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STATE OF WASHINGTON

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NO. 64497-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VIET VU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether when, on remand as to Count XIII, the trial court decided not to modify any terms of the sentence previously imposed except the confinement time on Count XIII, terms of sentence previously imposed are beyond the scope of this appeal.

2. Whether the community custody period properly imposed in the 2004 sentencing as to Counts I, II, XI, and XII is beyond the scope of this appeal from resentencing on Count XIII.

B. STATEMENT OF THE CASE

The defendant, Viet Vu, was found guilty by jury verdict of two counts of burglary in the first degree, two counts of robbery in the first degree, and one count of assault of a child in the second degree.¹ CP 17-18, 23. The convictions related to two home invasion robberies, on September 15, 2003, and October 1, 2003. CP 30-31. The jury found that Vu was armed with a firearm as to all counts. CP 18.

Vu was sentenced by the Honorable Steven González on November 19, 2004. CP 17-26. Vu received a standard range

¹ The Brief of Appellant incorrectly describes the convictions, omitting the two counts of burglary in the first degree and referring to nonexistent convictions of two counts of robbery in the second degree. App. Br. at 1-3.

sentence as to each count and community custody was imposed for the established range of 18 to 36 months, based on Vu's conviction for a violent crime. CP 21.

Vu appealed his convictions and they were affirmed by this Court by unpublished opinion. CP 27-37. A petition for review of that decision was denied. State v. Vu, 159 Wn.2d 1002 (2007). The mandate issued on February 14, 2007. CP 27.

Vu then filed a personal restraint petition challenging his convictions and sentences in this case. CP 39. The State conceded that Vu was entitled to resentencing on Count XIII, assault of a child in the second degree, because the court sentenced Vu to 156 months on that count (standard range sentence combined with the firearm enhancement) and the statutory maximum for that offense is 120 months. CP 39. The personal restraint petition was granted solely as to that issue. CP 39.

On remand, the trial court entered an order resentencing Vu to an 84-month term of confinement on Count XIII, noting that the 36-month term for the firearm enhancement ordered on November 19, 2004, as well as all other terms of that 2004 sentence, remained in effect. CP 47; RP 4-5.

C. ARGUMENT

1. THERE WAS NO COMMUNITY CUSTODY TERM IMPOSED IN 2009, SO THE TERM OF COMMUNITY CUSTODY ORIGINALLY IMPOSED IS BEYOND THE SCOPE OF THIS APPEAL.

The community custody term that was imposed in this case was imposed in 2004. The remand was limited to a reduction in the term of confinement imposed on Count XIII so that the combination of the basic sentence and the firearm enhancement did not exceed the maximum penalty for assault of a child. CP 39-40.

The trial court had no reason to revisit the community custody period previously imposed, as it was properly imposed based on Counts I, II, XI, and XII, which were affirmed and were not the subject of the remand. The trial court did not revisit the community custody period. CP 47. When Vu tried to raise issues beyond the specific issue remanded to the trial court, the judge refused to consider them. RP 4-5.

The court specifically stated in its ruling that, "The 36 month firearm enhancement ordered on 11-19-04 remains in effect as well as all other terms of the 11-19-04 judgment and sentence." CP 47. The community custody period was included in the matters that remained in effect, as it was properly imposed as to each of the

other convictions. The defense attorney at the 2009 hearing explained his understanding of this fact to the defendant:

It doesn't change the sentences entered on any other count. What the order does change is the sentence on the underlying count, on 13.

RP 7.

Only the exercise of independent judgment by the trial court on remand may revive an issue that was not raised in an earlier appeal. State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); see also State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009), rev. denied, 230 P.3d 1061 (2010) (any issue related to sentencing may be raised after full, adversarial resentencing hearing on remand). Because the trial court in this case did not revisit the sentences imposed on the remaining counts, the term of the community custody imposed was not an issue on remand and cannot be raised on appeal from the order entered on remand.

2. THE COMMUNITY CUSTODY TERM IMPOSED IN 2004 IS NOT WITHIN THE PROPER SCOPE OF THIS APPEAL.

Vu claims that the term of community custody imposed in this case is erroneous and must be reduced to 18 months. That claim is

not properly part of this appeal because the community custody term was imposed in 2004 and was not reconsidered in 2009.

One community custody term was imposed in 2004, a range of 18 to 36 months. CP 21. All five of Vu's convictions, for burglary in the first degree, robbery in the first degree, and assault of a child in the second degree, are for crimes that are defined as violent offenses. RCW 9.94A.030(5). As Vu concedes, the community custody period was proper when it was imposed. App. Br. at 3. At that time, the proper community custody term upon conviction for any violent offense was 18 to 36 months. Former RCW 9.94A.701; former RCW 9.94A.850(5); WAC 437-20-010. The range imposed was proper based on each one of Vu's convictions, regardless of Vu's convictions on the remaining counts.

When this Court remanded this case to the superior court in 2009, it was for resentencing only on count XIII. CP 39-40. There was no resentencing on the remaining counts. Id. When a defendant is not resentenced, the defendant cannot challenge the original sentence on appeal from the order entered on remand. State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). The 18 to 36 month term was properly imposed as to Counts I, II, XI, and XII

and cannot now be revisited because the defendant was not resentenced on any of those counts.

Moreover, the 2009 legislation² cited by Vu does not have the effect of reopening sentences that are final. The effective date of that legislation is July 26, 2009.³ Laws of 2009, ch. 375. Vu offers no authority for the proposition that a sentence that was properly imposed can be challenged because if it had occurred at a later date, the sentence would not be proper.

Vu asserts that "[t]he legislature expressly made [the 2009] amendment retroactive to all cases in which a community custody term was imposed and not yet completed." App. Br. at 3 (emphasis added). He does not quote the language upon which he relies for that conclusion, but cites section 20 of the statute as authority for that statement. Id. The complete text of that section provides:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

² Laws of 2009, ch. 375.

³ Vu cites section 18 of the act as authority for an effective date of August 1, 2009, but section 18 of the act was vetoed. Laws of 2009, ch. 375.

Laws of 2009, ch. 375 §20. The legislative intent with respect to the application of the law appears in the final clause of that section, "sentenced after the effective date of this section." Id. This intent also is evident in the language of the section specifying the community custody terms to be imposed:

(2) A court shall, in addition to other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

Laws of 2009, ch. 375 §5. There is no indication that the legislature intended to have this provision applied to sentences that already were final when the statute took effect.

Vu also cites as authority for his assertion of retroactive application In re Pers. Restraint of Brooks, 166 Wn.2d 664, 672 n.4, 211 P.2d 1023 (2009). Brooks does not support Vu's assertion that the 2009 amendment to RCW 9.94A.701 expressly applies to every defendant who has had a community custody term imposed but who has not completed it. The cited footnote in Brooks notes the effective date of the amendment but does not suggest that it would apply to sentences imposed before the effective date of the new law. Brooks, 166 Wn.2d at 672 n.4.

The cases cited by Vu for the proposition that this Court must correct an erroneous sentence all refer to sentences that were not properly imposed, not sentences that would be different if the sentence were imposed under a legislative scheme enacted later. E.g., In re Pers. Restraint of Call, 144 Wn.2d 315, 330-32, 28 P.3d 709 (2001) (miscalculated offender score); State v. Loux, 69 Wn.2d 855, 420 P.2d 693 (1966), overruled in part, State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) (sentence conflicting with statute mandating consecutive term for crime committed while under sentence of a felony was in excess of court's jurisdiction).

The last case upon which Vu relies, McNutt v. Delmore,⁴ not only does not support his argument but directly refutes it. The trial court in McNutt imposed a sentence that conflicted with an existing statute. 47 Wn.2d at 564. The trial court corrected its error eight months later, setting aside the original sentence and entering a new sentence. Id. McNutt argued that the trial court was powerless to correct the sentence. Id. The Supreme Court held that when a sentence has been imposed without authority, the trial court "has the duty to correct the erroneous sentence." Id. at 565 (emphasis

⁴ 47 Wn.2d 563, 288 P.2d 848 (1955).

in original). The Court immediately qualified its holding, "This does not, of course, affect the finality of a correct judgment and sentence that was valid at the time it was pronounced." Id.

At the resentencing on Count XIII in 2009, the trial court did not impose a community custody term or modify the community custody term properly imposed in 2004. Therefore, the community custody term properly imposed in 2004 is not within the scope of this appeal.

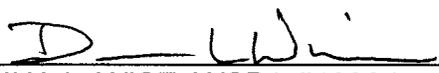
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Vu's sentence on Count XIII and to decline review of the remainder of the sentences imposed in 2004.

DATED this 18th day of June, 2010.

Respectfully submitted,

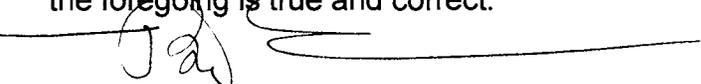
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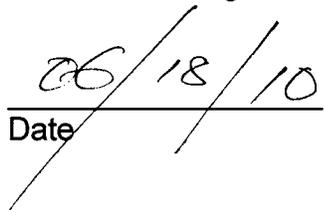
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to GREGORY C. LINK, 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. VIET VU, Cause No. 64497-1-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.



Name
Done in Seattle, Washington



Date