

FILED
Court of Appeals
Division III
State of Washington
7/26/2019 11:40 AM

No. 36600-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANDREW RICHMOND,

Appellant.

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

The Honorable Judge Scott R. Sparks

APPELLANT'S OPENING BRIEF

Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

C. STATEMENT OF THE CASE.....1

D. ARGUMENT.....6

Issue 1: Whether the trial court erred in imposing conditions of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC and undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment.....6

Issue 2: Whether the trial court erred by imposing interest on legal financial obligations other than restitution.....12

E. CONCLUSION.....13

TABLE OF AUTHORITIES

Washington Supreme Court

In re Postsentence Review of Leach, 161 Wn.2d 180,
163 P.3d 782 (2007).....6, 8

State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007)....7

State v. Autrey, 136 Wn. App. 460, 150 P.3d 580 (2006).....7

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).....6, 12

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..6

State v. McCorkle, 137 Wn.2d 490, 973 P.2d 461 (1999)..12

State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).....12, 13

State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993).....7

Washington Courts of Appeal

State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009).....7

State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015).....9

State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003)...10, 11, 12

State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 1116 (2018).....7, 8

State v. Munoz-Rivera, 190 Wn. App. 870, 361 P.3d 182 (2015)..11

State v. O’Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008)..7

State v. Taylor, Nos. 51291-2-II, 51301-3-II,
2019 WL 2599184 (Wash. Ct. App. June 25, 2019).....8

State v. Warnock, 174 Wn. App. 608, 299 P.3d 1173 (2013).....10, 11

Washington Statutes and Session Laws

Laws of 2018, ch. 269, § 1.....	13
RCW 9.94A.345.....	9
RCW 9.94A.607(1).....	9
RCW 9.94A.703(3) (2014).	9, 12
RCW 9.94A.703(2)(d) (2014).....	8
RCW 10.01.160(3).....	8
RCW 10.82.090(1).....	13
RCW 10.101.010(3).....	8

Washington Court Rules

GR 14.1(a).....	8
-----------------	---

A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a condition of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC.
2. The trial court erred in imposing a condition of community custody requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment.
3. The trial court erred by imposing interest on legal financial obligations other than restitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the trial court erred in imposing conditions of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC and undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment.

Issue 2: Whether the trial court erred by imposing interest on legal financial obligations other than restitution.

C. STATEMENT OF THE CASE

The State charged Joseph Andrew Richmond with one count of second degree murder, alleged to have occurred on September 22, 2014. (CP 8). The case proceeded to a jury trial. (CP 89-118; 1 RP¹ 220-1178).

Mr. Richmond filed a motion in limine to “preclude the prosecution from inquiring about his past drug use or any evidence thereof.” (CP 129-131). On the final day of trial, the trial court heard argument on the motion. (1 RP 947-962).

¹ Upon motion by Mr. Richmond, on July 17, 2019, this Court transferred the Report of Proceedings from Mr. Richmond’s first appeal, COA No. 34157-7-III, to this appeal. References to “1 RP” herein refer to the report of proceedings from COA No. 34157-7-III. References to “2 RP” herein refer to the Report of Proceedings filed in this current cause number, consisting of a single volume containing the resentencing hearing held on January 25, 2019.

The State sought to admit the following evidence, as relevant to Mr. Richmond's ability to perceive, recollect, and remember the events on the day in question:

I am going to ask [Mr. Richmond] whether or not he was using methamphetamine that day, and the [sic] depending on his answer I'd like to be able to impeach with a statement he gave on the day he was arrested, where he indicates he has a daily methamphetamine habit and that he uses two to three grams a day.

....

He gave a statement to a mental health professional on September 24th at 7:45 saying that He reports daily meth' use two to three grams with tolerance. That's what he told the mental health professional.

(1 RP 947, 956-957).

The trial court ruled the State could ask Mr. Richmond whether he was using methamphetamine on the day in question, but the State could not utilize the statement he made to the mental health professional:

I'm going to let the state ask a question, take the answer, whatever it is. But I'm not going to - - That statement, we're not going to use it in this trial. The one that he gave to the medical professional.

(1 RP 951, 961).

Subsequently, Mr. Richmond testified in his own defense. (1 RP 974-1046). On cross-examination, the State questioned Mr. Richmond as follows:

[The State:] Were you using any mind-altering substances on that day, September 22nd, 2014?

[Mr. Richmond:] No, I was not.

[The State:] Hadn't drank any alcohol?

[Mr. Richmond:] No.

[The State:] Hadn't used any methamphetamine?

[Mr. Richmond:] No.

(1 RP 1020-1021).

The jury convicted Mr. Richmond of second degree murder. (CP 165; 1 RP 1173-1178). At sentencing, the trial court included an Idaho conviction in Mr. Richmond's offender score. (CP 177-190; 1 RP 1182-1214). The trial court also imposed a community custody condition requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment:

[Trial court:] But as part of the – community custody I'll require that you obtain an anger management evaluation and comply with any recommended treatment. I have no evidence that he was on drugs during the commission of this offense, even though there apparently were drug paraphernalia found in his home the day after or a few days later. So I can't really – evaluation. But it would behoove you, if you do have a drug problem, to get treatment for that in – in confinement. I'm not going to order it because I don't think the – law would allow me to. Am I wrong on that, [State]? [The State:] Judge, there is information that he gave to the jail – We discussed this before he testified. I'm going to leave it in the court's discretion but he was intake [sic] into jail within 48 hours of the offense and he made an admission that he had a daily methamphetamine habit, admitted to using one to two grams of methamphetamine per day. So . . . That's an admission he made. [Trial court:] I think that's sufficient. I've changed my mind. I'd forgotten that particular fact. Okay. So I will order that you obtain a – a – chemical dependency evaluation and comply with any recommended treatment. And of course if you disagree with that, that will be one of the things that you can take up with the Court of Appeals.

(CP 181, 188; 1 RP 1210-1211).

The trial court did not make a finding that the defendant has a chemical dependency that contributed to the offense. (CP 178; 1 RP 1182-1214).

Mr. Richmond appealed. (CP 198-211). An order of indigency was entered for purposes of appeal. (CP 192-197). In a published opinion, this Court affirmed Mr. Richmond's conviction, but remanded the case to the trial court for resentencing. (CP 230-259); *see also State v. Richmond*, 3 Wn. App. 2d 423, 415 P.3d 1208 (2018). This Court found "[t]he appellate record lacks sufficient information to resolve the question of whether Mr. Richmond's Idaho conviction should have been included in the offender score. We therefore remand for resentencing on this issue." (CP 247); *see also Richmond*, 3 Wn. App. 2d at 437. This Court ruled "[w]e affirm Mr. Richmond's conviction but remand to the trial court with instructions to conduct a comparability analysis and assessment of Mr. Richmond's offender score." (CP 247); *see also Richmond*, 3 Wn. App. 2d at 437.

The trial court held a resentencing hearing on January 25, 2019. (CP 282; 2 RP 5-12). The State stipulated that the Idaho conviction should not be included in Mr. Richmond's offender score. (2 RP 5-6). The trial court sentenced Mr. Richmond without including the Idaho conviction in his offender score. (CP 283-293; 2 RP 9-11).

The trial court also imposed a term of community conditions with conditions, including requiring Mr. Richmond to pay supervision fees as determined by DOC [Department of Corrections] and undergo an evaluation for treatment for chemical dependency and fully comply with all recommended

treatment. (CP 287-288; 2 RP 10). In imposing these conditions, the trial court stated:

It's my understanding that there's still thirty-six months of community custody. I'm trying to remember if I imposed, the conditions I imposed, we'll look at the last sentence. Maintain law abiding behavior, submit to testing of your bodily fluids, not possess or consume controlled substances, including marijuana, without a valid prescription, undergo an evaluation and treatment for chemical dependency and anger management. These are consistent with what we did before.

(2 RP 10).

The trial court did not make a finding that the defendant has a chemical dependency that contributed to the offense. (CP 284; 2 RP 5-12).

The trial court also imposed legal financial obligations, comprised of a \$500 victim penalty assessment. (CP 289; 2 RP 10). The judgment and sentence requires Mr. Richmond pay interest on all legal financial obligations:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

(CP 290).

Mr. Richmond appealed. (CP 301-315, 317-329). An order of indigency was entered for purposes of appeal. (CP 297-300).

D. ARGUMENT

Issue 1: Whether the trial court erred in imposing conditions of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC and undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment.

The trial court erred in imposing a condition of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC, because this fee is a discretionary legal financial obligation (LFO), and the trial court found Mr. Richmond indigent. The trial court also erred in imposing a community custody condition requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment, because there is no evidence that chemical dependency contributed to his offense and the trial court did not make a finding pursuant to RCW 9.94A.607(1). Both conditions should be stricken from his judgment and sentence.

Mr. Richmond challenges these community custody conditions for the first time on appeal. (2 RP 5-12). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Where the trial court lacked authority to impose a community custody condition, the appropriate remedy is to remand to strike the condition. *See, e.g., State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The trial court erred in imposing the following two conditions of community custody: a condition requiring Mr. Richmond to pay supervision fees as determined by DOC, and a condition requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment. Each condition is addressed in turn below.

First, the trial court erred in imposing a condition of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC. The community custody supervision fee is a discretionary LFO, because it can be waived by the sentencing court. *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3,

429 P.3d 1116 (2018); *see also* RCW 9.94A.703(2)(d) (2014) (allowing the sentencing court to impose, or to waive, a condition of community custody requiring an offender to “[p]ay supervision fees as determined by the department[.]”).

Discretionary LFOs cannot be imposed on a defendant who is indigent at the time of sentencing. *See* RCW 10.01.160(3); *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Mr. Richmond was found indigent at sentencing. (CP 297-300). Therefore, the condition of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC should be stricken. *See State v. Taylor*², Nos. 51291-2-II, 51301-3-II, 2019 WL 2599184, *4 (Wash. Ct. App. June 25, 2019) (holding that because the defendant was found indigent at sentencing, the community custody supervision fee must be stricken under RCW 10.01.160(3)).

Second, the trial court erred in imposing a condition of community custody requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment.

A trial court’s sentencing authority is limited to that granted by statute. *Leach*, 161 Wn.2d at 184. The trial court may order an offender to do the following, as part of a term of community custody:

(c) Participate in crime-related treatment or counseling services;

² GR 14.1(a) authorizes citation to unpublished opinions of the Court of Appeals as nonbinding authority.

(d) 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;

....

or (f) [c]omply with any crime-related prohibitions.

RCW 9.94A.703(3)(c), (d), (f) (2014); *see also* RCW 9.94A.345 (stating “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”). The Court of Appeals “has struck crime-related community custody conditions when there is ‘no evidence’ in the record that the circumstances of the crime related to the community custody condition.” *State v. Irwin*, 191 Wn. App. 644, 656–57, 364 P.3d 830 (2015).

In addition, pursuant to RCW 9.94A.607:

Where the court finds that the offender has any 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. A rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense. The court may also impose a prohibition on the use or possession of alcohol or controlled substances regardless of whether a chemical dependency evaluation is ordered.

RCW 9.94A.607(1).

In *State v. Warnock*, the court found the trial court erred by ordering the defendant to obtain a chemical dependency evaluation and treatment as a community custody condition, where there was no evidence that any substance except alcohol contributed to the defendant's offense, and no finding made pursuant to RCW 9.94A.607(1). *State v. Warnock*, 174 Wn. App. 608, 611-14, 299 P.3d 1173 (2013). In discussing RCW 9.94A.607(1), the court stated that "[i]f the court fails to make the required finding, it lacks statutory authority to impose the condition." *Id.* at 612. The court found "a court's authority to order treatment is circumscribed by statutes to crime-related treatment." *Id.* at 614. The court held "[b]ecause there is no evidence and finding that anything other than alcohol contributed to [the defendant's] offense, we remand with directions to amend the judgment and sentence to impose only alcohol evaluation and recommended treatment." *Id.*

In *State v. Jones*, the court found the trial court erred by ordering the defendant to participate in alcohol counseling as a condition of community custody, because there was no evidence that alcohol contributed to his crimes or that the alcohol counseling requirement was crime-related. *State v. Jones*, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). The court further found that "alcohol counseling 'reasonably relates' to the offender's risk of reoffending and to the safety of the community, only if the evidence shows that alcohol contributed to the offense." *Id.* at 208.

Here, the trial court did not make a finding, pursuant to RCW 9.94A.607(1), that Mr. Richmond has a chemical dependency that contributed to the offense. (CP 178, 284; 1 RP 1210-1211, 2 RP 5-12). Therefore, the trial court lacked statutory authority to impose the challenged community custody condition, to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment. *See Warnock*, 174 Wn. App. at 612. Furthermore, there is no evidence in the record that chemical dependency contributed to Mr. Richmond's crime of second degree murder, or that the requirement to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment was crime-related. (1 RP 1020-1021). Mr. Richmond testified he was not using any mind-altering substances on the day of the offense, including methamphetamine. (1 RP 1020-1021). No other evidence of drug use by Mr. Richmond on the date in question was admitted into evidence. (1 RP 947, 951, 956-957, 961, 974-1046).

The trial court erred by requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment, because it was not crime-related. *See Warnock*, 174 Wn. App. at 611-614; *Jones*, 118 Wn. App. at 207-08; *see also State v. Munoz-Rivera*, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (holding that where there was no evidence that any substances other than alcohol contributed to the defendant's offenses, the

community custody condition imposing a substance abuse evaluation and treatment must be limited to alcohol only).

In addition, undergoing an evaluation for treatment for chemical dependency and fully complying with all recommended treatment, does not “reasonably relate” to Mr. Richmond’s risk of reoffending or the safety of the community, because there is no evidence that chemical dependency contributed to the offense. *Jones*, 118 Wn. App. at 208; *see also* RCW 9.94A.703(3)(d) (2014).

Therefore, the condition of community custody requiring Mr. Richmond to undergo an evaluation for treatment for chemical dependency and fully comply with all recommended treatment should be stricken.

Issue 2: Whether the trial court erred by imposing interest on legal financial obligations other than restitution.

The provision of the judgment and sentence imposing interest on all LFOs is contrary to recent statutory amendments and must be stricken.

Illegal or erroneous sentences can be challenged the first time on appeal. *See Bahl*, 164 Wn.2d at 744; *see also State v. McCorkle*, 137 Wn.2d 490, 495-496, 973 P.2d 461 (1999).

Mr. Richmond’s judgment and sentence was entered on January 25, 2019. (CP 283-293; 2 RP 5-12).

House Bill 1783, effective June 7, 2018, modified Washington’s system of LFOs, addressing “some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” *State v. Ramirez*, 191 Wn.2d 732,

747, 426 P.3d 714 (2018). Among other changes, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs. *See* Laws of 2018, ch. 269, § 1; *see also Ramirez*, 191 Wn.2d at 747 (noting this change). Specifically, House Bill 1783 amended RCW 10.82.090 as follows:

Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. *As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.*

RCW 10.82.090(1) (emphasis added); *see also* Laws of 2018, ch. 269, § 1.

Thus, following the changes made by House Bill 1783, the statute now prohibits the accrual of interest on non-restitution LFOs. RCW 10.82.090(1).

The provision in Mr. Richmond's judgment and sentence requiring payment of interest, entered after June 7, 2018, violates this provision of amended RCW 10.82.090. (CP 290). Interest cannot accrue on the non-restitution LFOs imposed on Mr. Richmond. *See* RCW 10.82.090(1); *see also* Laws of 2018, ch. 269, § 1.

This Court should remand with instructions to modify the judgment and sentence to strike the provision imposing interest on all LFOs.

E. CONCLUSION

The trial court erred by imposing conditions of community custody requiring Mr. Richmond to pay supervision fees as determined by DOC and undergo an evaluation for treatment for chemical dependency and fully comply

with all recommended treatment. The trial court also erred by imposing interest on Mr. Richmond's legal financial obligations. Mr. Richmond requests this Court strike the two challenged community custody conditions, and the provision imposing interest on all legal financial obligations.

Respectfully submitted this 26th day of July, 2019.



Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

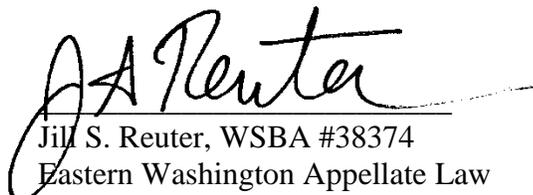
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 36600-6-III
vs.) Kittitas County No. 14-1-00247-4
)
JOSEPH A. RICHMOND) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 26, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joseph A. Richmond, DOC #884586
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Respondent at prosecutor@co.kittitas.wa.us using the Washington State Appellate Courts' Portal.

Dated this 26th day of July, 2019.


Jill S. Reuter, WSBA #38374
Eastern Washington Appellate Law
PO Box 8302
Spokane, WA 99203
Phone: (509) 242-3910
admin@ewalaw.com

NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW

July 26, 2019 - 11:40 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36600-6
Appellate Court Case Title: State of Washington v. Joseph A. Richmond
Superior Court Case Number: 14-1-00247-4

The following documents have been uploaded:

- 366006_Briefs_20190726114028D3979204_6910.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief filed 7.26.19.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us

Comments:

Sender Name: Jill Reuter - Email: jill@ewalaw.com
Address:
PO BOX 8302
SPOKANE, WA, 99203-0302
Phone: 509-242-3910

Note: The Filing Id is 20190726114028D3979204