

NO. 39954-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID MOSTELLER,

Appellant.

FILED
COURT OF APPEALS
10 MAR 29 AM 9:36
STATE OF WASHINGTON
BY [Signature]
ENTER

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE..... 6

E. ARGUMENT 7

 1. THE COURT REPEATEDLY ORDERED MOSTELLER TO SUBMIT TO FORCED ANTIPSYCHOTIC MEDICATIONS WITHOUT FINDING CLEAR AND CONVINCING EVIDENCE THAT SPECIFIC MEDICATIONS WERE NECESSARY, SUBSTANTIALLY LIKELY TO RESTORE COMPETENCY, AND IMPORTANT FOR THE PROSECUTION OF A SERIOUS CASE 7

 a. The necessity of forced antipsychotic drugs must be proven by clear, cogent, and convincing evidence..... 7

 b. The court did not hold any hearing to determine the need for forced antipsychotic medications 9

 2. THE COURT IMPOSED THE WRONG TERM OF COMMUNITY CUSTODY AND UNCONSTITUTIONALLY ORDERED MOSTELLER SUBMIT TO FORCED MEDICATIONS AS A CONDITION OF COMMUNITY CUSTODY 15

 a. The court imposed a term of community custody exceeding the 18 months authorized by statute..... 15

 b. The community custody condition mandating psychiatric medications upon penalty of sanction violates Mosteller’s rights to liberty and privacy..... 16

3. THE COURT MISCALCULATED THE STANDARD RANGE AND IMPROPERLY INCLUDED A TIME-BARRIED CONVICTION IN THE OFFENDER SCORE ...	19
a. The Judgment and Sentence uses an incorrect offender score and imposes an unauthorized term of community custody	19
b. A prior offense may not be included in the offender score calculation if it has “washed out” by operation of the sentencing statute	22
c. The offender score “stipulation” carries no legal authority, and to the extent it is enforceable against Mosteller.....	25
d. Mosteller received ineffective assistance of counsel at sentencing	28
4. THE COURT’S FAILURE TO ENTER MANDATORY FINDINGS OF FACT FOLLOWING THE BENCH TRIAL PRECLUDE MEANINGFUL APPELLATE REVIEW.....	30
a. Written findings are a mandatory and essential part of appellate review	30
b. The failure to file findings of fact requires reversal	31
F. CONCLUSION	32

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Marriage of Olivares</u> , 69 Wn.App. 324, 848 P.2d 1281, <u>rev. denied</u> , 122 Wn.2d 1009 (1993).....	31
<u>In re Restraint of West</u> , 154 Wn.2d 204, 110 P.3d 1122 (2005)...	20
<u>In re: Personal Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009)	15, 16
<u>In re: Personal Restraint of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	20, 22, 23, 25, 27
<u>State v. A.N.J.</u> , __ Wn.2d __, 2010 WL 314512 (Jan. 28, 2010)....	28
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	31
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	19
<u>State v. Dahl</u> , 139 Wn.2d 678, 990 P.2d 396 (1999)	31
<u>State v. Drum</u> , _Wn.2d __, 2010 WL 185786 (2010).....	26
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	21, 22, 23
<u>State v. Krall</u> , 125 Wn.2d 146, 881 P.2d 1040 (1994)	23, 30
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007)	20

Washington Court of Appeals Decisions

<u>State v. Adams</u> , 77 Wn.App. 50, 888 P.2d 1207, <u>rev. denied</u> , 126 Wn.2d 1016 (1995).....	8, 13
<u>State v. Hernandez-Ramirez</u> , 129 Wn.App. 504, 119 P.3d 880 (2005)	9, 10
<u>State v. Jones</u> , 118 Wn.App. 199, 76 P.3d 258 (2003).....	19

<u>State v. Motter</u> , 139 Wn.App. 797, 162 P.3d 1190 (2007)	15, 19
<u>State v. Ortega</u> , 120 Wn.App. 165, 84 P.3d 935 (2004)	29
<u>State v. Witherspoon</u> , 60 Wn.App. 569, 805 P.2d 248 (1991)	32

United States Supreme Court Decisions

<u>Riggins v. Nevada</u> , 504 U.S. 127, 112 S.Ct. 810, 118 L.Ed.2d 479 (1992)	8, 9
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)	29
<u>Sell v. United States</u> , 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)	8, 10, 13
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	28
<u>Washington v. Harper</u> , 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)	8

Federal Decisions

<u>United States v. Hernandez-Vasquez</u> , 513 F.3d 908 (9 th Cir. 2008)	9, 10
<u>United States v. Rivera-Guerro</u> , 426 F.3d 1130 (9 th Cir. 2005).....	10, 13
<u>United States v. Williams</u> , 356 F.3d 1045 (9 th Cir. 2004)	17

United States Constitution

Fifth Amendment.....	8
Fourteenth Amendment	8, 16

Sixth Amendment..... 8

Washington Constitution

Article I, § 3 8
Article I, section 22..... 8, 32
Article I, section 7..... 8

Statutes

Laws 2002..... 24
Laws 2008..... 16
Laws 2009..... 17
RCW 9.94A..... 20, 21, 22, 23, 24, 27
RCW 9.94A.030..... 15
RCW 9.94A.500..... 22
RCW 9.94A.525..... 22, 23
RCW 9.94A.631..... 18
RCW 9.94A.715..... 16
RCW 9.94A.728..... 15
RCW 9.94A.850..... 15
RCW 9A.56.070..... 24
RCW 71.05.217..... 11, 13

Court Rules

RAP 1.2(b) 30

Other Authorities

State of Wash. Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual (2008) 16, 21

State of Wash. Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, III-87 (1988) 25

A. SUMMARY OF ARGUMENT.

While he was awaiting trial for charges of criminal trespass and third degree assault, the court authorized a state hospital to forcibly medicate David Mosteller with antipsychotic drugs to restore his competency. Before entering this order, the court did not conduct a hearing, offer Mosteller the opportunity to object, or enter any findings establishing the need for involuntary medications despite case law and statutes that set forth specific criteria a court must consider and place a heavy burden of proof on the State when it seeks involuntarily administered medications for purpose of competency restoration.

The court further erred by imposing a term of community custody far longer than what the pertinent statute authorizes. It ordered Mosteller take medications as a condition of community custody, under penalty of incarceration, without any limitation and absent any explicit findings he needed these medications. The court calculated Mosteller's offender score as "7" when it only listed six possible points in the judgment and sentence. It counted one prior conviction in Mosteller's offender score despite a facially apparent wash-out that barred the court using this earlier conviction in the offender score calculation. Finally, the court failed to enter

written findings of fact following its bench trial. Due to these numerous errors, Mosteller is entitled to a new trial as well as a new sentencing hearing if his convictions remain.

B. ASSIGNMENTS OF ERROR.

1. The court denied Mosteller his rights to liberty, privacy, and due process of law by ordering him to submit to involuntary antipsychotic medications without requiring the State prove the necessity of forced medications by clear, cogent, and convincing evidence.

2. The court ordered Mosteller to serve an unauthorized term of community custody.

3. The court improperly ordered Mosteller to take antipsychotic medications as a condition of community custody without limitation and absent required findings of fact.

4. The court miscalculated Mosteller's offender score.

5. The court included an offense in Mosteller's offender score when it "washed out" under the controlling statute.

6. Mosteller received ineffective assistance of counsel at sentencing by his attorney's failure to object to the sentencing errors.

7. The court failed to enter mandatory findings of fact following a bench trial, thus denying Mosteller his right to a meaningful appeal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Forcing a person accused of a crime to submit to involuntarily administered antipsychotic medications is a massive intrusion upon the person's liberty and privacy, and potentially impairs the accused's right to a fair trial due to side effects of the medication. The State may not forcibly administer antipsychotic medications to an accused person unless it proves by clear and convincing evidence that such medications are necessary and substantially likely to render the accused competent to stand trial. The trial court ordered Mosteller take involuntary psychotropic drugs without holding a hearing or making any findings of the necessity justifying the State's use of force to medicate Mosteller. Did the court order thereby violate Mosteller's rights to liberty, privacy, and due process of law?

2. A court's authority to impose a sentence is strictly limited by statute. The court ordered Mosteller serve 27 months of community custody, far exceeding the 9 to 18 months authorized

by statute. Did the court impose an incorrect term of community custody?

3. The court's authority to order conditions of community custody is constrained by statute and the parameters of constitutional law. A court may not broadly mandate that a person take medications as a condition of community custody. Did the court's order that Mosteller take all medications prescribed by his mental health provider as a community custody condition violate his right to be free from unwanted and unnecessary medications?

4. The judgment and sentence is facially invalid when its plain terms show the court imposed a sentence unauthorized by law. The judgment and sentence states that Mosteller has an offender score of "7" but it only lists six possible convictions that may be counted as points. The judgment and sentence and other documents presented to the court show that Mosteller was living in the community and not convicted of any new crime for more than five years, meaning that a prior Class C felony could not be counted in Mosteller's offender score. Did the court miscalculate Mosteller's offender score and impose a sentence that exceeded the standard range?

5. There is no reasonable, legitimate strategic reason for an attorney to enter into a stipulation of a criminal defendant's sentencing range for purposes of a guilty plea when the defendant has not pled guilty. After Mosteller's trial, his attorney signed a stipulation saying that Mosteller agreed to the State's calculation of his standard range for purposes of a guilty plea. Where Mosteller had not pled guilty and there was no conceivable legitimate reason to stipulate that Mosteller's offender score was higher than available evidence showed it to be, did Mosteller receive ineffective assistance of counsel by entering into a sentencing stipulation?

6. After a bench trial, the court must enter written findings of fact and conclusions of law explaining all material facts supporting the essential elements of the charged offenses. Findings of fact are necessary for a meaningful appeal. The court did not file any written findings of fact or conclusions of law after Mosteller's bench trial. Has Mosteller been denied his right to meaningfully appeal his convictions when the court has not entered mandatory findings of fact explaining the basis of its verdict?

D. STATEMENT OF THE CASE.

When David Mosteller did not immediately leave a Starbucks coffee shop upon a police officer's direction that it was "time to leave," the officer told him he was under arrest for trespass. 10/29/09RP 72-73.¹ According to Officer Philip Reynolds, Mosteller swung at him. *Id.* at 76. Reynolds swung back and the two men wrestled until other customers helped Reynolds handcuff Mosteller. *Id.* at 24, 49, 56, 58, 64, 76-78. The State charged Mosteller with one count of third degree assault and criminal trespass. CP 56.

Mosteller had a long history of psychiatric problems, including multiple stays at Western State Hospital. 10/29/09RP 104-05. After an initial evaluation found Mosteller not competent to stand trial, the court committed Mosteller for 90 days for competency restoration and authorized the medical staff to administer antipsychotic medications involuntarily if needed. CP 43-45; 10/29/09RP 107. Mosteller's competency was briefly restored but several months later, the court again ordered Mosteller returned to Western State Hospital for competency restoration and

¹ The verbatim report of proceedings (RP) are referred to herein by the date of the proceeding followed by the page number.

similarly authorized involuntary antipsychotic medications at the discretion of the hospital staff. CP 37-39, 42.

The court found Mosteller competent on October 1, 2009, almost one year after the incident. CP 31, 56. At his first court appearance, he waived his right to trial by jury. CP 29-30. Mosteller was convicted of the charged offenses. CP 11. The court imposed a sentence of 33 months in prison and 27 months on community custody, which the court believed was a standard range term. CP 11-19; 10/30/09RP 6. This appeal timely follows. CP 1. Pertinent facts are discussed in further detail in the relevant argument section below.

E. ARGUMENT.

1. THE COURT REPEATEDLY ORDERED MOSTELLER TO SUBMIT TO FORCED ANTIPSYCHOTIC MEDICATIONS WITHOUT CLEAR AND CONVINCING EVIDENCE THAT SPECIFIC MEDICATIONS WERE NECESSARY, SUBSTANTIALLY LIKELY TO RESTORE COMPETENCY, AND IMPORTANT FOR THE PROSECUTION OF A SERIOUS CASE

a. The necessity of forced antipsychotic drugs must be proven by clear, cogent, and convincing evidence. All persons accused of a crime possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.” Washington

v. Harper, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 7. Involuntary medications interfere with an individual's rights to privacy, liberty, and to a fair trial free of undesired side effects caused by antipsychotic medications. Riggins v. Nevada, 504 U.S. 127, 137, 112 S.Ct. 810, 118 L.Ed.2d 479 (1992); State v. Adams, 77 Wn.App. 50, 55, 888 P.2d 1207, rev. denied, 126 Wn.2d 1016 (1995); U.S. Const. amends. 5, 6, 14; Wash. Const. art. I, §§ 3, 7, 22.

As the Riggins Court noted, the side effects of forced medications may impact “not just Riggins’ outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.” Id. at 137. Consequently, the record had to show “that administration of antipsychotic medication was necessary to accomplish an essential state policy.” Id. at 138.

The involuntary administration of drugs “solely for trial competence” purposes may occur only in “rare” instances. Sell v. United States, 539 U.S. 166, 180, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In Sell, the court ruled that the rare instance when forced medication is permitted for purposes of trial competence arises

only after the State has proven: (1) “that important government interests are at stake”; (2) “that involuntary medication will significantly further those concomitant state interests”; (3) “that involuntary medication is necessary to further those interests”; and (4) “that administration of the drugs is medically appropriate.” 539 U.S. at 180-83 (emphases in original).

In any case where the State seeks to forcibly medicate a person in order to stand trial, “[t]he State bears the burden of proving each element justifying involuntary medication by clear, cogent, and convincing evidence.” State v. Hernandez-Ramirez, 129 Wn.App. 504, 512, 119 P.3d 880 (2005). Furthermore, the court may not give “unrestricted authority” to the medical providers, and therefore must specify the types of medications permitted, dosages, and the duration of forced medications. United States v. Hernandez-Vasquez, 513 F.3d 908, 916-17 (9th Cir. 2008).

b. The court did not hold any hearing to determine the need for forced antipsychotic medications. The court signed several orders authorizing Western State Hospital to forcibly administer antipsychotic medications without holding a hearing. CP 38, 44. As in Riggins, the court did not acknowledge Mosteller’s “liberty interest in freedom from unwanted antipsychotic drugs.”

504 U.S. at 137. The court failed to apply the Sell factors before approving the forcible administration of medications to Mosteller, and did not find the State established the Sell factors by clear, cogent, and convincing evidence.

“The record must be developed whenever a Sell determination is to be made.” United States v. Rivera-Guerro, 426 F.3d 1130, 1142 (9th Cir. 2005). The court must explicitly find that the State has proven the need for medications as required by Sell, and the defendant must have an opportunity to challenge the request. Id.

Medications substantially further the prosecution’s interest in pursuing the case only when they are likely to render the defendant competent and are “substantially unlikely to have side effects that may undermine the fairness of the trial.” Hernandez-Ramirez, 129 Wn.App. at 510. Additionally, “to pass muster under Sell,” the court must specifically authorize certain medications for a limited period of time. Hernandez-Vasquez, 513 F.3d at 916. As explained in Hernandez-Vasquez, the court’s order,

must identify: (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the

defendant may continue before the treating physicians are required to report back to the court on the defendant's mental condition and progress.

Id. at 916-17. Such specificity is required because the court may not “simply delegate unrestricted authority to physicians” in the context of competency restoration. Id. at 917; see also RCW 71.05.217(7) (prohibits involuntary administration of antipsychotic drugs unless ordered after judicial hearing and “specific findings of fact” entered on mandatory criteria).

The court’s order authorizing forced medications to restore Mosteller’s competency for trial simply said:

Western State Hospital shall administer such psychotropic drugs as is deemed medically appropriate by Western State Hospital staff to assist the defendant in recovering his competency. Said medication shall be administered without the defendant’s consent, if necessary. . . .

CP 38, 44. The court entered an identical order two times, on February 12, 2009, and July 16, 2009. CP 38, 44. The court’s orders were not preceded by any hearing or on-the-record discussion of the State’s interest in forcibly medicating Mosteller, the necessity of medications to restore competency, the likelihood medications would render Mosteller competent to stand trial, or the

side effects of medications that could undermine Mosteller's right to a fair trial.

Before the court entered its first order authorizing involuntary administration of antipsychotic medications, the court received an evaluation finding Mosteller incompetent to stand trial. The evaluator noted that in light of Mosteller's "history of poor compliance with medication . . . he will unlikely accept treatment with psychotropic medications voluntarily." Supp. CP __, sub no. 19 (Feb. 9, 2009 evaluation p. 11). Thus, the evaluator asked for "judicial authority" to administer psychotropic medications "against his [Mosteller's] will if deemed clinically necessary." Id. Presumably based upon this evaluation, the court granted unlimited authority to hospital "staff" to involuntarily administer "psychotropic drugs as is deemed medically appropriate." CP 44. Mosteller received antipsychotic medications against his will. Supp. CP __, sub. no. 53 (Sept. 24, 2009 evaluation, p.6) (Mosteller "adamant" will not take medications; IM [involuntary medication] prescribed "for refused oral doses"); Supp. CP __, sub. no. 46 (Mosteller received "involuntarily administered . . . antipsychotic medications").

The court ordered the administration of involuntary antipsychotic medications without even mentioning the specific procedural requirements mandated by Sell or RCW 71.05.217(7). The court's order cited only State v. Adams, 77 Wn.App. 50, 888 P.2d 1207 (1995), as authority for ordering involuntary medications, yet Adams was decided eight years before Sell. CP 38, 44. The court's ruling does not even implicitly encompass the necessary criteria under Sell, and an explicit ruling is mandated by Sell. CP 38, 44; see Rivera-Guerro, 426 F.3d at 1142.

The court required Mosteller to submit to involuntary antipsychotic medications for the purpose of restoring his competency to stand trial without acknowledging any of the on-the-record analysis required. It did not find that criminal trespass, a gross misdemeanor, and third degree assault, classified as non-violent offense,² constituted a "serious crime" for which the government has an "important interest" in prosecuting. Sell, 539 U.S. at 166. The court did not consider whether side effects would impair Mosteller's right to a fair trial. It did not weigh the importance of prosecuting the charges of third degree assault and criminal trespass. CP 56-57. The court did not determine that no

less invasive alternatives existed. The court did not find that forcibly administered anti-psychotic medications were substantially likely to render Mosteller competent to stand trial. The court did not hold the prosecution to its burden of proof by clear and convincing evidence. Absent any discussions of the mandatory criteria of forced medications for the purpose of rendering someone competent to stand trial, the court's order violated Mosteller's rights to be free from unwanted, intrusive antipsychotic medications.

The psychiatric evaluations entered in the case are replete with references to Mosteller's desire to avoid antipsychotic medications, or at least reduce the dosage and frequency. Supp. CP __, sub. no. 19 (September 24, 2009 evaluation, p. 3, 6, 9; April 2, 2009 evaluation, p. 6; February 9, 2009 evaluation, p. 10-11); Supp. CP __, sub. no. 46 (evaluation, p. 3). Mosteller disliked the dosage and frequency of the medications requested by the State's doctor even when he agreed to take them. Supp. CP __, sub. no. 19 (April 2, 2009 evaluation, p. 6). The utter absence of any consideration of Mosteller's right to avoid unwanted psychotropic medications, where it was the State's burden to prove the necessity

² RCW 9.94A.030(50).

such medications, undermined his right to a fair trial and requires reversal.

2. THE COURT IMPOSED THE WRONG TERM OF COMMUNITY CUSTODY AND UNCONSTITUTIONALLY ORDERED MOSTELLER SUBMIT TO FORCED MEDICATIONS AS A CONDITION OF COMMUNITY CUSTODY

Among the errors in the judgment and sentence, the court imposed 27 months of community custody when the governing statute only authorized a range of 9 to 18 months. Additionally, it ordered Mosteller to take psychotropic medications without considering his constitutional right to decline these medications and upon penalty of imprisonment. Resentencing is required.

a. The court imposed a term of community custody exceeding the 18 months authorized by statute. A term of community custody must be authorized by the legislature. In re: Personal Restraint of Brooks, 166 Wn.2d 664, 667-68, 211 P.3d 1023 (2009); State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007).

Third degree assault is a class C, nonviolent felony. RCW 9A.36.031(2); RCW 9.94A.030(50). Under the statute in effect at the time of Mosteller's offense, a sentence for third degree assault must include community custody "for the community custody range

established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer.” Former RCW 9.94A.715(1) (2008).³ The community custody range for third degree assault at the time of the offense was 9 to 18 months. WAC 437-20-010; see also State of Wash. Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, III-47 (2008) (scoring worksheet attached as Appendix A).

The court imposed 27 months of community custody. CP 14. The court apparently believed that the statute authorized a longer term but imposed 27 months to prevent Mosteller’s total sentence from exceeding the statutory maximum of 60 months. RCW 9A.20.021(1)(b); 10/30/09RP 6. The court misunderstood the length of community custody authorized by statute and improperly imposed 27 months of community custody for third degree assault. 10/30/09RP 6; WAC 437-20-010. This term must be reduced upon resentencing. Brooks, 166 Wn.2d at 675.

b. The community custody condition mandating psychiatric medications upon penalty of sanction violates Mosteller’s rights to liberty and privacy. Requiring a person to take

³ The legislature repealed RCW 9.94A.715 in 2009. Laws 2008, ch. 231,

antipsychotic medication under threat of incarceration is “an unusually serious infringement of liberty” even as a condition of probation following a criminal conviction. United States v. Williams, 356 F.3d 1045, 1055 (9th Cir. 2004). The liberty interest at stake with forced medications is “so weighty” that a court may not order medications as a probation condition unless it enters explicit, specific findings “of overriding justification and a determination of medical appropriateness.” Id.

A trial court’s order requiring psychotropic drugs as a probation condition must comport with the limitations on forcible administration of drugs applied in other contexts. Id. Additionally, the order must be narrowly drawn so that there is no greater deprivation of liberty than is reasonably necessary to serve the goals of probation. Id. The court must expressly find that the restriction is appropriate and reasonably necessary based on available medical evidence. Id. at 1056. It must give “attention to the type of drugs proposed, their dosage, and the expected duration of a person's exposure, as well as an opportunity for the supervise[e] to challenge the evaluation and offer his or her own medical evidence in response.” Id. at 1056.

§ 57; Laws 2009, ch. 28, § 42.

The court ordered Mosteller to comply with “prescribed medications” without giving any attention to Mosteller’s interest in refusing. The order requires Mosteller to undergo an evaluation for mental health treatment, and further provides that he:

shall complete any and all recommended [mental health] treatment. Defendant shall take prescribed medication as ordered by treatment provider.

CP 17 (emphasis added); see RCW 9.94A.631(1) (“If an offender violates any condition or requirement of a sentence,” offender may be arrested without a warrant; if arrested, the offender must be jailed).

The court made no finding about the type of drug, duration, or dosage even though Mosteller had complained about the dosage of the drugs he was prescribed. The court allocated the mental health provider unlimited authority to prescribe medications that Mosteller must take without regard for the necessity of the medications. CP 17. As discussed in Williams, a court order of forced medications must be narrowly tailored and reasonably necessary to address an identifiable disorder, condition, or problem (1) that defendant is currently suffering from; (2) that is reasonably related to her offense, future criminality, rehabilitation or reformation; and (3) for which medication is an appropriate. 356

F.3d at 1055-56. The court's broadly stated order violated Mosteller's right to due process of law.

While the court may have the authority to order a person take prescribed antipsychotic drugs as a condition of community custody, it may not do so absent the explicit and specific findings required by law. See State v. Jones, 118 Wn.App. 199, 76 P.3d 258 (2003) (reversing community custody condition ordering mental health treatment without evidence mental illness influenced crime).

On remand the court must reduce the term of community custody and either strike the order of forced medication as a community custody condition or make explicit findings establishing the need for court-ordered medications. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (affirming right to challenge community custody condition before enforcement when predicated on legal error).

3. THE COURT MISCALCULATED THE
STANDARD RANGE AND IMPROPERLY
INCLUDED A TIME-BARRED CONVICTION
IN THE OFFENDER SCORE

a. The Judgment and Sentence uses an incorrect offender score and imposes an unauthorized term of community custody. A sentence must be authorized by the legislature

“because it is the legislature's sole province to fix legal punishments.” Motter, 139 Wn.App. at 801 (citing State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007)). The judgment and sentence is the final sentencing order establishing the terms of the sentence. In re Restraint of West, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005).

The plain language in the judgment and sentence carries the full weight of the trial court's sentencing authority. West, 154 Wn.2d at 207. A sentence is “invalid on its face” if it imposes a sentence that “exceeds the duration allowed by statute and the alleged defect is evident on the face of the document without further elaboration.” Id.; see In re Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002).

The judgment and sentence lists the criminal history used to calculate Mosteller's offender score. It lists six prior adult felony convictions, but finds Mosteller has an offender score of “7.” CP 12-13. The court did not check any box indicating there is a basis to add an additional point.⁴ Although some offenses require a court to add extra points for certain types of offenses, no statute directs a

court to count any type of prior offense as more than one point for Mosteller's offense of conviction. RCW 9.94A.525(7). The third degree assault scoring form prepared by the Sentencing Guidelines Commission does not direct a court to count any prior offense as more than a single point. App. A (scoring worksheet).

An offender score of "7" for third degree assault provides for a standard range of 33-43 months in prison. App. A. The court imposed the low end of the standard range, giving Mosteller a sentence of 33 months in prison. 10/30/10RP 6.

The court's judgment and sentence sets out six prior felony convictions for Mosteller, each of which count as one point under RCW 9.94A.525. CP 12. An offender score of "6" authorizes a standard range of 22-29 months. App. A. Where the judgment and sentence does not authorize any additional criminal history or reason to elevate Mosteller's sentence, the judgment and sentence is invalid on its face and Mosteller's sentence exceeds the standard range. See State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). The necessary remedy is to remand the case for a standard range sentence. Id.

⁴ The prosecution filed a document alleging Mosteller should receive an additional point in his offender score because he was on community custody when the incident occurred, but the court did not enter any such finding in its

b. A prior offense may not be included in the offender score calculation if it has “washed out” by operation of the sentencing statute. RCW 9.94A.525(2)(c) provides in relevant part:

Class C prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in conviction.

RCW 9.94A.500(1) requires that the sentencing court determine by a preponderance of the evidence the nature and extent of an individual’s criminal history.

Due process requires the State bear the burden of proving an individual’s criminal history and offender score by a preponderance of the evidence. Ford, 137 Wn.2d at 480-81. When the record does not support the criminal history and offender score calculation, the error may be raised on appeal even if no objection was raised below. Id. at 484-85; Goodwin, 146 Wn.2d at 873-74.

RCW 9.94A.525(2) mandates that prior offenses, “shall not be included” if they have washed out. The term “shall” indicates a

judgment and sentence. CP 13, 41.

mandatory duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The statute is not phrased to imply that prior offenses are included “unless” they are shown to have washed out. Thus, as Ford and Goodwin recognized, the State must offer sufficient proof to permit the trial court to determine the prior offenses should be included in the offender score -- proof that the offenses have not washed out.

The judgment and sentence shows a 10 year gap between Mosteller’s **1988** conviction for the Class C felony of taking a motor vehicle without permission and his **1998** conviction for theft in the second degree. CP 12. If Mosteller did not have any convictions for a five year period, the 1988 taking a motor vehicle conviction could not be counted in his offender score. Goodwin, 146 Wn.2d at 867-68; RCW 9.94A.525(2)(c).

The judgment and sentence notes Mosteller had “45 misd/gross misd convictions,” but does not indicate the dates of any misdemeanor convictions. CP 12. Intervening misdemeanor convictions would prevent a “wash out” of a prior offense only if they interrupted the required five year period of “crime free” behavior in the community. RCW 9.94A.525(2)

The State filed psychological evaluations in this case which contain a "Legal History" section from Mosteller's NCIC criminal history. Supp. CP _, sub. no. 19 (Feb. 9, 2009 evaluation, p. 9-10). According to this NCIC report, Mosteller had many arrests starting in 1978 and through 2008. Id. The report contains at least 50 charges filed against Mosteller in that 30 year period. Yet it lists no arrests for any offenses from September 15, 1988, taking a motor vehicle until August 20, 1997, criminal trespass. The evaluations also document Mosteller's psychiatric treatment in significant detail, including brief admissions to the hospital in 1988 and early 1989 but not admitted again for a number of years. Id. at 6. The records show Mosteller was released in April of 1989 and not admitted again for any evaluation until June of 1997, eight years later.

Taking a motor vehicle without permission was a Class C felony in 1988. Former RCW 9A.56.070 (1988).⁵ It may not be counted in Mosteller's offender score if he was living in the community and not convicted of any crime occurring in a consecutive five year period from 1988 until 1997. RCW 9.94A.525(2)(c). The documents filed in the court showed

⁵ The Legislature amended RCW 9A.56.070 in 2002, adding first and second degrees and designating the first degree offense as a Class B felony. Laws 2002, ch. 321 § 1.

Mosteller was not convicted of an offense, or even arrested for one, from 1988 until 1997. It is inconceivable that he was in custody for the 1988 taking a motor vehicle conviction for longer than 1 year, as it was his first felony and the standard range sentence would have been 0-60 days.⁶ Furthermore, the Western State Hospital records show a brief hospitalization in 1989 and then no record of any admissions until June 1997. Based on the available documents presented to the court before sentencing, the court lacked authority to count this 1988 felony as part of Mosteller's criminal history. Goodwin, 146 Wn.2d at 868.

c. The offender score "stipulation" carries no legal authority. Very little discussion of Mosteller's offender score occurred at the sentencing hearing. 10/30/09RP 2-7. The prosecution asked for 43 months, which was the high end of the offender score based on a "7" and Mosteller's attorney asked for 33 months, the equivalent of the low end of this standard range. Id. at 2, 5.

⁶ State of Wash. Sentencing Guidelines Commission, Adult Sentencing Guidelines Manual, III-87 (1988), available at: http://www.sgc.wa.gov/PUBS/Past_Manuals/Manual_1988/Adult_Manual_Sec_3_1988.pdf, and a copy of the worksheet for Taking a Motor Vehicle is attached as App. B.

No one mentioned a stipulation that appears in the court file during the sentencing hearing. This stipulation was signed by the parties and dated October 30, 2009, the day after the trial concluded. CP 21. It says Mosteller was agreeing to the prosecution's calculation of his criminal history and offender score **as part of a guilty plea**. CP 20-21 (emphasis added).

The stipulation reads that "upon the entry of a plea of guilty . . . Mosteller hereby agrees and stipulates that the following prior convictions are his/her complete" criminal history. CP 20. The stipulation also agrees that later discovered criminal history may be used "without affecting the validity of the guilty plea." CP 21. It provides that "if the plea of guilty is set aside" the State may prosecute additional charges withheld by plea negotiation. CP 21.

Mosteller did not plead guilty. Because Mosteller did not plead guilty, there is no reason to credit this stipulation as having any contractually binding effect or constituting a waiver of all sentencing issues. The stipulation to an offender score of "7" and agreement that no offenses "washed out" has no legal effect where the stated intent of the document is to bind Mosteller to the terms of a guilty plea. CP 20-21.

Moreover, courts “are not bound by stipulations to legal conclusions.” State v. Drum, Wn.2d __, 2010 WL 185786, *4 (2010). As a matter of law, available evidence shows the 1987 conviction had washed out, and the judgment and sentence does not support an offender score of “7.”

In Goodwin, the defendant pled guilty and signed a plea agreement that he was agreeing to the prosecution’s statement of his criminal history. 146 Wn.2d at 864. The offender score included a prior conviction that should have washed out based on a gap in time between convictions and the defendant’s age. The Goodwin Court rejected the State’s efforts to preclude Goodwin from being resentenced based on an accurate offender score, because “a defendant cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that authorized by statute and thus cannot waive a challenge to such a sentence.” Id. at 872. The Court took “the opportunity to clarify the law,” and ruled that “a defendant cannot agree to punishment in excess of that which the Legislature has established.” Id. at 873-74.

Mosteller cannot empower a court to disregard its sentencing authority and impose a sentence that is not permitted under the sentencing statutes. RCW 9.94A.525(2)(c) does not

permit a court to impose a sentence when there has been a crime-free period of five years while the person was living in the community. All available evidence documenting Mosteller's arrest history and psychiatric hospitalizations showed at least an eight year period in which Mosteller was living in the community crime-free. Thus, the court improperly included his 1988 conviction for taking a motor vehicle in his offender score.

d. Mosteller received ineffective assistance of counsel at sentencing. In the event the prosecution asks to bind Mosteller to the portion of the stipulation agreeing to a specific offender score and forgoing any "wash out" claims, the stipulation must be invalidated as the product of ineffective assistance of counsel. CP 20-21. Mosteller has the right to meaningful assistance of competent counsel at his sentencing. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. A.N.J., __ Wn.2d __, 2010 WL 314512, *10-12 (2010); U.S. Const. amend. 6;⁷ Wash. Const. art. I, § 22.⁸

⁷ The Sixth Amendment provides, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

⁸ Article I, section 22 of the Washington Constitution provides, in pertinent part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"

There could not be any conceivable tactical benefit to agreeing to waive any challenges to the prosecution's belief that Mosteller's offender score was higher than it is under the law. A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Mosteller did not plead guilty and did not receive any reduction in his charges in exchange for agreeing to a certain offender score.

Furthermore, one fundamental duty of competent counsel is to investigate the sentencing consequences of a conviction. The state provided a detailed list of every arrest of Mosteller's according to the national criminal database NCIC. This database listed a nine year gap in which Mosteller was not arrested for any crimes and psychiatric evaluations submitted by the defense documented that Mosteller was not confined in any psychiatric facility from 1989 until 1997. If the stipulation is construed as a binding agreement that Mosteller's offender score includes this 1988 Class C felony conviction, the stipulation is predicated on an obvious legal error and is not the product of competent counsel.

Prejudice resulting from an increased sentence based on a stipulation to a legally incorrect offender score is plain. Absent this

meritless stipulation, the court would be required to erase the 1988 conviction for taking a motor vehicle and reduce Mosteller's offender score by one point, thereby decreasing the standard range. See App. A (scoring worksheet for assault in the third degree). Counsel's unreasonable and purposeless agreement to waive any "wash out" argument prejudiced Mosteller and requires resentencing with a competent attorney.

4. THE COURT'S FAILURE TO ENTER MANDATORY FINDINGS OF FACT FOLLOWING THE BENCH TRIAL PRECLUDE MEANINGFUL APPELLATE REVIEW

a. Written findings are a mandatory and essential part of appellate review. When the court conducts a bench trial, it is required to file written findings of fact relating to each material element of the offense. CrR 6.1(d).⁹ The rule is mandatory. See e.g., State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) (the word "shall" in a statute is presumptively imperative and creates a duty); RAP 1.2(b) (when a word indicating "must" rather than "should" is used, the rule emphasizes that failure to perform act in timely way involves severe sanctions).

⁹ CrR 6.1(d) provides in pertinent part:

In a case tried without a jury, the court shall enter written findings and conclusions in a case that is appealed. In giving the decision, the facts found and conclusions of law shall be separately stated.

The purpose of written findings is not merely to assist, but to enable an appellate court's review of questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). A court's oral ruling is "no more than [an] oral expression[] of the court's informal opinion at the time rendered." Head, 136 Wn.2d at 622. The oral opinion has no binding effect unless expressly incorporated into a final written judgment. Id. at 622.

When facts are not included in the written findings, the reviewing court presumes the omission means missing facts were not adequately proven. Armenta, 134 Wn.2d at 14. The absence of a finding of fact is interpreted as a finding against the party with the burden of proof. In re Marriage of Olivares, 69 Wn.App. 324, 334, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009 (1993).

b. The failure to file findings of fact requires reversal.

When the lack of written findings prejudices the defendant's right to appeal, reversal is the proper remedy. Head, 136 Wn.2d at 624; see State v. Dahl, 139 Wn.2d 678, 692-93, 990 P.2d 396 (1999) (Alexander J., dissenting) (grounds for finding prejudice include reliance on inadmissible evidence and lengthy delay in

proceedings); State v. Witherspoon, 60 Wn.App. 569, 572, 805 P.2d 248 (1991) (late findings violate appearance of fairness and require reversal where remand is inadequate remedy based on lengthy delay and defendant's continued custody).

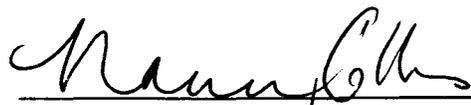
Although Mosteller filed his notice of appeal months ago, the court has not entered written findings of fact and conclusions of law. The court's failure to enter these mandatory findings impairs his ability to appeal his convictions and impedes his exercise of his constitutional right to appeal in all cases. Wash. Const. art. I, § 22.

F. CONCLUSION.

For the reasons stated above, Mr. Mosteller respectfully asks this Court to reverse his convictions and sentence.

DATED this 26th day of March 2010.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

ASSAULT, THIRD DEGREE

(OTHER THAN "ASSAULT OF A POLICE OFFICER WITH A PROJECTILE STUN GUN" (RCW 9A.36.031(H)))

(RCW 9A.36.031(1)(a) through (g) and (i))

CLASS C - NONVIOLENT

CRIME AGAINST A PERSON (RCW 9A.41.02)

I. OFFENDER SCORING (RCW 9.94A.525(7))

ADULT HISTORY:

Enter number of felony convictions..... _____ x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions _____ x 1 = _____

Enter number of nonviolent felony dispositions _____ x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same conduct count in offender score)

Enter number of other felony convictions _____ x 1 = _____

STATUS: Was the offender on community custody on the date the current offense was committed? (if yes), + 1 = _____

Total the last column to get the Offender Score
(Round down to the nearest whole number)

--	--

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE (LEVEL III)	1 - 3 months	3 - 8 months	4 - 12 months	9 - 12 months	12+ - 16 months	17 - 22 months	22 - 29 months	33 - 43 months	43 - 57 months	51 - 60* months

- B. If the court orders a deadly weapon enhancement, use the applicable enhancement sheets on pages III-8 or III-9 to calculate the enhanced sentence.
- C. If a sentence is one year or less: community custody may be ordered for up to one year (See RCW 9.94A.545 for applicable situations).
- D. When a court sentences an offender to the custody of the Dept. of Corrections, the court shall also sentence the offender to community custody for the range of 9 to 18 months, or to the period of earned release, whichever is longer (RCW 9.94A.715).
- E. For a finding that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, see page III-10, Sexual Motivation Enhancement – Form C.
- F. If the current offense was a gang-related felony and the court found the offender involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), the standard sentencing range for the current offense is multiplied by 125%. See RCW 9.94A.533(10).

- *Statutory maximum sentence is 60 months (5 years) (RCW 9A.20.021(1)).

III. SENTENCING OPTIONS

- I. First-Time Offender Wavier; for eligibility and sentencing rules; See RCW 9.94A.3650
- II. Alternative to Total Confinement; for eligibility and rules see RCW 9.94A.680.
- III. Work Ethic Camp; for eligibility and sentencing rules see RCW 9.94A.690.
- IV. Drug Offender Sentencing Alternative; for eligibility and sentencing rules see RCW 9.94A.660.

Although the Washington Sentencing Guidelines Commission does all that it can to assure the accuracy of its publications, the scoring sheets are intended to provide assistance in most cases but do not cover all permutations of the scoring rules. If you find any errors or omissions, we encourage you to report them to the Sentencing Guidelines Commission.

APPENDIX B

TAKING MOTOR VEHICLE WITHOUT PERMISSION
(RCW 9A.56.070)
NONVIOLENT

I. OFFENDER SCORING (RCW 9.94A.360 (8))

ADULT HISTORY: (If the prior offense was committed BEFORE 7/1/86, count prior adult offenses served concurrently as ONE offense; those served consecutively are counted separately. If both current and prior offenses were committed AFTER 7/1/86, count all convictions separately, except (a) priors found to encompass the same criminal conduct under RCW 9.94A.400(1)(a), and (b) priors sentenced concurrently that the current court determines to count as one offense.)

Enter number of felony convictions _____ x 1 = _____

JUVENILE HISTORY: (All adjudications entered on the same date count as ONE offense)

Enter number of felony adjudications _____ x 1/2 = _____

OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same criminal conduct count in offender score)

Enter number of other felony convictions _____ x 1 = _____

STATUS: Was the offender on community placement on the date the current offense was committed? if yes, + 1 = _____

Total the last column to get the TOTAL OFFENDER SCORE
(round down to the nearest whole number)

II. SENTENCE RANGE

A. OFFENDER SCORE:	0	1	2	3	4	5	6	7	8	9 or more
STANDARD RANGE:	0 - 60	0 - 90	2 - 5	2 - 6	3 - 8	4 - 12	12+ - 14	14 - 18	17 - 22	22 - 29
(Seriousness Level I)	days	days	months	months	months	months	months	months	months	months

III. SENTENCING OPTIONS FOR TAKING MOTOR VEHICLE WITHOUT PERMISSION

- A. If "First-time offender" eligible: 0-90 days confinement and up to two years of community supervision with conditions (RCW 9.94A.120 (5))
- B. One day of jail can be converted to one day of partial confinement or eight hours of community service (up to 240 hours) (RCW 9.94A.380)
- C. If sentence is one year or less: community supervision may be ordered for up to one year (RCW 9.94A.383)
- D. Partial confinement may be served in home detention (RCW 9.94A.030(20))

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 39954-7-II
v.)	
)	
DAVID MOSTELLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> LORI SMITH, DPA
LEWIS COUNTY PROSECUTING ATTORNEY
345 W MAIN ST FL 2
CHEHALIS, WA 98532 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> DAVID MOSTELLER
945368
MONROW CORRECTIONAL COMPLEX
PO BOX 777
MONROE, WA 98272 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2010.

X _____ 

FILED
COURT OF APPEALS
DIVISION ONE
10 MAR 29 AM 9:36
STATE OF WASHINGTON
BY 
DEPUTY

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710