

NO. 68838-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FALE PE'A,

Appellant.

2019 JUN 20 PM 3:01  
COURT OF APPEALS  
STATE OF WASHINGTON  
CLERK OF COURT  
JENNIFER S. PAVI  
JENNIFER S. PAVI

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BARBARA LINDE

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	6
1. THE COURT IMPROPERLY IMPOSED SENTENCE FOR A DEADLY WEAPON ENHANCEMENT THAT WAS NOT CHARGED IN THE SECOND AMENDED INFORMATION.....	6
2. PE'A'S ARGUMENT THAT THE COURT DID NOT FOLLOW PROPER STATUTORY PROCEDURES WHEN IMPOSING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY IS MOOT BECAUSE PE'A IS NOT ON COMMUNITY CUSTODY.....	7
D. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Hart v. Department of Social and Health Services,  
111 Wn.2d 445, 759 P.2d 1206 (1988)..... 8, 9

In re Pers. Restraint of Bush, 95 Wn.2d 551,  
627 P.2d 953 (1981)..... 7

In re Pers. Restraint of Cross, 99 Wn.2d 373,  
662 P.2d 828 (1983)..... 8

Sorenson v. Bellingham, 80 Wn.2d 547,  
496 P.2d 512 (1972)..... 8

State v. Gentry, 125 Wn.2d 570,  
888 P.2d 1105 (1995)..... 8

State v. Hunley, 175 Wn.2d 901,  
287 P.3d 584 (2012)..... 8

State v. Recuenco, 163 Wn.2d 428,  
180 P.3d 1276 (2008)..... 6

State v. Theroff, 95 Wn.2d 385,  
622 P.2d 1240 (1980)..... 7

Statutes

Washington State:

RCW 9.94A.030..... 9

RCW 9.94A.501..... 7, 9

RCW 9.94A.701..... 9

**A. ISSUES PRESENTED**

1. Because a deadly weapon sentencing enhancement is the functional equivalent of an “element” of a crime, due process requires that such an enhancement be specifically alleged in the information. Here, Pe’a was initially charged with first-degree assault with a deadly weapon enhancement. The information was later amended to add an alternative means of committing first-degree assault, and it retained the deadly weapon enhancement allegation. Then, at the start of jury selection, the State moved to amend the information a second time, to expand the charging period. The second amended information did not include the deadly weapon enhancement allegation. The jury was instructed regarding the enhancement, and returned a finding that Pe’a was armed with a deadly weapon at the time of the offense. Did the trial court err when it imposed sentence for a deadly weapon enhancement not charged in the second amended information?

2. A case is moot if the court can no longer provide effective relief. A moot appeal should be dismissed unless the issue presents a matter of continuing and substantial public interest. Here, Pe’a challenges the court’s imposition of a community custody condition requiring her to obtain a mental health evaluation and follow through with recommended treatment. Pe’a is not on community custody and is not subject to the

condition she complains of. Pe'a's claim of error is limited to the facts of her case, and would be of no guidance to others. Should this Court decline to address this moot issue?

**B. STATEMENT OF THE CASE**

Appellant Pe'a is a native of American Samoa. V RP 597.<sup>1</sup> She is a transgendered male who identifies as a female. V RP 609. She was part of a circle of friends, some of whom she knew from a young age in American Samoa. III RP 286; V RP 600. The group included Jovi Timo, Isyss Viena, Berta Faau'i, and Taffy Maene. II RP 192-96; III RP 286-88, 329-32; IV RP 422-24; V RP 600.

On the evening of January 21, 2011, the group was socializing and drinking at Pe'a's apartment. II RP 204-08; III RP 290, 332-33; IV RP 427. Viena was intoxicated and began to annoy Timo. II RP 209-10; III RP 293-96, 334-36; IV RP 433. Timo repeatedly told Viena to stop and go to bed, but Viena persisted, getting into Timo's face. II RP 210; III RP 296, 336; IV RP 434. Timo grabbed Viena by the face and pushed her down. II RP 210; III RP 296, 342; IV RP 434, 440.

After Timo pushed Viena, Pe'a attacked Timo with several kitchen knives, stabbing her multiple times. II RP 215-16; III 298, 344-46; IV RP

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<sup>1</sup> The report of proceedings consists of 5 volumes. The State adopts the same abbreviations used by appellant Pe'a.

446. When Maene tried to intervene, Pe'a chased Maene and swung a knife at her, leaving Maene with a superficial wound. IV RP 449-54.

Timo's wounds were severe. One of Pe'a's blows punctured Timo's chest beneath her clavicle. II RP 164. Timo lost a significant amount of blood, approximately two liters, before arriving at Harborview Medical Center. II RP 163. A chest x-ray revealed a large amount of blood in her chest cavity. II RP 166. Following a CT angiogram, doctors learned that the stab wound to Timo's clavicle had punctured her subclavian artery. II RP 171. She required surgery to repair the damage. II RP 172; III RP 238. Timo also had several penetrating wounds to her back. II RP 169-70. She was hospitalized for approximately two months. III RP 238.

Pe'a was charged by original information with first-degree assault with a deadly weapon enhancement for her attack on Timo. CP 1. She was charged with second-degree assault, with no enhancement, for her attack on Maene. CP 2.

At the start of trial, the State moved to amend the information to add an alternative means of committing the first degree assault against Timo. CP 8-9; I RP 22. Pe'a did not object. I RP 22. The first amended information continued to reflect the deadly weapon enhancement. CP 8. After the court read the information to the jury panel at the start of

*voir dire*, the State realized that it intended the charging period to span the course of January 21 to January 22, 2011, instead of January 21 alone.

CP 10-11; II RP 143. The State moved to amend the information to allege the additional date. CP 10; II RP 143. Again, Pe'a did not object. II RP 143. The second amended information did not include the deadly weapon enhancement. CP 10. Nevertheless, the jury was instructed on the enhancement. CP 48-49.

Despite the fact that witnesses Viena, Faau'i, and Maene all testified that, at the most, Timo had pushed Viena down to the ground causing her to scrape her face, Pe'a testified that she had seen Timo "beating" on Viena, hitting her with her fists, thumping her on her stomach, and kicking her in the face. V RP 617. Pe'a claimed that Viena began foaming at the mouth and shaking as if she was having a seizure. V RP 619.

Pe'a testified that she grabbed three or four knives and ran outside to confront Timo. V RP 619-20, 652-53. She claimed that Timo grabbed her by the hair and punched her in the face. V RP 621. Pe'a admitted that she stabbed Timo multiple times. V RP 621-22.

Pe'a presented testimony from Dr. Delton Young, who opined that she suffered from bipolar disorder not otherwise specified. V RP 692, 694-95. Young told the jury that he believed Pe'a's mood disorder,

accompanied by her intoxication on the night of the assault, “heavily impacted her capacity to perceive the situation realistically in its right proportions.” V RP 704-05. Young declined to conclude that Pe’a lacked the ability to form the intent to commit assault, but he stated that he believed her capacity to do so was impaired. V RP 707.

During closing argument, Pe’a argued that her mental illness, combined with the effects of the alcohol she was drinking that night, impaired her ability to appropriately judge the situation, and that she believed she was intervening to save Viena’s life. VI RP 815-19.

Regarding victim Timo, the jury convicted Pe’a of the lesser-included offense of second-degree assault, and found that Pe’a had been armed with a deadly weapon during its commission. CP 51-52. The jury acquitted Pe’a of assaulting Maene. CP 53-54.

At sentencing, Pe’a told the court that she had initially wanted to request an exceptional sentence, but conceded that “there’s an argument that, given the verdict in the case, that perhaps I don’t get to say that the mental health defense failed.” VI RP 833. The court concurred that it was “likely that the jury very much considered [Pe’a’s mental health] in making the decision that they made.” VI RP 838.

Recognizing that Pe’a’s mental health “played a role” in the crime, the court nevertheless imposed the high end of the standard range—a total

of 21 months incarceration, including 12 months for the deadly weapon enhancement. CP 61; VI RP 838-39. The court also imposed 18 months of community custody, during which time Pe'a was ordered to obtain a mental health evaluation and follow all recommended treatment. CP 62, 65. Pe'a appealed. CP 66.

**C. ARGUMENT**

1. THE COURT IMPROPERLY IMPOSED SENTENCE FOR A DEADLY WEAPON ENHANCEMENT THAT WAS NOT CHARGED IN THE SECOND AMENDED INFORMATION.

Pe'a was initially charged with first-degree assault with a deadly weapon enhancement. CP 1. Later, at the beginning of trial, the State moved to amend the information to add an alternative means of committing the crime. CP 8-9; I RP 22. The State continued to allege the deadly weapon enhancement in the amended information. CP 8. Then, at the start of jury selection, the State moved to amend the information a second time, for the purpose of expanding the charging period by one extra day. CP 10-11; II RP 143. The second amended information did not include the deadly weapon enhancement allegation. CP 10.

Because a deadly weapon enhancement is the functional equivalent of an "element" of the crime, it must be alleged in the information. State v. Recuenco, 163 Wn.2d 428, 434-35, 180 P.3d 1276

(2008) (citing In re Pers. Restraint of Bush, 95 Wn.2d 551, 554, 627 P.2d 953 (1981)). Due process requires that the information contain specific allegations that an enhancement is sought, so that the accused is on notice that consequences will flow from conviction. State v. Theroff, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980).

Because the law requires that a deadly weapon enhancement be charged in the information, the court erred when it imposed a sentence for a deadly weapon enhancement that was not included in the second amended information. The case should be remanded to strike the deadly weapon enhancement.

2. PE'A'S ARGUMENT THAT THE COURT DID NOT FOLLOW PROPER STATUTORY PROCEDURES WHEN IMPOSING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY IS MOOT BECAUSE PE'A IS NOT ON COMMUNITY CUSTODY.

Pe'a appeals the trial court's imposition of a mental health evaluation and treatment as part of her community custody. However, pursuant to RCW 9.94A.501(5), the Department of Corrections ("DOC") has closed Pe'a's case. She is not on community custody, and is not subject to the condition she claims was improperly imposed by the trial court. As a result, this court can provide her no effective relief. Because Pe'a's case presents no issue of continuing and substantial public interest,

but rather involves a factual issue limited to Pe'a's own circumstances, the claim should be dismissed as moot.

“As a general rule, we do not consider questions that are moot.” State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). A case is moot if the court can no longer provide effective relief. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). A moot appeal should generally be dismissed. Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972).

However, even where an issue is moot, a court may nevertheless decide the issue if it presents a matter of “continuing and substantial public interest.” Hunley, 175 Wn.2d at 907. In determining whether a sufficient public interest is involved, a court will consider, “(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur.” In re Pers. Restraint of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (citing Sorenson, 80 Wn.2d at 558).

Washington courts have invoked the continuing and substantial public interest exception to hear cases involving matters of constitutional interpretation, validity and interpretation of statutes and regulations, and important issues likely to arise in the future. Hart v. Department of Social

and Health Services, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). Cases that are limited to their facts, and that will be of little use or guidance to others, do not fall within the substantial public interest exception. Id. at 451.

In this case, the court imposed an 18-month term of community custody pursuant to RCW 9.94A.701(2) and RCW 9.94A.030(54)(a)(viii). CP 62. However, under RCW 9.94A.501, the Department of Corrections was not authorized to supervise Pe'a unless her risk assessment indicated that she was a high risk to reoffend. RCW 9.94A.501(3), (5). Apparently, Pe'a's risk assessment did not so indicate. CP 76-80. Because Pe'a is not subject to community custody, this Court is incapable of providing her with any meaningful relief from a condition of DOC community custody that the trial court might have improperly imposed.

Moreover, Pe'a's appeal does not involve any matter of continuing or substantial public interest. Cases that are limited to their facts are of little use or guidance to others because the factually-specific scenario is unlikely to recur. Such a possibility is too remote to counteract the harm of what would essentially be an advisory opinion. Hart, 111 Wn.2d at 450-52.

Pe'a's unenforceable condition of community custody requiring mental health treatment does not involve a matter of continuing and

substantial public interest, and this Court should dismiss the claim as moot.

**D. CONCLUSION**

For the reasons outlined above, this Court should decline to address Pe'a's moot argument regarding the terms of community custody, and remand to strike the deadly weapon enhancement.

DATED this 20<sup>th</sup> day of June, 2013.

Respectfully submitted,

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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 Marla L. Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. FALE PE'A, Cause No. 68838-3 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 90 day of June, 2013

A handwritten signature in black ink, appearing to be "M. Zink", written over a horizontal line.

Name  
Done in Seattle, Washington