

65302-4

65302-4

NO. 65302-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

---

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED .....	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	5
1.    GIIR HAS WAIVED ANY ERROR IN THE LACK OF A DOC PRESENTENCE REPORT BECAUSE HE COULD HAVE RAISED THE ISSUE ON HIS FIRST APPEAL BUT DID NOT.....	5
2.    A DOC REPORT IS NOT A NECESSARY PREREQUISITE TO A TRIAL COURT'S AUTHORITY TO IMPOSE MENTAL HEALTH CONDITIONS OF COMMUNITY CUSTODY.....	7
a.    The Trial Court Satisfied The Requirements of RCW 9.94A.505(9).....	7
b.    Any Failure to Comply With The Statutory Procedure Required Was Harmless Error.....	15
D. CONCLUSION .....	18

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Bullseye Distributing v. Wa. Gambling Commission,  
127 Wn. App. 231, 110 P.3d 1162,  
rev. denied, 155 Wn.2d 1027 (2005) ..... 13

Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801,  
16 P.3d 583 (2001)..... 9

Guijosa v. Wal-Mart Stores,  
101 Wn. App. 777,  
6 P.3d 583 (2000),  
aff'd, 144 Wn.2d 907 (2001). ..... 13

State v. Alvarez, 128 Wn.2d 1,  
904 P.2d 754 (1995)..... 9

State v. Anderson, 92 Wn. App. 54,  
960 P.2d 975 (1998), rev. denied,  
137 Wn.2d 1016 (1999)..... 15, 16

State v. Brooks, 142 Wn. App. 842,  
176 P.3d 549 (2008)..... 14

State v. Carter, 89 Wn.2d 236,  
570 P.2d 1218 (1977)..... 14

State v. Giir, 153 Wn. App. 1015 (2009) ..... 2, 4

State v. Gonzales, 90 Wn. App. 852,  
954 P.2d 360, rev. denied,  
136 Wn.2d 1024 (1998)..... 16

State v. Hughes, 154 Wn.2d 118,  
110 P.3d 192 (2005)..... 16

State v. Jacobs, 154 Wn.2d 596,  
115 P.3d 281 (2005)..... 9

<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	12, 13, 14
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	11, 12
<u>State v. Neher</u> , 112 Wn.2d 347, 771 P.2d 330 (1989).....	13
<u>State v. Oxborrow</u> , 106 Wn.2d 525, 723 P.2d 1123 (1986).....	16
<u>State v. Sauve</u> , 100 Wn.2d 84, 666 P.2d 894 (1983).....	5
<u>State v. Thomas</u> , 150 Wn.2d 666, 80 P.2d 168 (2003).....	14

#### Statutes

##### Washington State:

Former RCW 9.94A.505(9) .....	1, 4, 7, 8, 11, 14
Former RCW 9.94A.715 (2005) .....	3
Laws of 1998, ch. 260 .....	10
Laws of 2008, ch. 231 .....	9, 11, 12
RCW 71.24.025.....	8
RCW 9.94A.370 .....	16
RCW 9.94A.500 .....	11
RCW 9.94A.530 .....	11, 17
RCW 9.94A.535 .....	17
RCW 9.94A.703 .....	9, 12

Rules and Regulations

Washington State:

CrR 7.1..... 11

Other Authorities

1998 Reg. Sess. Wa. Legis., Final Bill Report SB 5760.....11

A. ISSUES PRESENTED

1. Whether Giir has waived the claimed error because he could have raised this claim in his first appeal but did not do so.

2. Whether former RCW 9.94A.505(9) permits reliance on a defense presentence report to provide the basis for the findings required to justify imposition of mental health conditions of community custody.

3. Whether former RCW 9.94A.505(9) permits reliance on either a presentence report or expert evaluations to provide the basis for the findings required to justify imposition of mental health conditions of community custody.

4. Whether any technical error in compliance with the procedure described in former RCW 9.94A.505(9) is harmless, given the court's entry of the necessary findings based on expert evaluations and the defense presentence report.

B. STATEMENT OF THE CASE

Kero Giir was charged with murder in the first degree for the killing of Roda Bec and assault in the second degree for the stabbing of Veronica Abbas, both occurring on May 28, 2005, and

both including deadly weapon enhancements. CP 8-9. On direct appeal this Court summarized the facts of the case as follows:

Giir was born in and spent his early years in Sudan. When he was eight years old, civil war broke out. Giir suffered significant violence, abuse, and extraordinary hardship for several years in Sudan and then in a refugee camp in Kenya. Roda Bec also fled Sudan as a child and met Giir at the Kenyan refugee camp, where they spent several years before immigrating to the United States in 2001. Giir and Bec dated for several years, but their relationship deteriorated in the months preceding the assault. Bec wanted to end the relationship, and Giir objected. In February 2005, Giir went uninvited to Bec's dormitory room, where they argued and he threatened to kill her. Bec's roommate reported the incident to police, but Bec told police Giir had apologized and she declined to pursue a complaint. On May 27, 2005, Bec was visiting her friend Veronica Abbas. Giir called and asked Bec to meet him to discuss their relationship. When Bec refused, Giir threatened to kill her and one of her brothers. Abbas told Giir he could come to the apartment the next morning if he did not come alone. The next morning, Giir went to a hardware store, where he bought two knives, and then returned to his apartment, where he wrote a letter explaining that he intended to kill Bec because she had mistreated him. Giir later told police that he wrote the letter and left it for someone to find because he intended to commit suicide after he killed Bec. Giir went to Bec's apartment. After they argued for a while, Giir pulled out a knife and stabbed Bec in the back while she was sitting on a couch, and he stabbed her multiple times as she tried to crawl away. Abbas saw the attack and tried to stop Giir, but could not do so. Abbas suffered a severe cut to her hand. She fled to a neighbor's apartment and called for help. Not long after, police received a report that a man later identified as Giir had jumped from an overpass onto a highway in an apparent suicide attempt. Giir survived the injuries he sustained.

State v. Giir, 153 Wn. App. 1015 (2009) (table); CP 36-37.

Giir plead guilty to amended charges of murder in the first degree and assault in the third degree with no deadly weapon enhancements. CP 10-11, CP 94-116. Based on the two current convictions, Giir's presumptive sentence range for the murder in the first degree was 250 to 333 months of confinement, with a mandatory period of community custody. CP 13, 141; former RCW 9.94A.715 (2005).

Giir moved to withdraw his plea, claiming he was given inconsistent information as to the standard range sentence and that his plea was coerced by his attorney. CP 145-50. The motion was denied. CP 267-71.

Giir then requested an exceptional sentence below the presumptive range based on a "failed mental defense." CP 50, 76-77, 122-26. At the sentencing hearing, Giir's counsel repeatedly referred to his written presentence report to the court in support of that request, although he did not file that report. CP 74-77.

The sentencing court rejected the request for an exceptional sentence and imposed a standard range sentence of 300 months of confinement. CP 15, 83. The court expressed no surprise at the many references to the defense presentence report and indicated

that it had read the materials submitted by defense counsel. CP 74-77, 80-81. The court imposed the mandatory community custody and a crime-related condition of community custody, that Giir "obtain a mental health evaluation and follow all treatment recommendation[sic]." CP 16, 19.

Giir appealed. He claimed that his trial counsel was ineffective in failing to investigate Giir's competency to enter a guilty plea; this Court rejected that challenge. State v. Giir, 153 Wn. App. 1015 (2009) (table); CP 35, 41-44. Giir also claimed that the trial court improperly imposed mental health conditions of community custody because it did not make findings required by former RCW 9.94A.505(9). CP 44. This Court agreed and remanded "for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9)." CP 48.

The trial court considered the arguments of the parties on remand and entered an order making the findings required by former RCW 9.94A.505(9). CP 88; 4/23/2010 RP 13-17. The court specified that its findings on remand were "based on defense's presentence report, presentation at sentencing and evaluations by Dr. Wheeler and Dr. Kriegler." CP 88; 4/23/2010 RP 17.

C. ARGUMENT

1. GIIR HAS WAIVED ANY ERROR IN THE LACK OF A DOC PRESENTENCE REPORT BECAUSE HE COULD HAVE RAISED THE ISSUE ON HIS FIRST APPEAL BUT DID NOT.

Giir does not challenge the sufficiency of the evidence in support of the findings entered by the trial court or the adequacy of the findings. Giir now claims that the trial court lacked authority to impose mental health conditions of community custody because the Department of Corrections (DOC) did not file a presentence report in this case. That claim has been waived because it could have been raised in Giir's first appeal but was not.

If an issue could have been raised on a first appeal but was not, that issue cannot be raised in a second appeal. State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983). The defendant may seek relief in a personal restraint petition. Id.

In his first appeal, Giir claimed that the mental health conditions imposed were improper because of the lack of findings as to the nature of his mental illness and its connection to the crimes, but he did not argue that the conditions could not be imposed because no DOC report had been filed. CP 44, 47-48. This Court noted that Giir apparently addressed his mental health

problems in "his presentence report" and that reports of mental health experts had addressed it in their reports. CP 47-48. Giir could have raised the argument that a DOC report was a necessary prerequisite to imposing mental health conditions and that its absence absolutely precluded imposition of the conditions, as that absence was conclusively established when Giir was sentenced.

This Court remanded for the trial court to consider the findings required to impose the conditions, but that remand was pointless if the failure of DOC to file a presentence report precluded imposing the conditions regardless of the court's findings and the uncontroverted factual basis for the findings in the reports of the mental health experts. If the issue had been raised and found to have merit, this Court would have remanded with direction to the trial court to strike the conditions.

Because Giir did not raise this issue in his first appeal, he has waived this claim.

2. A DOC REPORT IS NOT A NECESSARY PREREQUISITE TO A TRIAL COURT'S AUTHORITY TO IMPOSE MENTAL HEALTH CONDITIONS OF COMMUNITY CUSTODY.

Giir claims that a sentencing court lacks authority to impose mental health conditions pursuant to former RCW 9.94A.505(9) unless DOC has submitted a presentence report. That claim should be rejected. The statute refers to "a presentence report" and, in the context of this subsection, any presentence report supporting imposition of the condition would qualify. Even if the legislature has directed the court to base its opinion on a DOC presentence report, reliance on other evidence (including Giir's own presentence report with claims that mental illness mitigated his responsibility for the murder and assault, and relevant expert evaluations) did not deprive the court of authority to order the conditions. Any error in the procedure followed was merely technical and was harmless.

a. The Trial Court Satisfied The Requirements of RCW 9.94A.505(9).

The essential requirements of RCW 9.94A.505(9) were satisfied by the sentencing court. The provision for consideration of a presentence report was satisfied by consideration of the defense

presentence report in this case. CP 88. Further, to effectuate the legislature's intent, this Court should construe the statute as providing that consideration of a presentence report is not mandatory when there is a factual basis for the required findings in expert evaluations. On remand, the trial court found that Giir had a predicate mental illness and that it likely influenced these crimes, as required for the court to order mental health conditions. Giir does not dispute that the information in the expert evaluations was sufficient to justify the court's findings in support of the mental health conditions.

Under former RCW 9.94A.505(9), mental health treatment may be ordered as a condition of community custody if the court finds that reasonable grounds exist to believe that the defendant is a mentally ill person under RCW 71.24.025 and that is likely to have influenced the offense. The statute provides in relevant part:

(9) 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.

Former RCW 9.94A.505(9) (2006). That provision was in effect at the time of Giir's crimes and at the time of his original sentencing. In 2008, the legislature repealed this provision, replacing it with a provision now codified in RCW 9.94A.703, as follows:

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

...

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

(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;

....

RCW 9.94A.703(3); Laws of 2008, ch. 231, §§9, 25.

The meaning of a statute is a question of law reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The court's fundamental objective is to discern and carry out the legislature's intent. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The plain meaning of a statute is determined based on the language used, the context of the statute, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

The provision at issue was enacted by the legislature in 1998, "to decrease the likelihood of recidivism and reincarceration by mentally ill offenders." Laws of 1998, ch. 260, § 1. That goal was to be accomplished by "authorizing" courts to request presentence reports from DOC "when a relationship between mental illness and criminal behavior is suspected" and authorizing courts to order treatments for defendants whose crimes were "influenced by a mental illness." Id. That is, the legislature was authorizing courts to obtain information by means of a DOC report and to order treatment when the defendant's mental illness influenced his crimes. The bill report explained:

Presentence reports are currently required for offenders convicted of felony sex offenses. They are used to collect additional information to assist in determining the sentence to be imposed.

1998 Reg. Sess. Wa. Legis., Final Bill Report SB 5760.

Giir's argument that the lack of a DOC report prohibits imposing mental health conditions, even where the court has considered expert evaluations and the defendant has himself asserted that a mental illness influenced his crimes, is contrary to the legislative intent to authorize court-ordered treatment under these circumstances.

Giir relies on State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009), for the proposition that "a presentence report" can mean only a DOC presentence report. The holding of Mendoza, however, was specifically limited to the conclusion that a prosecutor's assertion of criminal history is not a "presentence report" within the meaning of RCW 9.94A.530(2) (relating to criminal history). Mendoza, 165 Wn.2d at 930.

Mendoza rejected arguments based on the technical descriptions of presentence reports in RCW 9.94A.500 and in CrR 7.1. Mendoza, 165 Wn.2d at 923-24. It emphasized the importance of the greater statutory scheme. Id. at 924. The Court relied in part on later legislative amendments to that section to resolve "some ambiguity" in the term, finding that the legislature's reference to the prosecutor's "criminal history summary" distinguished it from a "presentence report." Id. at 924-25.

By contrast, since Giir's sentencing, the legislature completely repealed the restrictions imposed in former RCW 9.94A.505(9). Laws of 2008, ch. 231, § 25. It enacted a broad provision that, as part of any term of community custody, the court may order an offender to participate in crime-related treatment or counseling services or 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. Id. at § 9 (codified as RCW 9.94A.703). No special reports or more specific findings are required. RCW 9.94A.703.

So, while the terms in the statute at issue in Mendoza were later defined more narrowly by the legislature, the authority of the court to order mental health conditions was broadened. It is apparent that the legislature intended sentencing courts to be able to impose mental health conditions when a mental health problem contributed to the crime. The term "presentence report" in this section should be interpreted to mean a presentence report from any source. In this instance, the defense presentence report would qualify.

Moreover, the court's authority to impose mental health conditions was not dependent on the existence of a presentence report. The court in State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), concluded that the requirements of former RCW 9.94A.505(9) must be satisfied before mental health conditions could be ordered by the court. In its discussion, the court noted that the trial court "did not obtain or consider a presentence report

or mental status evaluation." Jones, 118 Wn. App. at 209. It concluded that mental health conditions could properly be imposed as affirmative conditions of sentence "only if the court obtains a presentence report or mental status evaluation and finds that the defendant was a mentally ill person whose condition influenced the offense." Id. at 263-64 (emphasis supplied).

It is an accepted proposition of statutory construction that the conjunctive "and" and the disjunctive "or" may be interpreted as substitutes when it is clear from the statutory language that it is appropriate. Bullseye Distributing v. Wa. Gambling Commission, 127 Wn. App. 231, 238-40, 110 P.3d 1162, rev. denied, 155 Wn.2d 1027 (2005); Guijosa v. Wal-Mart Stores, 101 Wn. App. 777, 790, 6 P.3d 583 (2000), aff'd, 144 Wn.2d 907 (2001). Courts will avoid a literal reading of a statute if it would result in "unlikely, absurd, or strained consequences." State v. Neher, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

The court in Jones interpreted this statute, former RCW 9.94A.505(9), in a common sense manner, concluding that either a presentence report or a mental status evaluation could be a sufficient basis for the required findings. Jones, 118 Wn. App. at 263-64. A reading that would require a presentence report even

where there is a sufficient basis for the findings in expert evaluations, or even, as in this case, where the defendant claims a mental illness influenced his criminal behavior, is absurd.

In State v. Brooks, 142 Wn. App. 842, 176 P.3d 549 (2008), the court struck mental health conditions, agreeing that the trial court did not comply with former RCW 9.94A.505(9). However, the court did conclude that pre-trial testimony of a therapist was a sufficient factual basis to order mental health conditions. Brooks, 142 Wn. App. at 850. It struck the conditions because the trial court did not make the necessary findings that a mental illness of the defendant most likely influenced the offense. Id. at 851-52.

There is no need to resort to the rule of lenity in construing this statute. The rule of lenity "only applies when a penal statute is ambiguous and legislative intent is insufficient to clarify the ambiguity." State v. Thomas, 150 Wn.2d 666, 672, 80 P.2d 168 (2003) (emphasis in original). The rule of lenity "does not require forced, narrow or overstrict construction if it defeats the intent of the legislature." Id., citing State v. Carter, 89 Wn.2d 236, 242, 570 P.2d 1218 (1977).

Both Jones and Brooks interpret the statutory language referring to a presentence report and mental status evaluations to

require a factual basis from either source for the required findings that are a prerequisite to mental health conditions. That is the only reasonable interpretation of this provision, in light of the legislative intent.

b. Any Failure to Comply With The Statutory Procedure Required Was Harmless Error.

Even if this Court concludes that former RCW 9.94A.505(9) mandates that a sentencing court consider a DOC presentence report before imposing mental health conditions, the failure to do so in this case was harmless error. The failure to consider every source of information specified did not deprive the sentencing court of statutory authority to act, when the court made unchallenged findings that Giir had a qualifying mental illness and that the mental illness influenced Giir's criminal behavior. CP 88.

Errors in sentencing proceedings may be harmless. This Court has concluded that failure to comply with the statutory requirement that sentencing occur within 40 days of conviction may be harmless. State v. Anderson, 92 Wn. App. 54, 59-61, 960 P.2d 975 (1998), rev. denied, 137 Wn.2d 1016 (1999). The Court concluded that the legislature would not have intended that

sentencing be precluded if not imposed within 40 days, because that would be inconsistent with the purposes of the Sentencing Reform Act, which include protection of the public. Id. at 60. The defendant did not show prejudice, so the Court found the statutory violation harmless. Id. at 60-61.

The Supreme Court has concluded that the failure to provide the evidentiary hearing mandated by former RCW 9.94A.370<sup>1</sup> as to contested facts may be harmless error. State v. Oxborrow, 106 Wn.2d 525, 537-38, 723 P.2d 1123 (1986). Likewise, violation of the statutory right to allocution may be harmless. State v. Gonzales, 90 Wn. App. 852, 954 P.2d 360, rev. denied, 136 Wn.2d 1024 (1998); cf. State v. Hughes, 154 Wn.2d 118, 152-53, 110 P.3d 192 (2005) (defendant waives statutory right to allocution if he does not request the opportunity to exercise it).

Giir asserted at sentencing that he suffered from Post-Traumatic Stress Disorder (PTSD). CP 79-80. Warner, his attorney, stated "When we talked about in the legal papers what is called a 'failed mental defense,' it's not saying that it is an excuse." CP 76. This remark refers to a defense presentence report that was not filed with the court. See CP 74-77. The court also

received a copy of psychologist Wheeler's report, which described PTSD symptoms evidenced by Giir. CP 56, 162-82. The reports of Wheeler and defense expert Kriegler previously were filed as part of Giir's motion to withdraw the guilty plea and the sentencing court relied on those reports. CP 159-82; 4/23/2010 RP 13, 17.

The "failed mental defense" mitigating factor that may support an exceptional sentence under RCW 9.94A.535 is that "the defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). By relying upon this mitigating factor,<sup>2</sup> Giir has asserted himself that his PTSD played a significant role in the crimes committed, a murder and an assault, and that satisfies the requirements of RCW 9.94A.505(9). The State did not dispute that he suffered from PTSD. CP 56-57.

The mental evaluation and treatment condition was properly imposed after Giir requested an exceptional sentence below the standard range based on his own assertion that there was a "failed mental defense," CP 76, which requires a finding that an impaired mental state influenced his capacity to appreciate the wrongfulness

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<sup>1</sup> Currently codified as RCW 9.94A.530.

<sup>2</sup> It is made clear by the State's response to the request for an exceptional sentence that this was the provision relied upon by the defense. CP 134-35.

of his conduct at the time of the murder, or his capacity to conform his conduct to the law. RCW 9.94A.535(1)(e).

If the trial court erred in failing to order and consider a presentence report from DOC, that error was merely a technical error in this case and should not preclude imposition of mental health conditions that even Giir apparently concedes are warranted by the Giir's mental illness and its influence on his crimes.

D. CONCLUSION

For the foregoing reasons, Giir's claim should be rejected. The State respectfully asks this Court to affirm the mental health requirements imposed by the trial court as conditions of Giir's community custody.

DATED this 27<sup>th</sup> day of September, 2010.

Respectfully submitted,

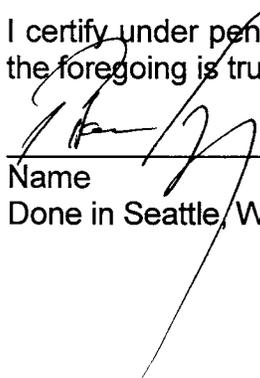
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CASEY GRANNIS, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KERO GIIR, Cause No. 65302-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

  
Name

Done in Seattle, Washington

09-27-10  
Date