictions rather than consecutive or concurrent convictions.

The unjust effect of the multiplier in both instances is the same.

b. Does the "crime related rule" prevent a sentencing judge from considering the purposes stated in 9.94A.010 in deciding whether to grant a downward departure from the Sentencing Guidelines?

No. Both RCW 9.94A.535 and RCW 9.94A.535(1)(g) expressly state that the sentencing judge is to consider the purposes of the Sentencing Reform Act set forth in 9.94A.010 in deciding whether to grant a request for a downward departure from the Sentencing Guidelines.

STATEMENT OF FACTS

Mr. Waldenberg became addicted to narcotic medications at the age of 14 while being treated by a doctor in Montana for migraine headaches, which he had had from the age of 11. (VRP, 4/6/11. p. 12) He was able to conform his conduct to the law through high school and college, but remained addicted to prescription drugs.¹ (CP 64-70; 46) He married in 1997. In 2001, his marriage began to fall apart. In addition to prescription medications, he began to abuse alcohol and became addicted to gambling. His marriage ended in divorce in May of 2003. (CP 64-70; 46)

Mr. Waldenberg was arrested for burglary in Montana in October of 2003, and promptly confessed to fifteen (15) other burglaries. All were at night. All were in unoccupied businesses. (CP 46) All were for small amounts of money, and all occurred in 2003. (CP 46; 65-70) In June of 2004, noting that Mr. Waldenberg had mental health and chemical dependency issues and was addicted to narcotics, the court in Montana sentenced Mr. Waldenberg to concurrent sentences on all sixteen (16) burglaries, of twenty (20) years in prison, with fifteen (15) years suspended.

Montana paroled Mr. Waldenberg to Jefferson County on June 19, 2009. Initially, he was addiction free, but on September 2, 2009, he was injured in a motorcycle accident which required six surgeries, which revived his addiction to prescription medications. (CP 46)

On April 28, 2010, Mr. Waldenberg burgled a beauty salon in Port Hadlock. It was night, the salon was unoccupied, and the amount of money involved was small. He admitted committing the crime immediately after his arrest.

¹ Mr. Waldenberg graduated from high school in 1984 and attended the University of Montana in 1991. After college, he worked for several businesses as a sales representative.

In June of 2010, he was released on bail and entered the paralegal program at Edmonds Community College. At the time of his sentencing in this case, he had a paralegal internship, and would graduate with a paralegal degree that spring. His grades were excellent. (CP 50, 51) He attended chemical dependency classes at Cascade Recovery. (CP 46) He had attended mental health sessions at Jefferson Mental Health, and was seeing Dr. Vance Sherman, a psychiatrist in Port Townsend, weekly. (CP 47; VRP, 4/6/11, p. 11) He regularly attended AA meetings, was an active member of the Quimper Unitarian Fellowship, and has weekly counseling sessions with Bruce Bode, the QUUF pastor. (VRP 4/6/11, p 6; CP. 16, 17) Natalie Hamilton, the owner of the salon where the burglary occurred, supported Mr. Waldenberg's entry into a rehabilitation program, rather than a sentence that would involve a lengthy period of incarceration, and destroy the rehabilitation plan Mr. Waldenberg had constructed for himself. (VRP 4/6/11, pp.5, 45, 46)

Pre-trial, appellant, over the objection of the prosecution, filed a motion to permit entry into Drug Court. On February 4, 2011, the court, found that appellant was an excellent candidate for Drug Court, but held that State v. DiLuzio, 121 Wn.App. 802, compelled him to deny the motion, stating "I can't, 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, pp. 21, 22) and "I can't override the Prosecutor's decision no matter what it's based on" ... "It's more of a plea bargain alternative or a pre... I'm not sure what it is, but I wouldn't call it a sentencing alternative." (VRP 2/4/11, pp. 21, 22).

After conviction, Defendant again moved for entry into Drug Court. Judge Verser elaborated on the reason for his earlier decision, stating that Drug Court:

Would be a great thing for him, but I can't order you into Drug Court, and I'll make that a finding specifically. In State v. DiLuzio, at 121 Wn.App. 802, 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, p. 6).

Referring to DiLuzio, the court stated further:

I went back and read it, and I'd read it before because I think that argument has been made before, as well, that I can override the prosecutor. I went back and read it again and I can't. And I believe that's not even an option that I can consider. And so I'm going to say that for the record to make sure ... if there's some reason to look at it by an appellate court to tell me I was right or wrong on that. But I, I don't believe I can consider Drug Court.

(VRP, 4/6/11, pp.60-61).

Appellant also moved the court for a downward departure from the Sentencing Guidelines. Judge Verser found that there were substantial and compelling reasons justifying an exceptional sentence holding that, "the multiple offense policy of 9.94A.889 results in a clearly excessive sentence," (VRP, 4/6/11. p. 64.), but believed the law compelled him to deny the motion.

ARGUMENT

I. The court erred in holding that it did not have the power to sentence Appellant to Drug Court

As noted above, Mr. Waldenberg made a motion pretrial for entry into drug court, and made a second motion post-conviction pursuant to the relevant provisions of the

Jefferson County Drug Court policies and procedures. The standard of review on this issue is de novo. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

Although he determined that Eric Waldenberg was an ideal candidate for Drug Court, Judge Verser stated that his hands were tied by the court in State v. DiLuzio, 121 Wn.App. 822, 90 P.3d 1141, (Div. III, 2004), and denied both motions. At page 60 of his sentencing remarks, Judge Verser stated:

Alright, so when I got these memorandums, I, you know, I read all these letters, and I'm going well, this guy- this is a guy who's probably not going to commit another crime if he's under the supervision of DOC and he's really into treatment. And so I was thinking hey, drug court would be a great thing for him, but I can't order you into drug court, and I'll make that a finding specifically. In State v. DiLuzio, at 121 Wn.App. 822, the 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.

At the bottom of page 60, Judge Verser continued:

I went back and read it again (DiLuzio) and I can't. And I believe that's not even an option that I can consider. And so I'm going to say that for the record to make sure that if there's some reason to look at it by an appellate court to tell me I was right or wrong on that. But I, I don't believe I can consider Drug Court.

In DiLuzio, Division Three considered an appeal from the ruling of a trial judge in Spokane County ruling that, without the prosecutor's referral, the defendant could not enter drug court. On its facts, the court in DiLuzio found that the prosecutor had denied referral to drug court on the possession and theft charges of the defendant, both because the Department of Corrections had a hold on him and he did not demonstrate he had a Spokane residence, both justifiable reasons from the drug court manual. (p. 822).

In dictum, however, the DiLuzio court stated “this whole issue on appeal is whether the prosecutor or the trial court retains the power to refer a defendant to drug court” and stated that the prosecution “retains” executive discretion to decide whether to recommend referral to drug court.²

But DiLuzio did not identify the source of the “executive discretion” that the prosecution “retains”. That “executive discretion” is not based on any finding of the state legislature. RCW 2.28.170, under the general statutory title of “Courts” says nothing whatsoever about a prosecutor having exclusive executive discretion to determine who is able to enter drug court and who is not. The word “prosecutor” does not appear in the statutory enactment.

DiLuzio cites no Washington case that supports its statement that the prosecution “retains” the executive discretion to determine who enters drug court. Instead, DiLuzio cites two cases, one from Louisiana and one from Oklahoma. In State v. Taylor, 769 So.2d 535, 537, (Louisiana 2000), the Supreme Court of Louisiana held that a defendant may not enter the Louisiana drug court program unless he is first recommended to it by the district attorney. The court based its decision on the express language of a statute regarding probation, La. Rev. Stat. 13, section 5304(b), subsection (1), which states:

b. Participation in probation programs shall be subject to the following provisions:

² DiLuzio also likened the exercise of entry into drug court by the prosecution as a form of plea bargaining, comparing it to the power of the prosecutor to decide whether to seek the death penalty. That power, however, is expressly conferred on the prosecution by statute, RCW 10.95.040(1).

(1) The district attorney may propose to the court that an individual defendant be screened for eligibility as a participant in the drug division probation program. (Emphasis not added.)

Similarly, Woodward v. Morrisey, 991 P.2d 1042, 1045, (Oklahoma 1999) (the Oklahoma case cited by DiLuzio), the Court's holding that the prosecutor could veto defendant's application to diversion was based on an Oklahoma legislative enactment, citing 10 Title 22 O.S.Supp. 1998, section 471 et. seq., which defined the drug court program. Section 471.2(b) specifically provided:

The offender must request consideration for drug court program as provided in subsection C and this section shall have approval from the district attorney before being considered for the drug court program.

Both the Louisiana and the Oklahoma courts base their decision on express statutory provisions granting the prosecutor the power to determine who would be eligible for drug court participation. DiLuzio cites no other decisional authority from any other jurisdiction in support of its ruling.

Lacking either statutory or persuasive decisional authority for its decision, DiLuzio resorted to an interpretation of the drug court "policy" of Spokane County. Spokane County did not have a formal drug court policy, but a memorandum drafted by an assistant public defender was cited by the court as expressing the practice and policy of Spokane County and reasoned that entry into drug court was a function of plea bargaining, and a contractual relationship between defendant and the prosecution, into which the court could not intervene.

Nowhere in legislation creating Drug Courts is there any evidence that the legislature intended that the prosecutor and the executive branch of government be

“gate keepers” for all county drug courts statewide. In fact, the opposite is the case. The legislative enactment that created Drug Courts, RCW 2.28.170, is titled Drug Courts. It refers to drug court in every paragraph, it says nothing about the prosecution, or “plea bargaining.” It is found in Title 2 of the RCW, which is titled Courts of Record, and Chapter 28 of Title 2, titled Powers of Courts and General Provisions. It describes establishment of a court that has special calendars or dockets nominated “drug court” that has a special calendars or dockets designed to achieve a reduction in recidivism and substance abuse among non-violent, substance abusing felony and non-felony offenders... by increasing their likelihood for successful rehabilitation through early, continuous and intense judicially supervised treatment, mandatory periodic drug testing, use of appropriate sanctions and other rehabilitative services. Nowhere in Title 2, Chapter 28, or 2.28.170 is there any reference to powers “retained by the prosecution” which require that admission to all county Drug Courts is controlled by the prosecutor.

Entry into Drug Court in Jefferson County, moreover, is gained by contract, not between the prosecutor and the defendant, but between the court and the defendant, the terms of which are set forth in a document titled “Drug Court Contract”. The preamble of the contract states: “Comes now the defendant and enters into the following Drug Court contract whereby this court and defendant agree to the following terms,” (emphasis added). The prosecution is nowhere named or identified as a party to that “contract”. The remainder of the “contract” refers to the defendant and “the court”. (CP 7). The Jefferson County Drug Court Policy also allows admission post-conviction, a time when plea bargaining is virtually non-existent. (CP 31)

Unfortunately, the trial court in DiLuzio also rejected Mr. DiLuzio's suggestion that it look, by analogy, to Schillberg v. State, 94 Wn.2d 772, 777, 61 P.2d 115 (1980). In Schillberg, the Washington Supreme Court held that the process established by RCW 10.05 for deferred prosecutions to treat an alcohol problem is essentially a sentencing alternative which occurs after a prosecutor decides to charge, and that that portion of RCW 10.05.030 which required the concurrence of the prosecuting attorney before the court could continue the arraignment and refer the defendant for a treatment evaluation was unconstitutional as an infringement of a discretionary judicial act.

Schillberg emphasized that the refusal of the prosecutor to agree to the deferral would essentially wreck "the program" the defendant had entered, and distinguished RCW 10.09.030 from similar statutes in other jurisdictions which set out in substantial detail the standards guiding the prosecutorial decision to determine the eligibility of the accused for deferred prosecution or its analogy (emphasis added), and stating:

The employment of standards to guide a prosecutor's decision minimize the possibility that the state will act arbitrarily in violation of the due process rights of defendants and where the prosecutor makes an eligibility determination based on clear standards, such a denial is subject to judicial review, the risk to a defendant is substantially reduced and the legislative purpose of deferred prosecutions will be achieved.

See also People v. Superior Court, 11 Cal. 3d 59, 520 P.2d 405 (1974).

The DiLuzio court stands alone, however, in refusing to analogize drug court prosecutions to deferred prosecutions, at least for the purpose of revocation proceedings. In State v. Drum, 143 Wn.App. 608, 613, 181 P.3d 18, (Div. 2, 2008), this court recognized a split in divisions, noting that:

Division One has held that courts may apply the principles of Chapter 10.05 RCW which governs deferred prosecutions to drug court prosecutions, ... (Division Two finding that deferred prosecution statutes apply by analogy to drug court proceedings); but see State v. DiLuzio, 121 Wn.App. 822, 830 (Division Three concluded that deferred prosecutions and drug court proceedings are not analogous).

As noted above, Eric Waldenberg is a perfect candidate for Drug Court. He is not violent. His Montana burglaries were triggered by gambling addiction and chemical dependency. The prosecution in this case has given no reason based on objective criteria for refusing to agree to Mr. Waldenberg's entry into the Drug Court program, and, after considering all of the facts and circumstances of this case, Judge Verser found that Appellant was an excellent candidate for Drug Court, but mistakenly believed that DiLuzio compelled him to deny Mr. Waldenberg's motion for entry. This court should reverse Judge Verser's denial of that motion and remand this case to the Superior Court for reconsideration of Appellant's request for entry into Drug Court.

II. The court erred in denying Appellant's motion for a downward departure from the Sentencing Guidelines.

RCW 9.94A.505 establishes guidelines which courts may follow to sentence felony offenders. The sentencing guidelines, however, allow the sentencing judge discretion to depart from the guidelines and to tailor his sentence "to the person and the crime" before him. The main thing is that the sentence be "just" and, to achieve justice, the guidelines allow a court to impose a sentence outside the standard range if it finds "substantial and compelling reasons, justifying an exceptional sentence." RCW 9.94A.535. The standard of review on this issue is de novo. State v. Law, *supra*.

RCW 9.94A.535, in pertinent part, states:

The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, if there are "substantial and compelling reasons for justifying an exceptional sentence."

The purposes of the Sentencing Reform Act of 1981 are to:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment that is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender the opportunity to improve her or himself;
- (6) Make frugal use of the state's and local government's resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

Subparagraph (1) of RCW 9.94A.535 lists "mitigating circumstances" which authorize a court to impose a sentence below the standard range. They are not exclusive. RCW 9.94A.535 states that "statutory mitigating standards are illustrative only and are not intended to be exclusive reasons for exceptional sentences." (emphasis added).

Subsection (g) of RCW 9.94A.535 enables a court to impose a sentence below the standard range if:

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 as expressed in 9.94A.010. (emphasis added)

As noted above, Judge Verser found that there were substantial and compelling reasons to justify an exceptional sentence, holding that the operation of the multiple offense policy of RCW 9.94A.589 in this case results in a "clearly excessive sentence."

RCW 9.94A.589 applies to “Consecutive or Concurrent Sentences,” but the operation of and application of the prior convictions is identical to 9.94A.535, i.e. its operation may result in a sentence that is clearly excessive. See: State v. Oxborrow, 106 Wn.2d 525, 723 P.2d 1123 (1986) and State v. Stalker, 42 Wn.App. 1, 4-5, 707 P.2d 1371 (1985).

Oxborrow and Stalker found “statutory aggravators” which enabled the sentencing judge to impose a sentence more severe than that allowed by the sentencing guidelines. But both cases stand for the proposition that the guidelines allow the sentencing judge “discretion in tailoring the sentence to the person and the crime before him” (emphasis added). Stalker at pp.4-5. Oxborrow and Stalker were decided under RCW 9.94A.390(2)(g), the predecessor of 9.94A.535(2)(g). The mirror image statute, 9.94A.535(1)(g), authorizes downward departures from the guidelines.

In State v. Sanchez, 69 Wn.App. 255, 848 P.2d 208, (Div. II, 1993), the court imposed a sentence below the guidelines, the court cited State v. Batista, 116 Wn.2d 777, 808 P.2d 1141 (1991), which involved an upward departure, stating:

Necessarily, Batista’s reasoning applies to RCW 9.94A.390(1)(g) as well as to RCW 9.94A.390(2)(g). If a sentence under RCW 9.94A.390(2)(g) is justified by effects that are egregious, it follows that a sentence under RCW 9.94A.390(1)(g) is justified by effects that are “non-existent, trivial or trifling.”

Sanchez was charged with having made three (3) sales of cocaine, which, under the Sentencing Guidelines, would have required a sentence in the standard range of 67-89 months. The trial judge, however, imposed an exceptional sentence of 36 months on each count, the sentences to run concurrently.

On appeal, the court stated that the effects of the first controlled buy were not “trivial or trifling,” but found that the effects of the operation of the multiple offense statute would result in a sentence for Sanchez that was “clearly unjust” and imposed a sentence that resulted in a downward departure (emphasis added). See also: State v. Bridges, 104 Wn.App. 98, 15 P.3d 1047, (Division III, 2001).

In this case, the standard sentencing range for second degree burglary is 30 to 90 days (RCW 9.94A.510). If Mr. Waldenberg were a first offender, his sentencing range would be 60 days, but because of his prior convictions in Montana, his offender score is nine and his standard range is 54 months.³ All of the burglaries occurred at night in unoccupied offices. All were for small amounts of money. All were motivated by Mr. Waldenberg’s gambling addiction. All occurred in a very short period of time. Mr. Waldenberg immediately confessed to sixteen (16) burglaries, which they may not have solved if he had not confessed to them. Rigid application of the Sentencing Guidelines in this case will result in a sentence that is clearly “excessive” and “unjust”, and Judge Verser so found.

A. “CRIME RELATED” RULE

Judge Verser also felt compelled by the “crime-related” rule stated in State v. Tai N. 127 Wn.App 233, 113 P.3d 19 (Div. I, 2005), to reject Appellant’s request for downward departure. Tai N. was based on State v. Law, 154 Wn.2d 85, 110 P.3d 717, (2005). In Law, the defendant, an 18 year old woman, a single mother, pleaded guilty to second degree theft. Based on her offense and past criminal history, the guidelines

³ 54 months is the standard range for the most serious crimes that can be committed, including forcible rape, first degree robbery, first degree assault, and most crimes of violence, etc.

called for a 22 to 29 month sentence. The trial court sentenced her to six months and converted four of those months to community service, basing its decision on the testimony of numerous witnesses that Law was recovering from substance abuse, that she was involved in a 12-step program and church activities, that she had a positive impact on others in recovery, and that her building and strengthening a support system would be interrupted by a lengthy prison sentence. The court also found that she was forming a strong bond with her son, who was in the foster-care system, and that she was developing a relationship with an older daughter to whom she had previously relinquished her parental rights.

The Court of Appeals reversed the trial court, and the Superior Court affirmed, stating, “We hold now, as we have consistently in the past, that SRA 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 a particular defendant, but unrelated to the crime, are not relevant under the SRA⁴.”

RCW 9.94A.535, however, does not state that the reason for exceptional sentences must related to the crime itself. The plain language of 535 requires only that the court, consider the purposes of this chapter as found in 9.94A.010. Law, moreover, did not involve an interpretation of 9.94A.535(1)(g), which explicitly directs the court to consider the sentence “in light of the purpose of this chapter as expressed in

⁴ The court acknowledged 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 ...” State v. Varga, 151 Wn.2d 179, 193, 86 P3d 139 (2004), but stated that “reliance on the purposes of the SRA, as found in RCW 9.94A.010” were insufficient justifications “for the trial court’s downward departure.” (p. 92).

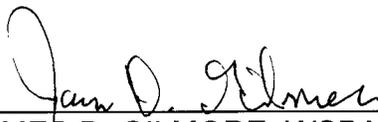
9.94A.010.” (Emphasis added.) At least four of those purposes are personal to Mr. Waldenberg in this case; i.e. protect the public (Verser found Mr. Waldenberg not likely to reoffend), offer the offender opportunity to improve himself (Mr. Waldenberg’s rehabilitation program), make frugal use of the state’s and local government’s resources (Mr. Waldenberg is funding his own rehabilitation program, working, and a contributing member of society), and promote respect for the law by providing punishment that is just (Mr. Waldenberg’s self-rehabilitation would encourage other offenders to do likewise).

In this case, all of Eric Waldenberg’s crimes were petty burglaries. To sentence him to five years in jail under the circumstances of this case would be manifestly unjust, and Judge Verser so found but erred in believing that the law stripped him of all discretion and required him to deny Mr. Waldenberg’s motion.

CONCLUSION

For the reasons stated above, and the authorities cited, Appellant requests that this court find that Judge Verser was not compelled by State v. DiLuzio to deny Mr. Waldenberg’s request to enter Drug Court, find that Judge Verser was not required by RCW 9.94A.535 to deny Mr. Waldenberg’s Motion for Downward Departure, and remand this case to the trial court for resentencing consistent with these findings.

RESPECTFULLY SUBMITTED this 3rd day of January, 2012.



JAMES D. GILMORE, WSBA # 37338
Attorney for Appellant

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

STATE OF WASHINGTON

Respondent/Plaintiff,

No: 42026-1-II
(Jefferson County Cause No. 10-1-00075-1)

v.

CERTIFICATE OF SERVICE

ERIC O. WALDENBERG

Appellant/Defendant.

IT IS HEREBY CERTIFIED that on this date, I delivered a copy of Appellant's Amended Opening Brief

to:

Jefferson County Prosecuting Attorney's Office
1820 Jefferson Street, Third Floor,
Port Townsend, Washington

by U.S. Mail, postage prepaid.

Dated this 3 day of January, 2012.



JAMES D. GILMORE, WSBA # 37338
Attorney for Appellant

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

STATE OF WASHINGTON

Respondent/Plaintiff,

v.

ERIC O. WALDENBERG

Appellant/Defendant.

No: 42026-1-II
(Jefferson County Cause No. 10-1-00075-1)

AFFIDAVIT OF SERVICE

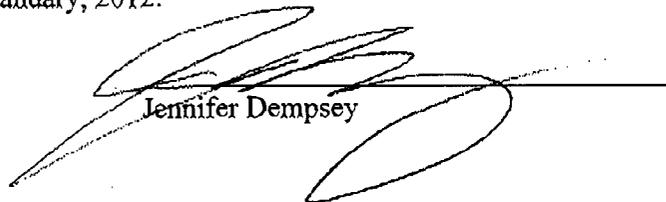
I, Jennifer Dempsey, declare as follows:

I am over 18 years of age and am not a party to this action. On this date I spoke with James Gilmore and confirmed that on the 10th day of January, 2012, Mr. Gilmore delivered a copy of Appellant's Amended Opening Brief to:

Eric Waldenberg, Appellant
210 Cameron Dr
Port Ludlow, WA 98365-9713

by U.S. Mail, postage prepaid.

Dated this 12th day of January, 2012.


Jennifer Dempsey