

FILED

FEB 17 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 27306-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOHN JOSEPH COOK
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE CARRIE L. RUNGE

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

FILED

FEB 17 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 27306-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOHN JOSEPH COOK
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE CARRIE L. RUNGE

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....4

 1. The special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.....4

 2. The trial court exceeded its authority by imposing affirmative conditions of sentence that the defendant obtain anger management and substance abuse evaluations and follow any treatment recommendations.....6

D. CONCLUSION.....10

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>State v. Alexander</u> , 125 Wn.2d 717, 888 P.2d 1169 (1995).....	8
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	6
<u>State v. Bashaw</u> , 144 Wn. App. 196, 182 P.3d 451 (2008), <i>rev. granted</i> , 165 Wn.2d 1002 (2008).....	6
<u>State v. Dixon</u> , 159 Wn.2d 65, 147 P.3d 491 (2006).....	6

<u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	4, 5
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	8
<u>State v. Julian</u> , 102 Wn. App. 296, 9 P.3d 851 (2000).....	9
<u>State v. Parramore</u> , 53 Wn. App. 527, 768 P.2d 530 (1989).....	9
<u>State v. Phelps</u> , 113 Wn. App. 347, 57 P.3d 624 (2002).....	9
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	4

Statutes

Wash. Const. art. I, § 21.....	4
Chapter 9.94A.....	6, 7
RCW 9.94A.030(11).....	7
RCW 9.94A.505(8).....	6
RCW 9.94A.505(9).....	7
RCW 9.94A.700(5)(c).....	7
RCW 9.94A.710(2).....	7
RCW 9.94A.715.....	7
RCW 9.94A.715(1).....	8
RCW 9.94A.715(2)(a).....	8

Treatises

David Boerner, SENTENCING IN WASHINGTON § 4.5 (1985).....	9
---	---

A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it had to be unanimous on the answer to the special verdict.

2. The trial court erred in imposing a condition of sentence that the defendant obtain an anger management evaluation and follow treatment recommendations.

3. The trial court erred in imposing a condition of sentence that the defendant obtain a substance abuse evaluation and follow treatment recommendations.

4. The trial court erred in imposing an exceptional sentence.

Issues Pertaining to Assignments of Error

1. Should the special verdicts be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts? (Assignments of Error 1, 4)

2. Did the trial court exceed its statutory authority by imposing conditions of sentence that the defendant obtain anger management and substance abuse evaluations and follow any treatment recommendations? (Assignments of Error 2, 3)

3. Did the sentencing court abuse its discretion by ordering Mr. Cook to undergo anger management and substance abuse evaluations for

the purpose of determining if he needed such treatment? (Assignments of Error 2, 3)

4. Do the facts of this case demonstrate that anger management and substance abuse evaluations and recommended treatment were related to the circumstances of the offense, Mr. Cook's risk of re-offending, or the safety of the community? (Assignments of Error 2, 3)

B. STATEMENT OF THE CASE

John Joseph Cook was found guilty by jury verdict of four offenses. CP 23-26. The offenses of bail jumping and one count of violation of a protection order arose from post-incident conduct of failure to appear for a scheduled trial date and initiation of third-party contact by Mr. Cook's mother with the victim, Ms. Phillips. CP 64; 5/5/08 RP 7-8, RP¹ 93-96, 122, 159-62. The offenses of residential burglary and a second count of violation of a protection order occurred when Mr. Cook entered and took their 3-year-old daughter from Ms. Phillips' apartment. CP 63-64; RP 72-77, 83-92, 97-102, 109-17, 123.

The State alleged as domestic violence aggravating sentencing factors that the residential burglary and protection order violation took

¹ The transcript of the jury trial is contained in two volumes and will be referred to as "RP ____". The transcripts of sentencing and any pre-trial hearings will be referred to by their dates, e.g. "7/17/08 RP ____".

place in front of a minor child. CP 63-64. The jury was instructed in pertinent part:

You will also be given two special verdict forms for the crimes of Burglary in the First Degree or Residential Burglary as charged in Count I, and violation of a No Contact Order as charged in Count II. If you find the defendant not guilty of either of these crimes, do not use the corresponding special verdict form(s). If you find the defendant guilty of either crime, you will then use the corresponding special verdict form(s) and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form(s) "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

Instruction No. 24, CP 57. The jury answered "yes" to the special verdict for these two counts. CP 22.

The standard range for residential burglary was 6-12 months. CP 13. Based on the jury finding of the aggravating factors and Mr. Cook's stipulation, the trial court imposed an exceptional sentence of 12 months plus 1 day of incarceration on the burglary and concurrent sentences within the standard ranges on the other counts. CP 13, 15; 7/17/08 RP 5-6. The court imposed a 10-year domestic violence no-contact order regarding Ms. Phillips and the minor child. CP 10-11; 7/17/08 RP 6. Without discussion, the trial court followed the State's recommendation and required as conditions of sentence that Mr. Cook obtain anger management and substance abuse evaluations and follow any treatment

recommendations. CP 15; 7/17/08 RP 2, 6. Mr. Cook was ordered to return to court on Thursday, January 14, 2010 at 8:30 a.m. and show proof of compliance with the evaluations and recommendations. Id.

This appeal followed. CP 3–4, 7–8.

C. ARGUMENT

1. The special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.

Washington requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

By contrast, in the present case, the jury was instructed quite differently:

You will also be given two special verdict forms for the crimes of Burglary in the First Degree or Residential Burglary as charged in Count I, and violation of a No Contact Order as charged in Count II. If you find the defendant not guilty of either of these crimes, do not use the corresponding special verdict form(s). If you find the defendant guilty of either crime, you will then use the corresponding special verdict form(s) and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form(s) “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer “no”.*

Instruction No. 24, CP 57 (emphasis added).

This instruction incorrectly requires jury unanimity for the jury to answer “no” to the special verdicts, contrary to Goldberg. Thus, if the jury was deadlocked, instead of just answering “no,” it would feel compelled by this instruction to continue deliberations to reach unanimity. Since this

instruction misstates the law, the special verdicts must be stricken.²

Absent the aggravating factors, the exceptional sentence must be vacated.

2. The trial court exceeded its authority by imposing affirmative conditions of sentence that the defendant obtain anger management and substance abuse evaluations and follow any treatment recommendations.

This court reviews sentencing conditions for abuse of discretion. State v. Armendariz, 160 Wn.2d 106, 112, 156 P.3d 201 (2007). A court abuses its discretion if its decision is manifestly unreasonable or based on unreasonable or untenable grounds. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 491 (2006).

Under RCW 9.94A.505(8), a court sentencing a defendant for a felony offense may impose sentence conditions as provided in Chapter 9.94A.

As a part of any sentence, the court may impose and enforce crime-related prohibitions and *affirmative conditions as provided in this chapter*.

RCW 9.94A.505(8) (emphasis added). The term “affirmative conditions” is not defined in Chapter 9.94A.³ However, it is clear that the types of

² The Court ruled against this argument in State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008). However, review has been accepted at 165 Wn.2d 1002 (2008). Oral argument has not yet been scheduled.

affirmative conditions authorized by the Legislature in Chapter 9.94A must relate to the circumstances of the crime being sentenced.

For example, the Legislature requires a court to find that mental illness reasonably contributed to the crime before the court can require a defendant to participate in mental health treatment. RCW 9.94A.505(9).⁴ Where community placement or custody is appropriate, the Legislature authorizes only treatment and counseling services that are crime-related. RCW 9.94A.700(5)(c)⁵, RCW 9.94A.710(2)⁶, RCW 9.94A.715, which

³ *Cf.* 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. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the Department.” RCW 9.94A.030(11).

⁴ “The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender’s competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.” RCW 9.94A.505(9).

⁵ RCW 9.94A.700. Community placement. “(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions: ... (c) The offender shall participate in crime-related treatment or counseling services”

⁶ RCW 9.94A.710. Community custody for sex offenders. “(2) Unless a condition is waived by the court, the terms of community custody imposed under this section shall be the same as those provided for in RCW 9.94A.700(4) and may include those provided for in RCW 9.94A.700(5). ...”

governs most instances of community custody,⁷ appears to expand the nexus requirement to permit the imposition of affirmative conduct that is “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” RCW 9.94A.715(2)(a).⁸ Even under this broader application, the evidence must show that the proposed condition is related to the underlying crime. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

Herein, the trial court required as conditions of sentence that Mr. Cook obtain anger management and substance abuse evaluations and follow any treatment recommendations. CP 15; 7/17/08 RP 6. The court made no findings that such evaluations and any recommended treatments were reasonably related to the circumstances of the offense, Mr. Cook's risk of reoffending, or the safety of the community. 7/17/08 RP 6.

⁷ The statute is offense specific. State v. Alexander, 125 Wn.2d 717, 727, 888 P.2d 1169 (1995). The felony crimes of residential burglary and bail jumping are not subject to a term of community custody. RCW 9.94A.715(1) Thus the court herein did not impose a term of community custody. CP 15-16; 7/17/08 RP 2.

⁸ RCW 9.94A.715. Community custody for specified offenders—Conditions. ... “(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate 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, and the department shall enforce such conditions pursuant to subsection (6) of this section.”

More importantly, the court could not conclude from the information before it that Mr. Cook needed these types of treatment. There was no evidence in the record that Mr. Cook used drugs or had a substance abuse problem or that use of drugs or alcohol contributed to the charged crimes. Nor was there evidence that Mr. Cook had a chronic anger problem that resulted in the commission of these crimes. The jury refused to find that Mr. Cook assaulted Ms. Phillips during this incident. CP 21, 28–29. Nowhere in the record does the court make any connection between the offenses and an anger problem.

When imposing the conditions, the trial court noted that the evaluators might not even recommend either treatment for Mr. Cook. 7/17/08 RP 6. Because the court made no findings regarding the appropriateness of these evaluations in his case, it appears the trial court was forcibly “offering” Mr. Cook possible avenues of self-improvement. While “[p]ersons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, [] they may not be coerced into doing things which are believed will rehabilitate them.” State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, SENTENCING IN WASHINGTON § 4.5 (1985)). In the absence of findings that anger problems or substance

abuse contributed to Mr. Cook's offenses, the court exceeded its statutory authority by imposing the conditions. State v. Julian, 102 Wn .App. 296, 305, 9 P.3d 851 (2000) (citation omitted).

Sentencing authority is provided solely by statute and therefore a sentence imposed without such authority is imposed on untenable grounds. State v. Phelps, 113 Wn. App. 347, 357, 57 P.3d 624 (2002). Absent a crime-related nexus, the imposition of the challenged conditions cannot be sustained. These conditions of sentence exceeded the court's authority and must be stricken.

D. CONCLUSION

For the reasons stated, the special verdicts and exceptional sentence should be vacated and the matter remanded for resentencing without the challenged conditions of sentence.

Respectfully submitted this 17th day of February, 2009.


Susan Marie Gasch, WSBA #16485
Attorney for Appellant