69393-0

69393-0

NO. 69393-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order requiring appellant to obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody. CP 62.

2. The trial court erred in finding appellant to be a mentally ill person as defined in RCW 71.24.025 and that the condition is likely to have influenced the underlying offense. CP 62.

3. The trial court erred in exceeding the scope of this Court's second remand order. CP 60, 62.

Issues Related to Assignments of Error

Appellant was sentenced in 2007. He twice appealed a community custody condition that directed mental health evaluation and treatment. This Court twice reversed that condition, based on the trial court's failure to comply with statutory requirements.

In the second appeal, this Court held a Department of Corrections (DOC) presentence report is a statutory prerequisite to the condition. After this Court's second remand, the trial court directed the DOC to prepare a presentence report. The trial court filed that report in 2011. After the court entered another erroneous

order, a remand hearing was finally held in 2012, after which the court again imposed the condition.

a. Where sentencing occurred in 2007, and where the controlling authority makes it clear that "presentence" means "before sentencing," did the trial court err in determining that the 2011 report was a "presentence report"? CP 62.

b. Where this Court did not remand for resentencing, and where the trial court did not provide notice or exercise any discretion that might suggest it was holding a new sentencing hearing, is it clear that the 2012 remand hearing was not a "resentencing"?

c. Should the community custody condition again be vacated because it exceeded the trial court's sentencing authority?

B. STATEMENT OF THE CASE

This is Giir's fourth appeal from trial court orders requiring him to obtain a mental health evaluation and follow treatment recommendations. The orders were imposed as community custody conditions. The first two appeals reversed the conditions. The third appeal was settled when the parties agreed the trial court's third order was fatally flawed and could not withstand appellate review. CP 21, 46-50, 54-62; Supp. CP __ (sub no. 148, Appendix F, Additional Conditions of Sentence); RP 5, 14-15.

On August 15, 2007, Giir pled guilty to first degree murder and third degree assault. CP 14. Giir requested an exceptional sentence of 240 months, below the 250-month bottom of the standard range. Giir's request was based on evaluations from two psychologists, Doctors Julie Kriegler and Robert Wheeler. Both experts discussed the trauma Giir had suffered as a child in Sudan and refugee in Kenya. CP 37-42; RP 10-12.

On November 9, 2007, the court sentenced him to concurrent terms of 300 months and 8 months in prison. CP 17, 41. The court also imposed 24-48 months of community custody. CP 18, 41. One condition required Giir to "obtain a mental health evaluation and follow all treatment recommendations." CP 21, 41.

At the time of Giir's 2005 offenses, the relevant statute provided:

> (9) 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 9.94A.505(9) (2004), recodified as RCW 9.94B.080 (Laws of 2008, ch. 231, § 53); CP 57-58.

On appeal, Giir challenged the condition.[1] This Court rejected the state's procedural arguments (CP 46-49), and held the trial court erred in imposing the condition. CP 49-50. Because the court had not complied with RCW 9.94A.505(9) (2004), this Court remanded "for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9)." CP 50 (citing State v. Jones, 118 Wn. App. 199, 212, 76 P.3d 258 (2003)); CP 56.

On remand, Giir moved to strike the condition. He asserted, inter alia, the finding could not be made because DOC had not completed a presentence report. CP 35. By order dated April 23, 2010, the trial court entered findings over defense objection:

> The court finds that the defendant is a mentally ill person as defined in RCW 71.24.025 and 71.05 & that this condition is likely to have influenced the underlying offense. The finding is based on defense's presentence report, presentation at sentencing, and evaluations by Dr. Wheeler and Dr. Kriegler.

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[1] Giir also challenged the trial court's denial of a motion to withdraw his plea. Giir argued he was denied effective assistance because his trial counsel had failed to investigate competency as a basis to withdraw the plea. This Court rejected the claim. CP 43-46.

CP 52, 55.

Giir again appealed and challenged the condition. CP 51. This Court again rejected the state's procedural arguments, CP 56-57, and again held the court erred in entering the finding and ordering the condition. The statute states that "[a]n 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 competency or eligibility for a defense of insanity." CP 58 (court's emphasis). Because there was no DOC presentence report, the condition exceeded statutory authority. CP 58-60.

> Because the trial court did not order the statutorily-required presentence report prepared by the DOC and did not rely on such a report in ordering Giir to undergo mental status evaluation and treatment, we reverse this condition of community custody and remand.

CP 61.

This Court's decision was dated March 7, 2011. On March 22, 2011, before the mandate was issued, the state proposed and the trial court signed an order directing DOC to complete a presentence report, "pursuant to RCW 9.94A.500(1)." Supp. CP __ (sub no. 144, Order). The mandate was issued May 13, 2011. CP 53.

On August 18, 2011, the court sua sponte put a cover sheet on, and filed, what it identified as a "pre-sentence investigation." The "investigation" was prepared by Jeri Boe, a community corrections supervisor with DOC. Supp. CP __ (sub no. 147A, "Pre-sentence Investigation"). Boe noted that Giir had already been sentenced. The "investigation" states "[a]ll the personal information located in this report was compiled from documents the offender provided to DOC at the time of intake and information that Kero Giir provided during his Psychological Evaluation on 10/8/06." Id., at p.3. A similar statement precedes the "risk/needs assessment." Id., at p.4.

In the "Emotional / Personal" section, the "investigation" states:

> At the time of the Psychological Evaluation Giir was noted to be suicidal, although there was no indication of the presence of any psychotic or dissociative symptoms. There is some mention that he may suffer from PTSD, but collateral reports do not mention this diagnosis.

Id., at p.5. The "conclusion" section said Giir "has been found guilty of murdering his girlfriend in an angry rage and sentenced to a term of 300 months. Due to the fact that Giir has already been sentenced there will be no mention of sentencing options." Id., at p.6. The report made no sentencing recommendation "as this offender has been sentenced to 300 months for this crime." Id. For "conditions of

supervision" the report states "see attached Appendix F – Community Supervision (DOC 09-130)). Id.

It is unclear whether the "investigation" was provided to defense counsel. It identified Richard Warner as Giir's counsel, but Warner had withdrawn in December 2007, and other counsel had appeared and withdrawn by notices filed in March and April, 2011. Supp. CP __ (sub no. 83, notice of withdrawal), (sub no. 143, notice of appearance); (sub no. 145, notice of withdrawal).

On August 16, 2011, it appears that the trial court, sua sponte, signed Appendix F, which imposed additional conditions of sentence. That document was filed August 19, 2011. Supp. CP __ (sub no. 148). These were identified as "Crime Related Prohibitions" and "Conditions of Supervision [sic]." Two conditions required:

> 9) During term of community supervision [sic], submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections' requirements.
>
> 10) You shall undergo out-patient treatment as prescribed by the Court or Office of Community Corrections as follows: [sic]."

Supp. CP __ (sub no. 148, Appendix F Additional Conditions of Sentence). It appears that these were the conditions that Boe had

attached to the DOC "investigation" and the court adopted them verbatim. Id.; RP 5.

Unlike the first remand hearing, nothing in the court file suggests the state or the court notified Giir of any "hearing" before the court entered this third order. Giir was not transported from prison to King County. There are no clerk's minutes in the file, nor is there any indication the court or the state provided Giir with notice it had imposed new conditions on his judgment and sentence. There is no suggestion in the file that the court heard from Giir or any attorney acting on his behalf.[2]

In a mailing postmarked April 12, 2012, Giir sought to appeal the trial court's third imposition of the sentencing condition.[3] This Court opened case number 68893-6-I and appellate counsel was appointed. Giir filed a motion in this Court asking for the notice of appeal to be considered timely filed, or to enlarge the time, because

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[2] It appears Judge Spector was handling mental health court cases at Harborview at that time. She said they did not "have enough security to bring a murder convict up there." RP 9.

[3] The lengthy filing includes a notice of appeal, a motion and order to proceed in forma pauperis, a motion to withdraw his plea, Giir's affidavit, the defense presentence statement, Boe's "investigation," and the new Appendix F. Supp. CP __ (sub no. 151, Motion and Order to Proceed In Forma Pauperis).

he was not present for any hearing and had not been timely notified of the trial court's new Appendix F. The state did not respond to the motion.

The parties instead returned to the trial court, in the interest of judicial economy. RP 5, 14-15. On September 19, 2012, the trial court held a hearing. This time Giir was present and represented by trial counsel. Appellate counsel also appeared. RP 3, 13.

At the hearing the state moved the court to strike the new Appendix F. The state agreed that Giir had the right to be present when a court modifies conditions of his judgment and sentence. The state also asked the court to enter new a finding, based on the DOC "investigation" and the previous psychological evaluations. RP 5.

When the prosecutor asked to present telephonic testimony from Boe, defense counsel objected to taking additional testimony. Judge Spector responded, "[w]ell, this case is on remand. Of course I can take testimony. That's the whole point is that so the record can be fleshed out." RP 6. Defense counsel objected to the timeliness of the "presentence report," which must be provided "prior to sentencing." RP 7. Judge Spector responded, "[i]t was dated August 8, 2011. It's now – it's a year past that date. How much more time do you need?" RP 7. Counsel asserted taking additional testimony also

would violate timeliness requirements, and the trial court said "I disagree." RP 7.

Boe was sworn in as a witness. The prosecutor asked if mental health treatment was a condition the DOC would recommend. Defense counsel raised several additional objections. Judge Spector noted that Giir's counsel had been recently appointed, but the court had previously heard from experts to support the defense request for an exceptional sentence. RP 8-9.

In explaining her ruling, Judge Spector said

> But our appellate courts, in their infinite wisdom, decided there wasn't enough of a record for the Court to order this one condition. And when the Court based it on that, but then decided that the statute required somehow a DOC presentence report, which was then supplemented. And in your estimate it wouldn't be timely, also. But that was supplemented in August of 2011.

RP 9.

Boe was testifying telephonically, and was in her car on the side of the road at the time of the hearing. Boe confirmed that she had relied on Dr. Wheeler's report. She also recalled a second report but could not recall its author. RP 10-12, 17. Boe relied on the reports in concluding that DOC would recommend mental health treatment while Giir was on community custody. RP 12-13.

During Boe's testimony, Judge Spector said the scope of the remand allowed DOC to fulfill its "statutory requirements that somehow were not satisfactory on appeal." RP 11. She hoped "the Appellate Courts read all of this." RP 10. She wanted to avoid another remand, saying "[t]he Court of Appeals has nothing . . . better to do." RP 11.

When given the chance, appellate counsel discussed the procedural posture of the case, and why the parties had agreed to vacate the erroneous Appendix F. RP 14. For the record, counsel confirmed the frustration apparent in Judge Spector's demeanor, but also said the parties believed "the Court of Appeals does have better things to do." RP 15. The parties had agreed to vacate Appendix F because it made no sense to appeal conditions of sentence where the errors in their entry were obvious. RP 14-15.

Judge Spector then said she would "make the Finding." RP 15. She had previously read and considered Wheeler's and Kreigler's reports. She thought Giir's counsel's 2007 sentencing presentation had been compelling, as Giir had been one of the "Lost Boys" of Sudan and had suffered greatly during his youth. RP 16. When she had previously entered the finding she had not done so "lightly" or "in a cavalier manner." RP 16-17.

The court noted that Boe had basically taken Wheeler's and Kreigler's reports "and made a presentence report so that it would comply, at least on its face, with the statute so that this court can make a finding that he's mentally ill" and can order mental health treatment as a condition of community custody. RP 17. The court believed it would be remiss "not to order some type of mental health treatment." RP 17.

> And so my issue with the Court of Appeals is now they have their form, now they have their DOC report; and all [Boe has] done is taken all the reports and put it into their form, which I incorporate by reference, as a good little trial judge, so that I comply with the statute; that they seem to think there was nothing here before the Court.

RP 17-18. The court condemned what it called "formalistic policies" and that "we have lost the whole point of why we do these things." RP 18. "[I]t seems formalistic at best when we turn the statute on its head that I need the form so that the Court [of] Appeals knows that the form has been complied with statutorily[.]" RP 19-20.

The court then signed the order vacating Appendix F. The order also required Giir to "obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody." CP 62. The order was based on the DOC "report," Kriegler's and Wheeler's evaluations, and presentence reports initially

submitted by both counsel. The court found that Giir was a mentally ill person as defined in RCW 71.24.025 and that the condition is likely to have influenced the underlying offense. CP 62.

After the September 19th order was entered, the parties agreed to dismiss as moot the third appeal in No. 68893-6-I. RP 14; see also, Motion to permit entry of order and dismiss appeal as moot, and this Court's ruling dated September 27, 2012. Giir then filed a notice of appeal from the new order. CP 64-66.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT AS A COMMUNITY CUSTODY CONDITION.

The law governing Giir's sentence is the law in effect when Giir's offense occurred May 28, 2005. CP 14; RCW 9.94A.345. This brief therefore cites to statutes in effect at that time.

A trial court's authority to impose sentence is limited by the authority in the SRA at the time of the offense. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). This Court reviews de novo whether a trial court exceeds its statutory authority in imposing community custody conditions. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

This appeal follows Giir's second appeal. The controlling case law and statutes are fully set forth in this Court's second opinion, and Giir incorporates them here. CP 57-61; State v. Giir, noted at 160 Wn. App. 1026, 2011 WL 768839, *2-4 (No. 65302-4-I, March 07, 2011).

This Court held the trial court erred in imposing a mental health evaluation and treatment "without the benefit of a presentence report prepared by the DOC." CP 60. This Court rejected the state's harmless error argument for several reasons. One reason quoted former RCW 9.94A.500(1), which provided "the court shall order the department to complete a presentence report before imposing a sentence." CP 60, n. 4. Another quoted former RCW 9.94A.505(9), which states "[a]n order requiring mental status evaluation or treatment must be based on a presentence report." CP 60-61, n.4. In its conclusion, this Court stated, "[b]ecause the trial court did not order the statutorily-required presentence report prepared by the DOC and did not rely on such a report in ordering Giir to undergo mental status evaluation and treatment, we reverse this condition of community custody and remand." CP 61.

On remand, the trial court apparently believed the cure for these errors was to order DOC to produce what the court filed as a

"pre-sentence investigation." But this Court did not remand for resentencing, and the report was prepared more than three years after sentencing. Boe's report is not a "presentence report" as envisioned by statute, rule, or case law.

a. Boe's Report is not a "Presentence Report".

Under the Sentencing Reform Act (SRA), a court holds one sentencing hearing. RCW 9.94A.500; see also, State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989) (the SRA narrowly constrains a court's authority to modify a sentence). In Giir's case, that hearing occurred November 9, 2007. CP 14 ("The defendant, the defendant's lawyer, RICHARD WARNER, and the deputy prosecuting attorney were present at the sentencing hearing conducted today"); CP 19 (judgment and sentence signed November 9, 2007); RP 3 (prosecutor says Giir "was sentenced back on November 9th of 2007").

Boe's report was dated July 20, 2011. It was received by the trial court on August 8, 2011, and the court filed it August 18, 2011. Supp. CP __ (sub no. 147A). Although the court ordered DOC to "complete a presentence report and provide it to the Court pursuant to RCW 9.94A.500(1),"[4] the opportunity for a presentence report had

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[4] Supp. CP __ (sub no. 144, Order to the Department to Prepare a Presentence Report).

long since passed. There was nothing "presentence" about Boe's report.[5]

Statutory terms should be accorded their plain meaning in the context in which they appear. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). A number of Washington's statutes use the term "presentence report." The most relevant, RCW 9.94A.500,[6] makes it clear that a "presentence report" must be completed before the sentencing hearing. RCW 9.94A.500(1). A court may not enter an order requiring a mental health evaluation or treatment without first considering a "presentence report." RCW 9.94A.505(9); CP 58-61. A defendant may be found to have waived objections to information contained in a presentence report if the objections are not raised at sentencing (RCW 9.94A.530(2)); of course, this can only happen if the presentence report is completed before the sentencing hearing.

Court rules further cement this basic truth. The governing rule is titled, "Procedures Before Sentencing" and includes a subsection

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[5] Boe's report concedes as much: "Due to the fact that Giir has already been sentenced there will be no mention of sentencing options." Supp. CP __ (sub no. 147A, "Pre-sentence Investigation", at p.6).

[6] The statute is titled, 9.94A.500. "Sentencing hearing—Presentencing procedures—Disclosure of mental health services information[.]"

authorizing the court to order a presentence report be prepared by DOC, and a subsection discussing the contents of such a report. CrR 7.1(a) and (b) (emphasis added). The presentence report should be filed "at least 10 days before sentencing." CrR 7.1(a)(3).

The case law is in accord. See generally, State v. Sanchez, 146 Wn.2d 339, 353-57, 46 P.3d 774 (2002) (presentence report is prepared by community corrections officer before sentencing). In short, as this Court ruled in Giir's second appeal, the term "presentence report" has a plain meaning in this context, and requires the report to be prepared before sentencing. CP 59.

When applied here, these statutes, rules, and cases show the trial court again erred. Whatever else Boe's report may have been, it was not a "presentence report" required by the controlling statutes.[7] Therefore, based on the same authority this Court cited in its last opinion, this Court should vacate that portion of the order that imposes a community custody condition requiring a mental health evaluation and treatment. CP 62.[8]

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[7] Defense counsel's objection to the report on timeliness grounds should have been sustained, not ridiculed. RP 6-8.

[8] Because the order properly strikes the erroneously entered Appendix F, the entire order should not be vacated. CP 62.

b. This Court did not Remand for Resentencing.

In response, the state may claim the condition was properly entered because the 2012 hearing was a "resentencing." In this scenario, if the 2012 hearing is a "resentencing," then Boe's 2011 report could be seen as "presentencing." This brief offers two short predictive replies.

First, this Court did not remand for resentencing in either of Giir's first two appeals. This Court remanded for further proceedings that could lawfully occur under controlling statutes. CP 50, 61.

Second, Giir's right to appeal following the second remand is limited. See e.g., State v. Kilgore, 167 Wn.2d 28, 38-44, 216 P.2d 393 (2009) (a trial court's discretion to resentence on remand is limited by the appellate court's mandate, and a subsequent appeal is limited by the discretion exercised by the trial court). No one provided Giir or his counsel with notice that he was being resentenced. The trial court did not exercise any discretion to resentence Giir; it instead directed DOC to prepare a report and it then made a finding to order mental health evaluation and treatment. Given the state's fondness for narrow procedural arguments in Giir's appeals (CP 10-13, 56-57), it seems unlikely that the state can credibly argue the scope of Giir's current appeal exceeds a narrow challenge to the trial court's last

order. CP 62. In other words, there was no resentencing in 2012, and Boe's report cannot travel back in time to be the statutorily required "presentence report."

D. CONCLUSION

This Court should reverse that portion of the order entered September 19, 2012, that imposes a community custody condition requiring a mental health evaluation and treatment. CP 62. This Court should direct the trial court to vacate that portion of the order, and should not allow the exercise of any other authority or discretion on remand.

DATED this 31st day of July, 2013.

Respectfully Submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69393-0-I
	)	
KERO GIIR,	)	
	)	
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 31ST DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KERO GIIR
DOC NO. 312493
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2013.

X Patrick Mayovsky