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NO. 66529-4-I

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

REC'D
SEP 12 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DONNIE GREER,

Appellant.

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

The Honorable John P. Erlick, Judge

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erroneously imposed a substance abuse evaluation and treatment as a condition of community custody.

Issue Pertaining to Assignment of Error

Did the trial court err when it ordered appellant to submit to a substance abuse evaluation and follow recommended treatment as a condition of community custody where the evidence did not show substance abuse contributed to the offense, and where the court did not make a statutorily required finding that a chemical dependency contributed to the offense?

B. STATEMENT OF THE CASE[1]

Following a jury trial in King County Superior Court, appellant Donnie Greer was convicted of one count of possessing cocaine, one count of possessing marijuana (less than 40 grams) and one count of reckless driving. CP 46-47, 42, 43, 45. The jury acquitted Greer of driving under the influence.[2] CP 44.

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[1] This brief refers to the transcripts as follows: 1RP – 11/3/10; 2RP – 11/9/10; 3RP – 11/10/10; and 4RP – 11/12/10, 12/10/10 and 1/14/2011.

[2] Following a half-time motion, the court dismissed the DUI prong relating to driving under the influence of any intoxicating liquor *or drug*. 3RP 134-136; RCW 46.61.502(b). The court found the state offered *no* evidence from which a jury could find Greer was under the influence of drugs. 3RP 136. Accordingly, the DUI charge was submitted based solely on the liquor prong, and the jury acquitted. CP 29, 44.

At trial, the state's evidence showed that Auburn police officer Todd Glenn stopped Greer at approximately 4:00 a.m. after observing Greer, who was travelling northbound on Auburn Way South, pass several cars "as if they were standing still" and following too closely to the two cars with which he eventually caught up; those cars were travelling the speed limit and occupying both northbound lanes. 2RP 35-42; 3RP 33, 49.

Greer pulled over safely into a parking lot once Glenn turned on his siren and lights. 3RP 43-44, 61. When Glenn approached and asked for Greer's license, Greer realized he had left it at the nearby Muckleshoot Casino. 2RP 45; 3RP 65. Certain player cards require proof of identification. 3RP 66. Regardless, Greer gave the officer the requisite information necessary to identify him. 2RP 45; 3RP 66.

Glenn testified that during the encounter, however, he noticed Greer's eyes were "droopy" and "bloodshot" and he smelled moderately of alcohol. 2RP 44-45. When Glenn asked if he had been drinking, Greer reportedly said he had "a couple shots" at the casino. 2RP 46. As it was 4:00 a.m., the casino had stopped serving alcohol at least two hours earlier. 3RP 96.

Greer agreed to submit to voluntary field sobriety tests. 2RP 47-48. On the "walk and turn," Greer missed only two "heel-to-toe" steps by 2-3 inches. 2RP 55, 57; 3RP 9. Greer also performed well on the one-leg stand. 3RP 8. On his report, Glenn checked that Greer was "slightly" impaired. 3RP 94.

Nonetheless, based on the totality of the circumstances, and erring on the side of caution, Glenn decided to arrest Greer for driving under the influence. 3RP 9, 99. During a search incident to arrest, Glenn found marijuana and cocaine in a pocket of Greer's cargo shorts. 3RP 10-11, 111, 119, 125, 128.

At sentencing on December 10, 2010, the state asked for the maximum (six months) on the possession of cocaine count (CP 50), and concurrent 12-month sentences on the misdemeanors, suspended on condition Greer serve 90 days on count II (marijuana possession) and 5 months on count IV (reckless driving). 4RP 28-29. The state also asked the court to impose an alcohol and substance abuse evaluation and to follow all treatment recommendations as a condition of community custody on the felony. 4RP 28.

Defense counsel was surprised by the prosecutor's request for essentially the maximum on each offense, as the state initially

offered to plead the case out as misdemeanors. 4RP 29-30. Because Greer was a working father of a six-month old, the defense asserted "something other than confinement would serve everybody better[.]" 4RP 30. The defense further asserted that, "*If the court has concerns about substance abuse*, he understands he's going to have to do a substance abuse evaluation." 4RP 31 (emphasis added).

For the felony, the court imposed 30 days of confinement, to be served concurrently with the misdemeanors, and 12 months of community custody with the condition that Greer obtain a substance abuse evaluation and follow all treatment recommendations. CP 49-56. For the misdemeanors, the court imposed 12-month concurrent, suspended sentences on condition Greer serve 1 day on count II and 30 days on count IV. CP 57-59. This appeal timely follows. CP 60.

C. ARGUMENT

THE COURT WRONGLY ORDERED A SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered that Greer obtain a substance abuse evaluation and follow all treatment

recommendations. CP 56. Because the court acted outside its authority in doing so, the condition should be stricken.

Former RCW 9.94A.700(5)(c) (2003)[3] allows the court to impose "crime-related treatment or counseling services" only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment). And before such rehabilitative treatment may be imposed, RCW 9.94A.607(1) requires the court to find a chemical dependency contributed to the offense:

> Where the court finds that the offender has a 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.

(Emphasis added).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate

[3] RCW 9.94A.700 was recodified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

court assumes the Legislature means exactly what it says, giving criminal statutes literal interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

Here, the evidence did not show the alleged problem in need of treatment contributed to the offense, as required under Jones. Although officer Glenn found marijuana and cocaine in Greer's possession, there was no evidence he was under the influence of alcohol or drugs at the time of the offense. Indeed, the court did not allow the drug prong of DUI go to the jury, and the jury acquitted Greer of being under the influence of intoxicating liquor. Accordingly, there was no evidence alcohol or drugs contributed to the offense.

Nor did the court make the required finding under RCW 9.94A.607(1) that a chemical dependency contributed to the offense. The court was therefore without authority to impose the substance abuse evaluation and treatment condition.

In State v. Powell, Division Two remarked the trial court correctly imposed substance abuse treatment as a community custody condition despite the lack of a finding as required by RCW 9.94A.607(1) because the trial evidence showed the defendant consumed methamphetamine before committing the offense and

the defense asked the court to impose substance abuse treatment. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73, 206 P.3d 321 (2009). The court's remarks in Powell are dicta because the court had already decided to reverse the conviction on a separate issue when it addressed the viability of the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Regardless, the court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense. Powell ignored this unambiguous mandate in reasoning the condition is valid even if the court makes no finding on the matter so long as the trial record could support such a finding. Powell, 139 Wn. App. at 819-20. The Powell

Court's approach renders the statutory language referring to the need for a finding superfluous. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).

Moreover, "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The court in Powell ran afoul of these well-established principles when it independently reviewed the record and, in effect, made a finding the sentencing court never made.

But perhaps most importantly, the evidence here did not show alcohol or any other substance contributed to the offense. Accordingly, the condition was not crime-related. Nor did the defense request the condition. Defense counsel merely recognized that "*If the court has concerns about substance abuse*," it could

order an evaluation, provided it made the requisite finding. 4RP 31 (emphasis added).

Sentencing errors may be raised for the first time on appeal. State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This Court should order the sentencing court to strike the condition pertaining to the substance abuse evaluation and treatment on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

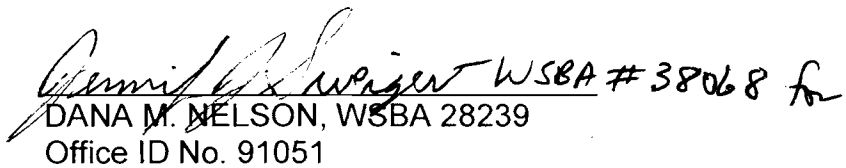
D. CONCLUSION

For the reasons stated above, the sentencing court was without authority to require Greer to undergo a substance abuse evaluation and follow recommended treatment. The condition should be stricken from the judgment and sentence.

Dated this 12th day of September, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 66529-4-I
	)	
DONNIE GREER,	)	
	)	
Appellant.	)	

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 12TH DAY OF SEPTEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONNIE GREER
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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF SEPTEMBER, 2011.

x Patrick Mayovsky