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NO. 51967-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

YENILEN GUZMAN,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel at sentencing.

2. The community custody condition prohibiting appellant from entering any “bar or place where alcohol is the chief item of sale” is not crime-related. CP 39.

3. The community custody condition requiring appellant to complete a substance abuse evaluation and comply with any recommended treatment was not authorized. CP 39.

Issues Pertaining to Assignments of Error

1. Appellant pled guilty inter alia to: delivering (1) methamphetamine between June 1 and June 15, 2017; (2) delivering methamphetamine between June 18 and June 30, 2017; and (3) conspiracy to deliver methamphetamine between June 1, and June 30, 2017. The state included a point in appellant’s offender score for the conspiracy charge. Where appellant did not affirmatively agree to the state’s calculation of her offender score for purposes of the plea, did defense counsel provide ineffective assistance of counsel in failing to argue the delivery and conspiracy charges constituted the same criminal conduct?

2. Where the community custody condition prohibiting appellant from entering bars or places where alcohol is the chief commodity for sale is not crime related, should it be stricken?

3. Where the court made no finding that a chemical dependency contributed to the offense, should the community custody condition requiring appellant to undergo a drug and alcohol evaluation and follow treatment recommendations be stricken?

B. STATEMENT OF THE CASE

By an amended information, appellant Yenilen Guzman was charged with: (1) delivering methamphetamine between June 1, and June 15, 2017; (2) delivering methamphetamine between June 18 and June 30, 2017; (3) possession of heroin with intent to deliver on July 12, 2017; (4) possession of methamphetamine with intent to deliver on July 12, 2017; and (5) conspiracy to deliver methamphetamine on or between June 1, 2017 and June 30, 2017. CP 9-16. For each charge except the conspiracy, the state also alleged that the quantities of drugs involved were substantially larger than for personal use. CP 1-9.

The state's charges were based on two deliveries of methamphetamine Guzman made to an undercover officer in June (counts one and two) and methamphetamine and heroin found in

Guzman's possession following her arrest in July (counts three and four), after she became suspicious and left before the last controlled buy could be consummated. CP 1-8.

Pursuant to a plea agreement, Guzman pled guilty as charged. CP 23-32. Although she agreed the charges involved substantially larger quantities than for personal use, Guzman did not agree to an exceptional sentence. CP 19; RP 124.

On the plea form, the state recited Guzman's offender score as 3 points yielding a standard range of 20-60 months for counts one through four and 0-12 for count five (conspiracy). CP 24. The plea form included the following language about Guzman's criminal history:

The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the judge about those convictions.

CP 24. Twenty-six year-old Guzman had no criminal history, however, and the prosecuting attorney did not attach a statement. CP 23-32; RP (2/26/18) 114, 118.

At sentencing, the prosecutor requested the court run several of the sentences consecutively for an exceptional sentence

of 180 months in total. RP 90. Defense counsel argued that although an exceptional sentence of some amount might be appropriate, 180 months was too long. RP 115-16. Counsel deferred to the court to set an appropriate length. RP 116.

The court noted Guzman had been victimized and indoctrinated into the drug world by a dangerous drug dealer (“Primo” a.k.a. “Menchito”). RP 60, 87, 118. As the undercover officer Sean Kirkwood testified at sentencing, Primo preys on young people, bestowing them with kindness for a couple months, coercing them into doing his dirty work and then turns on them. RP 11-12, 60-61.

Kirkwood believed Guzman was “new to the game.” RP 12. Kirkwood described her as “submissive.” RP 66. “[T]here was a love relationship going on [between her and Primo], which may have caused her to keep her guard down a little bit.” RP 12. Kirkwood testified that while Guzman and Primo were in Mexico, “he did some things that were really unforgiveable” to Guzman:

In short, he left her there to die. He physically hurt her, forced her to do some things that were prostitution related. He left her in the street with no money and no way to get back home. She eventually made her way back home, and I think that was the turning point for which she kind of stopped her communications with him.

RP 13-14. While in Mexico, Primo also badgered Guzman to use drugs against her will. RP 61-62.

When Guzman returned, she tried to use the connections she had made while working for Primo to make some deals of her own. RP 14-15. Kirkwood and the West Sound Narcotics Enforcement Team (who had been investigating Primo) heard wind of this and set up the buys which led to the current charges. RP 9, 14-17.

Despite Guzman's victimization and good character before meeting Primo,¹ however, the court was persuaded that an exceptional sentence was appropriate because the quantities of drugs involved were "over-the-top." RP 119. The court imposed a sentence of 120 months. RP 121. This appeal follows. CP 45.

C. ARGUMENT

1. GUZMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Defense counsel's failure to argue the June deliveries of methamphetamine and the June conspiracy to deliver methamphetamine constituted the same criminal conduct was

¹ Guzman's father testified that before Guzman's victimization by Primo, Guzman was a good daughter, good mother and good worker. RP 86. The family had always been proud of her. RP 86.

deficient performance. Guzman was prejudiced because she did not affirmatively agree to the state's calculation of her offender score and because her offender score would have been lower without the additional point for the conspiracy. Although the court imposed an exceptional sentence, the court must first correctly calculate the offender score before imposing an exceptional sentence. Remand for resentencing is required.

The Sixth Amendment to the United States Constitution guarantees the assistance of counsel to criminal defendants. Its purpose is to ensure that the accused does not suffer an adverse judgment or lose the benefit of procedural protections because of the ignorance of the law. United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3d Cir.1979). A defendant is guaranteed that he need not stand alone against the State at any "critical stage" of the proceedings. United States v. Wade, 388 U.S. 218, 224–27, 87 S. Ct. 1926, 1930–32, 18 L.Ed.2d 1149 (1967). It is also well-established that a defendant is entitled to counsel during the sentencing phase of his or her case. As stated by the Supreme Court in Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977):

Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A failure to argue same criminal conduct when such an argument is warranted constitutes ineffective assistance. State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004).

Defense counsel performed deficiently in failing to argue the June deliveries of methamphetamine and the June conspiracy to deliver methamphetamine constituted the same criminal conduct. Detective Kirkwood testified he completed two methamphetamine deliveries with Guzman in June 2017. On the first occasion, Guzman was accompanied by a male, whose name was not specified. RP 20-21. On the second occasion in June, two weeks later, Guzman came with Peter Abarca. RP 22. These facts comprised counts one and two. For count five, the state alleged that during the same time period, Guzman conspired with someone

other than the intended recipient to deliver methamphetamine. CP 14.

Essentially, the deliveries are the fruit of the conspiracy itself. Although the convictions do not violate double jeopardy – State v. Pineda-Pineda, 154 Wn. App. 653, n.9, 226 P.3d 164 (2010) (citing Iannelli v. United States, 420 U.S. 770, 777-78, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)) – they do constitute same criminal conduct. State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Crimes encompass the same criminal conduct if they involve the same criminal intent and were committed against the same victim at the same time and place. RCW 9.94A.589(1)(a); State v. Vike, 125 Wash.2d 407, 410, 885 P.2d 824 (1994).

State v. Deharo is directly analogous. Deharo was seen selling drugs to several men. When police arrested him, he was carrying six bindles of heroin and \$318 in cash. He was convicted of conspiracy to deliver heroin and possession with intent to deliver heroin. His conspirator – a middle man in some of the observed transactions – was convicted separately of conspiracy. Deharo, 136 Wn.2d at 857.

On appeal, the Supreme Court considered whether the offenses constituted the same criminal conduct. At the outset, the court noted the offenses were committed at the same time and place and involved the same victim, the public at large. Deharo, at 858. Thus the dispositive question was intent. The court concluded the intent for both was the same – a recognizable scheme to sell drugs:

The dispositive issue, then, is whether they involved the same criminal intent. The definition of same criminal conduct requires inquiry into the defendant's "objective intent." State v. Porter, 133 Wash.2d at 185, 942 P.2d 974. We have applied this standard in a series of drug cases, most recently in Porter. The defendant there sold methamphetamine to a police officer, who then asked her if she had any marijuana. She was arrested after selling him some of that drug as well. We held that those crimes encompassed the same criminal conduct. They "occurred in a continuing, uninterrupted sequence of conduct as part of a recognizable scheme to sell drugs." Id. at 185-86, 942 P.2d 974 (distinguishing State v. Burns, 114 Wash.2d 314, 788 P.2d 531 (1990)) (delivery count required intent to sell in the present, whereas possession with intent to deliver involved intent to sell in the future) and State v. Maxfield, 125 Wash.2d 378, 886 P.2d 123 (1994) (manufacturing marijuana involved past and present intent to grow, whereas possession of packaged marijuana involved intent to deliver in the future).

Similarly, in the present case, the "objective intent" underlying the two charges is the same-to deliver the heroin in one or both conspirators' possession. Possessing that heroin was the

“substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in Porter, the two crimes should be treated as encompassing the same criminal conduct.

Deharo, 136 Wn.2d at 859.

Here, the conspiracy was based on either the first delivery in June or the second delivery two weeks later in June. In either scenario, the objective intent for the conspiracy was the same as either delivery – to sell methamphetamine. The “substantial step” was the possession of the methamphetamine that was ultimately delivered. As in Deharo, the crimes involved the same drugs. There is therefore no logical distinction between Guzman’s case and Deharo’s. Reasonably competent counsel would have argued that the conspiracy was part and parcel of either of the deliveries and therefore did not score separately in the offender score.

Defense counsel’s deficient performance prejudiced Guzman. Without an extra point for the conspiracy, her offender score would have been two points. One for the second June delivery and one for the two possession with intent charges. State v. Vike, 125 Wn.2d 407 (1994) (possession with intent to deliver

arose from same criminal conduct even though one was heroin and one was cocaine); see also RP 90 (prosecutor scored as same criminal conduct). With an offender score of 0-2, Guzman's standard sentence range would have been 12+-20 months, not 20+-60. RCW 9.94A.517.

Although the court imposed an exceptional sentence, it may have exercised its discretion differently as to the appropriate length had it known that Guzman's standard range was actually lower than perceived. Considering that the court felt that doubling the high end of the range was appropriate, it may have imposed 20+20 for a total of 40, rather than 60+60 for a total of 120. Indeed, it is well settled that the sentencing court must first correctly calculate the offender score before imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997).

In response, the state may argue Guzman waived her same criminal conduct challenge by virtue of the plea agreement. See e.g. In re Personal Restraint of Shale, 160 Wn.2d 489, 158 P.3d 588 (2007). There, Shale argued the trial court erred in failing to treat some of his crimes as same criminal conduct when calculating his offender score. The Supreme Court held he waived the issue because he agreed to the offender score calculation in his plea

agreement. Significantly, the trial court in taking the plea addressed Shale's offender score calculation during the colloquy and asked if Shale understood why he had 9 points. Shale, at 495.

In contrast, there was no such discussion during Guzman's plea colloquy. 2RP (1/16/18) 4. The court never mentioned Guzman's score or how it was calculated. 2RP 4. And as for the written plea agreement, Guzman agreed only to "[t]he prosecuting attorney's statement of my criminal history" that was "attached to this agreement." CP 24. But Guzman had none and there was no attachment.

Thus, this case is readily distinguishable from Shale. This Court should follow the general rule that a defendant cannot agree to punishment in excess of that which was authorized by the legislature. See In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Alternatively, the judgment and sentence is invalid on its face because the date span for the conspiracy to deliver methamphetamine encompasses the same dates as the deliveries of methamphetamine. CP 34. The deliveries clearly are the realization of the conspiracy to deliver methamphetamine. Relief is therefore required. Goodwin, 146 Wn.2d at 876-77 (no waiver

when judgment and sentence on its face showed Goodwin's offender score was miscalculated).

In sum, defense counsel's failure to argue same criminal conduct constituted ineffective assistance of counsel. Guzman did not waive the issue by virtue of the plea agreement. This Court should therefore reverse and remand for resentencing.

2. THE COURT WAS WITHOUT AUTHORITY TO IMPOSE CERTAIN CONDITIONS OF COMMUNITY CUSTODY.

As part of the judgment and sentence, the court imposed 12 months of community custody for each charge, except the conspiracy. CP 36. As conditions, the court imposed the requirement that Guzman: "Enter no bar or place where alcohol is the chief item of sale;" and "complete an evaluation for substance abuse" and "comply with all treatment recommended by CCO and/or treatment provider." CP 39. The first condition is unauthorized because it is not crime-related. The second is unauthorized because the court did not find that a chemical dependency contributed to the offenses. This Court should strike the conditions.

The trial court's authority to impose sentence in a criminal proceeding is strictly limited to that authorized by the legislature in

the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Any sentencing condition that is not expressly authorized by statute is void. Id.

This Court reviews de novo whether a sentencing court has statutory authority to impose a given condition. Id. In contrast, a trial court's decision to impose a condition is reviewed for abuse of discretion only if that court had statutory authorization to impose it. Id. at 326.

While defense counsel did not object to the improper community custody condition in the court below, erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

- (i) The Condition Prohibiting Guzman from Entering Bars or Places where Alcohol is the Chief Commodity Is Not Crime-Related and therefore Unauthorized.

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable, and some discretionary. No condition related to bars, or places where alcohol is the chief commodity is expressly listed. RCW 9.94A.703. However, a court may impose other "crime-related prohibitions." RCW 9.94A.703(3)(f).

A crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.” RCW 9.94A.030(10).

Courts interpret statutes by first looking to their plain language as the indicator of legislative intent. TracFone Wireless, Inc. v. Dep’t of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Although the issue of crime-relatedness arises frequently in Washington, to date no court has squarely tackled the phrase “directly relates to the circumstances of the crime” based on its plain meaning.

Generally, where the words in a statute are undefined, a court will rely on dictionary definitions. State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). If a statute’s meaning is plain on its face, the court must apply that meaning. State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004).

The word “circumstance” appears in the statutory definition of crime-related prohibition. “Circumstance” is undefined in the statute but is defined in the dictionary as

a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place : a condition, fact, or event accompanying, conditioning, or determining another : an adjunct or concomitant that is present or logically is likely to be present[.]

WEBSTER'S THIRD NEW INT'L DICTIONARY 410 (1993). Thus, a circumstance of the crime is a part or attribute of the crime, or something that accompanies, conditions, or determines the crime.

The fact that "bar[s] or place[s] where alcohol is the chief item for sale" played no part in Guzman's crime means that such establishments do not qualify as a circumstance of the crime.

But RCW 9.94A.030(10) is even more demanding. It does not permit a prohibition based upon a *loose* connection to a circumstance of the crime, but only one that "directly relates" to such a circumstance.

To "relate" means "to show or establish a logical or causal connection between." WEBSTER'S, supra, 1916. "Directly" means "in close relational proximity." Id. at 641. Understood in this manner, the crime-related prohibition must pertain to the actual crime, not just to any potential crime within a broad and varied category of criminal activity.

For instance, in State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), Division One struck a condition prohibiting Internet access because there was

no evidence O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in State v. Zimmer, 146 Wn. App. 405, 413-14, 190 P.3d 121 (2008), the court struck a condition prohibiting possession of cell phones or data storage devices because no evidence in the record showed Zimmer used or intended to use such devices to possess or distribute methamphetamine. This was so even recognizing that such devices were commonly used to distribute illegal drugs. Id. at 414.

Where the record does not support a factual nexus between the prohibition and the commission of the crime, the prohibition may not be imposed as a crime-related prohibition under RCW 9.94A.030(10). There was no evidence bars, or places where alcohol is the chief item for sale had anything to do with Guzman’s offenses. Accordingly, the condition prohibiting her from entering

such establishments is not crime-related and therefore should be stricken.

- (ii) The Condition Requiring Guzman to Undergo a Substance Abuse Evaluation and Follow Treatment Conditions Is Unauthorized Because the Court Did Not Find a Chemical Dependency Contributed to the Offense.

RCW 9.94A.505(9) provides, “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” And under RCW 9.94A.703(3)(c)–(d), as a condition of community custody, the court is authorized to require an offender to “[p]articipate in crime-related treatment or counseling services” and in “rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.”

The SRA specifically authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her 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). If the court fails to make the required finding, it lacks statutory authority to impose the condition. State v. Warnock, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

Here, Guzman acknowledged that drug addiction contributed to her offense. RP 108-109. For whatever reason, however, the court did not so find. RP 117-126. The legislature in its wisdom requires such a finding before the trial court can impose drug treatment. Because the court did not make the required finding here, the court lacked authority to require Guzman to undergo a drug and alcohol evaluation and follow recommended treatment. The condition should be stricken.

D. CONCLUSION

Ms. Guzman's offender score was calculated incorrectly as a direct result of her attorney's deficient performance. Because the court must first calculate an offender's offender score correctly before imposing an exceptional sentence, a new sentencing hearing – at which the court may choose to exercise its discretion differently based on the corrected, lower offender score – is necessary. Alternatively, the challenged community custody conditions should be stricken.

Dated this 20th day of August, 2018

Respectfully submitted

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