

NO. 37212-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ELIJAH GIVENS,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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

The Honorable Robert A. Lewis, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The court erred in ordering conditions of community custody which were not related to appellant's offense.

Issue pertaining to supplemental assignment of error

Where there was no evidence that controlled substances or sexual deviancy contributed to appellant's offense, did the court exceed its authority in ordering appellant to report to his CCO when controlled substances or legend drugs are prescribed, avoid areas known for drug activity, participate in sexual deviancy treatment, submit to plethysmographic testing, and avoid pornography?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Following a bench trial, Givens was convicted of one count of luring. CP 64-67; RCW 9A.40.090. In addition to 120 days confinement, the court ordered 12 months of community custody with conditions including the following:

Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act, or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.

...

Defendant shall not frequent known drug activity areas or residences.

...

Defendant shall enter into, cooperate with, fully attend and successfully complete all inpatient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. Defendant shall not change sex offender treatment providers or treatment conditions without first notifying the Prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings, and behaviors in a timely manner and cease all deviant sexual activity.

...

Defendant shall, at his/her own expense, submit to periodic plethysmograph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody. Copies of the examination results shall be provided to the Prosecuting Attorney's Office upon request.

Defendant shall not possess or use any pornographic material or equipment of any kind and shall not frequent establishments that provide such materials for view or sale.

CP 75-77.

C. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT EXCEEDED ITS AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY UNRELATED TO GIVENS'S OFFENSE.

A court may impose only a sentence authorized by statute. State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). "If the trial court exceeds its sentencing authority, its actions are void." Id. Whether a trial court exceeded its statutory authority under the Sentencing Reform Act is

an issue of law reviewed de novo. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025 (2008). Moreover, “[a] sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.” Paulson, 131 Wn. App. at 588 (quoting State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000)).

Givens was convicted of one count of luring, an “unranked” felony offense. See RCW 9.94A.515. Thus, under RCW 9.94A.505(2)(b), the trial court was authorized to impose a sentence including up to one year of confinement and up to one year of community custody. The statute provides that the term of community custody is “subject to conditions and sanctions as authorized in RCW 9.94A.710(2) and (3),” and that statute in turn provides that the conditions of community custody shall be the same as provided in RCW 9.94A.700(4) and may include the conditions authorized in RCW 9.94A.700(5). RCW 9.94A.505(2)(b); RCW 9.94A.710(2).

Under RCW 9.94A.700(5), a court is authorized to order that the offender participate in crime related treatment or counseling services. RCW 9.94A.700(5)(c). In addition, the court is authorized or order that the offender comply with any crime related prohibitions and affirmative conditions. RCW 9.94A.505(8); RCW 9.94A.700(5)(e).

The court exceeded its authority in this case by ordering that Givens report to his CCO when controlled substances or legend drugs are prescribed, avoid areas known for drug activity, participate in sexual deviancy treatment, submit to plethysmographic testing, and avoid pornography. Because none of these conditions is crime-related, the court had no authority to impose them.

A condition is crime related if it directly relates to the circumstances of the crime. Motter, 139 Wn. App. at 802. Thus, in Motter, although the defendant was convicted of first degree burglary, conditions involving controlled substances were crime related because he admitted using heroin that night, he had a long history of drug abuse, and burglary of a doctor's office is often motivated by the desire to steal drugs. Motter, 139 Wn. App. at 803.

In this case, on the other hand, while it was undisputed that Givens was drinking beer, there was no evidence that controlled substances contributed to Givens's offense. A court may order an offender not to use or possess non-prescribed controlled substances, regardless of whether the crime was drug related. RCW 9.94A.700(4)(c). But no other drug-related conditions are authorized unless they are directly related to the circumstances of the crime. Since there was no evidence that controlled substances played any part in Givens's offense, the court exceeded its

authority in ordering that Givens “notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed” and that he “not frequent known drug activity areas or residences.” CP 75. These conditions are invalid and must be stricken. See State v. O’Cain, ___ Wn. App. ___, 184 P.3d 1262 (2008) (invalid condition of community custody must be stricken).

The conditions relating to sexual deviancy treatment, plethysmograph testing, and pornography are similarly invalid. Givens was not convicted of a sex offense. Chapter 9A.44 RCW defines sex offenses in Washington. Givens was convicted of luring, which is defined in RCW 9A.40.090. Moreover, there was no allegation or finding that Givens’s offense was sexually motivated, and no evidence which would have supported such an allegation. The court lacked authority to order Givens to cooperate with sexual deviancy treatment, to submit to plethysmographic testing, and to avoid pornographic material and establishments. Those conditions must be stricken.

D. CONCLUSION

The trial court exceeded its authority in imposing community custody conditions unrelated to Givens's offense, and those conditions must be stricken.

DATED this 9th day of July, 2008.

Respectfully submitted,



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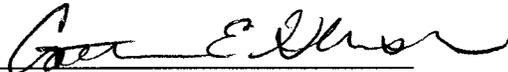
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Motion to File Supplemental Brief and Supplemental Brief of Appellant in *State v. Elijah Givens*, Cause No. 37212-6-II directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
July 9, 2008

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