

NO. 70293-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL CONTRERAS GONZALES

Appellant.

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The judgment erroneously requires appellant to submit to a substance abuse evaluation and treatment as a probation condition.

Issue Pertaining to Assignment of Error

Evidence at trial demonstrated that alcohol abuse contributed to appellant's crimes. At sentencing, the court repeatedly indicated its intent to require appellant's participation in an alcohol evaluation and recommended treatment. The judgment, however, orders appellant to submit to a "substance abuse evaluation" and treatment not limited to alcohol abuse. Is this error where it appears to conflict with the court's intent and is not authorized by law?

B. STATEMENT OF THE CASE

The Whatcom County Prosecutor's Office charged Rafael Contreras Gonzales with Attempting to Elude a Police Vehicle and Driving Under the Influence of Alcohol. CP 8-9.

The evidence at trial revealed that on the evening of January 12, 2013, Gonzales was spotted in the parking lot of the Ferndale Hagen Store driving a red pickup truck erratically. RP 29-32. He drove over some shrubbery – temporarily getting stuck – caused

the back end of the truck to fishtail, and spun his tires. RP 35-37. An employee of the store called 911 and spoke to a dispatcher as Gonzales ran several stop signs and sped out of the parking lot. RP 35, 39-42.

Ferndale Police Sergeant Kevin Davis spotted Gonzales on the main roadway, followed him in pursuit, and activated the overhead lights on his marked police car. RP 51, 57, 59. Gonzales was speeding, eventually traveling 60 miles per hour in a 25-mph zone. RP 51, 58. At points, he crossed into the lane for oncoming traffic. RP 67-69. Gonzales finally stopped the pickup somewhere between half a mile and a mile from the time Sgt. Davis activated his lights. RP 69-73. Gonzales brought the truck to an abrupt stop, put the transmission in reverse, and backed in to Sgt. Davis' patrol car. RP 74-75. He then pulled forward again before coming to a final stop. RP 79. When Sgt. Davis placed Gonzales into custody, he could smell "an overwhelming odor of alcohol on him." RP 83.

Washington State Patrol Trooper Jessica Saucerman arrived on scene to administer field sobriety tests. RP 103-104. Based on Gonzales' appearance, his driving, and the tests, she concluded he was impaired. RP 104-112. Gonzales admitted he was impaired.

RP 104. At the police station, Gonzales provided a breath sample, which registered .179. RP 121-122.

The defense conceded Gonzales was guilty of DUI, but asked the jury to acquit him on the eluding charge. RP 206. The jury convicted on both charges. CP 33. The Honorable Judge Ira Uhrig imposed concurrent sentences of 60 days for eluding and 364 days (with 304 days suspended) on the DUI. CP 35.

Under RCW 9.95.210(1)(b), Judge Uhrig imposed “community custody” for 60 months on the DUI conviction.¹ CP 36. Judge Uhrig repeatedly indicated his intent that Gonzales participate in an alcohol evaluation and recommended treatment. RP 235-236. Under “crime related treatment or counseling services,” however, the judgment and sentence orders a broader “substance abuse evaluation” and treatment. CP 36.

Gonzales timely filed his Notice of Appeal. CP 45.

¹ RCW 9.95.210 uses the word “probation” rather than the term “community custody.” In addition to employing the wrong label, Gonzales’ judgment also erroneously cites to the SRA provisions relating to community custody. See CP 36 (citing RCW 9.94A.505 and 9.94A.702).

C. ARGUMENT

THE COURT ERRED IN ORDERING A SUBSTANCE
ABUSE EVALUATION AND TREATMENT.

A court may only impose a sentence, including conditions of supervision, authorized by statute. State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). "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). Whether a trial court exceeded its statutory authority is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). A condition of sentence imposed without statutory authority can be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993).

Recently, this Court held that for sentences imposed under the SRA, it is error to require a general chemical dependency evaluation and treatment where the only substance involved is alcohol. State v. Warnock, 174 Wn. App. 608, 611-614, 299 P.3d 1173 (2013). The remedy is "remand with directions to amend the

challenged condition so that it imposes only alcohol evaluation and recommended treatment.” Id. at 609.

As an initial matter, despite the written judgment’s use of the term “substance abuse evaluation,” it does not appear that Judge Uhrig intended such a broad condition. In his oral remarks, he repeatedly spoke only of an “alcohol evaluation.” RP 235-236 (mentioning it five times). This is not surprising, since alcohol was the only substance involved in the case. Moreover, the judgment itself indicates the treatment condition is “crime related,” further underscoring the court’s intent.

In light of this, the broader language “substance abuse evaluation” contained in the written judgment creates an ambiguity. See Warnock, 174 Wn. App. at 614 (condition capable of both a narrow and broad reading is ambiguous). “A sentence must be ‘definite and certain.’” State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Where, as here, an aspect of the sentence is ambiguous, at the very least remand is necessary for clarification. See State v. Broadaway, 133 Wn.2d 118, 135-136, 942 P.2d 363 (1997); Jones, 93 Wn. App. at 17-19.

Here, however, Judge Uhrig did not have the authority to require Gonzales' participation in a general substance abuse evaluation and treatment. Unlike the SRA, for misdemeanors, the sentencing court may impose any probation condition with a logical connection to the ultimate objective of rehabilitation. State v. Hall, 35 Wn. App. 302, 307-308, 666 P.2d 930 (1983). While this provides broader authority for misdemeanors, conditions must still be logically related to rehabilitation. Assuming Judge Uhrig truly intended to subject Gonzales to an evaluation and treatment for substances other than alcohol, there is no logical relationship to rehabilitation because there is no evidence Gonzales suffers from such a problem.

Gonzales does not contest the alcohol evaluation and treatment; it can be a proper probation condition and is proper in this case. See State v. Joy, 34 Wn. App. 369, 370-371, 661 P.2d 994 (1993). Treatment for other drugs that contribute to an offense may also be proper when necessary for a defendant's rehabilitation. See State v. LaRoque, 16 Wn. App. 808, 809-811, 560 P.2d 1149 (1977). But that is simply not the case here.

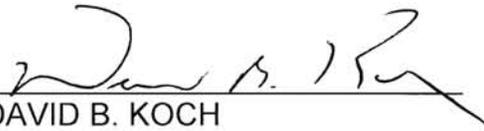
D. CONCLUSION

There was no authority to order Gonzales' participation in an evaluation and treatment for abuse of substances beyond alcohol. This Court should remand with directions to amend the challenged condition so that it imposes only an alcohol evaluation and recommended treatment. Even if this Court concludes Judge Uhrig was authorized to order a broader evaluation and treatment, the matter should be remanded so that he can clarify his intent.

DATED this 29th day of August, 2013.

Respectfully Submitted,

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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 29TH DAY OF AUGUST 2013, 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 29TH DAY OF AUGUST 2013.

X *Patrick Mayovsky*

2013 AUG 29 11:14:18
CLERK OF COURT
STATE OF WASHINGTON