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FILED
March 27, 2015
Court of Appeals
Division I
State of Washington

NO. 72618-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM NEMRA,

Appellant.

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

The Honorable George Appel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred by imposing as a condition of the judgment and sentence that appellant obtain a chemical dependency evaluation and follow treatment recommendations.

Issue Pertaining to Assignment of Error

Where the court did not find that chemical dependency contributed to the offense, did the court act outside its authority in ordering appellant to obtain a chemical dependency evaluation and follow treatment recommendations as a condition of sentence?

B. STATEMENT OF THE CASE¹

On November 15, 2013, the Snohomish County prosecutor charged appellant Adam Nemra with burglarizing the Burger King on Bickford Avenue in Snohomish on July 29, 2013. CP 90-91. Subsequently, the state was allowed to amend the information to include three additional counts of burglary involving: a Marysville Burger King on October 9, 2013; an Arlington Burger King on October 11, 2013; and an Everett Dollar Tree on October 22, 2013. CP 82-83.

While this case was pending, the state moved to increase bail on grounds Nemra allegedly committed new offenses while on

bond for this case. Supp. CP ___ (sub. no. 36, State's Motion, 5/28/14). As an appendix, the state attached a new information filed under a 2014 cause number in Snohomish County charging Nemra with first degree possession of stolen property and first degree trafficking in stolen property for conduct involving thermostats stolen from an Auburn Gensco on May 21, 2014. Id.

On August 8, 2014, Nemra pled guilty to charges filed in an amended information in this case. 1RP 3, 10. In addition to the burglaries previously described, the amended information included a fifth count of burglary allegedly committed at Bob's Burger and Brew in Everett on July 17, 2013. CP 77-78. Nemra also pled guilty to the Gensco charges filed under the 2014 cause number. 1RP 10.

In the statement of defendant on plea of guilty for this case, Nemra agreed with the state's calculation of his offender score as 16 points, which yielded a standard sentencing range of 51-68 months. CP 57-58, 68-70; see also 1RP 5. The standard range on the Gensco charges was 63-84 months. 1RP 8.

¹ This brief refers to the verbatim report of proceedings as: 1RP – 8/8/14; and 2RP – 10/21/14.

At the plea hearing, Nemra verified he was pleading guilty without any plea agreement from the state.² 1RP 3, 6. In fact, the state indicated it would be asking the court to impose an exceptional sentence in the way of consecutive sentencing for the two cause numbers based on the “free crimes” aggravator.³ 1RP 6, 7. Nemra indicated he would be asking the court to impose a sentence under the drug offender sentencing alternative (DOSA). 1RP 7.

At sentencing on October 21, 2014, the state indicated it was seeking restitution in the amount of \$18,000.00 for this case and \$55,000.00 on the Gensco case. 2RP 4-5. Nemra agreed to restitution and signed orders to that effect. 2RP 5, 15, 18.

As indicated, the state asked the court to impose an exceptional sentence in the way of consecutive sentences consisting of 68 months on this case and 76 months on the Gensco case for a total of 144 months. Supp. CP ___ (sub. no. 48, State’s Sentencing Memorandum, 10/16/14); 2RP 6. The state urged the

² The prosecutor indicated Nemra rejected the state’s offer to recommend a ten-year sentence in exchange for a global resolution to a number of potential charges in four counties. 1RP 5.

³ Under RCW 9.94A.535(c), the court may impose an exceptional sentence if the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

court not to impose a DOSA, reasoning it was greed, not an addiction, that controlled Nemra. 2RP 14.

Despite this characterization, the prosecutor nonetheless asked the court to require Nemra to undergo a chemical dependency evaluation and to follow any treatment recommendations. 2RP 6. Although the offenses carried no community custody, the state argued the court could sanction Nemra for noncompliance through its contempt powers. 2RP 6.

As also indicated, Nemra asked for a DOSA, reasoning his acts were motivated by drug addiction. 2RP 21, 25. And Nemra had newfound motivation for rehabilitation, as his wife had recently become pregnant. 2RP 21-22. She spoke on behalf of her husband at sentencing. 2RP 23-24.

The court declined to impose a DOSA, however:

Mr. Nemra, at some point it stops being all about taking care of you and making sure you're okay and that you have the best of everything and starts being about the people you victimized. I am very sorry that your wife is going to be without you for a great long while and that your family is going to be without you for a great long while. But sir, that's you. You did that. You made the choices. I don't know why you did that, but you did that.

Mr. Cornell [the prosecutor] says it's because you are greedy. It may be. It may be because of an addiction. Whatever it is, the DOSA didn't work.^[4]

⁴ Nemra received a DOSA in a prior case. CP 35.

And I don't know what's going to work, but I do know what's going to keep you from committing burglaries for a while, and it's prison. And prison is where criminals go, and that's where you're going to go.

2RP 27 (emphasis added).

The court found the "free crimes" aggravator justified an exceptional sentence and ran the sentences on the two cases consecutively for a total of 144 months, 68 months on this case and 76 months on the Gensco case. CP 23; 2RP 27, 32. The court waived courts costs and attorneys fees based on Nemra's indigency. 2RP 28. The court also ordered that Nemra have no contact with any of the businesses "that are the victims of these offenses, and that you obtain a chemical dependency and undergo such follow-up as it is reasonably recommended." 2RP 29; see also CP 25. This appeal follows. CP 1.

C. ARGUMENT

THE COURT ACTED OUTSIDE ITS AUTHORITY IN ORDERING NEMRA TO OBTAIN A CHEMICAL DEPENDENCY EVALUATION AND FOLLOW TREATMENT RECOMMENDATIONS.

Because the court did not find a chemical dependency contributed to Nemra's offenses, the court acted outside its authority in imposing an evaluation and treatment as a condition of the judgment and sentence.

Although the defense did not object to the challenged condition below, sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose specific community custody 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 a substance abuse evaluation, it must first 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.

RCW 9.94A.607(1).

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 substance abuse or chemical dependency contributed to Nemra's offenses. On the contrary, the court expressly declined to find Nemra's acts were motivated by addiction and remarked they could have been the result of greed or "whatever." 2RP 27. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could order Nemra to obtain a chemical dependency evaluation and undergo such follow-up as is reasonably recommended. RP 29.

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 the 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.

More importantly, the court entered no finding in the judgment and sentence or elsewhere that substance abuse or chemical dependency contributed to the offense. The statute requires such a finding before an evaluation and treatment may be imposed. RCW 9.94A.607(1). The condition therefore should be stricken.

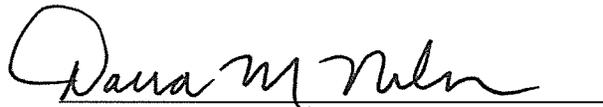
D. CONCLUSION

The court acted outside its authority in requiring Nemra to undergo a chemical dependency evaluation and follow treatment recommendations as a condition of sentence. This Court therefore should order the condition stricken from the judgment and sentence.

Dated this 27th day of March, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 72618-8-1
)	
ADAM NEMRA,)	
)	
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 27TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADAM NEMRA
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P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2015.

X *Patrick Mayovsky*