

62777-5

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NO. 62777-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VINH PHAM,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the trial court exceeded its authority under the Sentencing Reform Act (SRA) when ordering Pham to obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody.

B. STATEMENT OF THE CASE

The State charged the defendant, Vinh Pham, with residential burglary (count I), malicious mischief in the second degree (count II), and assault in the third degree (count III) based on a series of events that culminated in Pham's arrest on March 15, 2008. CP 1-8. Pham's jury trial on these charges occurred in November 2008 before the Honorable Dean S. Lum. The evidence at trial established the following facts.

Be Pham¹ and his wife, Loan Nguyen, owned a house in Skyway. RP (11/10/08) 6-7. Be and Nguyen rented the house to Pham and his family based on an informal, oral agreement because Be and Pham were cousins. RP (11/10/08) 8-10. In 2001, Pham went to prison in California, but Be allowed Pham's wife and

¹ To avoid confusion, Be Pham will be referred to as "Be" and the defendant will be referred to as "Pham."

children to continue living in the house. RP (11/10/08) 10-11.

Eventually, however, Pham's wife and children moved out of the house, and Be had the locks changed. RP (11/10/08) 11-12.

When Pham returned from California, he asked Be if he could stay at the house again, and Be agreed. RP (11/10/08) 12-13. But soon thereafter, Be asked Pham to leave the house because Pham was using drugs. RP (11/10/08) 14-15. Pham refused to move out, so Be packed up Pham's belongings and put them outside, and changed the locks again. RP (11/10/08) 16-17.

After Be kicked Pham out of the house and changed the locks, Pham started breaking in. RP (11/10/08) 18. Pham also changed the locks on the house so that he could enter but Be could not. RP (11/12/08) 4-5.

In early March 2008, Be came to the house to check on things, and discovered that the entire house was severely damaged and filthy. RP (11/12/08) 7-8. Be and Nguyen came back to the house with a truck and cleaning supplies on March 15, 2008 in order to clean the house and remove the trash. RP (11/12/08) 8. The house was full of garbage, rotten food, yard waste, and human feces. RP (11/12/08) 8-9. There was extensive water damage to the carpets and floors from pipes that had been purposefully

broken, and from toilets and sinks that were clogged. RP (11/12/08) 19, 27; RP (11/13/08) 20. The walls were damaged with holes and stains. RP (11/12/08) 30-31. There appeared to be feces thrown on the walls. RP (8/13/08) 20.

As Be was loading bags of trash into his truck, he heard his wife screaming in the master bedroom. RP (11/12/08) 9. Be ran into the room to see what was the matter, and discovered Pham lying motionless in the closet. RP (11/12/08) 9-10. Be and Nguyen called 911. RP (11/12/08) 10.

King County Sheriff's Deputies responded to the call as a burglary in progress. RP (11/13/08) 10-11. Upon arrival, one of the responding deputies immediately recognized Pham as the same person who had violently resisted arrest less than a week earlier.² RP (11/13/08) 7-10, 14. As two deputies attempted to arrest Pham, he began struggling and kicking and broke free from their grasp. RP (11/13/08) 15. During the struggle, Pham kicked Deputy James Schaur's in the thigh, knee, and groin. RP (11/13/08) 58-59. The deputies used a taser, but without success. RP (11/13/08) 59-60. It took three deputies to eventually gain control of Pham. RP

² Sheriff's deputies were called on March 9, 2008 because Pham was sleeping in a stranger's yard. RP (11/13/08) 6.

(11/13/08) 61-62. The deputies saw what appeared to be crack pipes near where they had struggled with Pham. RP (11/13/08) 42.

Pham testified at trial, and admitted that he was using crack cocaine at the time of the incident. RP (11/17/08) 21-22. However, Pham claimed that he was not burglarizing the house because the house actually belonged to him, not Be and Nguyen. RP (11/13/08) 92-94. Pham claimed that he did not damage the house intentionally because he owned it; however, he also said that he damaged the house because he could feel the presence of the spirit of his deceased child. RP (11/17/08) 43-45. Pham denied assaulting Deputy Schaur. RP (11/17/08) 13-14.

At the conclusion of the trial, the jury convicted Pham of second-degree malicious mischief and third-degree assault as charged in counts II and III. CP 49-50. As to count I, residential burglary, the jury found Pham guilty of the lesser included offense of criminal trespass in the first degree. CP 51.

The trial court imposed a standard-range sentence on both felonies, and imposed a suspended sentence with 24 months of supervised probation on the gross misdemeanor. CP 52-62. During the sentencing hearing, the trial court expressed concern based on the facts of the case that Pham may need mental health

treatment in addition to drug treatment, and Pham agreed that this was a valid concern. RP (11/24/08) 5. Accordingly, the trial court ordered Pham to obtain a mental health evaluation and to follow any treatment recommendations, both as a condition of community custody on count III, and as a condition of misdemeanor probation on count I. CP 53, 61. Pham now appeals. CP 64-75.

C. **ARGUMENT**

1. **ALTHOUGH THE MENTAL HEALTH CONDITIONS SHOULD BE STRICKEN FROM PHAM'S FELONY SENTENCE, THESE CONDITIONS WERE PROPERLY ORDERED AS PART OF PHAM'S MISDEMEANOR SENTENCE.**

Pham claims that the trial court exceeded its authority under the SRA when imposing a mental health evaluation and treatment as a condition of community custody. Brief of Appellant, at 2-6. Although Pham is correct that the trial court did not comply with the applicable statutory procedures in imposing mental health conditions of community custody, these same conditions were properly ordered as part of Pham's misdemeanor sentence. Accordingly, although this Court should remand for entry of an order striking the mental health conditions from Pham's felony judgment and sentence, these same conditions remain in effect as part of the misdemeanor sentence.

Under the SRA, which governs felony sentencing, the trial court may order a mental health evaluation and treatment as a condition of community custody only when certain procedures are followed. More specifically, under RCW 9.94A.505(9), the trial court must find "that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025," and that the offender's mental illness contributed to the offense. State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). In addition, the trial court's order should be based on a presentence report. Id.; see also State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007), rev. denied, 164 Wn.2d 1012 (2008).

In this case, although Pham agreed that he may need mental health treatment, the record does not establish compliance with the required statutory procedures. RP (11/24/08) 4-6. Accordingly, the State agrees that the condition of community custody requiring Pham to obtain a mental health evaluation and comply with any recommended treatment³ should be stricken from Pham's felony judgment and sentence. CP 61.

³ Pham does not challenge the requirement that he obtain a substance abuse evaluation and treatment, so that condition of community custody should remain in the felony judgment and sentence. CP 61. This condition is clearly proper, as Pham admitted to using crack cocaine at the time of the offense. RP (11/17/08) 21-22.

However, the SRA does not control the imposition of probationary conditions on misdemeanants. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), rev. denied, 140 Wn.2d 1006 (2000). Rather, a sentencing court has broad discretion to suspend a misdemeanor sentence "upon such terms as the superior court may determine." RCW 9.92.060(1). Under this statute, the trial court may impose any probationary conditions that would tend to prevent the future commission of crimes, whether or not such conditions are crime-related. Williams, 97 Wn. App. at 263. In this context, "[e]valuations of various kinds are a standard probationary tool." State v. Wilkerson, 107 Wn. App. 748, 756, 31 P.3d 1194 (2001).

In this case, the trial court properly exercised its discretion in ordering Pham to undergo a mental health evaluation and to follow any treatment recommendations as a condition of probation on his suspended misdemeanor sentence. CP 53. Indeed, Pham does not argue otherwise on appeal, and he acknowledged at sentencing that he could benefit from such treatment. RP (11/24/08) 5. In

addition, given the facts of this case,⁴ the trial court clearly had a rational basis to impose this condition of probation on Pham's conviction for criminal trespass.

In sum, while Pham is correct that the trial court's order for a mental health evaluation and treatment as a condition of community custody should be stricken from the felony judgment and sentence, this provision remains as a valid condition of probation on the misdemeanor judgment and sentence.

D. CONCLUSION

For the reasons stated above, this Court should remand to the trial court for entry of an order striking the mental health provisions from the conditions of community custody. In all other respects, Pham's sentences are valid and should be affirmed.

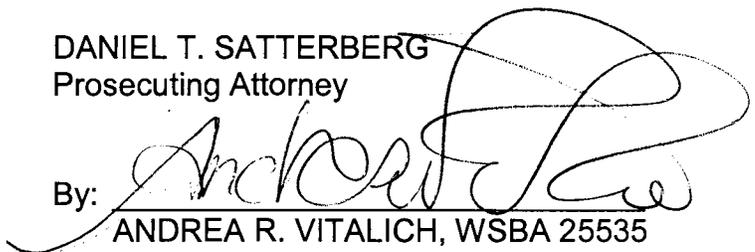
⁴ In addition to the extreme manner in which the house was damaged and the fact that Nguyen found Pham sleeping in the closet amid the damage and filth, which would be cause for concern regarding Pham's mental health standing alone, Pham testified that he damaged the house because he could feel the spirit of his deceased child in the house. RP (11/17/08) 44-45.

DATED this 23rd day of September, 2009.

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 Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. VINH PHAM, Cause No. 62777-5-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.

U Brame

Name

Done in Seattle, Washington

9/23/09

Date