73913-1

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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 OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

A. INTRODUCTION

RCW 9.94A.670(4) mandated that the trial court give great weight to the victim's support of Mr. Tran's Special Sex Offender Sentencing Alternative ("SSOSA") application. The trial court failed to mention and appeared to ignore the victim's support when it declined to grant Mr. Tran a SSOSA. The trial court's failure to comply with the sentencing statute requires this Court to remand this case for resentencing.

Additionally, this Court should find Mr. Tran is amenable to treatment. Mr. Tran was found to be amenable by the only assessment prepared for the court and the victim supported the SSOSA. Because the evidence is all documentary, this Court stands in the same position as the trial court when evaluating the evidence. Substantial evidence supports finding Mr. Tran is amenable to treatment, and this Court should so find prior to remand.

B. ASSIGNMENTS OF ERROR

1. The court committed legal error when it failed to consider the opinion of the victim as required by RCW 9.94A.670(4) before denying Mr. Tran's request for a SSOSA.

2. The trial court erred in finding Mr. Tran was not amenable to treatment when substantial evidence supported his amenability.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. RCW 9.94A.670(4) requires a trial court give great weight to the opinion of a victim when considering whether to impose a SSOSA. Where the trial court failed to consider the victim's support of Mr. Tran's application for a SSOSA, does the court's failure require a new sentencing hearing?

2. The evidence presented to the Court established Mr. Tran was amenable to treatment. Where the trial court's finding that Mr. Tran was not amenable to treatment is contrary to the evidence, should this Court find that Mr. Tran was amenable to treatment?

D. STATEMENT OF THE CASE

Mr. Tran met Vicki, JVT's[1] mother in 2003. Sub CP__, Sub 30 (presentence investigation).[2] They dated, eventually lived together, and in 2006 Vicki changed her surname and the names of her daughters to Tran. *Id*. The relationship between Vicki and Mr. Tran ended in 2012. *Id*.

In 2013, JVT disclosed to Vicki she had been molested by Mr. Tran between 2009 and 2012. *Id*. Mr. Tran was charged and then took responsibility for his misconduct by pleading guilty to indecent liberties with forcible compulsion. 2RP 2.[3] He stated he pled guilty to take responsibility for what he had done, to seek treatment, and to avoid forcing JVT to testify against him. 2RP 7. At sentencing, Mr. Tran requested a SSOSA. 1RP 6.

A Presentence Investigation was prepared for the court. Dr. Norman Glassman, a certified sex offender treatment provider, examined Mr. Tran. Sub CP__, Sub 30. Dr. Glassman concluded that Mr. Tran was amenable to treatment. *Id*. Community Corrections Officer Aimee Hughes also interviewed him. *Id*.

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[1] Because the victim in this case is a minor, only her initials will be used in the brief.

[2] This brief references the Clerk's Papers as CP.

[3] This brief references the Verbatim Report of Proceedings on June 10, 2015 as 1RP, and the Verbatim Report of Proceedings July 30, 2015 as 2RP.

JVT, fifteen years old at the time of trial, supported Mr. Tran's SSOSA application. 2RP 2. She wanted Mr. Tran to seek treatment. *Id*.

Mr. Tran's letter to the court was read into the record by his attorney. 2RP 11. Mr. Tran promised to "attend the treatment programs with all [his] heart." 2RP 11.

The trial court denied Mr. Tran's request for a SSOSA and instead imposed a standard range sentence. 2RP 13-14. The trial court did not make findings with regard to JVT's support of Mr. Tran's SSOSA application. 2RP 12-14, CP 18-33. Mr. Tran was sentenced to 82 months, a standard range sentence. 2RP 14, CP 21.

E. ARGUMENT

1. THE FAILURE OF A SENTENCING COURT TO COMPLY WITH RCW 9.94A REQUIRES A NEW SENTENCING HEARING.

a. <u>The failure to comply with the sentencing statute requires a new sentencing hearing.</u>

While trial judges have considerable discretion to sentence under the Sentencing Reform Act, they are still required to act within its strictures and the principles of due process. *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)). Failure to comply with an express statutory mandate requires reversal if there is a reasonable

probability the outcome of the proceeding would have been affected. *State v. Brown*, 178 Wn. App. 70, 80, 312 P.3d 1017 (2013). Failure to set out findings considering the mandatory factors of a sentencing statute makes it impossible to determine if the sentencing court complied with the statute's mandate. *State v. Fullers*, 37 Wn. App. 613, 619, 683 P.2d 209 (1984). Remand for entry of findings and resentencing is an appropriate remedy when the trial court has failed to comply with the sentencing statute. *See Fullers*, 37 Wn. App. at 621.

A person is eligible for a SSOSA sentence if they have been convicted of a sex offense with a possibility of confinement for less than eleven years. The conviction may not be for a violation of RCW 9A.44.050 or a sex offense which is also a serious violent offense. There must be a pre-existing relationship with the victim. The offense may not have resulted in serious bodily harm to the victim. The offender may have no prior convictions for sex offenses and no violent offense convictions within five years. RCW 9.94A.670(2).

The court may order experts to examine the offender to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). After receiving the ordered reports, the court shall

consider whether the defendant and the community will benefit from the use of this alternative. RCW 9.94A.670(4).

The court shall give "great weight" to the victim's opinion of whether to impose this disposition alternative. *Id*. A person who is able to complete a SSOSA sentence can have all or part of their sentence suspended. *State v. Wheeler*, 183 Wn.2d 71, 75, 349 P.3d 820 (2015).

b. The court failed to comply with the sentencing statute when it failed to consider JVT's recommendation that Mr. Tran receive a SSOSA.

RCW 9.94A.670 requires the trial court give great weight to a victim's recommendation. JVT supported Mr. Tran's application for a SSOSA. The failure of the trial court to consider JVT's opinion requires reversal for a new sentencing hearing.

Washington's legislature created the SSOSA program to give certain first time sex offenders the opportunity, and incentive, to receive sex offender treatment. *Wheeler*, 183 Wn.2d at 75 (citing *State v. Pannell*, 173 Wn.2d 222, 227, 267 P.3d 349 (2011)). Great weight is given to the opinions of victims of sex crimes, especially in the case of intra-family abuse, because the legislature found it encourages families to report sexual abuse. *State v. Jackson*, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991) (A statutory purpose of SSOSA is to increase reporting

of sex crimes), *see also* Const. art. I, §35 (granting rights to victims of crimes in order to encourage cooperation with law enforcement). By giving great weight to JVT's recommendation, her voice is not only heard in the proceedings, but the statutory purposes of increased reporting and improved compliance with treatment are achieved.

JVT supported Mr. Tran's SSOSA application because she wanted him to seek treatment.

The trial court denied Mr. Tran's SSOSA application because it found he was not amenable to treatment. 2RP 12-14. Not only did the court fail to give great weight to JVT's recommendation, it failed to give her recommendation any consideration at all. *Id*. In sentencing Mr. Tran, the court makes no mention in either its oral findings or in the judgment and sentence that it considered JVT's support for Mr. Tran's SSOSA application. *Id*. The court made findings regarding Mr. Tran's crime, Mr. Tran's personality, the circumstances of Mr. Tran's relationship with JVT's mother, and Mr. Tran's amenability to treatment. 2RP 12-13. The court made no findings regarding JVT's recommendation. Because the court did not make those findings, it is impossible to determine whether the court followed the directives of RCW 9.94A.670(4). *See Fullers*, 37 Wn. App. at 619 ("Since the court

did not set forth what it considered, it is impossible to ascertain whether it followed the directives of [the sentencing statute].").

c. Failure to comply with the sentencing statute entitles Mr. Tran to a new hearing.

The prosecutor's statement to the trial court clearly demonstrated JVT's support for Mr. Tran's SSOSA application. 2RP 2. When the trial court disregarded JVT's opinion and made no findings of its reasons for not giving JVT's support for the SSOSA the great weight it deserved, the court committed a legal error which requires this Court to order a new sentencing hearing.

The trial court failed to comply with RCW 9.94A.670(4) when it did not consider and give great weight to JVT's recommendation that Mr. Tran be sentenced to a SSOSA. Mr. Tran is entitled to a new sentencing hearing so the court may give JVT's recommendation the great weight mandated by the legislature.

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

a. The appellate court should review the evidence in this case de novo.

The trial court found Mr. Tran was not amenable to treatment. While findings of fact are typically reviewed for substantial evidence,

this Court reviews the findings de novo where the trial court has not seen or heard testimony requiring it to weigh or reconcile conflicting evidence. *State v. Kipp*, 179 Wn.2d 718, 726-27, 317 P.3d 1029 (2014) (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994)).

The evidence presented to the trail court does not require weighing or reconciling conflicting evidence. The evidence at sentencing consisted of the presentence investigation report, which included an evaluation of Mr. Tran by Dr. Norman Glassman and a report by Community Corrections Officer Aimee Hughes, and a letter written by Mr. Tran to the judge. Sub CP__, Sub 30. No testimony was offered by either party, although Mr. Tran's attorney read a letter to the court Mr. Tran had written. 1RP 2-6, 2RP 10-11. This court should review the uncontested evidence de novo. Because substantial evidence supports Mr. Tran's amenability for treatment, this Court should find the trial court erred in finding otherwise and remand with an order finding Mr. Tran is amenable to treatment.

b. Uncontested evidence shows Mr. Tran is amenable to treatment.

The SSOSA statute permits a judge to consider whether an offender is amenable to treatment when deciding whether to grant a

SSOSA. RCW 9.94A.670(4). However, the statute assigns responsibility for evaluating whether or not an offender is amenable to treatment to experts. The statute enables the court to order an examination to determine if the offender is eligible for treatment. RCW 9.94A.670(3). The statute requires the examiner to assess and report regarding the offender's amenability to treatment. RCW 9.94A.670(3)(b). If the court is not satisfied with the examination, the court may order a second examination, on its own motion, at the offender's expense. RCW 9.94A.670(3)(c).

The pre-sentence report included expert opinion regarding Mr. Tran's amenability for treatment. Dr. Glassman concluded Mr. Tran would be able to address his issues in sex offender treatment, Mr. Tran wanted treatment and would be able to utilize it, and treatment can "help him confront his impaired thinking, his deviant arousal, his sexual compulsivity, and his self-centerdness[sic]." Sub CP__, Sub 30. No other evidence within this report or otherwise presented to the court made a contrary conclusion.

Mr. Tran was evaluated by Dr. Glassman, who is a certified sex offender treatment provider. *Id*. Dr. Glassman interviewed Mr. Tran for four and a half hours and administered psychological tests to evaluate

his amenability to treatment. *Id*. Dr. Glassman found Mr. Tran wanted treatment and would be able to utilize it. *Id*., c.f. 2RP 13. Dr. Glassman's expert psychological opinion was Mr. Tran should be granted a SSOSA. Sub CP__, Sub 30.

CCO Hughes evaluated Mr. Tran by interviewing him and reviewing Dr. Glassman's report. While CCO Hughes recommended against granting Mr. Tran a SSOSA, the recommendation focused on the harm to JVT. The only conclusions she offers about Mr. Tran himself were his failure to understand the extent of the harm he caused JVT and his role in causing that harm. Sub CP__, Sub 30. Per Dr. Glassman, these failures can be addressed in sex offender treatment. *See Id*. CCO Hughes offers no contrary conclusion. *Id*.

The SSOSA statute assigns responsibility to experts to evaluate whether an offender is amenable to treatment. Because Dr. Glassman's report indicates Mr. Tran was amenable to treatment, and neither CCO Hughes's report nor Mr. Tran's letter to the judge indicate he would not attend treatment or benefit from it, this court should find Mr. Tran was amenable to treatment.

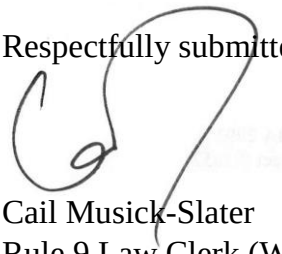
F. CONCLUSION

The opinion of the victim JVT is entitled to great weight. By failing to account for JVT's recommendation that Mr. Tran be given the opportunity to complete a SSOSA sentence, the court failed to comply with RCW 9.94A.670(4). Mr. Tran is entitled to a new sentencing hearing.

Because the evidence of Mr. Tran's amenability for treatment is clear and weighing of the evidence seen by the trial court is not required, this Court should also find Mr. Tran is amenable treatment.

DATED this 21st day of March 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 22ND DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING 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 22ND DAY OF MARCH, 2016.

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