

66629-1
REC'D

MAY 25 2011
King County Prosecutor
Appellate Unit

66629-1

NO. 66629-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROSCO BROWN, JR.,

Appellant.

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

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

2011 MAY 25 10:00 AM
COURT OF APPEALS
DIVISION ONE
CLERK'S OFFICE
1000 4TH AVENUE
SEATTLE, WA 98101

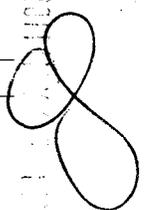


TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
THE TRIAL COURT WRONGLY ORDERED SUBSTANCE ABUSE TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.....	2
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Bauer v. State Employment Sec. Dept.</u> 126 Wn. App. 468, 108 P.3d 1240 (2005).....	4
<u>Davis v. Department of Labor and Industries</u> 94 Wn.2d 119, 615 P.2d 1279 (1980).....	5
<u>In re Marriage of Roth</u> 72 Wn. App. 566, 865 P.2d 43 (1994).....	4
<u>Kilian v. Atkinson</u> 147 Wn.2d 16, 50 P.3d 638 (2002)	3
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	5
<u>State v. C.G.</u> 150 Wn.2d 604, 80 P.3d 594 (2003)	4
<u>State v. E.A.J.</u> 116 Wn. App. 777, 67 P.3d 518 (2003).....	5
<u>State v. J.P.</u> 149 Wn.2d 444, 69 P.3d 318 (2003)	5
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	2
<u>State v. Keller</u> 143 Wn.2d 267, 19 P.3d 1030 (2001).....	3
<u>State v. Lopez</u> 142 Wn. App. 341, 174 P.3d 1216 (2007) <u>review denied</u> , 164 Wn.2d 1012 (2008)	5
<u>State v. Powell</u> 139 Wn. App. 808, 162 P.3d 1180 (2007) <u>reversed on other grounds</u> , 166 Wn.2d 73, 206 P.3d 321 (2009)	4, 5

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITES</u>	
RCW 9.94A.607	2, 3, 4
RCW 9.94A.703	2
Sentencing Reform Act.....	2

A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

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

B. STATEMENT OF THE CASE¹

The State charged Rosco Brown, Jr. with possession of cocaine. CP 1-4. After the court denied Brown's motion to suppress evidence,² Brown waived his right to a jury and permitted the court to decide the case based on stipulated evidence, including police and lab reports. CP 16-64. The court found Brown guilty as charged. CP 72-76; 2RP 5-8.

Brown requested an exceptional sentence arguing he was convicted for possessing only a small amount of cocaine. 4RP 2-4. Brown asked that, rather than shortening his sentence, the court permit him to serve it in

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 8/18/10; 2RP – 8/19/10; 3RP – 10/1/10; 4RP – 12/3/10; and 5RP – 1/7/11.

² CP 6-15, 77-81; 1RP 88-91

partial confinement at the Union Gospel Mission where Brown could continue drug treatment. 4RP 4-5.

The court denied Brown's exceptional sentence request and sentenced him within the standard range to 12 months and one day. 5RP 14; CP 86. As a condition of community custody, the court ordered Brown to continue engaging in substance abuse treatment. 5RP 14; CP 91.

C. ARGUMENT

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

As a condition of community custody, the court ordered Brown to "continue with substance abuse treatment." CP 91.

The Sentencing Reform Act (SRA) 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); RCW 9.94A.703(3)(c) (most recent codification of statute listing community custody conditions that courts may impose).

Before such rehabilitative treatment may be imposed, however, 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, this 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). The trial court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Brown's offense. 5RP 2-14; CP 83-91. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment.

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 required by RCW 9.94A.607(1) because the trial evidence showed Powell (1) consumed methamphetamine before committing the offense and (2) 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, however, because the court had already decided to reverse Powell's conviction 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).

In any event, the Court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the sentencing 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 concluding 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. But "[s]tatutes 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.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court should order the sentencing court to strike the condition pertaining to substance abuse 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).

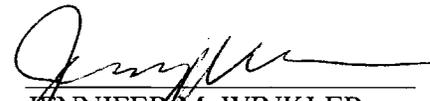
D. CONCLUSION

This Court should reverse the portion of the sentence relating to the challenged community custody condition and remand so the illegal condition may be stricken.

DATED this 25TH day of May, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JENNIFER M. WINKLER
WSBA No. 35220
Office ID. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66629-1-I
)	
ROSCO BROWN, JR.,)	
)	
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 25TH DAY OF MAY, 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] ROSCO BROWN, JR.
 DOC NO. 249989
 CEDAR CREEK CORRECTIONS CENTER
 P.O. BOX 37
 LITTLE ROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF MAY, 2011.

x Patrick Mayovsky

2011 MAY 25 PM 4:03