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Court of Appeals
Division I
State of Washington

NO. 72355-3-I

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

STATE OF WASHINGTON

Respondent

v.

JAMES O. WIGGIN,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Can the defendant challenge the trial court's order imposing mental health treatment as a condition of community custody when the defendant affirmatively asked the court to impose that condition?

2. If the court reviews the challenge to that condition should it remand the case and allow the trial court the opportunity to consider the condition after complying with the procedural requirements?

II. STATEMENT OF THE CASE

The defendant, James Wiggin, was convicted at bench trial of one count of failure to register as a sex offender in violation of RCW 9A.44.130. 1 CP 156. The crime occurred between April 7, 2009 and May 30, 2009. Id. The court ordered the defendant to serve 36 months of community custody as a condition of his sentence. 1 CP 160.

The defendant appealed his conviction and the community custody condition of his sentence. This court affirmed the conviction and reversed the order for a term of 36 months of community custody. 1 CP 130. The court found that the applicable community custody was zero to 12 months community custody. 1 CP 136. The

court remanded the case to the trial court for resentencing. 1 CP 140.

At resentencing the court imposed 12 months of community custody. 1 CP 122-123. The defendant moved for reconsideration arguing that his mental health condition contributed to the commission of his offense. 2 CP __ (Sub. 92, Memorandum in Support of Motion to Reconsider). The defendant supplied the court with an extensive record of his mental health treatment in support of the motion. Id., 2 CP __ (Sub 92, Sub. 96, Attachment: Snohomish County Jail Booking Records). The court denied the motion for reconsideration. 1 CP 118-119. This court reversed the order for 12 months community custody on the basis that the defendant had been denied his right of allocution. 1 CP 66. The case was remanded to the trial court for a hearing on the community custody condition before a different judge. Id.

The case was assigned to the Honorable Millie Judge. At that hearing the State maintained its recommendation for 12 months of community custody. 7/23/14 RP 2-3. The defendant's attorney argued that the court should impose zero days of community custody. 7/23/14 RP 3-4. The defendant then addressed the court discussing his mental health problems and

how they contributed to his offense. He expressed the concern that he had requested mental health treatment but had not received it from the Department of Corrections. 7/23/14 RP 4-7.

The court asked the defendant if he was requesting that she impose mental health treatment as part of a community custody order. The defendant confirmed that he was asking for that even though he understood that meant that he would be ordered to serve community custody despite counsel's argument to the contrary. 7/23/14 RP 7-10. Defense counsel did not argue that the court could not impose that condition of community custody. *Id.* The court ultimately granted the defendant's request. It imposed 12 months of community custody and ordered that the "defendant shall obtain a mental health evaluation and undergo any recommended treatment." 1 CP 50.

III. ARGUMENT

A. THE INVITED ERROR DOCTRINE PRECLUDES REVIEW OF A CLAIM THAT THE COURT ERRED WHEN IMPOSING MENTAL HEALTH TREATMENT AS A COMMUNITY CUSTODY CONDITION.

The defendant argues that the trial court erred when it failed to comply with procedural requirements set out in former RCW 9.94A.505(9) prior to imposing the mental health evaluation and treatment conditions of community custody. The defendant

specifically asked the court to impose that condition, even though the procedural requirements of that statute had not been met. In this circumstance the defendant has waived a challenge to the community custody condition.

Under the doctrine of invited error a party may not set up an error at trial and then complain about it on appeal. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). To apply the doctrine the defendant must have done some affirmative act that materially contributed to the error. State v. Mercado, 181 Wn. App. 624, 630, 326 P.3d 54 (2014). The doctrine is designed to prevent a party from misleading the court and then receiving a windfall by doing so. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009), cert denied, 562 U.S. 837 (2010).

Here the record demonstrates that if the court erred in failing to comply with a statutorily required procedure before imposing the condition, the defendant's affirmative conduct induced the court to do so. Whether the defendant should be ordered to submit to a mental health examination and treatment was raised for the first time by the defendant himself. He asked the court to do so without regard to any procedural requirements he now argues were necessary before imposing the condition. 7/23/14 RP 4-10. The

court sought input regarding the procedural requirements necessary before imposing a mental health condition. The defense did not argue that any other procedure was required. 7/23/14 RP 8-10. The court followed the procedure that it had been told was required to follow before imposing that condition. 7/23/14 RP 10-11. Because the defendant invited the court to impose the condition without regard to any procedural requirements, if the court erred in imposing it by employing the wrong procedure that error was invited.

The defendant argues that the invited error doctrine does not apply to this case for three reasons. The court should reject each of those arguments for the reasons discussed below.

The defendant first argues that his request was ambiguous because at one point the defendant asked the court to impose mental health treatment while he was serving time at DOC on another charge. He argues that he did not fully understand or request the additional condition as a part of community custody. However, the only issue at the hearing was whether to impose community custody and if so for how long. Counsel argued against imposing any community custody time. 7/23/14 RP 3-4. When the defendant asked to impose the mental health treatment condition

counsel clarified with him that he understood that would relate to the community custody portion of the sentence. The defendant responded "I understand. I would rather do that and get the help that I actually need and – instead of this run-around with the Department of Corrections and them actually really I feel sabotaging my transition." 7/23/14 RP 7-8. The defendant's arguments that the court also order treatment while in prison did not diminish this clear and unequivocal statement that the defendant wanted a mental health treatment condition of community custody imposed.

The defendant also argues that the prosecutor failed to give the court complete information about the procedural requirements before imposing a mental health treatment condition. He argues that he should not be blamed when the State had has much opportunity to avoid the error as the defense did.

Because the defendant was the only one who asked the court to impose the condition and that request only happened at the hearing, the prosecutor had not had the opportunity to investigate fully what the court must do in order to impose that condition. The defense did not seek additional time to investigate under what circumstances the court could impose that condition, even when

the court sought input in that regard. The defense cites no authority for the proposition that when a party sets up an error it is excused from application of the invited error doctrine because the opposing party did not point out the error at the time it occurred. The court has noted that the doctrine is applied without regard to the circumstances surrounding the claimed error. Henderson, 114 Wn.2d at 821 (Utter dissenting). If the court accepts the defendant's argument the effect would be to modify the doctrine. The court should refuse to do that because that modification would nullify the purpose of the doctrine by granting the party that set up the error a windfall.

Finally the defendant argues the doctrine does not apply because he cannot agree to an illegal sentence. Since the defendant is challenging the procedure by which the court imposed the community custody condition, and not the condition itself, that argument should fail.

The invited error doctrine does not preclude review where the court exceeded its statutory authority because a defendant cannot agree to a sentence in excess of that authority. Mercado, 181 Wn. App. at 631. For that reason a defendant was permitted to challenge a sentencing condition that could only be imposed if the

court made specific findings to support the order, and the court had failed to make that finding. (In a drug case the trial court ordered the defendant to be tested for the HIV virus under RCW 70.24.340 but failed to find that the offense was associated with the use of a hypodermic needle.) Id.

However the invited error doctrine does preclude review where the defendant agrees to waive a procedure that is otherwise required at sentencing. In Breedlove the court found the doctrine applied where the defendant challenged the court's failure to include findings and conclusions supporting an exceptional sentence as required by former RCW 9.94A.120(3) (1996). In re Breedlove, 138 Wn.2d 298, 302-303, 979 P.2d 417 (1999). The court reasoned that the petitioner waived any challenge to that error because the petitioner agreed that an exceptional sentence was justified, and signed the sentencing order with only a reference to that stipulation and no additional findings. Id. at 313.

Similarly a defendant who affirmatively agrees to an offender score waives the argument that the score was incorrectly calculated because the court failed make factual determinations that were otherwise required before prior convictions may be counted. State v. Hickman, 112 Wn. App. 187, 191, 48 P.3d 383 (2002), review

granted and remanded, 148 Wn.2d 1014, on remand, 116 Wn. App. 902 (2003) (a stipulation that out of state convictions were comparable to Washington offenses waives an appeal to a challenge to the offender score calculation or alternatively invited error in that calculation), In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 168 (2002) (“waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion”)(Court’s emphasis): see State v. Heddrick, 166 Wn.2d 898, 902, 215 P.3d 201 (2009) (a defendant invited error when the court did not follow the statutory procedures for finding her competent where counsel stipulated that the defendant was competent and did not file a competency evaluation).

The defendant argues that the court failed to follow the mandated procedure prior to imposing a mental health evaluation and treatment. BOA at 6-7. Since a defendant may waive a statutorily mandated procedure, and the defendant affirmatively asked to impose that condition without regard to procedural requirements, he affirmatively waived those requirements and otherwise invited any error in the court’s failure to comply with

those requirements. The cases cited by the defendant do not support his position that he did not waive review because each of those cases dealt with the court's authority to impose a substantive condition of the sentence. State v. Eilts, 94 Wn.2d 489, 617 P.2d 993 (1980) (court lacked authority to impose restitution for uncharged victims under RCW 9.95.210); State v. Wallin, 125 Wn. App. 648, 105 P.3d 1037, review denied, 155 Wn.2d 1012 (2005) (the court lacked statutory authority to extend the period of community custody where the portion of the statute permitting that action was not in effect at the time the defendant committed the crime); State v. Phelps, 113 Wn. App. 347, 356-357, 57 P.3d 624 (2002), (a court lacked the authority to enlarge the statute of limitations. However because there was statutory authority to place geographical restrictions on defendants, the defendant's agreement to be precluded from four counties could not be challenged under the invited error doctrine). But see State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014)(holding that the defendant may expressly waive the criminal statutes of limitations in a pretrial agreement when the statute of limitations on the underlying charge has not yet run at the time the defendant enters the agreement.)

The defendant also cites Motter for the proposition that a defendant's request to receive mental health treatment does not give the court the authority to impose it. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025 (2008). That case does not indicate that there was any evidence in the record to believe that the defendant had a mental health condition that contributed to the crime he was convicted of. It does not stand for the proposition that the court may not order mental health treatment in any circumstance. Because there is authority for the court to impose mental health treatment, that case is factually different from defendant's case here.

B. IF THE DEFENDANT HAS NOT WAIVED THE ISSUE FOR REVIEW, THE REMEDY IS TO REMAND TO THE TRIAL COURT TO ALLOW IT TO CONSIDER THE CONDITION AFTER COMPLYING WITH REQUIRED PROCEDURES.

If the court finds that the defendant has not waived the issue through the invited error doctrine the court should not direct the trial court to simply strike the condition as the defendant requests. Rather the court should remand the case to give the trial court an opportunity to comply with the statutory procedures.

The defendant was sentenced in accordance with the law in effect during April 7 to May 30, 2009, the dates on which he

committed the crime. RCW 9.94A.345. Former RCW 9.94A.505(2)(b) permitted the court to impose a "term of community custody not to exceed one year, subject to conditions and sanctions as authorized in RCW 9.94A.710(2) and (3); and/or other legal financial obligations." (June 12, 2008 – May 6, 2009) That statute permitted the court to impose the same community custody conditions as provided for in former RCW 9.94A.700(4) and (5). Former RCW 9.94A.710(2) (2008-2009).

Pursuant to former RCW 9.94A.700(5)(c) the court was permitted to order the defendant to participate in crime related treatment or counseling. A condition is crime related if it relates to the circumstances of the crime. RCW 9.94A.030(10), Motter, 139 Wn. App. at 802. A finding that a condition meriting treatment is related to the crime may be based on representations of the defendant and counsel. Id. at 803, State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003).

The court must also comply with the conditions set out in former RCW 9.94A.505(9) before ordering mental health treatment as a condition of community custody.¹ Jones, 118 Wn. App. at 210, State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007),

review denied, 164 Wn.2d 1012 (2008). Specifically that statute required the court to find “that reasonable grounds exist to believe 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.” Further the order requiring a mental status evaluation or treatment “must be based on a presentence report... The court may order additional evaluations at a later date if deemed appropriate.” Former RCW 9.94A.505(9).² In the absence of these two requirements the court has reversed the order for a mental status evaluation and treatment. Jones, 118 Wn. App. at 212, Lopez, 142 Wn. App. at 354.

Here the trial court had records demonstrating the defendant had received treatment for mental health conditions for a number of years while in and out of custody. The records also indicated the defendant had attempted suicide on various occasions. From these records the court found that the defendant had a diagnosed mental illness, and that mental illness played a role in the defendant’s offense. 7/22/14 RP 11. This finding satisfies the first

¹ Now codified as RCW 9.94B.080.

² The current version of this statute does not require a presentence report. Instead the order for mental status evaluation and treatment “may be based on a presentence report.” RCW 9.94B.080.

requirement necessary to impose a mental status evaluation and treatment.

However, given the procedural posture of the case when the defendant asked the court to impose mental health treatment as a community custody condition, no presentence report had been written on which the order could be based. Thus, the court failed to comply with the second procedural requirement before imposing the condition.

The defendant argues that the remedy is to remand to the trial court and simply strike the condition. In Jones however the court left open the possibility that the trial court could comply with the statutory requirements. Jones, 118 Wn. App. at 212. There the trial court imposed the mental health treatment condition without making the requisite findings, and without having a presentence report. Id. at 203. The court did have before it evidence that the defendant had a mental illness that contributed to his offense. Id. at 202. Counsel's representations that the defendant was bipolar, and that he was off his medications at the time which contributed to the crime, supported the conclusion that mental health treatment was "crime related." The court therefore remanded to the trial court to strike the mental health condition "unless it determines that it can

presently and lawfully comply with RCW 9.94A.505(9).” Id. at 212. In contrast where there was no basis in the record to support the condition this court remanded to the trial court to strike the condition. Lopez, 142 Wn. App. at 353-354.

Like Jones there is evidence in the record that would support the trial court’s findings that the defendant is a mentally ill person as defined by statute, and that the defendant’s mental illness influenced his offense in this case. The defendant specifically asked for that condition, acknowledging his need for treatment and that his mental health status contributed to the crime. Given these circumstances if the matter is remanded to the trial court it should be given an opportunity to order a presentence report addressing the defendant’s mental status and need for treatment prior to resentencing on the community custody portion of his sentence.

IV. CONCLUSION

For the forgoing reasons the court should find the defendant has waived any challenge to the mental health community custody condition under the invited error doctrine. If the court finds the defendant has not waived the error, then the court should remand to the trial court to allow the court to comply with the procedural

requirements necessary to impose that condition.

Respectfully submitted on December 22, 2015.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 20th day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Eric Broman, Nielsen, Broman & Koch, bromane@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of December, 2015, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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