

66603-7

66603-7

NO. 66603-7-1

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS PEPPERELL,

Appellant.

---

---

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUN 30 PM 3:56

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

The Honorable Larry E. McKeeman, Judge

---

---

BRIEF OF APPELLANT

---

---

DANA M. LIND  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	17
THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING PEPPERELL BECAUSE IT ERRONEOUSLY BELIEVED IT HAD NO DISCRETION TO DEPART FROM THE STANDARD RANGE.....	17
D. <u>CONCLUSION</u> .....	23

**TABLE OF AUTHORITIES**

	Page
<b><u>WASHINGTON CASES</u></b>	
<b><u>State v. Batista</u></b> 116 Wn.2d 777, 808 P.2d 1141 (1991) .....	19, 20
<b><u>State v. Bunker</u></b> 144 Wn. App. 407, 183 P.3d 1086 (2008) .....	22
<b><u>State v. Garcia-Martinez</u></b> 88 Wn. App. 322, 944 P.2d 1104 (1997) .....	22
<b><u>State v. Grayson</u></b> 154 Wn.2d 333, 111 P.3d 1183 (2005) .....	22
<b><u>State v. Sanchez</u></b> 69 Wn. App. 255, 848 P.2d 208 .....	15, 18, 19, 20, 21
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RCW 9.94A.010 .....	18
RCW 9.94A.535 .....	17, 18, 21, 22
RCW 9.94A.589 .....	11, 18, 19, 21, 22
Sentencing Reform Act .....	11, 12, 14, 16, 17

A. ASSIGNMENT OF ERROR

The trial court abused its discretion in sentencing appellant, because it erroneously believed it did not have authority to depart downward from the standard range.

Issue Pertaining to Assignment of Error

Where the evidence showed the effects of appellant's second bail jumping offense were nonexistent, trivial or trifling, did the trial court abuse its discretion in concluding there was no basis to depart from the standard range, other than a general dissatisfaction with it?

B. STATEMENT OF THE CASE<sup>1</sup>

Nicholas Pepperell is appealing the judgment and sentence entered following his conviction for bail jumping; the charge was based on his purported failure to report to serve his commitment for a prior bail jumping conviction. CP 1-23, 65-67. At Pepperell's jury trial on the current offense, the dispute centered on Pepperell's knowledge of the report date for the prior offense: whether he knew it was September 17, 2010, as the state alleged; or whether he mistakenly believed it was September 24, 2010, as the defense

---

<sup>1</sup> This brief refers to the transcripts as follows: RP – jury trial on January 10-11, 2011; and 1RP – sentencing on January 18, 2011.

alleged. CP 65-67; CP 59-61; RP 186. In other words, the dispute centered over a matter of one week. RP 186-187.

Pepperell was sentenced on the prior offense on September 9, 2010. CP 54, 65-66; RP 13, 16-17. Pepperell pled guilty to the charge pursuant to a plea agreement. Ex 1, p. 1-2, 4; RP 123. At the sentencing hearing, Pepperell's attorney Donald Wackerman sought a report date that would allow Pepperell to complete a work crew obligation in King County:

The one thing we would ask the Court is: Mr. Pepperell has also been resolving a matter in King County. On that matter he was given a sentence of work crew. He has a final five days on that work crew sentence which are scheduled to be completed between Monday and Friday of next week. We would ask to either let him report in the evening on next Friday or Saturday, but to allow him to complete this so he can close out his King County case and then only have this matter to deal with when he goes to DOC rather than face a warrant on that for not completing his work crew.

Ex 1, p. 2-3. Defense counsel concluded this request between 4:20:42 and 4:20:59, according to the transcript of proceedings.

After hearing from the prosecutor, again from defense counsel and also from Pepperell, at 4:23:13, the court had further questions of defense counsel, but ultimately granted the request for a report date as follows:

THE COURT: Okay. I think, given that he's been reporting, I'm sensitive to Mr. Wackerman's concerns. I'll set a report date out. I'll follow the recommendation for a commitment of 12 months and a day. I'll impose a \$500 crime victim penalty assessment, \$100 DNA fee, both of which are mandatory. I've signed the order of restitution for \$409.84. I will agree that to a late report – Mr. Wackerman, do you have a date for him to report?

MR. WACKERMAN: When do you finish your time?

THE DEFENDANT: Friday.

MR. WACKERMAN: What time?

THE DEFENDANT: Usually 3:30.

MR. WACKERMAN: If the Court gives him until 7 o'clock here, he can get up from King County and turn himself in on Friday.

THE COURT: Okay. That will be so ordered.

Ex 1, at p. 4-5, ending at 4:24:04.<sup>2</sup>

At Pepperell's trial for the current offense, Heidi Percy, judicial operations manager for the Snohomish County Clerk's Office, examined the minute entry for Pepperell's September 9, 2010 sentencing hearing. RP 41. It was prepared by courtroom clerk Debbie Horner, who also testified. RP 46; see infra.

---

<sup>2</sup> A transcript of the hearing was read to the jury at Pepperell's trial for the current bail jumping offense.

According to the minute entry, Pepperell was sentenced to 12 months plus one day to begin on September 17, 2010, at 7:00 p.m. RP 46; see also RP 88. According to Percy, who supervises the clerks for Snohomish County Superior Court, the clerk typically records what is said in open court onto the minute entry. RP 39, 47. But Percy indicated that if she were clerking on the date she testified (January 10, 2011), and the court ordered something to happen the following day, but did not indicate the specific date, she would record that the order was to be carried out January 11, 2011. RP 48. Percy explained: "Because knowing that today is the 10<sup>th</sup> and tomorrow is the 11<sup>th</sup>, that's what we would put in our – we would put a specific date as opposed to 'tomorrow.'" RP 48.

Horner, who prepared the minute entry, had no recollection of the hearing itself. RP 85, 90. However, she testified that because the hearing occurred at 2:00 p.m., it was either a Thursday or Friday, as that is when Snohomish County conducts sentencing hearings. RP 81. When shown a calendar, Horner confirmed the hearing appeared to have been on a Thursday. RP 81-82.

Although Horner did not recollect the hearing, she testified similarly to Percy in that she would have recorded a specific date as the date an order was to be carried out, as opposed to a more

ambiguous unit of time, such as “tomorrow.” RP 86. While Horner did not recall attempting to clarify the report date she recorded for the September 9 minute entry, she acknowledged she could have looked at the temporary order of commitment, described infra, to clarify the date, if she had been confused. RP 87-88, 93.

Judicial operations manager Percy also examined the judgment and sentence for Pepperell’s prior bail jumping offense, signed and dated by the judge and parties – including the defendant – on September 9, 2010, although it was date-stamped September 10. RP 49-50, 53-54. Significantly, the document did not indicate a report date. RP 52. On the document, was a paragraph or line stating: “Confinement shall commence immediately unless otherwise set forth here.” RP 52. Percy testified that portion of the judgment and sentence was left blank. RP 52, 71.

According to Percy, a judgment and sentence does not include carbon copies, and a defendant typically would not receive a copy at the time of sentencing, unless he or she requested one at the end of the hearing. RP 58-59. Generally, the prosecutor takes the original back to his or her office to make copies, and his or her secretary would then file a copy with the Clerk’s Office the next day.

RP 50. Nevertheless, Percy acknowledged the judgment and sentence is an important document that defense counsel typically goes over with his or her client right after judgment is pronounced.

RP 70.

Finally, Percy examined the temporary order of commitment for Pepperell's prior offense. She explained the document is important because: "when the defendant reports to jail, he has some kind of paperwork that says that he was sentenced to some kind of jail time."<sup>3</sup> RP 74. According to Percy, there are blank lines on the temporary order of commitment that are usually filled in by the prosecutor or defense attorney. RP 56. In the handwritten portion of Pepperell's temporary order, someone checked a box marked "other" and wrote "to report to Snohomish County Jail on 9/17/2010 at 7:00 p.m." RP 57. The document was not signed by Pepperell or his attorney, however, only the judge. RP 57.

Percy testified the temporary order of commitment consists of the original form plus 3 carbon copies. RP 57. The courtroom clerk would keep the original and provide copies to the attorneys.<sup>4</sup>

---

<sup>3</sup> Horner concurred. RP 87.

<sup>4</sup> Horner testified the "original is white, and then there's a pink copy that typically goes to the prosecutor, and there's a canary copy and a goldenrod copy that usually goes tot the defendant." RP 89. Horner clarified, "I believe the yellow,

RP 58. Percy assumed it was defense counsel's responsibility to provide a copy to the defendant. In any event, it was not the clerk's. RP 58; see also RP 90, 95. Percy acknowledged that sometimes paperwork is left behind in the courtroom. RP 75.

Snohomish County jail records manager Patricia Pendry testified the jail received from the court a copy of the temporary order of commitment for Pepperell's prior bail jumping offense. RP 98-99. Staff put it in the "ticket file" for September 17, the date Pepperell was to report. RP 101. On September 17, it was provided to the jail receptionist, "because everyone who comes to report for commitment reports to the receptionist first." RP 102. Pendry explained that when an individual fails to report by the end of the day, the jail receptionist forwards his or her information to administrators, such as Pendry, "for final signing off that they failed to report." RP 104. Pendry did so in Pepperell's case on September 20.<sup>5</sup> RP 104.

The court issued a warrant as a result. RP 59. Deputy Ron Doersch learned of Pepperell's warrant on September 23, 2010,

---

the canary copy, would be – I might have this backward – but for the defendant, and the goldenrod might be for the jail." RP 89.

<sup>5</sup> Because Pepperell's report date was Friday evening, Pendry did not sign the failure to report notice until the following Monday. RP 105, 116.

and went to the home Pepperell shared with his mother to arrest him.<sup>6</sup> RP 21-22.

Doersch testified that upon knocking and announcing at the front of the house and receiving no response, he went around back, saw a window open and decided to go in. RP 28, 34. Doersch did not hear “any shuffling around” or anyone “panicked, trying to open windows or escape from the house” before deciding to enter. RP 35-36. When Doersch began climbing in, he could see a tall, young man inside. The young man was in his “skivvies”<sup>7</sup> and said, “I’m here. I’m right here.” RP 29, 36. Doersch asked the young man to come closer and took him into custody. RP 30. According to Doersch, it was Pepperell, who said, “You know me. I’m not going to run from you. I’m Nick Pepperell.” RP 30.

Doersch reportedly told Pepperell he was under arrest for bail jumping. RP 30. According to Doersch, Pepperell said he was aware he had a warrant. RP 31. Although Doersch was uncertain of Pepperell’s exact words, Doersch testified Pepperell said “he was blaming his attorney, Donald Wackerman, I think is what he

---

<sup>6</sup> This was the same address Pepperell listed on the judgment and sentence for his prior bail jumping. RP 21, 72, 121.

<sup>7</sup> Doersch agreed Pepperell’s attire was consistent with someone who had been in bed. RP 36.

said, for the existence of a warrant and for not being in touch with him or not taking care of that.” RP 31.

At his trial on the current offense, Pepperell testified he thought his report date was “the second Friday,” September 24, because “it would give [him] enough time to finish [his] work crew.” RP 125. On cross-examination by the prosecutor, Pepperell acknowledged stating at the September 9 hearing that he had five days of work crew remaining. RP 136. However, Pepperell indicated work crew does not necessarily go out on consecutive days:

Q Do you agree that if the sentencing is being held on September 9<sup>th</sup> – and let’s assume for the sake of argument that that was a Thursday – that Monday through Friday of next week would have you completing your five days of work crew on September 17<sup>th</sup>?

A If weather would have allowed it. RP 137.

...

Q Okay. But weather concerns notwithstanding, what was represented here at the sentencing was the five days will be completed between Monday and Friday of next week.

A I remember the Judge making it clear that he saw that it was important that it was completed before I turned myself in for my sentence.

RP 138.

Pepperell explained that weather concerns had interrupted his days on work crew, prior to the September 9 hearing. RP 138. And the week following the September 9 hearing, weather concerns interrupted his remaining days on work crew. RP 144-145. That was why he thought he had a warrant; because he did not finish work crew "in the time that they thought I could finish it." RP 144. As Pepperell explained: "the way it works is they give you, you know, at date to finish all your work days. And if it's not completed, then they call you in for a review hearing." RP 144.

Although the temporary order of commitment indicated his report date as September 17, Pepperell did not recall receiving a copy of the order. RP 126. Whether he initially received it, he left court that day without any paperwork. RP 140. Before leaving, Pepperell's attorney asked if he wanted to receive his "judgment and sentence paperwork." RP 140. Pepperell said yes, and "just kind of assumed that everything was going to be put in an envelope that I needed." RP 140. Pepperell testified he later received a copy of the judgment and sentence in the mail at his mother's house. RP 126.

Pepperell testified that between September 9 and September 23, the morning of his arrest, he went about his

business, making no attempt to hide. RP 127. He was sleeping in bed when deputy Doersch decided to climb in through the window. RP 129-30. That was the first Pepperell realized of the officer's presence. RP 130.

When Doersch asked if he knew he had a warrant, Pepperell figured he did, but thought it was for work crew. RP 131. He was surprised to learn it was for bail jumping. RP 131. He had intended to turn himself in the following day. RP 131. Pepperell's comment about his defense attorney was in relation to pleading guilty to the prior bail jumping offense in the first place. RP 133.

As indicated above, the jury ultimately sided with the state. CP 38. In advance of sentencing, the defense moved for an exceptional sentence below the standard range on grounds that operation of the multiple offense policy of RCW 9.94A.589 resulted in a presumptive sentence that was clearly excessive in light of the purposes of the Sentencing Reform Act (SRA). CP 24-25. Specifically, by operation of RCW 9.94A.589(2)(a),<sup>8</sup> the sentence for the current offense would run consecutively to the prior bail

---

<sup>8</sup> That statute provides:

Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another

similar offenses. As counsel argued, “[I]t is fairly unusual for a person to actually be charged and convicted of bail jumping in Snohomish County, despite the fact that people fail to appear for scheduled court dates on a regular basis.” CP 26. As counsel explained, “it is much more common practice for the State to agree not to file bail jumping in exchange for plea to the underlying offense.” CP 26.

Fourth and fifth, the presumptive sentence would neither protect the public, as the offenses were non-violent, victimless crimes, nor offer Pepperell an opportunity to improve himself, as the offenses are classified much like escape charges. CP 26. As a result, Pepperell would serve most of his sentence in closed custody without the benefit of any rehabilitating programs. CP 27.

Finally, the presumptive sentence would not reduce the risk of reoffense, as the undisputed testimony was that Pepperell was a recovering addict who had gone through treatment and stopped using illegal drugs. CP 27; see RP 122-23. As defense counsel urged, an 18-month concurrent sentence (resulting in an additional 6 month sentence) would be sufficient to send the message that Pepperell “needs to be more diligent and responsible when it comes to his legal commitments.” CP 27.

In response, the state argued in favor of a standard range 18-month, consecutive sentence. Supp. CP \_\_ (sub. no. 41, State's Sentencing Recommendation, 1/18/11). According to the state, this recommendation took into account many of the mitigating factors addressed by the defense:

This sentence recommendation is close to the low end of the standard range, in recognition that the Defendant's fugitive status did not last very long and he did not put up a fight when he was apprehended. The State also considered the jury's empathetic response to the Defendant in presenting this low-end recommendation.

Id. at 2.

Responding to the request for an exceptional, the state alleged there was no factual record to support the defense's conclusions regarding the purposes of the SRA. The state also alleged that imposition of an exceptional sentence would result in an increase in bail jumping jury trials in the future. Finally, the state alleged that even if Pepperell was confused at to his report date, "this still portrays a Defendant with a woefully flawed perception of how he is supposed to conduct himself in the criminal justice system." Supp. CP \_\_ (sub. no. 41, State's Sentencing Recommendation, 1/18/11).

In reply, the defense asserted an exceptional sentence below the standard range was also appropriate because the effects of Pepperell's second conviction were "nonexistent, trivial or trifling," as defined in State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993). CP 33. As urged by the defense, "Mr. Pepperell's failing to report to the jail and maintaining his current residence for six days does little to justify the multiple offense policy." CP 34.

At sentencing, the defense maintained the court had discretion to impose an exceptional sentence, on grounds the effects of the second bail jumping offense were nonexistent or trifling. 1RP 5-6. But defense counsel also noted that many of the jurors convicted – not based on finding Pepperell did in fact have knowledge of his report date, but because they found *he should have known*:

In speaking with the jury afterwards, I think at least some of them made it clear that they were not necessarily finding that he did have knowledge but rather he should have had knowledge, that a reasonable person would have had knowledge, and therefore, they inferred that he did, in fact, have knowledge of this missed date.

1RP 6.

As an aside, defense counsel noted is that:

effectively every time that, under the way the law is currently written, effectively every time that someone is convicted of bail jumping in the same manner that Mr. Pepperell was convicted of bail jumping, which is missing his commitment date, that would require an additional consecutive sentence, and I don't think that was necessarily taken into account by the Legislature when they wrote that statute.

1RP 6-7.

Apparently focusing on defense counsel's final note, the court concluded there was no basis to impose an exceptional sentence, other than a general disagreement with the standard range:

Well, certainly a strong case can be made for the fact that the sentence called for here by the standard range is harsher than it should be, but the Court, under the SRA, is restricted to the legislative determination on that unless there are particular facts that are of individual concern to this particular case rather than some general disagreement with the policy decision that in all such cases the sentences should run consecutively. So I don't believe that any of the cases there were cited are directly helpful here.

I really can't think of anything particular to the facts of this case or this defendant that would justify an exceptional sentence. I think the only way you get there is by general disagreement with the legislative determination, and I'm not authorized to give a lesser sentence as a result of that.

1RP 10.

The court therefore imposed the low end of the range – 17 months – to run consecutively to the previously imposed sentence. 1RP 10. This appeal timely follows.

C. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING PEPPERELL BECAUSE IT ERRONEOUSLY BELIEVED IT HAD NO DISCRETION TO DEPART FROM THE STANDARD RANGE.

The trial court erroneously believed it had no discretion to depart from the standard range. Not only did operation of the multiple offense policy (requiring consecutive sentences) result in a presumptive sentence that was clearly excessive in light of the purposes of the SRA – as set forth in detail by defense counsel – but the effects of Pepperell’s second conviction were “nonexistent, trivial and trifling” as defense counsel also set forth. This Court should therefore reverse and remand for resentencing.

By statute, the court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of the Sentencing Reform Act, there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. The Legislature has provided a list of circumstances the court may rely on to impose an exceptional sentence below the

standard range. RCW 9.94A.535(1). One such circumstance is that “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.” RCW 9.94A.535(1)(g).

As defense counsel reported to the court, Division Two upheld application of this mitigating circumstance to impose a an exceptional sentence below the standard range in State v. Sanchez, 69 Wn. App. at 262. There, the police used an informant to set up three controlled buys with Sanchez on separate days within a short period of time, each buy involving only a small amount of drugs. Sanchez, 69 Wn. App. 256-57.

Although Sanchez had no criminal history, by operation of RCW 9.94A.589(1)(a),<sup>9</sup> he had six current offense points and a standard range of 67-89 months. Sanchez, 69 Wn. App. at 257. The court imposed exceptional sentences on each count, to run concurrently. In its written findings to support the exceptional sentence, the court noted the deliveries involved small amounts of cocaine to the same person over a brief period of time; and that the

---

<sup>9</sup> Sanchez was actually sentenced under a former version of the statute. For convenience and clarity, this brief cites the statutes as currently codified. For our purposes, the former and current codifications are the same.

police had complete control over the number of deliveries. Sanchez, at 258. The state appealed the exceptional sentence. Sanchez, at 256.

The issue before the appellate court was whether the multiple offense policy of RCW 9.94A.589 caused Sanchez's presumptive sentence to be clearly excessive. At the time, the Supreme Court had not interpreted this mitigating factor. However, it had interpreted its mirror image aggravating factor – whether operation of the multiple offense policy resulted in a sentence that was clearly too lenient. Sanchez, 69 Wn. App. at 260. In that context, the court had looked to either:

(1) “egregious effects” of defendant's multiple offenses and (2) the level of defendant's culpability resulting from the multiple offenses. Each of these factual bases must be beyond what is accounted for in presumptive sentencing, in accord with the requirement that any factor used in calculating the presumptive range may not be relied upon as an aggravating factor.

Sanchez, 69 Wn. App. at 260-61 (quoting State v. Batista, 116 Wn.2d 777, 787-88, 808 P.2d 1141 (1991)).

Applying this logic, the appellate court held that if an exceptional sentence above the standard range were justified by effects that are egregious, it follows that an exceptional sentence

below the standard range is justified by effects that are nonexistent, trivial or trifling. Sanchez, 69 Wn. App. at 261.

The court upheld the application of this mitigating factor to depart from the standard range in Sanchez's case:

In this case, the difference between the first buy, viewed alone, and all three buys, viewed cumulatively, was trivial or trifling. All three buys were initiated and controlled by the police. All three involved the same buyer, the same seller, and no one else. All three occurred inside a residence within a 9-day span of time. All three involved small amounts of drugs. The second and third buys had no apparent purpose other than to increase Sanchez's presumptive sentence. We conclude, as the sentencing court apparently did, that the second and third buys added little or nothing to the first.

Sanchez, 69 Wn. App. at 261.

As defense counsel pointed out, the circumstances of Pepperell's case are analogous to those in Sanchez. The difference between the first bail jump and the second was nonexistent, trivial or trifling. Pepperell failed to report for a period of one week. Moreover, he was not on the lam during that time, but trying to finish a King County obligation. And he was arrested peaceably in his own home where he indicated on the judgment and sentence he would be. Moreover, as indicated is a proper consideration under Batista, the level of Pepperell's culpability

resulting from the multiple offenses is less than others in the same category. Pepperell presented affirmative evidence he was confused or mistaken as to his report date. A number of jurors convicted based on the conclusion Pepperell *should have known* his report date, not that he necessarily did. That the effects of the second bail jump were trivial or trifling was expressly found by the jury as evidenced by their request the court impose less time than would ordinarily be imposed.

Pepperell recognizes that Sanchez was decided on the basis that operation of the multiple offense policy – of RCW 9.94A.589(1)(a) – resulted in a presumptive sentence that was clearly excessive. However, RCW 9.94A.535(1)(g) does not limit consideration to that provision of the multiple offense policy. Rather, it provides as a mitigating circumstance that “The operation of the multiple offense policy of RCW **9.94A.589** results in a presumptive sentence that is clearly excessive[.]” RCW 9.94A.535(1)(g) (emphasis added). There are other expressions of the multiple offense policy in 9.94A.589 than the provision at issue in Sanchez, such as the one at issue here, which provides: “(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another

felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.” This multiple offense policy provision requires a presumptive consecutive sentence whenever the individual commits a felony while under sentence for conviction of a felony. Accordingly, because there is no express limitation for consideration of the multiple offense policy of RCW 9.94A.589 (in its entirety) in 9.94A.535(1)(g), the Legislature envisioned circumstances where a presumptive consecutive sentence would be considered clearly excessive.

Accordingly, there was a valid legal basis for the court to depart from the standard range. The trial court erred in concluding otherwise. 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. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (quoting State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)). The trial court’s erroneous belief that it lacked the discretion to depart from downward from the standard range was an abuse of discretion warranting remand. Bunker, 144 Wn. App. at 421 (citing State v. Garcia-Martinez, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997)). This Court should

accordingly remand for resentencing to allow the court to exercise its discretion.

D. CONCLUSION

Because this Court failed to exercise its sentencing discretion, this Court should remand for resentencing with instructions for the court to exercise its discretion to impose an exceptional sentence.

Dated this 30<sup>th</sup> day of June, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



---

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66603-7-I
	)	
NICHOLAS PEPPERELL,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JUNE 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **MOTION FOR EXTENSION OF TIME TO FILE APPELLATE BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] NICHOLAS PEPPERELL  
DOC NO. 304835  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JUNE 2011.

x *Patrick Mayovsky*