69335-2

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NO. 69335-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK HILLS,

Appellant.

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

The Honorable Patrick Oishi, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The sentencing court erroneously imposed substance abuse evaluation and treatment as a condition of community custody.

2. The sentencing court erred when it prohibited the appellant from possessing alcohol.

3. The judgment and sentence contains a scrivener's error that should be corrected.

Issue Pertaining to Assignment of Error

1. Did the trial court err when it ordered appellant to submit to substance abuse evaluation and treatment as a condition of community custody where the court did not make a statutorily required finding that a chemical dependency contributed to the offense?

2. Where there was no evidence that the appellant's crime involved his use of alcohol, must the condition prohibiting him from possessing alcohol be stricken?

3. The court's judgment and sentence indicates that community custody is being imposed "for qualifying crimes committed before 7-7-2000." Should the judgment and sentence be corrected to impose community custody under the proper statutory provision?

B. STATEMENT OF THE CASE[1]

The State charged appellant Derrick Hills with possession of cocaine. CP 1-5. After Hills's suppression motion was denied, the case was tried to a jury. CP 7-18, 64-67. The jury found Hills guilty as charged. CP 30.

The court sentenced Hills to a high-end standard range sentence of 24 months plus of incarceration, as well as 12 months of community custody. CP 53-56. As a condition of community custody, the court ordered Hills to obtain a substance abuse evaluation and follow all treatment recommendations. 2RP 192; CP 60. The court also ordered that Hills not "possess or consume" alcohol. CP 60.

Hills timely appeals. CP 75-76.

C. ARGUMENT

1. THE TRIAL COURT WRONGLY ORDERED SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

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). Illegal or

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – 7/19 and 8/8/12; and 2RP – 8/9, 8/10, and 9/14/12.

erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

RCW 9.94A.703(3)(c) allows the court to impose "crime-related treatment or counseling services" only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment).

Before such rehabilitative treatment may be imposed, however, RCW 9.94A.607(1) requires the court to find a chemical dependency contributed to the offense:

> *Where the court finds that the offender has a chemical dependency that has contributed to his or her offense*, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

(Emphasis added).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the Legislature means exactly what it says, giving criminal statutes literal interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Hills's offense. 2RP 192; CP 52-60. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment.[2]

In State v. Powell, Division Two remarked the trial court correctly imposed substance abuse treatment as a community custody condition despite the lack of a finding as required by RCW 9.94A.607(1) because the trial evidence showed the defendant consumed methamphetamine before committing the offense and the defense asked the court to impose substance abuse treatment. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73, 206 P.3d 321 (2009).

But the Court's remarks in Powell are dicta because the Court had already decided to reverse conviction on a separate issue when it addressed the viability of the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994)

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[2] And although the statement was not introduced at trial, Hills reportedly told police officers that he did not intend to use the cocaine found on his person. 2RP 24-28 (argument and court ruling that Hill's statement should be excluded from jury's consideration).

("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Regardless, the Court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), a court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense. Powell ignored this unambiguous mandate in reasoning the condition is valid even if the court makes no finding on the matter, so long as the trial record *could* support such a finding. Powell, 139 Wn. App. at 819-20. The Powell Court's approach renders the statutory language referring to the need for a finding superfluous. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).

Moreover, "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The court in Powell ignored these well-established principles when it

independently reviewed the record and, in effect, made a finding the sentencing court never made.

Sentencing errors may be raised for the first time on appeal. Jones, 118 Wn. App. at 204; State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This Court should order the sentencing court to strike the condition pertaining to substance abuse evaluation and treatment on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

2. THE COURT ERRED IN IMPOSING AN UNLAWFUL ALCOHOL-RELATED COMMUNITY CUSTODY CONDITION.

Under RCW 9.94A.703, some community custody conditions are mandatory, while the sentencing court has discretion in imposing others. Under RCW 9.94A.703(3)(d), a sentencing court may order the defendant to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Under RCW 9.94A.703(3)(f), the trial court may also order the defendant to "comply with any crime-related prohibitions."

The court ordered Hills to refrain from consuming and possessing alcohol. CP 60. While RCW 9.94A.703(3)(e) specifically permits the court

to order a defendant not to consume alcohol, the court went further and required that Hills not *possess* alcohol.

There was no evidence, and the court did not find, that Hills consumed alcohol or that alcohol contributed to the offense. While the record indicates Hills admitted to officers he had smoked marijuana shortly before the officers confronted him,[3] alcohol was not discussed. The court therefore wrongly imposed the challenged alcohol-related condition. See Jones, 118 Wn. App. at 208 (alcohol-related conditions impermissible even where defendant admitted substance abuse contributed to the crime)

3. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND A SCRIVENER'S ERROR.

Finally, the court's judgment and sentence states that community custody is being imposed "for qualifying crimes committed before 7-1-2000." CP 55. The section to be used to impose community custody on "qualifying crimes committed after 6-30-2000" is left blank. CP 57. The judgment and sentence indicates, however, that the crime of conviction occurred in 2011. CP 52.

This Court should therefore remand to correct the judgment and sentence to indicate the proper authority for imposition of community

[3] E.g., 2RP 54.

custody. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also Bahl, 164 Wn.2d at 744, (illegal or erroneous sentences may be challenged for the first time on appeal).

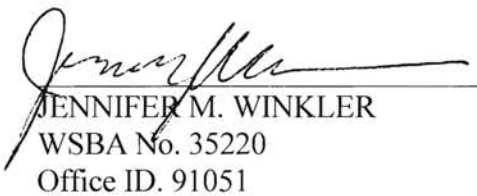
D. CONCLUSION

This Court should reverse the portion of the sentence relating to the challenged community custody conditions and remand so the illegal conditions may be stricken. The judgment and sentence should also be corrected to amend the scrivener's error.

DATED this 11TH day of February, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69335-2-I
	)	
DERRICK HILLS,	)	
	)	
Appellant.	)	

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 11TH DAY OF FEBRUARY, 2013, 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] DERRICK HILLS
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WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF FEBRUARY, 2013.

X Patrick Mayovsky