

71091-5

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NO. 71091-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JANICE BURRELL,

Appellant.

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

The Honorable James Cayce, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred in entering its order requiring appellant to obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody. CP 108.

Issue Related to Assignment of Error

Did the trial court err in imposing a community custody condition requiring mental health treatment without first following necessary statutory procedures?

B. STATEMENT OF THE CASE

On May 29, 2012, the state charged appellant Janice Burrell with second degree felony murder, based on the felony of second degree assault. CP 1-6; RCW 9A.32.050(1)(a), (b). The deceased was Arthur Smith, who had been stabbed in the chest. CP 19, 22-24. On May 8, 2013, Burrell pled guilty. CP 8-20.

The state agreed to recommend a mid-range sentence of 204 months in prison. CP 26; 2RP 45-48. The defense recommended an exceptional sentence of 119 months, below the 154-month bottom of the standard range. CP 26, 48.

The defense recommendation was based on Smith's lengthy physical and emotional abuse of Burrell. He had beaten her on many occasions, and had returned to abuse her several times after his

release from jail. He exhibited classic batterer behavior to control Burrell and separate her from other resources that might aid her escape the cycle of abuse. Smith was a violent "Original Gangster" with a teardrop tattoo and he had threatened to kill Burrell. CP 32-54, 84-95; 1RP 10-39, 94-96, 90-105; 2RP 34-36; 56-57. His nephew described Smith as very strong, with a temper, and a "knock out artist" who won gang fights and was proud of it. 2RP 34-36.

Burrell also had a history of mental illness, and had been diagnosed as bipolar, with schizoaffective disorder and post-traumatic stress disorder. CP 95-96; 1RP 49-50, 71-74, 80-81, 86-87.

On the day of the assault, Burrell was in the back seat of a car with Smith. Smith's son was driving and his nephew was in the front passenger seat. When Smith made a threatening gesture, Burrell snapped and stabbed him once in the chest to protect herself and to prevent further abuse. CP 2-6, 44, 90-91, 97-98; 1RP 59-60, 74-77, 82-83, 22-24.

The state argued Burrell suffered no mental health condition that prevented her from appreciating the wrongfulness of her act. Supp. CP __ (sub no. 111, State's Supp'l Presentence Report, at 11); 1RP 42-43, 62; 2RP 46-48.

The trial court imposed a mid-range sentence of 204 months. CP 104; 2RP 58-60. The court also ordered, as a community custody condition, that Burrell “obtain a mental health eval & follow all tx recs; Take all prescribed medications as directed within 30 days of release.” CP 108.

This appeal timely follows. CP 111.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ORDERING A MENTAL HEALTH EVALUATION AND TREATMENT AS A COMMUNITY CUSTODY CONDITION.

As a special condition of community custody, the court ordered Burrell to participate in a “mental health evaluation,” to “follow all tx recs,” and to “take all prescribed medications[.]” CP 108. This condition cannot be imposed until statutory prerequisites are followed. The court's failure to follow the mandated procedure requires reversal of this condition.

A trial court's authority to impose sentence is limited by the authority in the SRA at the time of the offense. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). The law governing Burrell's sentence is the law in effect on May 25, 2012. CP 19, 101; RCW 9.94A.345. This Court reviews de novo whether a trial court exceeds

its statutory authority in imposing community custody conditions.

State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9.94B.080 provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

The statute authorizes a trial court to order mental health evaluation and treatment only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080).¹ A court may not impose this community custody condition "unless the court finds, based on a presentence report and any applicable mental

¹ The heading of chapter 9.94B RCW states the chapter applies to crimes committed prior to July 1, 2000, but RCW 9.94B.080 applies to crimes committed after 2000. See Laws of 2008, ch. 231, § 55(1) ("Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective date of this section.").

status evaluations, that the offender suffers from a mental illness which influenced the crime.” State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007).

The court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term “mentally ill person” is defined in RCW 71.24.025(18). Only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of RCW 9.94B.080.

a. There Was No Presentence Report

Initially, although the parties each filed sentencing memoranda, the trial court did not order a “presentence report” as required. That report is prepared by the Department of Corrections (DOC), not the parties.

Statutory terms should be accorded their plain meaning in the context in which they appear. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). A number of Washington’s statutes use the

term “presentence report.” The most relevant, RCW 9.94A.500,² makes it clear that a “presentence report” must be completed before the sentencing hearing. RCW 9.94A.500(1). A court may not enter an order requiring a mental health evaluation or treatment without first considering a “presentence report.” RCW 9.94B.080. A defendant may be found to have waived objections to information contained in a presentence report if the objections are not raised at sentencing (RCW 9.94A.530(2)); of course, this can only happen if the presentence report is completed before the sentencing hearing.

Court rules further cement this basic truth. The governing rule is titled, “Procedures Before Sentencing” and includes a subsection authorizing the court to order a presentence report be prepared by DOC, and a subsection discussing the contents of such a report. CrR 7.1(a) and (b) (emphasis added). The presentence report should be filed “at least 10 days before sentencing.” CrR 7.1(a)(3).

The case law is in accord. See generally, State v. Sanchez, 146 Wn.2d 339, 353-57, 46 P.3d 774 (2002) (presentence report is prepared by community corrections officer before sentencing). In

² The statute is titled, 9.94A.500. “Sentencing hearing—Presentencing procedures—Disclosure of mental health services information[.]”

short, the term "presentence report" has a plain meaning in this context, and requires the report to be prepared by the DOC before sentencing.

b. The Court did not Make the Required Finding

Second, the court did not make the statutorily mandated finding that Burrell was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced the crime for which she was convicted. Instead, the court initially imposed a condition requiring an alcohol and substance abuse evaluation. 2RP 59. The prosecutor then asked if the court also would require a mental health evaluation and treatment, to which the court replied, "I only heard you say alcohol. Was your recommendation for mental health, as well?" The prosecutor said yes, she had asked for that condition, and the court then replied, "[y]es." 2RP 60.

Whatever else this shortcut procedure might be called, it was not based on a presentence report, and the court did not enter the statutorily required finding. The court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

The errors also substantially affect Burrell's rights. The court has commanded Burrell to allow a stranger to probe her thought

processes. Any type of mental examination entails an invasion of privacy. Guilford Nat'l Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921, 924 (4th Cir. 1962); Russenberger v. Russenberger, 623 So.2d 1244, 1245 (Fla. Dist. Ct. App. 1993). An involuntary psychological examination entails the revelation of intimate details of a person's life. An analyst conducting a mental examination undertakes "by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition." Edwards v. Superior Court, 16 Cal.3d 905, 911, 130 Cal. Rptr. 14 (Cal. 1976).

Moreover, one purpose of the SRA is to "[m]ake frugal use of the state's and local governments' resources." RCW 9.94A.010(6). That purpose would be frustrated if resource-intensive psychological evaluations and treatment could be imposed as community custody conditions following any conviction. The Legislature did not intend to throw open the doors to such evaluation whenever a person commits a crime. The Legislature instead required specific statutory steps before evaluation and treatment can be imposed, showing the intent to limit this condition to a narrow class of offenders.

An unlawful community custody condition can be challenged for the first time on appeal. The rule applies to erroneous community custody conditions in general and the erroneous imposition of mental health evaluation and treatment in particular. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (in general); Jones, 118 Wn. App. at 204 (mental health evaluation and treatment). The condition requiring a mental health evaluation and treatment must be stricken from the judgment and sentence. Lopez, 142 Wn. App. at 354.

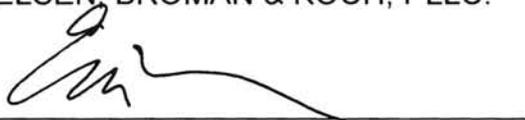
D. CONCLUSION

This Court should reverse and direct the trial court to strike the community placement condition. CP 108.

DATED this 3d day of October, 2014.

Respectfully Submitted,

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Today I deposited in the mails of the United States of America
a sealed and addressed envelope directed to all
of the following addresses, containing a copy of the
document to which this declaration is attached.
King County, WA
I certify under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.
[Signature] 10/3/14
Name Done in Seattle, WA Date