NO. 43472-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SPENCER LAWRENCE OBERG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Judge

No. 10-1-03778-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly require defendant to obtain a substance abuse evaluation and comply with necessary treatment where the court's finding that chemical dependency contributed to defendant's crimes was implicit in its ruling?

2. Is remand to correct defendant's sentence required in cause number 11-1-02533-2 where the term of incarceration and community custody exceeds the statutory maximum and the court's use of a ***Brooks*** notation is no longer appropriate to cure the error?

B. STATEMENT OF THE CASE.

1. Procedure

On November 15, 2011, SPENCER LAWRENCE OBERG, hereinafter "defendant," entered guilty pleas in three[1] separate cause numbers. Defendant's pleas were part of a global resolution encompassing several Pierce County cases and two King County cases. RP 3.

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[1] It appears that defendant also entered a guilty plea in a fourth cause number (10-1-02337-4), but that case is not part of this appeal. *See* RP 2; CP 121-122.

In Pierce County Cause No. 10-1-03778-2, defendant plead guilty to one count of identity theft in the second degree and one count of unlawful possession of a controlled substance. CP 95-103. This cause number had been originally charged as two counts of unlawful possession of a controlled substance, but defendant agreed to enter a guilty plea to the more serious felony of identity theft in order to facilitate the global resolution. CP 62-63, 64, 93-94, 125.

In Pierce County Cause No. 11-1-00523-4, defendant plead guilty to one count of residential burglary. CP 6-14. In Pierce County Cause No. 11-1-02533-2, defendant plead guilty to one count of obtaining or attempting to obtain a controlled substance by fraud, deceit or misrepresentation, and one count of assault in the third degree. CP 36-44. The court accepted defendant's pleas of guilty and sentenced him to a standard-range[2] sentence on each count. CP 18-30, 48-61, 104-117; RP 16-17. As part of his conditions of community custody, the court ordered defendant to obtain a substance abuse evaluation and to fully comply with

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Cause Number	Crime	Offender Score	Standard Range	Community Custody	Sentence Imposed	Maximum Term
10-1-03778-2	Identity Theft	9+	43-57	12 months	43	5 years
	Unlaw. Poss. of a Cont. Substance	9+	12+-24	12 months	24	5 years
11-1-00523-4	Residential Burglary	9+	63-84	0	84	10 years
11-1-02533-2	Obtain Cont. Sub. by Fraud	9+	12+-24	12 months	24	4 years
	Assault 3	9+	51-60	12 months	51	5 years

all recommended treatment for cause numbers 11-1-02533-2 and 10-1-03778-2. CP 48-61, 104-117. Community custody was not imposed on cause number 11-1-00523-4. CP 18-30. The court ordered all of defendant's sentences to run concurrent to each other and with previously sentenced cases from King County. CP 18-30, 48-61, 104-117.

On May 23, 2012, defendant filed an untimely notice of appeal with Division I of the Washington Court of Appeals. CP 121-122. On June 8, 2012, Division II of the Court of Appeals granted defendant an extension of time to file his appeal.

C. ARGUMENT.

1. BECAUSE THE SENTENCING COURT FOUND THAT DRUG USE CONTRIBUTED TO DEFENDANT'S OFFENSES, THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A REQUIREMENT THAT DEFENDANT OBTAIN A SUBSTANCE ABUSE EVALUATION AND COMPLY WITH RECOMMENDED TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

Appellate courts review conditions of community placement for abuse of discretion and will reverse only if the sentencing court's decision is manifestly unreasonable or based on untenable grounds. ***State v. Vant***, 145 Wn. App. 592, 602–03, 186 P.3d 1149 (2008) (a condition may be manifestly unreasonable if the court lacked authority to impose it).

The trial court has discretion to order a defendant to participate in crime-related treatment or counseling services, to comply with crime-

related prohibitions, and to participate in rehabilitative programs related to the offense, risk of reoffending, or community safety as conditions of community custody. RCW 9.94A.703(3)(c), (d), (f). Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may order the offender to participate in rehabilitative programs as part of his conditions of community custody. RCW 9.94A.607. Additionally, the court must order the offender to "comply with any conditions imposed by the [Department of Corrections] under RCW 9.94A.704," which authorizes the Department to impose noncrime-related conditions related to the risk to the community. RCW 9.94A.703(1)(b); RCW 9.94A.704(2)(a).

Here, defendant's attorney stated that defendant committed his crimes due to his drug addiction. RP 23-25. Defendant's wife informed the court that defendant committed his crimes due to his drug addiction. RP 22-23. Defendant's allocution to the court related entirely to his drug use, his desire to turn his life around, and to how his addiction to drugs caused him to "live[] way too much . . . on the wrong side of things in [his] short time of being an adult." RP 28. Defendant stated that he wanted to change his life and that he intended to "take advantage of absolutely everything that [he] can that will help [him] to make those changes." RP 28.

The court informed defendant that, if he found that chemical dependency had contributed to the crimes, he could order defendant to

undergo treatment. RP 11. After he accepted defendant's plea, the court noted that defendant was probably not the same person when he was under the influence of drugs. RP 29. The court also discussed how defendant was fortunate to still have family support in the face of his drug use and criminal behavior. RP 30. The court then addressed defendant's failure to take advantage of treatment options during prior encounters with the criminal justice system. RP 30-31. Finally, the court directly referenced defendant's attorney's statements that a drug addict will change only when he or she is ready. RP 31. The court then sentenced defendant, requiring him to obtain a "drug and alcohol evaluation and to be involved in treatment per [his] community corrections officer."

The court's finding that drug use contributed to defendant's crimes was implicit in the court's statements to defendant, which referenced the assertions of defendant, defendant's wife, and defendant's attorney. The entire colloquy related to defendant's drug use and his need to abstain in order to lead a productive life. Nothing in the plain language of RCW 9.94A.607 requires the court to utilize specific language. Because the court made an implicit finding that drug use contributed to the crimes charged, the court properly required defendant to obtain a substance abuse evaluation as a condition of his community custody under RCW 9.94A.607.

Defendant relies on ***State v. Jones***, 118 Wn. App. 199, 76 P.3d 258 (2003), for his contention that the sentencing court must make an explicit

finding that chemical dependency contributed to the offense before imposing any drug-related treatment as a condition of sentence. *See* Appellant's Brief at 12. Defendant's argument improperly broadens the scope of ***Jones***.

In ***Jones***, the defendant entered a guilty plea to first degree burglary and several other crimes. ***Jones*** 118 Wn. App. at 202. At sentencing, the defendant's attorney explained that Jones was bi-polar; that Jones was off his medication at the time of the crimes; that Jones was using methamphetamine at the time of his crimes; and that the "combination . . . obviously resulted in what happened." ***Jones***, 118 Wn. App. at 202. The court required Jones to participate in alcohol counseling and mental health counseling as conditions of community custody. ***Jones***, 118 Wn. App. at 203. On appeal, Division II struck the alcohol counseling condition, finding that there was no evidence suggesting that alcohol had contributed to the crimes. ***Jones***, 118 Wn. App. at 207-08. Division II also struck the mental health counseling condition, as the sentencing court had not complied with the procedure set forth in RCW 9.94A.505, which requires that an order requiring mental status evaluations and treatment to be based on a presentence report. ***Jones***, 118 Wn. App. at 209. As the sentencing court in ***Jones*** never ordered chemical dependency treatment, Division II never addressed the question of whether a sentencing court could make an implicit finding that

chemical dependency contributed to the crimes based on the defendant's attorney's claim that it was so.

Moreover, defendant's claim that the court ordered a drug/alcohol evaluation and treatment is incorrect. The court ordered a "substance abuse" evaluation. *See* CP 48-61, 104-117 (at paragraph 4.6(B)). As an attachment to both judgment and sentences, the court ordered a "Drug/Alcohol" evaluations and treatment "per CCO." CP 48-61, 104-117 (at Appendix F (VII)). This language states that defendant must comply with evaluations and treatment as ordered by his community corrections officer. Thus, the order simply identifies one possible condition of treatment and rehabilitation programs, which the court and the Department have clear statutory authority to impose[3] and which need not be "crime-related" under RCW 9.94A.704(2)(a), (4).

2. THE TRIAL COURT FAILED TO REDUCE THE LENGTH OF COMMUNITY CUSTODY FOR DEFENDANT'S THIRD DEGREE ASSAULT CONVICTION IN CAUSE NUMBER 11-1-02533-2 TO ENSURE THAT THE COMBINATION OF FULL CONFINEMENT AND COMMUNITY CUSTODY DID NOT EXCEED THE STATUTORY MAXIMUM.

Sentencing courts must reduce the time for community custody if the combination of confinement and community custody could exceed the

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[3] In the judgment and sentence for cause number 11-1-02533-2, the court included a condition under paragraph 4.4, which relates to property held in evidence, stating, "Drug/Alcohol eval. and follow up treatment recommended." CP 48-61. The State concedes that this language should be stricken as it does not relate to property held in evidence.

statutory maximum sentence for a particular crime. RCW 9.94A.701(9), Laws of 2009, ch. 375, § 20. Our Supreme Court has held a ***Brooks***[4] notation alone does not meet this new statutory requirement. ***State v. Boyd***, 174 Wn.2d 470, 472–73, 275 P.3d 321 (2012) (clarifying ***State v. Franklin***, 172 Wn.2d 831, 839–41, 263 P.3d 585 (2011)). Assault in the third degree is a class C felony. RCW 9A.36.031(2). The maximum sentence for a class C felony is five years. RCW 9A.20.021(1)(c).

Here the court ordered a period of confinement for defendant's third degree assault conviction in cause number 11-1-02533-2 of 51 months and community custody of 12 months. CP 48-61. The combination of incarceration and community custody exceeds the statutory maximum of 60 months. CP 48-61. The court attempted to limit defendant's confinement and community custody to the statutory maximum by inserting a ***Brooks*** notation. CP 48-61. Because the legislature has directed the court to reduce the period of community custody, a ***Brooks*** notation is no longer appropriate. This cause number should be remanded for the court to reduce the community custody for defendant's third degree assault conviction in accordance with RCW 9.94A.701(9).

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[4] ***In re Personal Restraint of Brooks***, 166 Wn.2d 664, 211 P.3d 1023 (2009). A ***Brooks*** notation was created in response to the inherent ambiguity relating to a defendant's earned early release from incarceration. ***Brooks*** 166 Wn.2d at 669. A ***Brooks*** notation is a written statement that "the total [term] of incarceration and community custody cannot exceed the maximum." ***Brooks***, 166 Wn.2d at 670.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's sentences for Pierce County Cause No. 10-1-03778-2, 11-1-00523-4, and to remand to correct defendant's sentence in Cause No. 11-1-02533-2 only.

DATED: May 13, 2013.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ e mail/or ABC-LMI delivery to the attorney of record for the appellant and ~~appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.14.13
Date Signature

PIERCE COUNTY PROSECUTOR

May 14, 2013 - 11:06 AM

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