

64497-1

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No 64497-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VIET VU,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory authority in imposing its sentences for Viet Vu's convictions.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. RCW 9.94A.701(2) requires a court impose an 18-month term of community custody for individuals convicted of violent offenses. Where the trial court imposed a 36-month term of community custody as part of Mr. Vu's sentences for violent offenses, did the court exceed its statutory authority?

2. RCW 9.94A.701(8) requires that where the combined term of community custody and confinement exceed the statutory maximum for an offense a trial court must reduce the term of community custody. Where the trial court imposed a 120-month sentence on a Class B Felony and imposed a term of community custody, did RCW 9.94A.701(8) require the trial court to impose a term of zero months community custody?

C. STATEMENT OF CASE

In 2004 Mr. Vu was convicted of several counts of first degree robbery, second degree robbery, second degree assault of

a child. CP 17, 23. As part of the sentence, the trial court imposed a community custody ranges of 18 to 36 months. CP 21.

On appeal, this Court affirmed his convictions. CP 27-37.

Mr. Vu subsequently filed a personal restraint petition which alleged in part that 154-months confinement on Count XII exceeded the 120-month statutory maximum for the offense. This court granted Mr. Vu relief on that claim and remanded for resentencing. CP 38-46.

On remand the court corrected the term of confinement on Count XIII. CP 47. The terms of community custody on each of the offenses remained unchanged.

D. ARGUMENT.

THE SENTENCING COURT EXCEEDED ITS
STATUTORY AUTHORITY

1. The SRA requires a sentencing court impose a determinate sentence in which the combined terms of confinement and supervision do not exceed the statutory maximum. “A trial court only possesses the power to impose sentences provided by law.” In re the Personal Restraint Petition of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701(2) provides:

A court shall, in addition to the 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.

Mr. Vu was convicted of three counts of first degree robbery, two counts of second degree robbery, and one count of second degree assault of a child. CP 17, 23. Each of these offenses is a violent offense. RCW 9.94A.030(50). The trial court imposed community custody ranges of 18 to 36 months. CP 21. Pursuant to RCW 9.94A.701(2) the proper term of community custody is 18 months. Thus, the court erred and exceeded its sentencing authority.

It is true that the trial court initially imposed its sentence in Mr. Vu's case in 2004. CP 17-26. At that time, the appropriate term of community custody was a range of 18 to 36 months. See former RCW 9.94A.701; and former RCW 9.94A.850(5). However, the Legislature amended RCW 9.94A.701 effective August 1, 2009, eliminating community custody ranges in favor of determinate terms, and shortening those terms. Laws 2009 ch. 375, §§ 5, 18. The Legislature expressly made that amendment retroactive to all cases in which a community custody term was imposed and not yet completed. Laws 2009 ch. 375, §20; In re the Personal Restraint Petition of Brooks. 166 Wn.2d 664, 672 n.4, 211 P.3d 1023 (2009).

Because he has not yet completed his term of community custody, the 2009 amendment applies to Mr. Vu. The judgment and sentence is erroneous.

In addition to the improper term of community custody, the judgment and sentence does not reduce the term of community custody for Count XIII. Count XIII, second degree assault of a child, is a Class B felony and thus carries a statutory maximum sentence of 120 months. The trial court imposed a term of 120 months confinement, 84 months plus 36 months for an enhancement. RCW 9.94A.701(8) requires:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provide in RCW 9A.20.021.

This provision is also a part of the 2009 amendment of RCW 9.94A.701. Laws 2009, ch. 375, § 5. It too applies to all cases, such as Mr. Vu's, in which a term of community custody was imposed but has not yet been completed. Laws 2009 ch. 375, §20; Brooks. 166 Wn.2d at 672 n.4. Thus, the sentence imposed must be corrected.

2. This court must correct Mr. Vu's sentence. "Courts have the duty and power to correct an erroneous sentence upon its discovery." In re the Personal Restraint Petition of Call 144 Wn.2d 315, 332, 28 P.3d 709 (2001); see also, State v. Loux, 69 Wn.2d 855, 858, 420 P.2d 693 (1966) ("[T]his court 'has the power and duty to correct the error upon its discovery' even where the parties not only failed to object but agreed with the sentencing judge"), overruled in part, State v. Moen, 129 Wn.2d 535, 545, 919 P.2d 69 (1996); McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), cert denied, 350 U.S. 1002 (1956).

Because the amendments to RCW 9.94A.701 took effect only on August 1, 2009, Mr. Vu could not have raised these issues in either his prior appeal or his personal restraint petition. The error is now apparent and is plain on the face of the judgment. Thus, this court must order correction of Mr. Vu's sentence.

E. CONCLUSION.

For the foregoing reasons, Mr. Vu respectfully requests this Court remand his case for resentencing.

Respectfully submitted 29th day April 2010.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64497-1-I
v.)	
)	
VIET VU,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2010, 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 29TH DAY OF APRIL, 2010.

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