

HEK 69043-4

69043-4

COA NO. 69043-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTOPHER LARSEN-SNYDER,

Appellant.

FILED  
APR 19 2014  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously imposed a 36 month term of community custody for the second degree assault offense under count I. CP 13.

2. The trial court erroneously imposed chemical dependency evaluation and treatment as a condition of community custody. CP 13.

Issues Pertaining to Assignments of Error

1. Where the controlling statute dictates an 18 month term of community custody for "violent offenses," did the trial court exceed its sentencing authority when it imposed a 36 term of community custody for the second degree assault offense under count I?

2. Did the trial court err when it imposed chemical dependency evaluation and treatment as a condition of community custody where the court did not make the statutorily required finding that a chemical dependency contributed to the offense?

B. STATEMENT OF THE CASE

The State charged Kristopher Larsen-Snyder with second degree assault with an attendant firearm allegation, first degree unlawful possession of a firearm, and possession of methamphetamine, a controlled substance. CP 84. The jury entered guilty verdicts on all three counts. CP 37, 40, 41. The court imposed a total of 67 months confinement, 36

months of community custody for the assault, and community custody conditions. CP 3, 12-13; 2RP<sup>1</sup> 253. This appeal follows. CP 1-2.

C. ARGUMENT

1. THE LENGTH OF THE COMMUNITY CUSTODY TERM IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM.

The trial court erred in imposing a community custody term of 36 months for the second degree assault offense under count I. CP 13; 2RP 253. The lawful term of community custody is 18 months.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94A.701(2) provides "A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense."

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 3/16/12; 2RP - two consecutively paginated volumes consisting of 4/23/12, 4/24/12, 4/25/12/5/23/12 and 6/25/12.

Second degree assault is a "violent offense" as defined by statute. RCW 9.94A.030(54)(a)(viii). It is not a "serious violent offense." See RCW 9.94A.030(45) (listing crimes that qualify as a "serious violent offense"). Under the plain language of RCW 9.94A.701(2), the term of community custody for second degree assault is 18 months.

A court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). The court here exceeded its statutory authority in imposing 36 months of community custody for the second degree assault offense.

"When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Murray, 118 Wn. App. at 522. The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980). This Court should reverse the unlawful term of community custody and remand for correction of the judgment and sentence to reflect an 18 month term of community custody for the second degree assault under count I.

2. IN THE ABSENCE OF A FINDING REQUIRED BY STATUTE, THE COURT WRONGLY ORDERED CHEMICAL DEPENDENCY EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered Larsen-Snyder to participate in a "chemical dependency evaluation" and "fully comply with all recommended treatment." CP 13. This condition must be reversed in the absence of the statutorily required finding that a chemical dependency contributed to the offense.

The defense did not object to this sentencing condition below but, as noted above, sentencing errors may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744; State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose this sentencing condition is a question of law reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Before a court may impose evaluation and treatment, 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 find a chemical dependency contributed to Larsen-Snyder's offense. 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 chemical dependency evaluation and treatment.

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).

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). Dicta have no precedential value. Bauer v. State Employment Sec. Dep't, 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), the 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." Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

The dicta in Powell also conflicts with Jones, where Division Two held the trial court's failure to make a statutorily required finding before ordering mental health treatment and counseling was reversible error even though the record contained substantial evidence supporting such a finding.

Jones, 118 Wn. App. at 209-10. The holding in Jones comports with the established principle that "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). The function of the appellate court is to review the action of the trial courts, not to act as one. Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010). The court in Powell violated this principle when it independently reviewed the record and, in effect, made a finding the trial court never made.

At trial here, an officer testified that Larsen-Snyder said he had been using methamphetamine for quite some time. 2RP 138. Larsen-Snyder testified that he used methamphetamine, and in particular had consumed methamphetamine earlier in the day. 2RP 179, 185. At the sentencing hearing, the court remarked, "he was apparently under the influence of methamphetamine while in possession of a firearm." 2RP 252. The court later referenced imposition of the chemical dependency evaluation and treatment condition requirement but said nothing more about it. 2RP 253.

The court entered no finding in the judgment and sentence or elsewhere that a *chemical dependency* contributed to the offense. In its oral remarks, the court found Larsen-Snyder was under the influence of methamphetamine when he committed an offense. 2RP 252. But the

court did not find Larsen-Snyder was chemically dependent on methamphetamine. There is a difference between usage and dependency. A person can use drugs and be under the influence of them at a given time without being chemically dependent on them. The statute requires a finding that the offender has a chemical dependency before such evaluation and treatment may be imposed, not merely that drug use influenced the offense. RCW 9.94A.607(1).

At the sentencing hearing, defense counsel said it was clear methamphetamine "might have played a role here" and hoped that Larsen-Snyder could get treatment while in DOC custody for that "addiction." 2RP 250-51. Defense counsel's approval of treatment for Larsen-Snyder did not authorize the court to impose such treatment in the absence of the finding required by RCW 9.94A.607(1).

"[A] defendant cannot empower a sentencing court to exceed its statutory authorization." Eilts, 94 Wn.2d at 495-96. Even a defendant's direct request to receive treatment as part of community custody does not give the court authority to impose it. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), disapproved on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010). In Jones, for example, defense counsel stated in open court that Jones was bipolar, that he was off his medications at the time of his crimes, and that this

combination "obviously resulted" in the crimes. Jones, 118 Wn. App. at 209. The trial court nevertheless lacked authority to order Jones to participate in mental health treatment in part because it did not make the statutorily required finding that Jones was a person whose mental illness contributed to his crimes. Id.

The same result holds here. Defense counsel's belief that treatment would be beneficial for his client did not authorize the court to impose that requirement as a condition of community custody absent the finding required by RCW 9.94A.607(1). This Court should remand with directions to strike the chemical dependency evaluation and treatment condition unless the trial court determines that it can presently and lawfully comply with the statutory requirement of a finding that Larsen-Snyder has a chemical dependency that contributed to an offense. Jones, 118 Wn. App. at 211 (setting forth remedy where court did not make statutorily required finding to support community custody condition).

D. CONCLUSION

This Court should (1) remand to correct the community custody term for the assault under count I and (2) direct the trial court to strike the challenged chemical dependency condition unless the trial court is lawfully able to enter the finding that a chemical dependency contributed to an offense as required by statute.

DATED this 29<sup>th</sup> day of November 2012.

Respectfully Submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69043-4-1
	)	
KRISTOPHER LARSEN-SNYDER,	)	
	)	
Appellant.	)	

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**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 29<sup>TH</sup> DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2012.

x *Patrick Mayovsky*