

66295-3

66295-3

NO. 66295-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON LEE,

Appellant.

REC'D
FEB 14 2014
King County Prosecutor
Appellate Unit

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

The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIelsen, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
C. <u>STATEMENT OF THE CASE</u>	3
1. <u>Investigation, charge, trials, and conviction</u>	3
2. <u>Sentencing</u>	4
D. <u>ARGUMENT</u>	4
<u>THE COURT EXCEEDED ITS AUTHORITY BY REQUIRING LEE TO OBTAIN A MENTAL HEALTH EVALUATION AND BY IMPOSING 24 MONTHS OF COMMUNITY CUSTODY WITHOUT IMPOSING TREATMENT</u>	4
1. <u>Sentencing courts must follow the SRA</u>	4
2. <u>A mental health evaluation was not an authorized condition of community custody</u>	5
3. <u>A mental health evaluation is not “treatment,” and ordering treatment was statutorily required for imposing two years of community custody under former RCW 9.94A.650</u>	10
4. <u>Where conditions of community custody exceed the SRA’s scope, the appropriate remedy is remand to strike the offending conditions</u>	12
5. <u>Lee’s case is not moot</u>	12
6. <u>The continuing and substantial public interest in accurate, lawful sentences overcomes any claim of mootness</u>	14
E. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Cross</u> 99 Wn.2d 373, 662 P.2d 828 (1983).....	13
<u>In re Pers. Restraint of Mines</u> 146 Wn.2d 279, 45 P.3d 535 (2002).....	12
<u>State v. Acevedo</u> 159 Wn. App. 221, 248 P.3d 526 (2011).....	5
<u>State v. Chester</u> 133 Wn.2d 15, 940 P.2d 1374 (1997).....	11
<u>State v. Hunley</u> 175 Wn.2d 901, 287 P.3d 584 (2012).....	14
<u>State v. Kintz</u> 169 Wn.2d 537, 238 P.3d 470 (2010).....	11
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	12
<u>State v. Schmidt</u> 143 Wn.2d 658, 23 P.3d 462 (2001).....	5
<u>State v. Slattum</u> 173 Wn. App. 640, 295 P.3d 788 (2013).....	14
<u>State v. Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	12
<u>State v. Varga</u> 151 Wn.2d 179, 86 P.3d 139 (2004).....	4
<u>Thomas v. Lehman</u> 138 Wn. App. 618, 158 P.3d 86 (2007).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Former RCW 9.94A.650 (2006)	5, 6, 10, 11, 12
Former RCW 9.94A.700 (2003)	7, 8
Former RCW 9.94A.715 (2006)	8
LAWS OF 2008, ch. 231, § 29	5
LAWS OF 2008, ch. 231, § 56	7
LAWS OF 2008, ch. 231, § 57	6
LAWS OF 2011, 1st Spec. Sess., ch. 40, § 9.....	5
RCW 9.94A.030	6
RCW 9.94A.650	1, 15
RCW 9.94A.700	6
RCW 9.94A.715	6
RCW 9.94B.050.....	7
Sentencing Reform Act of 1981	1, 2, 4, 10, 12, 14
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2435 (1993).....	11

A. INTRODUCTION

Following Jason Reeves Lee's conviction for residential burglary, the trial court sentenced Lee to 90 days of incarceration under RCW 9.94A.650, the first-time offender waiver. This sentence included a 24-month term of community custody and a community custody condition that Lee seek a mental health evaluation. The court's sentence exceeded its authority under the SRA for two reasons. First, the version of RCW 9.94A.650 under which Lee was sentenced did not authorize the imposition of a mental health evaluation. Second, the court lacked authority to impose a 24-month community custody period because Lee was not ordered to participate in any kind of treatment. Because the court imposed an unlawful sentence, this court must remand this matter to the superior court with instructions to strike the offending provisions from Lee's judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a condition of community custody that Lee obtain a mental health evaluation where no provision of the SRA under which Lee was sentenced authorized this condition.

2. The trial court erred in entering Appendix F to the judgment and sentence insofar as it required a mental health evaluation as a condition of community custody.

3. The trial court erred in imposing 24 months of community custody because treatment, a requisite for imposing a 24-month term, was not also ordered.

4. The trial court erred in entering ¶ 4.4(b) of the judgment and sentence insofar as it imposed a 24-month term of community custody without also ordering treatment.

Issues Pertaining to Assignments of Error

For a sentence to be lawful in Washington, trial courts must strictly follow the SRA.

a. Did the trial court exceed its sentencing authority when it imposed a mental health evaluation as a condition to community custody?

b. Did the trial court exceed its sentencing authority by doubling the term of community custody from 12 to 24 months even though no treatment of any kind was ordered?

c. Do the trial court's sentencing errors require remand to strike the erroneous community custody conditions and term from the judgment and sentence?

d. Should this court reject any argument that Lee's case is moot where the court can provide effective relief from the collateral consequences arising from the erroneous judgment and sentence?

e. Even if otherwise moot, should this court decide the issues in this case because they are of substantial and continuing public interest?

C. STATEMENT OF THE CASE

1. Investigation, charge, trials, and conviction

Police suspected Lee's involvement in a March 26, 2008 residential burglary in Seattle. CP 8. On April 14, 2008, police arrested Lee in relation to the burglary. CP 8. Upon custodial interrogation involving only Lee and the arresting officer, Lee made an inculpatory written statement with the officer's assistance. CP 8-9. Some 20 months later, the State charged Lee with one count of residential burglary. CP 2-3. At a pretrial CrR 3.5 hearing, the court ruled Lee's inculpatory statement admissible at trial. RP 81.

Lee's first trial ended in mistrial when a juror saw Lee in shackles. RP 186-88. At the second trial, the State produced evidence that a car regularly driven by Lee was used to transport stolen property from the burglarized residence. RP 212, 214, 258-59. In addition, the State's witnesses also provided descriptions of the stolen property. RP 261-62, 272. Lee's inculpatory statement was also admitted into evidence. RP 223-28. The defense presented no testimony. RP 276.

The jury found Lee guilty as charged. CP 40; RP 304-06.

2. Sentencing

At sentencing, the court invoked the first-time offender waiver and imposed a sentence of 90 days with credit for time served. RP 316; CP 64. The court also imposed two years of community custody. RP 316; CP 64. With regard to community custody, the court required “Lee . . . to obtain upon release a mental health evaluation, and follow-up with the treatment recommended by the evaluator, if any is recommended.” RP 317; see also CP 67. The court specifically stated, “I’m not ordering you into treatment.” RP 317. Rather, the court ordered the mental health evaluation and indicated that Mr. Lee was “to follow the conditions of the evaluator.” RP 317. Lee timely appealed.¹ CP 69.

D. ARGUMENT

THE COURT EXCEEDED ITS AUTHORITY BY REQUIRING LEE TO OBTAIN A MENTAL HEALTH EVALUATION AND BY IMPOSING 24 MONTHS OF COMMUNITY CUSTODY WITHOUT IMPOSING TREATMENT

1. Sentencing courts must follow the SRA

The setting of penalties and punishments for crime is a purely legislative function. State v. Varga, 151 Wn.2d 179, 193, 86 P.3d 139 (2004). When the trial court fails to adhere to the sentencing statutes as

¹ This appeal was initially withdrawn in error due to confusion between two appellants represented by this office with the name Jason Lee. This resulted in the issuance of mandate on April 15, 2011. When the erroneous withdrawal came to light, this court granted Lee’s motion to recall the mandate and reinstated Lee’s appeal.

written by the legislature, the result is an erroneous, unlawful sentence in excess of the trial court's authority. Id. In this case, the trial court exceeded its sentencing authority when it required a mental health evaluation and imposed two years of community custody pursuant to the first-time offender waiver without imposing treatment, a requisite under former RCW 9.94A.650 (2006)² for a two-year term of community custody.

This court reviews the trial court's statutory authority to impose community custody and conditions thereof de novo. State v. Acevedo, 159 Wn. App. 221, 231, 248 P.3d 526 (2011).

2. A mental health evaluation was not an authorized condition of community custody

At the time of Lee's offense, former RCW 9.94A.650(2)³ permitted courts to include a term of community custody that could include any of the following requirements:

- (a) Devote time to a specific employment or occupation;
- (b) Undergo available outpatient treatment for up to the period specified in subsection (3) of this section, or

² Former RCW 9.94A.650 was amended in 2008 and 2011. See LAWS OF 2011, 1st Spec. Sess., ch. 40, § 9; LAWS OF 2008, ch. 231, § 29. Because the date of the residential burglary in this matter was March 26, 2008, prior to the effective dates of these amendments, this brief will discuss former RCW 9.94A.650 as it was written at the time of the offense. State v. Schmidt, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001) (“[I]t is the law in effect at the time a criminal offense is actually committed that controls disposition of the case.”).

³ The “maze of statutes” regarding community custody conditions under former RCW 9.94A.650 is also set forth in some detail in Acevedo, 159 Wn. App. at 232-33.

inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to a community corrections officer; or

(f) Pay all court ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community restitution work.

Obtaining a mental health evaluation is notably absent.

In addition, former RCW 9.94A.650(3) indicated that “[a]ny term of community custody imposed under this section is subject to conditions and sanctions as authorized in this section and in RCW 9.94A.715(2) and (3).” Former RCW 9.94A.715(2) (2006), repealed by Laws of 2008, ch. 231, § 57, provided that “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).” Former RCW 9.94A.715(2) went on to read, “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”

Tracking the cross reference to former RCW 9.94A.700 (2003), recodified as RCW 9.94B.050 (Laws of 2008, ch. 231, § 56), former RCW 9.94A.700(4) imposed five mandatory terms of community placement unless waived by the sentencing court:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

Former RCW 9.94A.700(4). None of these provisions authorized the trial court to impose a mental health evaluation as a condition to community custody.

Subsection (5) of former RCW 9.94A.700 gave the court discretion to order the following five additional “special conditions” of community custody:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

Like the mandatory conditions of former RCW 9.94A.700(4), the discretionary conditions of former RCW 9.94A.700(5) provided no authority for a sentencing court to impose a mandatory mental health evaluation.

Because former RCW 9.94A.700 did not authorize a mental health evaluation, the only remaining question is whether a mental health evaluation falls within the court's purview to "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" Former RCW 9.94A.715(2)(a).

A one-time mental health evaluation can hardly qualify as a "rehabilitative program," which implies an ongoing course or process of rehabilitation. Moreover, the trial court's reasons for imposing a mental health evaluation did not reasonably relate to the crime, the risk of reoffending, or the community's safety. The only reason the court inquired

into Lee's mental health was that it had received a letter from Lee's aunt suggesting that Lee "need[ed] some serious mental health help." CP 83; see also RP 315. Because the court had no other indication of mental health issues generally nor their role in the burglary specifically, the mental health evaluation was not reasonably related to Lee's crime. Nor can such an isolated, nonspecific suggestion from Lee's aunt establish any relationship, let alone a reasonable one, between a mental health evaluation and Lee's risk of reoffending or the community's safety.

Moreover, the trial court appears to have imposed the mental health evaluation due to its perception of Lee's level of assertiveness, not because of its reasonable relationship to the crime, reoffending, or the safety of others. After Lee responded negatively to the court's question regarding whether he had mental health issues, the court stated, "Well, the facts of this case -- and I read the certification on the Rendering case, homicide that you're secondarily involved in. It seems to me one of your big problems is learning to say no." RP 315-16. It is unclear how "learning to say no" demonstrates a need for mental health evaluation and, conversely, how a mental health evaluation could help Lee "learn[] to say no." The court's vague suggestion that Lee should learn to be more assertive does not reasonably tie the crime, the risk of reoffending, or the safety of the community to a mental health evaluation.

Because the mental health evaluation was not affirmative conduct that reasonably related to the crime, the risk of reoffending, or the safety of the community, and because none of the other mandatory or discretionary conditions of community custody included a mental health evaluation, the court exceeded its authority under the SRA by imposing a mental health evaluation condition on Lee's community custody.

3. A mental health evaluation is not "treatment," and ordering treatment was statutorily required for imposing two years of community custody under former RCW 9.94A.650

Even if the former provisions of the SRA authorized the trial court to impose a mental health evaluation on Lee, the trial court had no authority to impose 24 months of community custody because the trial court did not order treatment.

Under former RCW 9.94A.650(3), the court could impose "up to one year of community custody *unless treatment is ordered*, in which case the period of community custody may include up to the period of treatment, *but shall not exceed two years*." (Emphasis added.) In this case, the trial court was unequivocal that it was not imposing treatment as a condition of community custody. RP 317 ("I'm not ordering you into treatment.").

"[T]reatment" is not specifically defined in former RCW 9.94A.650 or elsewhere in the SRA. When a term is undefined, "words in a statute are given their common law or ordinary meaning." State v. Chester, 133 Wn.2d

15, 22, 940 P.2d 1374 (1997). Courts “may discern the plain meaning of nontechnical statutory terms from their dictionary definitions.” State v. Kintz, 169 Wn.2d 537, 547, 238 P.3d 470 (2010). One definition of “treatment” is “preventive guidance and corrective training esp. of juvenile delinquents and youthful criminal offenders.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2435 (1993). But “treatment” might also be defined as “the action or manner of treating,” and the verb to “treat” can be defined as “to seek cure or relief of (as a disease).” Id. In addition, former RCW 9.94A.650(3) speaks of treatment as something that occurs over a period of time.

The one-time mental health evaluation ordered by the trial judge did not constitute treatment. Under any plausible definition, submitting to one mental health evaluation to identify the potential need for treatment is not the same as treatment. The trial judge understood this when he stated, “Mr. Lee is to obtain upon release a mental health evaluation and follow-up with the treatment recommended by the evaluator, *if any is recommended.*” RP 317 (emphasis added). Thus, various definitions of treatment, including the trial judge’s own understanding of “treatment” as the word appeared in former RCW 9.94A.650(3), demonstrate that Lee’s submission to a mental health evaluation was not treatment.

Because the mental health evaluation did not constitute treatment, and because no other treatment was ordered at Lee's sentencing, the trial court lacked authority to impose two years of community custody under the SRA.

4. Where conditions of community custody exceed the SRA's scope, the appropriate remedy is remand to strike the offending conditions

When the trial court exceeds its authority under the SRA by imposing unauthorized conditions of community custody, the erroneous conditions must be stricken from the judgment and sentence. State v. Riles, 135 Wn.2d 326, 353, 957 P.2d 655 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). In this case, the court exceeded its authority when it required Lee to obtain a mental health evaluation following his release. CP 67. The trial court also erred when it imposed 24 months of community custody under former RCW 9.94A.650(3) without also imposing treatment. CP 64. Accordingly, this court should remand this matter to the trial court to strike these conditions from Lee's judgment and sentence.

5. Lee's case is not moot

““A case is moot if a court can no longer provide effective relief.””
In re Pers. Restraint of Mines, 146 Wn.2d 279, 283-84, 45 P.3d 535 (2002)
(quoting In re Pers. Restraint of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828

(1983)). This case is not moot because Lee is entitled to the effective relief of having the mental health evaluation condition and 24-month community custody period stricken from his judgment and sentence.

Although community custody has likely ended and the mental health evaluation has likely been performed, Lee still suffers significant collateral consequences from each.⁴ First, having a record of a mental health evaluation imposed as part of a criminal judgment has long-ranging and significant consequences. Being ordered to submit to a mental health evaluation gives the impression that a defendant suffers from mental health conditions, thereby adversely affecting future educational, employment, and housing opportunities. In this case, the court entertained the possibility that Lee suffered from no mental health issues. See RP 317-18. Yet the court's erroneous imposition of a mental health evaluation suggests otherwise. Removing this collateral consequence would provide him with effective relief from his judgment and sentence.

Second, the erroneous length of a community custody term imposed in this case also gives the impression that Lee committed a more serious crime. It also implies that Lee was required to obtain mental health or substance abuse treatment because, as discussed above, treatment is the sole

⁴ On October 19, 2010, the trial court imposed a 90-day sentence with full credit for time served, suggesting that Lee's two-year community custody term started immediately and would have ended by October 19, 2012. RP 316; CP 64. In addition, nothing suggests that Lee failed to comply with obtaining a mental health evaluation as ordered.

requisite for imposing a two-year community custody term. These consequences of Lee's judgment and sentence also have adverse effects on Lee's ability to obtain work, to enter into a lease agreement, or to receive financing, among several other impairments. Striking the 24 months of community custody imposed in this case would provide Lee with effective relief.

6. The continuing and substantial public interest in accurate, lawful sentences overcomes any claim of mootness

Even if this case were technically moot, this court "may retain and decide an appeal if it involves matters of continuing and substantial public interest." State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). Courts consider three factors in making this determination: "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur." State v. Slattum, 173 Wn. App. 640, 647, 295 P.3d 788 (2013) (quoting Thomas v. Lehman, 138 Wn. App. 618, 622, 158 P.3d 86 (2007)).

This case presents a matter of continuing and substantial public interest. First, the requirement that trial courts impose SRA-compliant sentences is a public question and alone a matter of significant public interest. To permit unlawful sentences to go unchecked in lower courts

would undermine our criminal justice system. Second, whether a mental health evaluation is permissible under the SRA and whether such an evaluation may constitute treatment for the doubling of community custody terms requires an authoritative determination that will surely guide public officers, namely judges, in the future. This is especially true given how frequently the legislature amends the SRA and the corresponding confusion that results. Finally, because the provision allowing doubling of community custody in cases where “treatment is ordered” appears in both former and current versions of Washington’s first-time offender waiver provision, RCW 9.94A.650, this issue is likely to recur. Therefore, even if this court determines that Lee’s case is technically moot, this court should address the issues presented in this case as matters of continuing and substantial public interest.

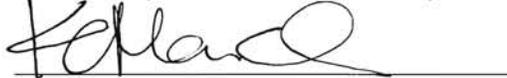
E. CONCLUSION

The trial court exceeded its sentencing authority when it required Lee to undergo a mental health evaluation as a condition of community custody. The trial court also exceeded its authority by imposing two years of community custody even though it did not order Lee into treatment. These sentencing errors require remand to the trial court so that they may be stricken from Lee's judgment and sentence.

DATED this 14th day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH

WSBA No. 45397

Office ID No. 91051

Attorneys for Appellant

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Respondent,

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JASON LEE,

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COA NO. 66295-3-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF FEBRUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON LEE
NO. 42520-086
FEDERAL DETENTION CENTER
SEATAC, WA 98198

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF FEBRUARY 2014.

x *Patrick Mayovsky*

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