

NO. 64553-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN E. BOTTOMLEY,

Appellant.

REC'D
OCT 22 2010
King County Prosecutor
Appellate Unit

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

The Honorable Michael Heavey, Judge
The Honorable Laura G. Middaugh, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED BY INCLUDING AS A COMMUNITY CUSTODY CONDITION THAT APPELLANT UNDERGO A SUBSTANCE ABUSE EVALUATION AND FOLLOW RECOMMENDED TREATMENT IF SO DIRECTED BY HIS SUPERVISORS.

Bottomley challenges three community custody conditions on appeal.¹ Brief of Appellant at 18-24. The state disagrees only with Bottomley's assertion the trial court erred by including the following condition: "If directed by your sexual deviancy treatment specialist or Community Corrections Officer [CCO], undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment" CP163 (Condition 20); Brief of Respondent (BOR) at 20-22. According to the state, the condition merely authorizes the Department of Corrections (DOC) to do something it is otherwise already permitted to do. BOR at 20-22. The state's argument conflicts with State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), and should be rejected.

The state argues former RCW 9.94A.720(1)(d) authorizes the DOC to impose additional community custody conditions "above and beyond

¹ The state concedes the trial court exceeded its statutory authority by prohibiting Bottomley from possessing or purchasing alcohol while on community custody. The state also agrees the trial court erred by prohibiting internet use without prior approval. Brief of Respondent (BOR) at 18-19. Bottomley urges this Court to find these concessions well taken.

those ordered directly by the trial court at sentencing." BOR at 21. Former RCW 9.94A.720(1)(d) provides, "For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the [DOC] may impose conditions as specified in RCW 9.94A.715."

Former RCW 9.94A.715(2)(b) provides:

As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody *based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.*

(emphasis added). Therefore, according to the state, "additional conditions of community custody as may be deemed appropriate by the DOC under former RCW 9.94A.715 need *not* be 'crime related.' Rather, they need only be based upon the risk to community safety." BOR at 21.

The state's logic collides with Jones. The question there was whether the trial court was authorized to order Jones to participate in alcohol counseling, despite no evidence showing alcohol contributed to the crime. Jones, 118 Wn. App. at 207. The Jones court acknowledged that RCW 9.94A.715 permitted a trial court to

order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct *reasonably related to the*

circumstances of the offense, the offender's risk of reoffending, or the safety of the community.

Jones, 118 Wn. App. at 208 (emphasis added).²

At the same time, however, former RCW 9.94A.700(5)(c) provided that a trial court, when imposing community custody, may order an offender only to "participate in *crime-related* treatment or counseling services." Jones, 118 Wn. App. at 207.³

² The Jones court mistakenly cited to former RCW 9.94A.715(2)(b) as the source of this provision. The correct source is former RCW 9.94A.715(2)(a). At the time Jones committed his offense, the pertinent provision was former RCW 9.94A.125(11)(b), which provided:

The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to (f) of this subsection. As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department of corrections under subsection (15) of this section. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety.

Former RCW 9.94A.125(11)(b) (2000).

³ At the time Jones committed his crime, the applicable provision permitted a trial court to order an offender to "participate in crime-related treatment or counseling services" as a condition of community custody. RCW 9.94A.120(9)(c)(iii) (2000).

The Jones court recognized the tension between these provisions: Under RCW 9.94A.715, a trial court could order alcohol counseling if alcohol use reasonably related to a risk of reoffense or community safety regardless whether alcohol contributed to the offense. This, the court found, would negate RCW 9.94A.500(5)(c)'s requirement that the condition be "crime-related." Jones, 118 Wn. App. at 208. To give effect to all pertinent statutory language, the court harmonized the two statutes, holding that "alcohol counseling 'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." Jones, 118 Wn. App. at 208; see Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

The state asks this Court to ignore the well-reasoned opinion in Jones. According to the state, the DOC may, based solely on risk of reoffense (as measured by a risk assessment) or risk to community safety, order participation in a rehabilitative program or otherwise perform affirmative conduct. But under Jones, the trial court has no such authority unless the condition is related to commission of the offense. Put simply,

the state maintains the "crime-related" requirement of RCW 9.94A.700(5)(c) applies to the sentencing court but not to the DOC.

The state offers no principled rationale for giving the DOC more sentencing authority than the sentencing judge. It is worth noting that the legislature has made clear the DOC acts in a quasi-judicial capacity when addressing community custody conditions: "In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function." RCW 9.94A.715(c). In other words, the DOC performs a "judicial act" when it sets a community custody condition. See Black's Law Dictionary 1258 (7th Ed. 1999) (defining "quasi-judicial act" as "[a]judicial act performed by an official who is not a judge."). The state, therefore, contends the DOC can perform a judicial act that the judge cannot perform.

This contention implicates the maxim that courts "presume the legislature does not intend absurd results and, where possible, interpret ambiguous language to avoid such absurdity." State v. Ervin, ___ Wn.2d ___, 239 P.3d 354, 358 (2010). Interpreting the applicable statutory provisions as giving the DOC more discretion to set community custody conditions than the sentencing judge causes an absurd result.

To avoid this absurdity, this Court should find the DOC may set only community custody conditions that relate to commission of the

crime. Because the trial court's imposition of the substance abuse-related condition was not crime-related, this Court should conclude the court did not authorize the DOC "to do what it already had the authority to do by statute." BOR at 21-22.

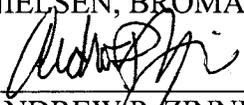
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Bottomley requests this Court to conclude the trial court exceeded its statutory sentencing authority by imposing community custody conditions that were not crime-related. For the reasons set forth in the Brief of Appellant, Bottomley urges this Court to reverse his conviction based on several instances of prosecutorial misconduct and to remand for a new trial.

DATED this 22 day of October, 2010.

Respectfully submitted,

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v.)	COA NO. 64553-6-I
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STEVEN BOTTEMLEY,)	
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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 22ND DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] STEVEN BOTTEMLEY
DOC NO. 336015
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF OCTOBER, 2010.

x. 