

NO. 68838-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FALE PE'A,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 MAR 11 PM 4:40

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

 1. The imposition of a sentencing enhancement that was not specially alleged violates the constitutional right to due process..... 6

 a. A deadly weapon sentencing enhancement must be specially alleged to comply with due process and statutory law 6

 b. The State did not allege a deadly weapon sentencing enhancement, yet one was imposed 10

 c. The enhancement should be stricken and the matter remanded for resentencing 11

 2. The community custody condition requiring Ms. Pe’a to submit to a mental health evaluation should be stricken because the trial court failed to comply with statutory requirements..... 12

F. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Pers. Restraint of Bush, 95 Wn.2d 551, 627 P.2d 953 (1981)... 7, 9

In re Postsentence Review of Leach, 161 Wn.2d 180,
163 P.3d 782 (2007) 12

State v. Barnett, 139 Wn.2d 462, 987 P.2d 626 (1999)..... 12

State v. Cosner, 85 Wn.2d 45, 530 P.2d 317 (1975) 8

State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006) 9

State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972)..... 9, 11

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) 6, 7

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) 7, 9

State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980)..... 7, 8, 10, 11

State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007) 7

Washington Court of Appeals Decisions

State v. Brooks, 142 Wn. App. 842, 176 P.3d 549 (2008) 13, 16

State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003)..... 13, 14, 15, 16

State v. Lopez, 142 Wn. App. 341, 174 P.3d 1216 (2007) 13

Constitutional Provisions

Const. art. I, § 22 6

U.S. const. amend. VI..... 6

Statutes

RCW 9.94A.505 13, 14

RCW 9.94A.533 12

RCW 9.94A.825 7, 9, 10, 11
RCW 9.94B.080 passim
RCW 9.95.015 9
RCW 71.05.020 14
RCW 71.24.025 12, 13, 14, 15

Rules

CtR 2.1 6

A. SUMMARY OF ARGUMENT

Fale Pe'a is the victim of an unlawfully entered sentence. The federal and state constitutions provide procedural safeguards to enable a person accused of a criminal offense to prepare an adequate defense. The State thwarted these requirements when it failed to notify Ms. Pe'a of its intent to seek a sentencing enhancement but presented the jury with such a special verdict and obtained an enhanced sentence.

The sentence also fails to comport with the statutory safeguards set forth in the Sentencing Reform Act. The State and the sentencing court failed to comply with the requirements for imposing a mental health evaluation condition of community custody.

These failings require the enhancement and mental health condition be stricken.

B. ASSIGNMENTS OF ERROR

1. In violation of procedural due process, a deadly weapon sentence enhancement was imposed despite the State's failure to include a special allegation in the second amended information.

2. The sentencing court erred by ordering Ms. Pe'a to obtain a mental health evaluation and follow recommendations without complying with the requirements of RCW 9.94B.080.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to set forth its intention to seek a deadly weapon sentencing enhancement in the information. The legislature has also codified this requirement. Where an amended information fails to indicate such an intent, a subsequently imposed enhancement must be stricken even if a special allegation was previously alleged. Should the deadly weapon sentence enhancement be stricken where the State's second amended information lacked any notice that the State sought such an enhanced sentence?

2. RCW 9.94B.080 permits the sentencing court to order an offender to undergo a mental health evaluation and participate in treatment only if based upon information in the presentence reports or a filed mental health status report and a finding the defendant fits the definition of a mentally ill offender. Must the order requiring Ms. Pe'a to undergo a mental health evaluation and participate in recommended treatment be stricken because the sentencing court did not find she was a mentally ill offender and the condition was not based upon information from a presentence report or mental health evaluation?

D. STATEMENT OF THE CASE

Fale Pe'a is a transsexual American Samoan who identifies as a female. V RP 596-97.¹ Although her parents accept her transsexual identity, she was not accepted by everyone in her family. V RP 609. She was also physically abused by her uncle. V RP 609-10.

Ms. Pe'a recognizes she has been dealing with depression related to her transsexual identity since she was young as well as a more recent history of alcohol abuse. V RP 630. She also suffers from bipolar disorder not otherwise specified, which means she exhibits some features of bipolar disorder although it is not clear whether she exhibits all the markers. V RP 692-97, 724-25. Ms. Pe'a had been prescribed medications, which she took intermittently because they were quite expensive. V RP 699-702.

Ms. Pe'a left American Samoa and her family when she was 18 years old and immigrated to the United States because she could receive better medical care for hormone replacement therapies and sexual reassignment surgery. V RP 597-99. In 2009, she relocated from Las Vegas, where she had lived for 10 years, to the Seattle area in

¹ The verbatim report of proceedings are transcribed in consecutively paginated volumes, referred to herein by volume number and then page of transcript, e.g. :I RP 99.

search of employment. V RP 601-03. Ms. Pe'a indeed found a job and, after living with friends, was able to support herself in her own apartment. V RP 602-03, 628.

Ms. Pe'a has established a close group of friends who are also American Samoan immigrants that self-identify as transsexual, including Nashville Jovi Timo and Isyss Viena. V RP 600-01; *see* II RP 185-87, 189-90, 192-98, 244-45; III RP 260-61, 284-88, 290-91; IV RP 422-26, 465. One evening Ms. Pe'a hosted a party for the group in her new apartment. *E.g.*, II RP 204-05; III RP 290-94, 334-35; IV RP 427-28. It was a weekend night and everyone was drinking alcohol, including Ms. Pe'a. II RP 204-08; V RP 613-14. Ms. Timo and Ms. Viena got into a disagreement, an occurrence that Ms. Pe'a and the others had witnessed on other occasions. II RP 209-11, III RP 254-58, 295-99, 315-17; IV RP 431-34, 437. However, this time the disagreement was more severe than in previous encounters. III RP 258, 296-97; V RP 616-17; *see* III RP 338-39 (Timo pushed Viena several times); IV RP 434-35 (same; Viena had bloody nose or mouth); *see also* V RP 615-16 (interaction reminded Pe'a of abusive relationship she experienced in Las Vegas). Ms. Pe'a ultimately interceded by attacking Ms. Timo with some kitchen knives. II RP 213-16; III RP

297-99, 342-47, 351-52. Ms. Timo was seriously injured but recovered. II RP 171-72, 238-39. Another friend, Taffy-Lei Maene, intervened and received minor injuries. IV RP 420, 449-55.

The State charged Ms. Pe'a with assault in the first degree as to Ms. Timo (count one) and assault in the second degree as to Ms. Maene (count two). CP 1-2. With regard to the first count, the State initially included a deadly weapon sentencing enhancement. CP 1. The charges did not change during the course of the State's prosecution. *Compare* CP 1-2 *with* CP 8-9 (amended information); CP 10-11 (second amended information). However, the State's second amended information did not include a special sentencing enhancement allegation. CP 10-11.

At trial, Ms. Pe'a asserted that she acted in defense of Ms. Viena and that her actions were a result of voluntary intoxication as well as misperceptions related to her mental health condition. *E.g.*, VI RP 824; CP 39-44. A psychologist also testified that untreated mental illness and intoxication affected how Ms. Pe'a perceived the situation and the availability of reasonable alternative measures, such as calling the police. V RP 703-06, 731-32, 739-40.

The jury acquitted Ms. Pe'a of assaulting Ms. Maene. CP 53-54. She was also acquitted of assault in the first degree against Ms. Timo. CP 50. However, the jury convicted her of the lesser-included offense of assault in the second degree. CP 51. Despite the lack of a special allegation, the jury also found by special verdict that Ms. Pe'a was armed with a deadly weapon. CP 52. As a result, a 12-month enhancement was added to her sentence. CP 59, 61. At the request of the State, but without evidentiary support or analysis, the court also required Ms. Pe'a to submit to a mental health evaluation and comply with recommended treatment. VI RP 832-33, 839; CP 65.

E. ARGUMENT

1. The imposition of a sentencing enhancement that was not specially alleged violates the constitutional right to due process.

- a. A deadly weapon sentencing enhancement must be specially alleged to comply with due process and statutory law.

A charging document must include all of the essential elements of a crime, statutory or otherwise, "to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); accord Const. art. I, § 22; U.S. const. amend. VI; CrR 2.1(b). This rule enables the accused to prepare an adequate defense. *Kjorsvik*, 117 Wn.2d at 101.

“A challenge to the constitutional sufficiency of a charging document may be raised initially on appeal.” *Kjorsvik*, 117 Wn.2d at 102. Appellate courts “review a challenge to the sufficiency of the charging document de novo.” *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007).

“Sentencing enhancements, such as a deadly weapon allegation, must be included in the information.” *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (citing *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981)).

Likewise, RCW 9.94A.825 requires the State make a special allegation and present evidence establishing the accused was armed with a deadly weapon. The statute provides that a finding whether the defendant was armed with a deadly weapon shall be made only “wherein there has been a special allegation . . . establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime.” RCW 9.94A.825 (emphasis added).

This specific issue was examined in *State v. Theroff*, 95 Wn.2d 385, 622 P.2d 1240 (1980). There, the defendant was charged by information with two counts of first degree murder. 95 Wn.2d at 386-87. The State simultaneously filed a separate notice advising the

defendant that it would seek a deadly weapon enhancement. *Id.* at 387. The State subsequently amended the information, realleging the two counts of first degree murder and adding a count of second degree murder. *Id.* The amended information contained no intention to seek an enhanced penalty as to any count. *Id.* And the State did not file another separate notice of intent to seek enhanced penalties. *Id.* at 392. The defendant was found guilty of second degree felony murder, and by special verdict, the jury found petitioner was armed with a deadly weapon at the time of the commission of the crime. *Id.* at 387. However, because the State neglected to provide the defendant with notice that it intended to seek an enhanced penalty in its information, the Court remanded for resentencing. 95 Wn.2d at 393.

Relying on prior case law, the *Theroff* Court held, “[d]ue process of law requires that the information contain specific allegations [that the State seeks an enhanced penalty based on a deadly weapon], thus putting the accused person upon notice that enhanced consequences will flow with a conviction.” *Id.* at 392 (quoting *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975)). The Court reasoned, “[w]hen prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.” *Id.* at 392. “Thus, unless a

complaint is properly amended, once the State elects which specific charges it is pursuing and includes elements in the charging document, it is bound by that decision.” *Recuenco*, 163 Wn.2d at 435.

The rule that a sentencing enhancement must be stricken if not pled by special allegation was reaffirmed in *Bush*. There, the Supreme Court noted a “deadly weapon allegation must be included in the information.” 95 Wn.2d at 554 (citing *State v. Frazier*, 81 Wn.2d 628, 632-35, 503 P.2d 1073 (1972) (holding “due process requires that the issue of whether that factor [that a deadly weapon was used in commission of the crime] is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty” (emphasis added))). As the *Bush* Court noted, the pre-Sentencing Reform Act (SRA) statute also mandates that a deadly weapon enhancement may only be imposed if specially alleged. *Id.* (citing RCW 9.95.015); *cf.* RCW 9.94A.825 (containing same requirement for post-SRA offenses).

As our Supreme Court noted in *Recuenco*, that rule has not since been altered. 163 Wn.2d at 435; *accord State v. Crawford*, 159 Wn.2d 86, 94, 147 P.3d 1288 (2006) (prosecutors must set forth their intent to seek enhanced penalties for the underlying crime in the information).

Put simply, procedural due process requires an intention to seek a deadly weapon sentencing enhancement be set forth in the information.

- b. The State did not allege a deadly weapon sentencing enhancement, yet one was imposed.

The case at bar is indistinguishable from *Theroff*. Initially, the State indicated its intent to seeking a deadly weapon sentencing enhancement. CP 1 (information); CP 8 (amended information). However, like in *Theroff*, its second amended information contained no special allegation providing notice it would seek a sentencing enhancement based on the use of a deadly weapon. CP 10-11. The second amended information sets forth the factual predicate and statutory citations for the underlying offense, assault in the first degree. CP 10. The factual description includes that the assault is alleged to have occurred “with a deadly weapon.” CP 10. But this is merely the basis for a standard range sentence for first-degree assault. The second amended information does not indicate any intent to seek a sentencing enhancement and does not cite RCW 9.94A.825 or 9.94A.533. Aside from within the description of the assault charges, the second amended information does not mention use of a deadly weapon or increases in punishment.

Thus, like in *Theroff*, Ms. Pe'a was not provided sufficient notice of the State's intent to seek a sentencing enhancement. Moreover, contrary to RCW 9.94A.825, there was no "special allegation" that Ms. Pe'a was armed with a deadly weapon at the time of the commission of the assault. Consequently, no deadly weapon enhancement could be imposed.

Nonetheless, like in *Theroff*, the jury was provided a special verdict and responded affirmatively that a deadly weapon was armed with a deadly weapon at the time of the commission of the crime alleged in count one (assault of Ms. Timo). CP 52. The court imposed the deadly weapon sentencing enhancement, increasing the term of confinement by 12 months. CP 59, 61. Like in *Theroff*, due process was violated by the imposition of a deadly weapon sentencing enhancement where none was specially alleged. *See Theroff*, 95 Wn.2d at 393.

- c. The enhancement should be stricken and the matter remanded for resentencing.

This due process violation requires the sentencing enhancement be stricken. *Theroff*, 95 Wn.2d at 393; *Frazier*, 81 Wn.2d at 635.

The State may argue that the error is moot because Ms. Pe'a has served her term of confinement, including the 12-month sentencing

enhancement. However, a deadly weapon sentencing enhancement carries continuing consequences. For example, under RCW 9.94A.533(3)(d) and 4(d), any subsequent deadly weapon enhancement would require twice the term of confinement if Ms. Pe'a has been previously sentenced for a deadly weapon enhancement. This Court should strike the enhancement and remand for resentencing.

2. The community custody condition requiring Ms. Pe'a to submit to a mental health evaluation should be stricken because the trial court failed to comply with statutory requirements.

A court's sentencing authority derives expressly from statute.

In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

RCW 9.94B.080 authorizes imposition of a mental health evaluation condition only where the sentencing court follows certain procedures. Specifically, the 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 this condition is likely to have influenced the offense." RCW 9.94B.080;² *State v. Jones*, 118 Wn. App. 199, 76 P.3d

² Though the title of chapter 9.94B RCW refers to "crimes committed prior to July [sic] 1, 2000," RCW 9.94B.080 is applicable to crimes committed after the year 2000, as recognized by Laws of 2008, ch. 231, § 55. This legislation recodified former RCW 9.94A.505(9) (2004) as RCW 9.94B.080.

258 (2003) (interpreting prior codification of RCW 9.94B.080 at former RCW 9.94A.505(9)); *see also State v. Brooks*, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008) (same); *State v. Lopez*, 142 Wn. App. 341, 353–54, 174 P.3d 1216 (2007) (applying same as to condition requiring psychiatric evaluation). Furthermore, the court’s decision must be based upon information in the presentence report or prior mental health evaluations submitted to determine competency to stand trial or applicability of an insanity defense. RCW 9.94B.080.

The statute 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 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.

RCW 9.94B.080.

The statute refers to RCW 71.24.025, the Community Mental Health Services Act, for the definition of “mentally ill person.” RCW 9.94B.080. The Act’s definition of “mentally ill persons” in turn refers

to four other subsections of the definitional statute. RCW 71.24.025(18). The Legislature's definition covers people with serious mental impairments that substantially and negatively impact their cognitive or volitional functions or render them dangerous to themselves or others. RCW 71.24.025(1), (4), (27); RCW 71.05.020(17), (23), (24). A person may benefit from mental health counseling and not fit the definition of mentally ill person.

In *Jones*, the Court of Appeals held the trial court exceeded its authority in ordering a mental health evaluation without complying with the unambiguous criteria of former RCW 9.94A.505(9). The court so held even though significant evidence was presented at trial that the defendant suffered from bipolar disorder and his failure to take prescribed medications contributed to his crimes. 118 Wn. App. at 208-11. A sentencing court may not order an offender to participate in a mental health evaluation and any recommended 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." *Id.* at 202. Thus the court ordered the trial court to strike the community custody condition requiring a mental health evaluation and

treatment “unless it determines that it can presently and lawfully comply with” the statute. *Id.* at 212.

Here, the sentencing court did not have before it either a presentence report or mental health evaluations in satisfaction of RCW 9.94B.080. Thus the court could not have relied upon such evidence in imposing the condition that Ms. Pe’a participate in a mental health evaluation. In fact, the State simply requested the condition and the court provided it without any analysis or cited basis. VI RP 832-33, 839. Admittedly, there was evidence Ms. Pe’a suffers from bipolar disorder not otherwise specified; however RCW 9.94B.080 requires more. *See Jones*, 118 Wn. App. at 208-12; V RP 692-97 (testimony of Dr. Young). Additionally, the court did not find that “reasonable grounds exist to believe that [Ms. Pe’a] is a mentally ill person as defined in RCW 71.24.025.” *Compare* CP 65 (App. H to Judgment & Sentence) *with* RCW 9.94B.080.

The sentencing court required Ms. Pe’a to obtain a mental health evaluation and follow all treatment recommendations without reviewing a statutorily-sufficient report concerning her mental health status or finding her to be a mentally ill person. The court erred by not following RCW 9.94B.080. Accordingly, the sentence should be

remanded with instructions to strike the mental health evaluation condition unless the court determines it can presently and lawfully comply in full with RCW 9.94B.080. *See Brooks*, 142 Wn. App. at 851-52; *Jones*, 118 Wn. App. at 212.

F. CONCLUSION

Because Ms. Pe'a was denied constitutionally required notice, the deadly weapon sentencing enhancement should be stricken. Additionally, the sentence should be remanded for the court to strike the condition requiring a mental health evaluation or for the court to determine it can presently and lawfully comply with the statutory prerequisites to its imposition.

DATED this 11th day of March, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,)

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FALE PE'A,)

Appellant.)

NO. 68838-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MARCH, 2013, I CAUSED 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 THE MANNER INDICATED BELOW:

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