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NO. 62777-5-I

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

STATE OF WASHINGTON,

REC'D

Respondent,

v.

JUL 30 2009

VINH PHAM,

King County Prosecutor  
Appellate Unit

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 JUL 30 PM 3:49

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erroneously sentenced appellant to submit to a mental health evaluation and treatment as a condition of community custody.

Issue Pertaining to Assignment of Error

Did the trial court err when it required a mental health evaluation and treatment as a condition of community custody without following statutorily required procedures?

B. STATEMENT OF THE CASE<sup>1</sup>

The State charged appellant Vinh Pham with residential burglary (count 1), second degree malicious mischief (count 2), and third degree assault (count 3) based on events occurring February 15 through March 15, 2008. CP 1-10.

A jury convicted Pham of the lesser-included offense of first-degree criminal trespass as to count 1. It convicted Pham of counts 2 and 3 as charged. CP 48-51.

On counts 2 and 3, both felonies, the court sentenced Pham to concurrent standard ranges sentences of 5 months and 12 months.<sup>2</sup> CP 58.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 11/4/08; 2RP – 11/5/08; 3RP – 11/10/08; 4RP – 11/12/08; 5RP – 11/13/08; 6RP – 11/17/08; 7RP – 11/18/08; and 8RP – 11/24/08. 7RP and 8RP are bound in the same volume.

<sup>2</sup> Section 4.4 of the judgment and sentence transposes the sentences as to

The court also imposed 12 months of community custody for count 3. CP 58. As a condition of community custody, the court ordered Pham to "obtain a mental health evaluation" and "comply with all recommended treatment recommendations." CP 61.

The court sentenced Stewart to 24 months of probation on count 1, a gross misdemeanor. CP 52-54. The court ordered the felony and gross misdemeanor sentences to run consecutively. CP 52, 58.

C. ARGUMENT

THE COURT ERRED IN ORDERING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court erred when it ordered Pham to "obtain a mental health evaluation" and "comply with all recommended treatment recommendations" as a condition of community custody. CP 61. Reversal of this portion of Pham's sentence is required.

RCW 9.94A.505(9) provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status

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each count. Compare CP 56 with CP 58.

evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94A.505(9) authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may therefore not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord, State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008).

The sentencing court did not make the statutorily mandated finding that Pham was a "mentally ill person" as defined by RCW 71.24.025, nor did it find mental illness influenced the crime for which Pham was convicted. The trial court thus erred in imposing the mental health treatment condition. Lopez, 142 Wn. App. at 353-54; Jones, 118 Wn. App. at 202.

During the sentencing hearing, the prosecutor explained Pham had already served his statutory maximum incarceration on the felony counts. 8RP 2. The prosecutor therefore requested the court impose “12 months of community custody . . . and Mr. Pham be allowed to follow with substance abuse treatment, and follow all treatment [sic].” 8RP 2. Defense counsel agreed with the recommendation that Pham be released and agreed 24 months of probation on the gross misdemeanor charge was an appropriate sentence. 8RP 3.

The court agreed immediate release was appropriate. The court also stated:

[T]he [biggest] concern is the treatment. And I think not only substance abuse, but I would like to see mental health that would do authority for the CC [sic]. I’m not sure the [Sentencing Reform Act] would give us the flexibility we would like, and certainly the defendant’s abuse of drugs<sup>3</sup> obviously affected his mental state. And some individuals don’t have mental issues, but I don’t know as I’m sitting here.

Maybe it is all just the drugs, but your behavior . . . leads me to believe you have very little impulse control here. And you need treatment.

8RP 5.

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<sup>3</sup> Pham admitted to smoking crack cocaine the morning of the incident that led to his arrest on the charges. 6RP 21.

At that point, Pham interjected, “Well, because at the time I was in the state of mind that I probably did not think through what I was doing, and so yeah, I need treatment, if that will be granted.” 8RP 5.

The court did not find Pham was a mentally ill person whose condition influenced the offense as required under RCW 9.94A.505(9). Brooks, 142 Wn. App. at 850-52. Instead, the court stated it was certain Pham’s drug use contributed to the crimes, and so found. CP 58 (finding under RCW 9.94A.607 that Pham’s chemical dependency contributed to the offense, justifying chemical dependency treatment). In contrast, the court stated it was uncertain whether mental health issues contributed to the offense. 8RP 5.

In addition, this Court should reject any suggestion Pham or his counsel’s statements provide the basis to impose the condition. In Jones, defense counsel stated in open court that Jones was bipolar, that he was off his medications at the time of his crimes, and that this combination “obviously resulted” in the crimes. Jones, 118 Wn. App. at 209. The trial court nevertheless lacked authority to order Jones to participate in mental health treatment in part because it did not make the statutorily required finding that mental illness contributed to his crimes. Id.

Neither Pham’s nor his counsel’s statements approached this level of acknowledgment of mental illness. As in Jones, the court erred when it

ordered Pham to complete a mental health evaluation and treatment as a condition of community custody.

Sentencing errors derived from the court's failure to follow statutorily mandated procedures may be raised for the first time on appeal. Jones, 118 Wn. App. at 204. This Court should order the trial court to strike the community custody conditions pertaining to mental health evaluation and treatment. Lopez, 142 Wn. App. at 354.

D. CONCLUSION

For the foregoing reasons, this Court should reverse the portion of sentence relating to the challenged community custody condition and remand so the condition may be stricken.

DATED this 30<sup>TH</sup> day of July, 2009.

Respectfully submitted,

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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62777-5-1
	)	
VINH PHAM,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VINH PHAM  
2909 S. COURT STREET  
SEATTLE, WA 98144

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JULY, 2009.

x *Patrick Mayovsky*