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NO. 66008-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MUSTAFA ARTEH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUZANNE BARNETT
THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court improperly ordered Arteh to submit to a mental health evaluation and treatment as a condition of community custody when the court did not order and review a presentence report on Arteh's mental status?

2. Whether the trial court improperly imposed a no-contact order protecting victim Sarah Fauquet and witness Ronda Prentice for a period of 10 years when both Fauquet and Prentice were witnesses to the possession of stolen property in the second degree charge only?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Mustafa Arteh was charged by amended information with one count of robbery in the second degree and one count of possession of stolen property in the second degree. CP 5-7.

Trial began on June 2, 2010. 1RP 3¹. On July 16, 2010, a jury found Arteh guilty as charged. CP 63, 65. On August 18, 2010, the Honorable Suzanne Barnett imposed the high end of the standard range,

¹ The verbatim report of proceedings consists of thirteen volumes, which will be referred to as follows: 1RP (June 2, 2010); 2RP (June 3, 2010); 3RP (June 7, 2010); 4RP (June 8, 2010); 5RP (June 7 and 8, 2010); 6RP (July 7, 2010); 7RP (July 12, 2010); 8RP (July 13, 2010); 9RP (July 14, 15, and 16 and August 18, 2010); 10RP (April 22, 2011); 11RP (April 27, 2011); and 13RP (November 4, 2011).

70 months, for the robbery in the second degree charge and the mid-point of the standard range, 25 months, for the possession of stolen property charge. CP 108; 9RP 550-51. The court ordered that the time imposed run concurrently. 9RP 551. The court also imposed 12 months of community custody. CP 109. As a condition of community custody, the court ordered Arteh to obtain a mental health evaluation and follow any treatment recommendations. CP 113; 9RP 552. The court also imposed a no-contact order protecting Sarah Fauquet and Ronda Prentice for a period of 10 years. CP 108; 9RP 551, 552.

2. SUBSTANTIVE FACTS

On November 12, 2009 at approximately 1 a.m., victim April Anderson exited the Bremerton Ferry Terminal and was approached by the defendant, Mustafa Arteh. 8RP 306-09. Arteh asked Anderson for a cigarette. 8RP 309. Anderson said no and kept walking. 8RP 310. Arteh followed Anderson and asked her again for a cigarette. 8RP 312. Anderson gave Arteh a cigarette in hopes he would leave her alone. 8RP 312. Arteh followed Anderson and asked her for more cigarettes. 8RP 314. Anderson reached for her wallet, and Arteh grabbed Anderson's phone from her hand,

punched her in the head, and grabbed her wallet. 8RP 315-19. Anderson fought back, and Arteh punched her in the head a couple of times before fleeing on foot with her wallet and phone. 8RP 318.

Meanwhile, witness Matthew Swann was driving his car nearby and saw Anderson running after Arteh. 5RP 19; 8RP 321. Anderson told Swann what happened, and Swann drove away and found Arteh. 5RP 20-22. Swann asked Arteh for Anderson's wallet and phone, and Arteh told Swann that Anderson stole his wallet. 5RP 19-20. Arteh then fled and tried to board a bus. 5RP 20. A few minutes later, police officers located Arteh sitting on a bench at the bus stop, and detained him. 5RP 35-37. Anderson and Swann both identified Arteh. 5RP 35-37.

Police searched Arteh incident to arrest and found two access cards belonging to victim Sarah Fauquet. Fauquet's cards were stolen from her purse while she was at the Twister Club in Seattle on November 11, 2009 at approximately 11:45 p.m. 5RP 70-77. Fauquet and witness Ronda Prentice both identified Arteh as a person who sat next to them in the Twister Club when Fauquet's access cards were stolen. 5RP 78-80.

C. RESPONDENT'S CONCESSION OF ERROR

1. THE STATE ASKS THIS COURT TO ACCEPT ITS CONCESSION THAT THE TRIAL COURT DID NOT FOLLOW PROPER PROCEDURE BEFORE REQUIRING ARTEH TO SUBMIT TO A MENTAL HEALTH EVALUATION AND TREATMENT.

Arteh argues that the sentencing court erred in imposing a mental health evaluation and follow up treatment for robbery in the second degree and possession of stolen property in the second degree. The State concedes that the trial court did not follow the statutorily-required procedure before ordering mental health treatment. Thus, the matter should be remanded for resentencing.

RCW 9.94A.715(2)(b) authorizes the court to order a defendant to participate in rehabilitative programs. Mental health treatment and counseling are considered to be valid rehabilitative programs. See State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

A trial court may order a mental health evaluation and treatment only when the court has considered a presentence report and has made findings that the defendant's mental illness contributed to his crimes. RCW 9.94B.080; Jones, 118 Wn. App. at 202; State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). Failure to follow this procedure can be raised for the first time on appeal. Jones, 118 Wn. App. at 204. At

sentencing, Arteh's counsel on his behalf told the court that Arteh needed "additional mental health treatment," and that he didn't "believe Mr. Arteh would object to that being a condition of his community custody."

9RP 534.

It was reasonable for the trial court to rely on defense counsel's remarks in imposing mental health treatment, however, there was no presentence report for the trial court to consider and the court did not make the requisite findings. 9RP 527-55. Based on Jones, Lopez, and Brooks, it appears that the trial court erred by not requiring a presentence report and not making the necessary findings regarding Arteh's mental illness.

2. THE STATE ASKS THIS COURT TO ACCEPT ITS CONCESSION THAT THE TRIAL COURT IMPROPERLY ORDERED THAT ARTEH NOT HAVE CONTACT WITH VICTIM SARAH FAUQUET AND WITNESS RONDA PRENTICE FOR A PERIOD OF 10 YEARS.

Arteh argues that the sentencing court erred in imposing a no-contact order for 10 years protecting Sarah Fauquet and Ronda Prentice. The State concedes that the trial court exceeded the maximum time allowance for the crime. Thus, the matter should be remanded for resentencing.

A court may order a no-contact order as a condition of community custody for a term of the maximum sentence to the crime. RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201, 208 (2007). Possession of stolen property in the second degree is a class C felony with a maximum sentence of five years. RCW 9A.56.160(2); RCW 9A.20.021(1)(c).

It was reasonable for the court to order a no-contact order protecting Sarah Fauquet and Ronda Prentice who were the victim and witness respectively of the possession of stolen property charge. However, based on Armendariz, the period of 10 years for the no-contact order was not proper given the five-year statutory maximum for possession of stolen property in the second degree.

D. CONCLUSION

Under Jones, Lopez, and Brooks, the trial court improperly imposed a mental health evaluation and treatment as a condition of community custody without ordering and reviewing a presentence report. This Court should remand for the trial court to consider whether mental health evaluation is appropriate utilizing the proper procedure.

Under RCW 9.94A.505(8), and Armendariz, the trial court improperly imposed a no-contact order protecting Fauquet and Prentice

for a period of 10 years. This matter should be remanded for the trial court to consider whether imposing a five year period is appropriate.

DATED this 14th day of June, 2012.

Respectfully submitted,

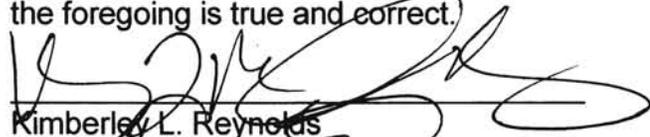
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, 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. MUSTAFA ARTEH, Cause No. 66008-0-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.



Kimberley L. Reynolds
Done in Seattle, Washington

6/14/12
Date