

NO. 65858-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW VOGT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

DEBORAH A. DWYER  
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COURT OF APPEALS  
DIVISION I

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A. ISSUE

1. Whether the trial court properly exercised its discretion in denying Vogt's request to be sentenced under the Parenting Sentencing Alternative.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Matthew Vogt was charged by amended information with five counts of Domestic Violence Felony Violation of a Court Order. The State alleged that, on five occasions between February 20 and March 21, 2009, Vogt violated the terms of a No Contact Order protecting his wife, April Vogt, and that at the time of these violations Matthew Vogt had at least two prior convictions for violating the provisions of similar orders. CP 1-8, 17-19.

Vogt proceeded to jury trial. At the close of the State's case, the State moved to dismiss Count 1, and the court accordingly dismissed that count. 2RP 112-13. The jury found Vogt not guilty of Counts 2, 3 and 4, and guilty of Count 5. CP 20-23, 44.

At sentencing, based on Vogt's offender score of 6 and his standard range of 41-54 months, the State recommended 54

months of confinement.<sup>1</sup> 4RP 2, 22; CP 54. Vogt asked the court to impose the Parenting Sentencing Alternative ("PSA") (RCW 9.94A.655). 4RP 4-7, 9-11, 14-16. The State opposed the PSA, based on concerns about Vogt's mental health and his amphetamine use.<sup>2</sup> 4RP 3, 11-14. The Department of Corrections ("DOC") submitted a Risk Assessment Report, in which it explicitly did *not* recommend a PSA. 4RP 11-12; Supp. CP \_\_\_\_ (sub # 107) (Appendix A).

The trial court denied Vogt's request for a PSA. 4RP 22. The court instead imposed a Drug Offender Sentencing Alternative ("DOSA"), resulting in a term of confinement of 23.75 months, followed by an equal term of community custody. 4RP 22-23; CP 56. During the period of community custody, the court ordered Vogt to complete domestic violence batterers' treatment, obtain a mental health evaluation and follow all treatment recommendations, and continue with substance abuse and alcohol treatment. 4RP 23;

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<sup>1</sup> Vogt's offender score was based on five prior convictions for forgery, and one prior conviction for unlawful issuance of checks. CP 60.

<sup>2</sup> The State also opposed a Drug Offender Sentencing Alternative, based on Vogt's felony history. 4RP 2-3.

CP 62. The court set a review hearing to monitor compliance.

4RP 24; CP 62.

## 2. SUBSTANTIVE FACTS.

At the time of trial (June 2010), Matthew and April Vogt had been married for approximately 11 years. 2RP 134. On July 30, 2008, a judge at the Kirkland Municipal Court entered a domestic violence no-contact order against Matthew Vogt, with April Vogt as the protected party. Ex. 3. The order did not contain a check-mark in the box preceding the section limiting the defendant from coming within a certain distance of certain places; however, "500 ft" was written on the blank for distance, and the restriction was explicitly applied to "residence," "school," and "workplace" by checking each relevant box. Id.

Several witnesses testified at trial to seeing Matthew Vogt during February and March 2009, at or outside the home in Bellevue where April Vogt lived with their two young sons. 2RP 25-33, 43-45, 53-60. Based on their observations, neighbors believed that Matthew Vogt was living at the house with his family. 2RP 28-29, 33, 53, 60. The witnesses were generally uncertain

about dates, and on some of the occasions about which they testified, the two Vogt adults were not seen together. Id.

Bellevue Police Detective Ellen Inman testified about her interaction with Matthew Vogt on March 30, 2009, when she arrested him for violating the no-contact order. 2RP 69, 77. Vogt told Inman that he and his wife had tried to get the no-contact order lifted, but they were not successful. 2RP 77. Vogt indicated that he understood the terms of the order, including the part that restricted him from coming within 500 feet of April's residence. 2RP 78. Vogt told Inman that he felt stupid, and wondered why he couldn't learn. 2RP 77.

The defense stipulated that, at the time of the current alleged violations, Vogt had at least two prior convictions for violating the provisions of a court order.<sup>3</sup> 2RP 110-11; Ex. 5.

Matthew Vogt testified at his trial. He acknowledged that a no-contact order prohibiting him from direct or indirect contact with his wife issued on July 30, 2008. 2RP 134. Vogt did not recall the judge telling him that he could not go within 500 feet of his wife's residence, school or workplace. 2RP 134-35. Vogt claimed that,

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<sup>3</sup> This made the current alleged violations class C felonies. RCW 26.50.110(5).

when he pled guilty to earlier violations of the order, he thought that the order would be dismissed. 2RP 143. Vogt admitted that, after January 29, 2009, he lived part-time at his parents' house and part-time at the house that his wife was renting in Bellevue. 2RP 144-45. He claimed that he thought there was not a no-contact order in effect at that time. 2RP 145.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO SENTENCE VOGT UNDER THE PARENTING SENTENCING ALTERNATIVE.

Vogt contends that the trial court refused to sentence him under the Parenting Sentencing Alternative ("PSA") because the court had concluded that this alternative was available only for women who were the sole caretakers of their children. He argues that the trial court thus refused to exercise its discretion, and that he is entitled to resentencing before a different judge.

Vogt's argument is based on a misunderstanding of the record. While the trial judge opined that he did not think that the legislature intended the PSA to apply to fathers who were not the sole custodians of their children, the sentencing decision was not

based on that opinion. The court recognized that the wholesale exclusion of such fathers from the PSA would not likely survive constitutional scrutiny. The court listened to the arguments of the parties, read the DOC risk assessment recommending against the PSA, and decided that Vogt was not an appropriate candidate for this alternative. The court properly exercised its discretion in instead sentencing Vogt to a Drug Offender Sentencing Alternative ("DOSA").

The Parenting Sentencing Alternative sets out criteria for eligibility, which include that "[t]he offender has physical custody of his or her minor child or is a legal guardian or custodian with physical custody of a child under the age of eighteen at the time of the current offense." RCW 9.94A.655(1)(e). The statute leaves the imposition of this alternative to the trial court's discretion:

If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody. The court shall consider the offender's criminal history when determining if the alternative is appropriate.

RCW 9.94A.655(4). The statute further provides that, "[t]o assist the court in making its determination, the court may order the

department [DOC] to complete either a risk assessment report or a chemical dependency screening report as provided in RCW 9.94A.500, or both reports prior to sentencing." RCW 9.94A.655(2).

The trial court from the beginning recognized that the decision whether to impose a PSA was a matter for the court's discretion, and it signaled that it did not intend to go in that direction: "I am not inclined to exercise my discretion and allow him a parenting sentencing alternative or to exercise -- and I see no basis for a downward exceptional. A DOSA I would consider . . . ." 4RP 8.

When defense counsel asked to be allowed to "finish [his] presentation regarding the family sentencing alternative," the court responded, "You may." 4RP 9. Counsel then pointed out that a DOSA would result in prison time, thus keeping Vogt away from his children, in whose care Vogt was actively involved. 4RP 10. Counsel again urged the court to impose the PSA. 4RP 11.

The State argued against the PSA. The prosecutor quoted from the DOC risk assessment: "Based on Mr. Vogt's criminal history, his current crime, his behavior exhibited during my interview, his lack of honesty when found with his wife and his

minimizing his crimes, the Department of Corrections does not recommend Mr. Vogt for [this] sentencing alternative." 4RP 11-12; Supp. CP \_\_\_\_ (sub #107) (Appendix A). The prosecutor also argued that, given Vogt's mental health issues and methamphetamine use, it was not safe for him to be with his children. 4RP 12-14; see Supp. CP \_\_\_\_ (sub #107), at p. 3 of 4 (Vogt reported using methamphetamine as recently as four months prior to sentencing, and connected his drug use to his bipolar disorder).

After hearing rebuttal argument from defense counsel (4RP 14-16), the trial court commented that "Mr. Vogt is a six-time felon for crimes of dishonesty; then he thumbs his nose at a court order telling him he cannot have contact with his wife." 4RP 16.

The court then heard from Vogt and his wife. 4RP 17-21. Matthew Vogt said that he wanted "to take care of my family and . . . to be able to be sober." 4RP 19. April Vogt told the court that her two young sons needed their father: "I think that is why this parenting sentencing alternative was -- I mean it takes two parents to raise children." 4RP 20.

The following exchange then took place between the court and defense counsel:

**Court:** Well I take no great pleasure in sentencing you, Mr. Vogt. It is my impression that the family sentencing alternative is for mothers, generally speaking, and for the sole guardian of their children, so the motion for a family sentencing alternative is denied.

**Defense Counsel:** Your Honor, if I could just clarify that there is nothing in the law that indicates that it is for a sole guardian, nor a mother.

**Court:** *I understand that, totally. If you wish to appeal my decision, you may well do that. . . . I believe it is discretionary. I have read the risk assessment. I have heard from both sides and I was just giving you -- I believe it doesn't put it to a sex because of the equal protection and due process laws of the state and the country, but I have a feeling it wasn't for this kind of case.*

4RP 22 (italics added).

This record makes it clear that the trial court understood its discretion, and understood that the PSA was not, and could not legally be, limited by gender. The court's expressed doubt that the PSA "wasn't for this kind of case" followed its reference to the arguments of the parties and the DOC risk assessment. Thus, "this kind of case" logically referred to the critical facts of Vogt's position -- his criminal history, his mental issues, and his amphetamine use -- and not, as he now argues, to the fact that he is male and was not the sole custodial parent.

A defendant is not *entitled* to a sentence under the PSA. See RCW 9.94A.655(4) (trial court must first determine that the sentencing alternative is appropriate). However, a court's *categorical refusal* to consider a sentencing alternative, or its refusal to consider it for a *class* of offenders, is effectively a failure to exercise discretion and is subject to reversal. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

In Grayson, the defendant asked for a DOSA. Id. at 336. Grayson's extensive criminal record appeared to make him a poor candidate for this sentencing alternative. Id. Nevertheless, the trial court made no mention of this in its oral ruling, stating explicitly that its "main reason for denying [the DOSA] is because of the fact that the State no longer has money available to treat people who go through a DOSA program." Id. at 337. When the prosecutor asked the court to consider other factors on the record, the court responded brusquely, "I'm not going to give a DOSA, so that's it." Id. A bare majority of the court reversed "on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate." Id. at 343.

Here, by contrast, the trial court readily acknowledged that the PSA statute did not, and legally could not, restrict the alternative to women. 4RP 22. The court twice explicitly acknowledged that the decision was a discretionary one, signaling that it was not *categorically* refusing to impose the alternative. 4RP 8, 22. Finally, the court explicitly referred to the arguments of the parties, and to the DOC risk assessment recommending *against* a PSA in this case, before concluding that the requested alternative "wasn't for this kind of case" -- thus confirming that it had "meaningfully considered" whether the alternative was appropriate for Vogt. 4RP 22.

Given these facts, Vogt's argument that the trial court did not exercise its discretion in refusing to impose a PSA, and sentencing him instead to a DOSA, should be rejected. The trial court properly exercised its discretion in sentencing Vogt.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Vogt's conviction and sentence. The State does

not object to remand of this case for the purpose of amending the judgment and sentence to reflect the dismissal of Count 1.

DATED this 16 day of May, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DEBORAH A. DWYER, WSBA #18887  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

# **APPENDIX A**

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CASE NUMBER: 09-1-01968-8 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 09-1-01968-8 SEA
vs.	)	
	)	ADDITION OF DOC RISK
MATTHEW VOGT,	)	ASSESSMENT REPORT TO TRIAL
	)	RECORD
	)	
	)	Defendant.
	)	
	)	
	)	

The parties, Senior Deputy Prosecuting Attorney Deborah A. Dwyer and Jennifer M. Winkler, attorney for Mr. Vogt, having agreed that the attached document, the Risk Assessment Report from the Department of Corrections, is properly a part of the trial court record, and the document having been inadvertently not filed in the Superior Court, the document is now being filed to correct the oversight and complete the record.

**Norm Maleng, Prosecuting Attorney**  
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STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

**RISK ASSESSMENT REPORT**

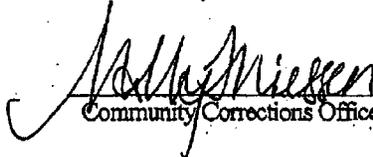
REPORT TO: The Honorable Michael Heavey  
County Superior Court  
OFFENDER NAME: Matthew Vogt  
AKA:  
CRIME: Felony Domestic Violence  
Violation of a Court Order  
DATE OF OFFENSES:  
CURRENT LOCATION: King County Jail  
HOME ADDRESS: Monroe, WA  
TELEPHONE NUMBER:

SENTENCE DATE: August 5, 2010  
DATE OF REPORT: August 2, 2010  
DOC NUMBER: 329830  
CAUSE NUMBERS: 09-1-01968-8 SEA  
COUNTY: King  
DOSA ELIGIBLE:  YES  NO  
OAA:  YES  NO  
ATTORNEY: Seth Conant  
FAX NUMBER:

*I certify or declare under penalty of perjury of the laws of the state of Washington that the following statements are true and correct to the best of my knowledge and belief based on the information available to me as of the date this report is submitted.*

Submitted By:

Approved By:

  
Community Corrections Officer  
8/2/10  
Date

Approved by phone  
8/2/10  
Date

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56; and RCW 40.14.

Distribution: ORIGINAL - Court, COPY - Prosecuting Attorney, Defense Attorney, File

Offender Information
Risk Level – Moderate

Sentence Information			
Prefix	County	Cause Number	Crime Description
	King	09-1-01968-8 SEA	Violation of Court Order

**Offender Risk/Need Summary**

**Criminal History**  
 08-1-04949-0 King Forgery (x5)  
 Unlawful Issuance of a Check or Draft over \$250  
 Domestic Violence Court Order Violation (x2)  
 Theft 3

**Education/Employment Narrative**  
 Mr. Vogt graduated from Monroe High School in 1989. He then attended Skagit County Community College between 1989 and 1991. He transferred to the University of Washington where he graduated with a degree in Economics in 1993.

After graduating from college, Mr. Vogt worked as a Medical Sales Representative. He worked for four different companies with the most recent company being Tendon Medical. He was working for them as a subcontractor at the time of his arrest.

Mr. Vogt mentioned that at one point he was unable to work and received Disability Insurance for his mental health diagnosis. It was unclear as to when this happened, however I believe that it was prior to him working as a subcontractor.

**Financial Narrative**  
 Mr. Vogt is currently incarcerated and unable to work. As mentioned above, he was a subcontractor for a medical sales company at the time of his arrest. He reports that his incarceration has caused his wife (victim) to get food stamps and move in with his parents.

**Family/Marital/State Registered Domestic Partnership Narrative**  
 Mr. Vogt was married to April Sarrett Vogt in 1999. He has three children, Jordon (stepson, 16), Ethan (9) and Jackson (8). Mr. Vogt reports that his biological children currently live with April and his stepson lives outside the home.

When asked about family history and CPS history he reported the following:

Approximately 18 months ago Jordon's biological father moved to Hawaii. He left for Hawaii owing child support for Jordon's brother, but not Jordon. Mr. Vogt and his wife did not pursue any child support from Jordon's father because they figured "if he wanted to pay he would have on his own". Jordon wanted to see his father, however he never came to visit. According to Mr. Vogt, Jordon spoke to his father and was told that Mr. Vogt and April were holding Jordon against his will. Jordon filed a CHINS petition alleging that Mr. Vogt was a "terrible" stepfather and that April was neglecting him.

Additionally, the petition alleged that Mr. Vogt would wake Jordon up in the middle of the night to clean the kitchen. Mr. Vogt denies that this ever happened and stated that Jordon's life was out of "Alice in Wonderland it was so good" as his biological grandparents "were loaded" and he would always go see them. Mr. Vogt stated that on the day that the CHINS petition went to court, Jordon's biological father showed up and took him to live with him.

When asked if there was any other CPS referrals that I should be aware of, Mr. Vogt stated that after Jordon moved in with his father he reported that Mr. Vogt made him undress in the shower at the YMCA. When I asked for clarification I was told that when Jordon was 7 years old they went swimming at the YMCA with Ethan and Jackson. After swimming, Mr. Vogt reports that all the boys took off their swim suits in the shower to rinse them and spin them dry. I asked Mr. Vogt to clarify the ages and the children involved as Ethan and Jackson were not born at the time Jordon was 7. He became flustered and stated that he could not remember the exact age but that they had been going to the YMCA for 10 years and this is something that everyone does.

#### Accommodation Narrative

Mr. Vogt is currently residing in the King County Jail awaiting sentencing. He reports that should he be approved for this program that he will be moving in with his wife and children at his parent's home in Monroe. When asked what he would do if a No Contact Order was put in place between himself and April, he said that the No Contact Order was dismissed a year ago. I attempted to clarify by asking where he would live should a new one be ordered and he stated that he could live with his father-in-law in the King County area.

#### Leisure/Recreation Narrative

Mr. Vogt reports that when he is with his family they go snowboarding, swimming at the YMCA and the lake, church and on walks. The family is active in the children's school and sports.

#### Companions Narrative

The only companions that Mr. Vogt reports are those through his church, Aniack Bible in Kirkland. He proudly reports that he no longer associates with his drug friends.

#### Alcohol/Drugs Narrative

Mr. Vogt reports using methamphetamine as recently as 4 months ago. He said that he was using monthly but stopped because he was tired of getting in trouble. Four years ago (April 2006), Mr. Vogt went to Schick Shadle to overcome his cocaine, marijuana and alcohol addictions. He reports that he started using methamphetamine after he graduated from this program.

It should be noted that at this point in the interview Mr. Vogt became upset with my questions. He had mentioned that he was using methamphetamine during a manic point in his Bi-Polar. I was attempting to get a better understanding of his diagnosis and drug use when he very angrily asked, "are you here as a mental health expert?" I attempted to respond to his question when he cut me off and again asked in a louder tone "are you here as a mental health expert?" He used explicit language and wanted to know why I was asking what I was asking. I informed Mr. Vogt that the interview was terminated at that point.

#### Emotional/Personal Narrative

As stated above, the interview was terminated. While I was gathering my belongings Mr. Vogt stated that he "hates" himself and that he was sorry for wasting my time.

**Attitudes/Orientation Narrative**

Unanswered at this time do, to the interview being terminated. However, my impression is that Mr. Vogt's attitude towards supervision will be poor. He appears to be able to present well, however when questioned he becomes aggressive and agitated.

**Victim Statement/Issues and Community Concerns**

While doing some background investigation on this case, I spoke with Children's Administration regarding Mr. Vogt and was told that there have been 14 referrals for investigation between 2009-2010 regarding the Vogt family and their children. Of the 14 referrals, one was investigated and a ruling of non-founded was rendered. The individual at Children's Administration emphasized that all of the referral were similar in nature with a theme of neglect, domestic violence and drug use. Additionally, they felt that the Vogt home was a high risk home and they showed concern for the children.

Further investigation shows that Mr. Vogt has been on Community Supervision before. A review of the chronological notes show that Mr. Vogt's has not always been honest with DOC staff. On 6/29/09, Mr. Vogt was visited by a Community Corrections Officer for a standard home visit. Upon the CCOs arrival they saw Mr. Vogt, two minor males (his sons), an older male (his father) and a female. The female ran into the house when the CCO got out of the vehicle. Mr. Vogt was asked who the female was and he told said it was his mother. Mr. Vogt's father stated that his mother was at work. The CCO asked Mr. Vogt several times who the female was and he finally said that it was April, his wife. When informed that there was a No Contact Order in place, Mr. Vogt stated that it had been dismissed and produced a piece of paper that showed that the Municipal No Contact Order had been dismissed. However, the felony No Contact Order was still in effect and Mr. Vogt was taken into custody.

Additionally, on 6/30/09 Mr. Vogt was being transported from the Snohomish County Jail to the King County Jail by CCOs. During the transport, Mr. Vogt became verbally aggressive towards the CCOs. He began to yell at the CCOs asking them how they look at themselves in the mirror and wanting to know why they were not "hunting down real criminal" like murderers or rapist. The CCOs feared for their safety because of his behavior and they called ahead to the jail for assistance upon arrival.

Based on Mr. Vogt's criminal history, his current crime, his behavior exhibited during my interview, his lack of honesty when found with his wife and his minimizing his crimes, the Department of Corrections does not recommend Mr. Vogt's for this sentencing alternative.

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14.

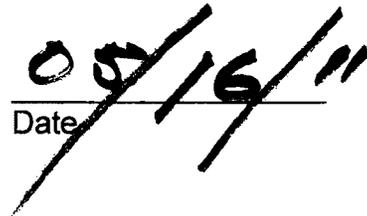
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Jennifer M. Winkler**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. MATTHEW VOGT**, Cause No. **65858-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington



Date