

January 15, 2021

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
Appellant,

No. [REDACTED]

AMENDED ORDER GRANTING MOTION TO MODIFY COMMISSIONER'S RULING, GRANTING APPELLANT'S RENEWED MOTION TO STAY HIS SENTENCE AND FOR RELEASE PENDING APPEAL, DENYING MOTION FOR ACCELERATED REVIEW, AND REMANDING FOR SETTING OF CONDITIONS OF RELEASE

THE COURT has considered appellant [REDACTED] motion to modify the commissioner's November 3, 2020 ruling denying his renewed motion for stay of sentence and immediate release pending his appeal; the appellant's statement of additional authorities; the respondent's answer to the motion to modify; appellant's reply; and the record and file herein.

Appellant is a 54 year old, African-American man, who suffers from high blood pressure. Renewed Motion, App. at 17<sup>1</sup>. [REDACTED] has been convicted of first degree theft and two counts of second degree theft. Based on two aggravating factors, he was sentenced to 120 months of confinement. His offenses involved wrongfully obtaining thousands of dollars in funds from elderly individuals in Pierce County for whom he had agreed to provide landscaping services. [REDACTED] has committed several similar prior offenses. He is currently incarcerated in Monroe Correctional Complex. Renewed Motion, App. at 17.

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<sup>1</sup> Renewed Motion for Stay of Sentence Pending Appeal (filed Oct. 2, 2020) (Renewed Motion).

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On December 20, 2019, following his incarceration, [REDACTED] filed an appeal in this court. The briefing in the appeal is not yet complete. In March 2020, Governor Jay Inslee began issuing emergency proclamations designed to limit the spread of COVID-19.

[REDACTED] moved for the trial court to stay the execution of his sentence pending appeal to mitigate the risk of serious illness or death from COVID-19. Renewed Motion, App. at 1-3. On May 1, 2020, the trial court denied the motion. Renewed Motion, App. at 3.

[REDACTED] moved in this court for review of the trial court's decision and, in the alternative, asked this court to exercise its own discretion to stay the execution of his sentence and to grant him conditional release under RCW 9.94A.585(3). A commissioner of this court denied the motion. Renewed Motion, App. at 4. A panel of judges granted [REDACTED] motion to modify the commissioner's ruling and remanded the matter to the trial court "to hold a hearing to determine whether bail and conditional release should be set pursuant to RCW 9.94A.585(3), RCW 9.95.0[6]2, RCW 10.73.040, and other applicable rules and statutes pending the resolution of the appeal." Renewed Motion, App. at 5. The trial court again denied release. Renewed Motion, App. at 11.

On October 2, 2020, [REDACTED] filed a renewed motion to stay his sentence and for release pending appeal, and for appellate review of the trial court's decision on remand. In support of this motion, [REDACTED] submitted documentation establishing that, among the prison population, someone his age is considered by the Department of Corrections (DOC) to be at "higher risk for severe disease and complications if they acquire COVID-19" and that DOC has acknowledged that he is someone who is at higher risk. Renewed Motion, App. at 36, 22. [REDACTED] also submitted documentation showing that those suffering from

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hypertension are at higher risk of death or serious illness from COVID-19. Renewed Motion, at App. at 36. Additionally, he submitted documentation showing that the confined living spaces, crowding, and other conditions in prisons increases the risk that COVID-19 will spread and that some DOC facilities have suffered from severe COVID-19 outbreaks. Renewed Motion, App. at 25-27, 58. ██████████ wife also filed a declaration stating that she supported her husband's release and that he could reside with her at her residence in Tacoma. Renewed Motion, App. at 19.

A commissioner of this court denied the renewed motion for stay of sentence pending appeal. ██████████ then filed the current motion to modify the commissioner's ruling. We review the commissioner's decision de novo. *State v. Vasquez*, 95 Wn. App. 12, 15, 972 P.2d 109 (1998).

Because we have independent authority to grant release under RCW 9.94A.585(3),<sup>2</sup> we choose to exercise our own discretion and do not address the trial court's ruling. We conclude that ██████████ has demonstrated that his age and health condition place him at greater risk of serious illness should he contract COVID-19 and that his incarceration places him at increased risk of contracting COVID-19.

Given ██████████ recidivism, we acknowledge that ██████████ poses a risk to the community if released without appropriate conditions. But this risk can be mitigated by restricting ██████████ to his wife's residence and imposing requirements such as electronic

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<sup>2</sup> RCW 9.94A.585(3) provides: "Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond."

No. [REDACTED]

home monitoring (EMH) (if available) and other appropriate release conditions that will limit [REDACTED] ability to reoffend. Because this risk can be controlled, the risk to appellant's health and life outweigh the risk to community.<sup>3</sup> Furthermore, we note that nothing suggests that appellant is likely to flee, or that a stay of the judgment will cause unreasonable trauma to the victim or the victim's family. Because we grant [REDACTED] motion for release pending appeal, we deny his motion for accelerated review.

Based on the foregoing, IT IS HEREBY ORDERED that [REDACTED] motion to modify is GRANTED and that his renewed motion for stay of sentence pending appeal is GRANTED. [REDACTED] motion for accelerated review is DENIED.

Pursuant to RCW 9.94A.585(3), this matter is remanded to the trial court to appoint counsel to appellant and to set release conditions, such as those discussed below, to ensure [REDACTED] does not commit any additional offenses. The superior court will hold a hearing to set the release conditions within 10 days of the date of this order.

The trial court shall set reasonable conditions to include:

1. No new criminal law violations, including not possessing a firearm.
2. Maintain residence at his wife's residence and not leave that residence without a court order.
3. Electronic home monitoring, if available.

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<sup>3</sup> As the Massachusetts Supreme Court aptly stated, “[T]he health risks to person in custody arising from [the COVID-19] pandemic require that we adjust the analysis applied to motions to stay the execution of sentence pending appeal. . . . In these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to remain in custody.” *Christie v. Commonwealth*, 484 Mass. 397, 401-02, 142 N.E. 3d 55 (2020).

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4. Appearance at all court hearings requiring his appearance.
5. No contact with the victim or the victim's family, or any witnesses.
6. No conducting any landscaping business activities.
7. Other reasonable conditions the trial court deems necessary.

The trial court shall also provide clear instructions to [REDACTED] for him to report to serve the remainder of his sentence should this court affirm his conviction and sentence or dismiss the appeal.

Appellant's counsel shall ensure that [REDACTED] and his wife fully understand the terms of release. Counsel for the State shall make all necessary parties aware of the terms of this court's and the trial court's order on remand.

Accordingly, it is hereby

ORDERED.

**PANEL:** Jj. SUTTON, WORSWICK, MAXA

FOR THE COURT:

  
SUTTON, A.C.J.