NO. 46855-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE MARCUM,

Appellant.

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

The Honorable Erik S. Rohrer, Judge
The Honorable Christopher Melly, Judge
The Honorable George L. Wood, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Marcum's *Alford* plea is invalid because there was no factual basis to support any of the charges.

2. The sentencing court erred in imposing a non-crime related condition of community custody prohibiting Marcum from possessing or consuming any drug unless prescribed by a medical professional.

3. The sentencing court erred in imposing a condition of community custody requiring Marcum undergo a substance abuse evaluation and fully comply with treatment.

4. The sentencing court erred in imposing a community custody condition that Marcum obtain a substance abuse evaluation without finding that substance abuse contributed to the offenses.

5. The sentencing court imposed discretionary legal financial obligations without considering Marcum's present or future ability to pay them.

6. The pre-printed finding in the judgment and sentence that Marcum has the current or future ability to pay legal financial obligations is erroneous.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court committed reversible error when, in accepting Marcum's *Alford* guilty plea, it relied on a written probable cause statement to establish a factual basis for each count but the probable cause statement provided insufficient facts for each count?

2. Whether the trial court acted without authority when it ordered Marcum to have a substance abuse evaluation as a condition of community custody even though it did not make the statutory required finding that Marcum had a chemical dependency that contributed to the offense?

3. Whether the trial court lacked authority to impose as a condition of Marcum's community custody that he not possess or use non-prescribed drugs when the condition was not crime related?

4. Whether the trial court abused its discretion when it imposed discretionary legal financial obligations on Marcum without considering Marcum's individualized present or future ability to pay them?

C. STATEMENT OF THE CASE

Marcum pleaded guilty to an amended information charging ten counts: rape of a child in the first degree[1] (count 1); child molestation in

[1] RCW 9A.44.073

the first degree[2] (count 2); sexual exploitation of a minor[3] (count 3); and possessing depictions of a minor engaged in sexually explicit conduct in the first degree[4] (counts 4–10). CP 52-64; RP[5] 4-11. In exchange for the guilty plea, the State dismissed four counts of possessing depictions of a minor engaged in sexually explicit conduct in the first degree (counts 11-14). CP 56; RP 8.

Marcum entered an *Alford* plea whereby he did not admit guilt but expressed belief there was sufficient evidence by which a fact finder would find him guilty and he wanted to take advantage of the State's plea offer. CP 60; RP 10. In accepting the plea, the court said it read the "probable cause statement" and found "it establishes a factual basis for your plea." RP 10; Supplemental Clerk's Papers, Motion for Determination of Probable Cause (sub. nom. 1). The court ordered a pre-sentence investigation. CP 5.

Prior to the sentencing hearing, Marcum sent a letter to the trial court saying he wished to withdraw his guilty plea. CP 49-51. He premised his desire to withdraw the plea on a sentencing calculation error, unacknowledged mental health issues, and lack of communication with

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[2] RCW 9A.44.083
[3] RCW 9.68A.040
[4] RCW 9.68A.070
[5] There is a single volume of verbatim for this appeal.

defense counsel. CP 50-51. Because of a potential conflict with defense counsel, the court appointed other counsel to assist Marcum. CP 45-47.

Marcum filed a motion and supporting declaration in support of the plea withdrawal. CP 34-43. In his declaration, Marcum complained he was not given the opportunity to review the entire discovery and, in pleading guilty, had not comprehended the likelihood that he would spend the rest of his life in prison. CP 41-42. The court heard argument, took the issue under advisement, and later filed a detailed written ruling denying the motion. RP 55-58; CP 25-33.

At sentencing, the court imposed concurrent sentences on all ten counts. CP 11. On the most serious charge, rape of a child in the first degree, the court imposed an indeterminate 300 months to life sentence. CP 11. The sentence on that charge obligated Marcum be on community custody for any time during the remainder of his life not spent in total confinement. CP 12. Marcum did not object to any of the community custody conditions imposed by the court. RP2 207-08.

The court also imposed discretionary legal financial obligations on Marcum without any consideration to his present or future ability to pay them. CP 10, 14-15. Marcum did not object. RP 69-71

Marcum appeals the court's denial of his motion to withdraw his guilty plea and every part of his judgment and sentence. CP 5.

D. ARGUMENT

1. MARCUM'S PLEA FAILS BECAUSE THE PROBABLE CAUSE STATEMENT RELIED ON BY THE COURT TO ESTABLISH A FACTUAL BASIS FOR MARCUM'S *ALFORD* PLEA DOES NOT INCLUDE SUFFICIENT FACTS TO SUPPORT ANY OF THE CHARGES.

A trial court cannot accept an *Alford*[6] plea without first establishing facts to support each count. In Marcum's case, the probable cause statement relied on by the trial court to provide facts in support of the plea failed to establish adequate proof of any of the ten counts to which Marcum pleaded guilty. Consequently, Marcum's plea fails. His case must be remanded to the trial court to allow Marcum to withdraw his guilty plea.

An *Alford* plea allows a defendant to plead guilty in order to take advantage of a plea bargain even if he is unable or unwilling to admit guilt. *Alford*, 400 U.S. at 31; See *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976). Pursuant to CrR 4.2, a court shall not accept a plea of guilty without first determining it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not accept a guilty plea unless satisfied there is a factual basis for the plea. *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). This is true even when a defendant does not admit guilt. *State v.*

[6] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)

Zhao, 157 Wn. 2d 188, 197, 137 P.3d 835, 839 (2006). Although evidence beyond a reasonable doubt is not required, the trial judge must still find sufficient evidence for a jury to determine each of the elements of each crime charged. *State v. Easterlin*, 159 Wn.2d. 203, 208, 149 P.3d 366 (2006).

Under CrR 4.2(f), the court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. Manifest injustice includes instances where "(1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept." *State v. Marshall,* 144 Wn.2d 266, 81, 27 P.3d 192 (2001). It is the defendant's obligation to prove the demanding manifest injustice standard. *State v. Taylor,* 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Marcum's plea was not voluntary because no facts were presented to establish a lawful basis for each count in the guilty plea. This court reviews the circumstances of a guilty plea de novo. *Young v. Konz*, 91 Wn.2d 532, 536, 588 P.2d 1360 (1979).

In his guilty plea form, Marcum did not make a factual statement as to what made him guilty of each offense. Instead, he provided

> I have reviewed the evidence in this case with my attorney and discussed it fully with him. I believe there is a substantial

> likelihood of my being convicted should this matter go to trial and I am entering this plea to take advantage of the State's plea offer.

CP 60. Marcum did not mark the pre-printed box that immediately followed his statement on the plea form that reads:

> [ ] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

CP 60. Marcum did not object to the court relying on the probable cause statement for facts to support the plea.

Marcum pleaded guilty to rape of a child in the first degree, child molestation in the first degree, sexual exploitation of a minor, and possession of depictions of a minor engaged in sexually explicit conduct in the first degree.

A person commits rape of a child in the first degree when he has sexual intercourse with another who is less than twelve years old and not married to him and he is at least twenty-four months older than the victim. RCW 9A.44.073.

A person commits child molestation in the first degree when he has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the him and is at least thirty-six months older than the victim. RCW 9A.44.083.

As charged, a person is guilty of sexual exploitation of a minor if he compels, aids, or causes a person under 18 to engage in sexually explicit conduct knowing that such conduct would be photographed.

CP 67; RCW 9.68A.040.

A person commits the crime of possession of depictions of a minor engaged in sexually explicit conduct in the first degree when he knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68.011(4)(a) through (e) as follows:

> (a) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals;
> (b) Penetration of the vagina or rectum by any object;
> (c) Masturbation;
> (d) Sadomasochistic abuse;
> (e) Defecation or urination for the purpose of sexual stimulation of the viewer.

RCW 9.68A.070.

The portion of the probable cause statement relied upon by the court established that Marcum possessed a flash drive. Apparently, the detective who wrote the probable cause certification did not look at the flash drive before interviewing Marcum and relied instead on Marcum's description of the flash drive's content for probable cause purposes. Per Marcum, the flash drive contained "child pornography." There were two

pictures of him on the flash drive "molesting a child." Marcum described two pictures of his face with his mouth against the vagina of a child. Marcum said the child was very young. Supp DCP, Motion for Determination of Probable Cause. Marcum did not define what he meant by "very young." Marcum also said the flash drive contained movies and pictures that depicted child pornography, child modeling photos and pictures showing child nudity. Marcum's statement includes no information as to how he defined child pornography. Supp. DCP, Motion for Certification of Probable Cause.

With only that information to go by, the court erred in finding sufficient facts to support any of the counts in Marcum's *Alford* plea. In fact, the probable cause statement only purports to broadly establish probable cause for the crime of possession of depictions of minors engaged in sexually explicit conduct without any reference to whether the conduct is first degree or second degree conduct. RCW 9.68A.070(1)(a) (first degree); RCW 9.68A.070(2)(a) (second degree). Supp. DCP, Motion for Determination of Probable Cause.

The rape of a child in the first degree fails because no evidence established facts to support Marcum committed the required conduct with a child younger than 12 years old. The child molestation fails for the same reason.

The sexual exploitation of a minor fails because there is no information suggesting a child on the flash drive was 17 or younger or that Marcum knew any sexual conduct would be photographed.

The six counts of possessing depictions of a minor engaged in sexually explicit conduct fail because the information in the probable cause motion fails to provide the flash drive contained six photos of minors engaged in the sexually explicit conduct defined by RCW 9.68.011(4)(a) through (e). A minor is a person under 18 years old. RCW 9.68A.011(5).

Because all of the counts Marcum pleaded guilty to were part of a single negotiated plea, even if just one count is supported by sufficient facts, he is still entitled to withdraw the whole plea. Pleas to multiple counts or charges made at the same time, described in one document, and accepted in a single proceeding, are indivisible from one another. *In re Personal Restraint of Bradley*, 165 Wn.2d 934, 941-942, 205 P.3d 123 (2009). A plea agreement is essentially a contract made between a defendant and the state. *State v. Hardesty*, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). Under normal contract principles, whether a contract is considered separable or indivisible is dependent upon the intent of the parties. *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003). When determining intent, the court is not concerned with unexpressed subjective

intent, but objective manifestations of intent. *Id.* Here, the objective intent is clear: the State resolved the case through a guilty plea and Marcum benefited by the dismissal of four counts. CP 56.

Marcum's invalid plea should be reversed and remanded to the trial court.

2. THE SUBSTANCE ABUSE EVALUATION AND TREATMENT CONDITION WAS UNLAWFULLY IMPOSED.

As a condition of community custody, the court ordered Marcum to undergo an evaluation for, and comply with, treatment for chemical dependency. CP 22 (condition 11). Because the condition is not crime-related, and was imposed without a statutory required finding, it should be stricken from Marcum's judgment and sentence.

Although Marcum did not object to the chemical dependency sentencing condition, sentencing errors may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose a specific community custody condition is a question of law reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.703 sets out mandatory, waivable, and discretionary community custody conditions that the court may impose. Any conditions

not authorized by statute must be crime-related. RCW 9.94A.703(3)(f); RCW 9.94A.030(10) defines a "crime-related prohibition" as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."

Before a court may impose a substance abuse evaluation, it must first find that chemical dependency contributed to the offense.

> When 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 rehabilitation 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.

RCW 9.94A.607(1).

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, *cert. denied*, 534 U.S. 1130 (2002).

The court did not find that chemical dependency contributed to Marcum's offenses at Section 2.1 of the judgment and sentence. The court did not check this box:

[ ] The defendant has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 8. Under the plain terms of RCW 9.94A.607(1), the court had to make such a finding before it could order Marcum to obtain a substance abuse evaluation and follow all treatment recommendations.

Marcum told the pre-sentence investigation (PSI) writer he was high on drugs when he committed some of the offenses. Supplemental Designation of Clerk's Paper's, Pre-Sentence Investigation (sub. nom. 101). However, the court may believe what it wants. The lack of a check on the judgment and sentence box reflects the court's disbelief that chemical dependency contributed to Marcum's offenses. CP 8. At sentencing, the prosecutor never asserted his belief that substance abuse contributed to the offense. RP 63-66. Instead, the Conditions of Supervision attached to the judgment and sentence contains this boilerplate language: "You shall obtain a chemical dependency evaluation and enter into, comply with and successfully complete any treatment program recommended therefrom." CP 22 (condition 11).

Given the record, including a chemical dependency evaluation and treatment as part of the boilerplate conditions is a mere oversight. When a sentence is imposed for which there is no authority of law, appellate courts have the power and the duty to correct the erroneous sentence upon

discovery. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980). The substance abuse evaluation condition must be stricken from the judgment and sentence.

3. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A PROHIBITION ON MARCUM'S POSSESSION OR USE OF ANY NON-PRESCRIBED DRUGS.

Marcum's offenses did not involve the use of the world's inventory of non-prescription drugs. The community custody condition that Marcum "shall abstain from the possession or use of drugs ... unless prescribed by a medical professional" must be stricken from the judgment and sentence because it is not crime-related.

As noted in Issue 2, RCW 9.94A.703 (3)(f) authorizes the court to impose crime-related prohibitions and a condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). A defendant always has standing to challenge the legality of a community custody condition even though he has not been charged with violating it. *State v. Valencia*, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010).

The prohibition on non-prescribed drugs is invalid because it is not directly related to the circumstances of Marcum's offense. RCW 69.41.010(9) defines "drug" broadly:

> (a) Substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them;
>
> (b) Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals;
>
> (c) Substances (other than food, minerals or vitamins) intended to affect the structure or any function of the body of human beings or animals; and
>
> (d) Substances intended for use as a component of any article specified in (a), (b), or (c) of this subsection. It does not include devices or their components, parts, or accessories.

Marcum violates community custody if, without first obtaining a prescription to do so, he uses an over-the-counter cold remedy, takes an aspirin, uses medicated lip balm, or applies anti-itch ointment to a mosquito bite. There is no evidence of a connection of any of these common uses of routinely non-prescription drugs with Marcum's offenses. Any consumption of illegal drugs or prescription drugs without a lawful prescription could be punished because Marcum's community custody conditions require him to "refrain from further violations of the law.' CP 22 (condition 18). The possession or use of non-prescribed drugs condition must be stricken from the judgment and sentence.

4. THE COURT VIOLATED STATUTORY MANDATE IN FAILING TO CONSIDER MARCUM'S ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS.

The court ordered Marcum to pay these discretionary legal financial obligations (LFOs): (1) $500 court-appointed attorney; and (2) $217.40 jail incidentals fee.[7] CP 29-31. The court erred in imposing these LFOs because it failed to make an individualized inquiry into Marcum's current and future ability to pay them.

The court may order a defendant to pay costs under RCW 10.01.160. However, the statute also provides "[t]the court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes legal financial obligations. *State v. Blazina*, 344 P.3d 680, 683 (2015). The record reflects no consideration here. RP 69-70.

[7] The court also ordered a $500 victim assessment, a $200 criminal filing fee, and a $100 DNA fee. CP 14-15. Those fees are not at issue on appeal because they are mandatory. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

In the judgment and sentence, this pre-printed, generic language appears:

> 2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 10.

Marcum challenges this finding on the ground that the court did not consider his individual financial resources and the burden of imposing such obligations on him. The boilerplate finding regarding ability to pay lacks support in the record. RP 69-70.

Further, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 344 P.3d at 683. The court failed to follow statutory mandate in imposing the legal financial obligations. The remedy is a new sentence hearing. *Id.*

The issue is ripe for review. *Blazina*, 344 P.3d at 683. And although defense counsel did not object below, an appellate court may reach this error consistent with RAP 2.5. *Id.* at 682. Marcum requests this

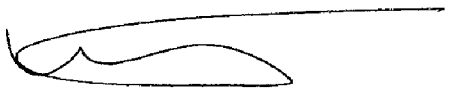
Court reach the merits. The LFO system is broken.[8] *Id.* at 683. It will not be fixed until appellate courts reach the merits of these claims and send cases back for resentencing thereby sending a clear signal to trial judges about the importance of individualized inquiry into ability to pay legal financial obligations.

E. CONCLUSION

Because no facts supported Marcum's *Alford* plea, his case must be remanded to the trial court to allow Marhum to withdraw his plea.

Absent the above remand, the trial court should be ordered to strike the non crime-related community custody conditions of a mandatory substance abuse evaluation and no possession or use of non-prescription drugs. The trial court should also hold a hearing to determine Marcum's individualized ability to pay LFOs.

Respectfully submitted this 22nd day of May 2015.



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[8] Problems associated with LFOs imposed against indigent defendants include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Blazina*, 344 P.3d 680, 684.

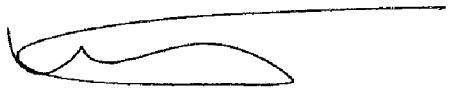
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Jesse Espinoza, Clallam County Prosecutor's Office, at jespinoa@co.clallam.wa.us (2) the Court of Appeals, Division II; and (3) I mailed it to Dwayne Marcum/DOC#369667, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 22, 2015, in Winthrop, Washington.



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