

NO. 45265-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT DOUG PIERCE,

Appellant.

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

The Honorable Sally F. Olsen Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court abused its discretion by refusing to consider non-statutory mitigating factors in support of an exceptional downward sentence.
2. The trial court abused its discretion by failing to exercise discretion in ruling on an exceptional sentence request.
3. The charging document was constitutionally deficient for failing to include the nature of the underlying charge in two counts of bail jumping.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion by refusing to consider non-statutory mitigating factors in support of an exceptional downward sentence?
2. Following a request for an exceptional sentence, did the trial court abuse its discretion by refusing to exercise its discretion?
3. Was the charging document constitutionally deficient for failing to include the nature of the underlying charge in two counts of bail jumping?

B. STATEMENT OF THE CASE

Pierce was charged by amended information with two counts of bail jumping, one count of theft in the third degree

and possession of methamphetamine. CP 31-57. The jury was unable to reach a verdict on the possession of methamphetamine charge. CP 66-67. The Court dismissed the third count of bail jumping. RP 355.

The final charging document charged Pierce with bail jumping as follows: Count II:

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 a requirement to report to a correctional facility for service of sentence, did fail to appear or 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 the Revised Code of Washington 9A.76.160.

CP 58-59. Count III reads as follows:

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 a requirement to report to a correctional facility for service of sentence, did fail to appear or 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 the Revised Code of Washington 9A.76.160.

CP 58-59.

Pierce missed his April 9, 2012 court date and returned to quash the warrant on April 13, 2013. RP 351. Pierce missed his August 7, 2012 court date and returned to quash the warrant on August 17, 2013. RP 352.

Regarding the first count of bail jumping, Pierce argued that after his car was stolen with his court documents he wrote down his court date as August 8, rather than the correct date of August 7. Pierce informed the court that he did not forget his court date but looked up his court date on the Washington court website to find the time of his hearing but could not find his correct court date on that website. RP 68-69.

The prosecutor explained that Pierce would argue he missed his court date due to being misled by the Washington State Court website. RP 65-66:

My understanding of his defense is that he will claim that he went on the Washington State court website, looked up his district court cause number, and that court -- that website gave him a future court date in district court. That date, if that is, in fact, the case, probably was an administrative date that the district court set to dismiss their case once Superior Court takes jurisdiction. Superior Court does not post dates on that website, and that website includes a very specific disclaimer that defendants, or anybody, cannot rely on the information on that website.

RP 65-66.

The District Court initially handled Pierce's felony cases waiting for the Superior Court to either dismiss the cases or have them bound over. RP 326-332, 348, 350. There were eighteen court dates scheduled from the inception of the case, excluding the District Court hearing dates. RP 352. The dates set forth on the court website corresponded to the court's internal process rather than to actual court appearances. RP 326.

The trial court denied Pierce's motion to present the "uncontrollable circumstances" defense to the first two counts of bail jumping if the state established that it gave Pierce notice of his court dates. RP 70, 72. The Court ruled

that Pierce's confusion about court dates was not a defense.  
RP 70-78.

The trial court denied Pierce's request for a downward exceptional sentencing ruling that Pierce had not presented statutory mitigating factors. RP22-27 (August 16, 2013). During sentencing, Pierce informed the court of reasons for missing court dates:

The issue here is a theft three and the August 7th bail jump. I wrote that date down on the calendar wrong. And as sure as the jury came and pointed back out to us that even the warrant that was written down was somebody else's name on that same date, it was a human error. It was a human error that I made just as sure as the clerk made that error. I came and quashed a warrant that wasn't even in my name.

RP 24 (August 16, 2013). During the sentencing hearing the prosecutor also informed the court of Pierce's reasons for missing court dates:

I am aware that at least on the first of the two convictions for bail jumping, Mr. Pierce has indicated -- and I think he had some proof of this -- that his vehicle in which the order that was given to him by the Court was in a vehicle that was later stolen. So, in essence, someone took his piece of paper. And he checked the Court's Web site and it gave him the date of when it was going to be dismissed in district

court. I explained that is not the date that he was supposed to be in for arraignment in superior court.

RP 9 (August 16, 2013). The trial court did not enter findings of fact and conclusion of law in support of denial of the exceptional sentence. The trial court simply ruled:

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 27 (August 16, 2013).

This timely appeal follows. CP 321.

C. ARGUMENTS

1. THE CHARGING DOCUMENT WAS CONSTITUTIONALLY DEFICIENT FOR FAILING TO LIST THE NATURE OF THE UNDERLYING CHARGE IN TWO COUNTS OF BAIL JUMPING: AN ESSENTIAL ELEMENT

An information must contain “[a]ll essential elements of a crime.” *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This enables the defendant to prepare a defense. *Kjorsvik*, 117 Wn.2d at 101-02. Whether the information is construed under a liberal construction or a strict construction standard depends on when the information is first

challenged. *Kjorsvik*, 117 Wn.2d at 103. When a charging document is challenged for the first time on appeal, it must be construed liberally. *State v. Williams*, 162 Wn.2d 177, 185, 170 P.3d 30 (2007); *Kjorsvik*, 117 Wn.2d at 105, 812 P.2d 86 (2007).

The words in the charging document are read as a whole, construed with common sense, and include facts necessarily implied. *Kjorsvik*, 117 Wn.2d at 109. In applying this liberal construction standard, the Court asks two questions: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused the lack of notice?” *Williams*, 162 Wh.2d at 185, quoting, *Kjorsvik*, 117 Wn.2d at 105–06.

Under the liberal construction, an information will be upheld on appeal, only if “an apparently missing element ... [may] be fairly implied from language within the charging document.” *Kjorsvik*, 117 Wn.2d at 104. A liberal reading however cannot cure an information that “cannot be construed to give notice of or to contain in some manner the

essential elements of a crime.” *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). This Court reviews a challenge to the adequacy of a charging document de novo. *State v. Williams*, 162 Wn.2d at 182.

In *City of Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992), the Supreme Court affirmed the principle that a citation that charged only by referring to the number of a city ordinance did not satisfy due process. *Brooke*, 119 Wn.2d at 635. Relying upon *Kjorsvik*, the Court in *Brooke*, reiterated “[w]e have repeatedly said that defendants should not have to search for the rules or regulations they are accused of violating.” *Brooke*, 119 Wn.2d at 635.

In *State v. Green*, 101 Wn.App. 885, 6 P.3d 53 (2000), the defendant was charged with bail jumping and the charging document only made reference to the municipal code section rather than naming the underlying charge. *Green*, 101 Wn.App. 890-891. This Court reversed the charges because the charging document listing the municipal code section did not provide notice of the underlying charge and under *Brooke, supra*, Green could not be made to search the code section or the file to determine

his underlying charge. *Green*, 101 Wn.App. at 101.

More recently, in *Williams*, the Supreme Court affirmed *Green*, holding that to be convicted of bail jumping, the defendant must be not only be charged with a particular underlying crime, but that crime must also be expressly named. *Williams*, 162 Wn.2d at 185<sup>1</sup>; *Green*, 101 Wn.App. 890-891. The Court in *Williams* also cited with approval this Court's decision in *State v. Pope*, 100 Wn.App. 624, 630, 999 P.2d 51 (2000) for the principle that a generic description of the underlying charge is constitutionally insufficient because it does not allow the accused to plan a defense. *Williams*, 162 Wn.2d at 185; *Pope*, 100 Wn.App. at 329-330 (charging document insufficient where the information merely stated that the defendant failed to appear “regarding a felony matter”).

Pierce's case, like these cases suffers the same charging document deficiencies because the bail jumping counts did not identify the underlying crimes, but rather made inadequate reference to the underlying cause number, which the Supreme Court in *Williams* held unconstitutional.

*Williams*, 162 Wn.2d at 185. The error here is not harmless because a harmless error analysis is never applicable to the omission of an essential element of the crime in the “to convict” instruction. *Pope*, 100 Wn.App. at 630. Here, the lack of a constitutionally sufficient charging document requires this Court reverse the charges of bail jumping and dismiss without prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER NON-STATUTORY FACTORS IN SUPPORT OF AN EXCEPTIONAL DOWNWARD SENTENCE.

The legislature is responsible for determining the legal punishments for criminal offenses. *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). Generally, a court must impose a sentence within the standard sentence range established by the SRA for the offense. *State v. Ha'mim*, 132 Wn.2d 834, 839, 940 P. 2d 633 (1997) (citing former RCW 9.94A.120(1) (1993)).

The appellate court analyzes the appropriateness of

an exceptional sentence by considering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.

2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.

3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

*State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005), quoting *Ha'mim*, 132 Wn.2d at 840.

Under RCW 9.94A.535, the legislature has authorized trial courts to impose an exceptional sentence if they find “substantial and compelling” reasons to go outside the standard range. RCW 9.94A.535. RCW 9.94A.535(1) “sets forth **nonexclusive ‘illustrative’ factors** which the court may consider in exercising its discretion to impose an exceptional sentence.” (Emphasis added) *Law*, 154 Wn.2d at 93.

The key requirement for both statutory and non-statutory mitigating factors requires that the factors must be considered “substantial and compelling”. *Law*, 154 Wn.2d at 93; *Ha'mim*, 132 Wn. 2d at 840.

In determining whether a factor legally supports a downward departure from the standard sentence range, the appellate Court conducts a two-part analysis: first, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range; and second, the mitigating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Law*, 154 Wn.2d at 95; *Ha'mim*, 132 Wn. 2d at 840.

The first part of the analysis considers the following seven Legislative purposes for imposing standard range sentences.

- (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 which is just;

- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

In *State v. Garcia*, 162 Wn.App. 678, 256 P.3d 379 (2011). the Court of Appeals affirmed an exceptional downward sentence based on the defendant's transportation difficulties which prevented him from complying with his sex offender registration reporting requirements. *Garcia*, 162 Wn.App. at 686-688. The Court considered the transportation difficulties "external forces" and Garcia's attempts to register "substantial and compelling" grounds in support of the exceptional sentence that were not considered by the legislature in determining standard *Garcia*, 162 Wn.App at 685.

For the second prong of the *Ha'mim*, analysis, the

Court distinguished Garcia's crime from other crimes under RCW 9A.44.130 because the trial court's mitigating factors were factors related to the elements of the crime, and Mr. Garcia's violation of RCW 9A.44.130 did not relate to a failure to disclose his residence or whether local authorities were aware of his presence in their jurisdiction. *Garcia*, 162 Wn.App. at 685. The mitigating factors related to an element of the crime, rather than to "personal conditions" such as Garcia's family and drug dependency, which were rejected as invalid mitigating factors. *Garcia*, 162 Wn.App. at 686-687.

Here, even though the trial court did not explain its denial of the request for an exceptional sentence, it is critical to analyze the elements of bail jumping to understand that the reason Pierce missed his court dates were related to the elements of bail jumping:

(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 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.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.170.

Pierce informed the trial court during the hearing to quash his April 9, 2013 court date and during the sentencing hearing, that his car had been stolen with his court documents, the same day he received those return court dates. RP 4, 9, 15, 19. Pierce unsuccessfully tried to obtain his court dates by searching the internet and the Washington State Court website. RP 9, 18, 21, 22.

Pierce's difficulties like Garcia's were "external forces", here related to the affirmative defense of "uncontrollable circumstances". Specifically, Pierce presented mitigating evidence during the sentencing hearing

of the “external forces” that impacted his ability to attend court: the stolen car- a scenario that Pierce did not create. RP 406; RP 9, 15, 18, 19, 21-24.

Pierce returned to court soon after missing his court dates to quash his April 9, 2013 warrant on April 13, 2013 and his August 7, 2013 warrant on August 17, 2013. RP 351, 352. While the Court did not allow Pierce to argue “uncontrollable circumstances” this did not prevent the trial court from considering the evidence in mitigation of an exceptional downward sentence. *Garcia*, 162 Wn.App at 685.

Pierce’s case is analogous to *Garcia*, in that Pierce’s inability to report was not due to an attempt to evade responsibility but rather due to a constellation of difficulties stemming from the external force of his car being stolen and an unsuccessful attempt to find his correct court dates on the court website. RP 4, 9, 15, 19; RP 9, 24, 27 (August 16, 2013).The Court here like the Court in *Garcia* should recognize that Pierce like *Garcia*, presented sufficient mitigation evidence to support an exceptional downward sentence. *Garcia*, 162 Wn.App at 685.

a. The Trial Court Abused its Discretion By Failing to Exercise Discretion.

The trial court's refusal to consider an exceptional sentence was an abuse of discretion. Where a defendant requests an exceptional sentence below the standard range, "review is limited to circumstances where the court refuses to exercise discretion at all or relies 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).

"While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Thus, "[t]he failure to consider an exceptional sentence is reversible error." *Grayson*, 154 Wn.2d at 342. Similarly, "[a] trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand." *State v.*

*Bunker*, 144 Wn.App. 407, 421, 183 P.3d 1086 (2008), *aff'd*, 169 Wn.2d 571, 283 P.3d 487 (2010).

Here, the trial court erroneously believed that it could not consider non-statutory mitigating factors to impose an exceptional downward sentence. RP 27 (August 16, 2013). This misunderstanding resulted in a failure to exercise discretion which is an abuse of discretion requiring remand for consideration of an exceptional sentence. *Grayson*, 154 Wn.2d at 342; *Bunker*, 144 Wn.App. at 421.

D. CONCLUSION

Robert Pierce respectfully requests this Court dismiss the bail jumping charges without prejudice based on an insufficient charging document that violated his due process right to notice of the charges and remand for reconsideration of non-statutory mitigating factors in support and an exceptional downward sentence.

DATED this 21st day of January 2014

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

*Lise Ellner*

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I, Lise Ellner, a person over the age of 18 years of age, served Kitsap County Prosecutor Appeals Department [kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us) and Robert Pierce DOC# 818008 Washington Corrections Center P. O. Box 900 Shelton, WA 98584, a true copy of the document to which this certificate is affixed, On January 22, 2014 Service was electronically.

*Lise Ellner*

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Signature

# ELLNER LAW OFFICE

**January 31, 2014 - 5:42 PM**

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### Comments:

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