73913-1

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May 27, 2016
Court of Appeals
Division I
State of Washington

NO. 73913-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BINH TRAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

The failure of the trial court to give JVT, the victim in this case, the great weight she was entitled to at sentencing entitles Mr. Tran to a new sentencing hearing The failure of the trial court to acknowledge JVT's recommendation and to either sentence him in accord with her recommendation or to enter written findings detailing the decision to deny Mr. Tran the opportunity to engage in the alternative sentence disposition entitles Mr. Tran to a new sentencing hearing. By relying on the erroneous finding Mr. Tran was not amenable to treatment, the trial court failed to comply with RCW 9.94A.670(4). Mr. Tran is entitled to a new sentencing hearing.

1. THE SENTENCING COURT'S FAILURE TO FOLLOW THE STATUTE IS LEGAL ERROR

a. The failure to comply with the sentencing statute requires a new sentencing hearing.

Appellate review is available for the correction of legal errors. *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Courts do not have discretion to act outside the bounds of the sentencing statute. *See State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993)). The

State's argument that a failure to comply with the sentencing statute is subject to review for abuse of discretion is without merit.

b. Requiring written findings of fact when the court imposes a sentence contrary to the victim's recommendation supports the purpose of the RCW 9.94A.670(4) and Const. art. I §35, regardless of whether or not the court grants an alternative sentence.

The State argues RCW 9.94A.670(4) does not require the trial court to enter findings whenever the court decides to impose a standard range sentence. Reply brief at 12-13. This narrow interpretation is contradicted by the plain language of RCW 9.94A.670(4). It also defeats the statutory and constitutional purposes of giving a voice to victims, discouraging victims who seek outcomes other than retribution from coming forward and cooperating with law enforcement to detect and prosecute these crimes. *See State v. Jackson*, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991), Const. art. I §35, RCW 9.94A.670.

The goal when interpreting the statute is to effect the legislature's intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015), (citing *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). The plain language of the statute is the clearest indicator of the legislative intent. *State v. Larson*, 184 Wn.2d at 848, (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). When a term is not

defined in the statute, the surrounding language helps determine the intended meaning and scope. *State v. Larson*, 184 Wn.2d at 848-49.

The term "treatment disposition" is not defined by the statute. RCW 9.94A.670, *see also* RCW 9.94A.030. "Treatment disposition" is used only three times in the statute, each time in subsection 4. RCW 9.94A.670(4). It is used twice to refer to the weight the court should give the victim's opinion on "whether the offender should receive a treatment disposition under this section." *Id*. The third time it is used to instruct the court to "enter written findings stating its reasons for imposing the treatment disposition." *Id*. Elsewhere in the statute, the language used to describe the alternative sentence is "the special sex offender sentencing alternative," or "this alternative." RCW 9.94A.670(2), (3).

The State argues "the treatment disposition" referred to in RCW 9.94A.670(4) refers only to the court imposing the alternative sentence. Reply brief at 12. The argument is unsupported by the plain language of the statute. It fails to acknowledge the treatment options provided to those serving standard sentences as they approach release or parole. Similarly, it fails to recognize that the words treatment disposition encompass a decision to not provide treatment. When the legislature

intended to limit the phrase treatment disposition to the alternative sentence, it included the limiting phrase "under this section." Furthermore, if the legislature intended for the findings to only be entered when the court imposed the alternative sentence, it could have used the unambiguous terms "special sex offender sentencing alternative," or alternative sentence.

RCW 9.94A.670(4) is correctly interpreted to require the trial court to enter the findings when the sentence imposed varies from the victim's recommendation, which serves the victim-empowering purposes of both Const. art. I, §35 and RCW 9.94A.670(4). The State's interpretation acknowledges only the voices of victims seeking retribution. This defeats the statutory purpose of encouraging victims to come forward and cooperate with law enforcement and should be rejected.

2. THE TRIAL COURT'S FINDING MR. TRAN IS NOT AMENABLE TO TREATMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

a. There was no dispute Mr. Tran was amenable to treatment.

The State argues there was a dispute concerning Dr. Glassman's conclusion Mr. Tran was amenable to treatment and the trial court was therefore called upon to determine the credibility of the conclusion.

Reply brief at 16. This argument is not supported by the record or the statutory scheme. While the prosecutor and CCO Hughes recommended against granting Mr. Tran's request for a SSOSA, they did not argue he was incapable of attending or benefitting from treatment. The prosecutor's recommendation was based on the forcible nature of the abuse combined with the defendant's denial of force. 2RP 2-6. The State did not argue Mr. Tran was not amenable to treatment and there was no dispute in the trial court.

Neither did any evidence contradict Dr. Glassman's determination Mr. Tran was amenable to treatment. Dr. Glassman reviewed the differing accounts of Mr. Tran and the victim. Dr. Glassman created the evaluation elucidating Mr. Tran's negative personality traits. Dr. Glassman's opinion Mr. Tran was amenable to treatment was formed with those facts in mind.

Furthermore, as argued in Mr. Tran's opening brief, RCW 9.94A.670(3) assigns responsibility for determining amenability to treatment to treatment providers.

Because substantial evidence supports Mr. Tran's ability to attend and benefit from treatment, this Court should find the trial court erred by finding Mr. Tran was not amenable to treatment.

b. The finding is not supported by substantial evidence.

The court found Mr. Tran was not amenable to treatment. This finding is not supported by substantial evidence. In order to find a defendant is not amenable to sexual deviancy treatment, competent professional indications are necessary. *State v. McNallie*, 123 Wn.2d 585, 591, 870 P.2d 295 (1994). *McNallie* provides examples of the sort of professional indications that would support the finding: a previous psychological evaluation finding the defendant not amenable to treatment, a therapist terminating treatment due to a current offense, commission of a sex offense during or shortly after treatment, or a prior history of failed attempts at therapy. 123 Wn.2d at 591-92. In cases without a history of treatment, finding a defendant is not amenable to treatment requires the opinion of a mental health professional that the defendant would not be amenable to treatment. *McNallie*, 123 Wn.2d at 592, (citing *State v. Pryor*, 115 Wn.2d 445, 455, 799 P.2d 244 (1990), overruled in part on other grounds by *State v. Ritchie*, 126 Wn.2d 388, 395, 894 P.2d 1308 (1995).

Mr. Tran does not have a history of failed treatment for sexual deviancy. Neither has a mental health professional offered an opinion he would not be amenable to treatment. In fact, the only mental health

professional to evaluate him, Dr. Glassman, believed Mr. Tran would be amenable to treatment. Because the evidence does not meet the standard for finding a defendant is not amenable to treatment, this court should reverse the trial court's erroneous finding.

c. The trial court reliance upon on improper factors when sentencing Mr. Tran requires a new sentencing hearing.

The trial court's failure to enter written findings of fact and to give great weight to the victim's opinion requires a new sentencing hearing. The trial court relied primarily on the erroneous finding that Mr. Tran was not amenable to treatment. Because the finding was erroneous, it was an inappropriate factor to consider in sentencing. "Where the trial court places significant weight on an inappropriate factor, it is generally necessary to remand for resentencing." *Matter of Vandervlugt*, 120 Wn.2d 427, 437, 842 P.2d 950 (1992), (citing *State v. Pryor*, 115 Wn.2d at 456). The trial court's emphasis on this erroneous finding requires remanded for resentencing.

3. CONCLUSION

The opinion of the JVT is entitled to great weight. By failing to acknowledge her recommendation Mr. Tran be given the opportunity to complete a SSOSA sentence, and relying on the erroneous finding Mr. Tran was not amenable to treatment, the trial court failed to comply

with RCW 9.94A.670(4). Mr. Tran is entitled to a new sentencing hearing.

DATED this 27th day of May 2016.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, BINH THAI TRAN, Appellant.	)))))))))	NO. 73913-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 27TH DAY OF MAY, 2016.

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