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COA NO. 67444-7-1

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

REC'D
FEB 27 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,
Respondent,
v.
JAMAL ALI,
Appellant.

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

The Honorable Michael Heavey, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supported appellant's conviction for bail jumping.

2. The court erred in entering conclusion of law "6" related to the bail jumping conviction. CP 49.¹

3. The court erred in failing to order a competency evaluation under RCW 10.77.060.

4. The court erred in imposing mental health evaluation and treatment as a condition of community custody. CP 58.

5. The court erred in prohibiting use of non-prescribed drugs as a condition of community custody. CP 58.

Issues Pertaining to Assignments of Error

1. Must appellant's bail jumping conviction be reversed due to insufficient evidence that he knew of the requirement to appear at a scheduled court hearing or that he did not in fact appear for the hearing on the scheduled date?

2. Where defense counsel's assessment supported by facts demonstrated a reason to doubt appellant's competency, did the trial court

¹ The trial court's written "Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d)" are attached as appendix A.

err in failing to order a mental health evaluation as mandated by RCW 10.77.060 and due process?

3. Did the court err when it imposed mental health evaluation and treatment as a condition of community custody without following statutorily required procedures?

4. Did the court err when it broadly prohibited appellant from using non-prescribed drugs as a condition of community custody where the evidence did not show use of legal, non-prescribed drugs was directly related to the offense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Jamal Ali by amended information with second degree assault with a deadly weapon allegation and bail jumping. CP 38-39. The court found Ali guilty as charged after a bench trial and imposed a total of 18 months confinement. CP 51, 54. This appeal follows. CP 60-70.

2. Competency Issue Raised Before Trial

At the February 2, 2011 hearing presided over by the Honorable Ronald Kessler, the prosecutor reported a reasonable plea deal appeared to

have been worked out but then fell through. 1RP² 7. According to the prosecutor, communications between defense counsel and Ali raised competency concerns. 1RP 7-8. The prosecutor noted mental health issues were present and that part of the proposed resolution of the case included entry into Mental Health Court. 1RP 8. The prosecutor said there was a breakdown in communication between client and attorney and concern that Ali was incompetent to assist counsel at trial. 1RP 8.

Eric Makus, Ali's attorney at the time, said the prosecutor was correct. 1RP 8-9. Makus had concerns based on his communication with Ali from the day before. 1RP 9. He described the details that seemed to pose an obstruction to a final plea agreement as "unusual." 1RP 9. Makus concurred with the prosecutor that a competency evaluation was appropriate. 1RP 9. Relying upon defense counsel's representation, Judge Kessler found reason to doubt competency and ordered a competency evaluation. 1RP 9; Supp CP __ (sub no. 44, Order, 2/2/11).

In March 2011, a Western State Hospital forensic evaluator filed a report that concluded Ali was competent. CP 33-34. The evaluator determined Ali appreciated the charges against him and the peril he faced

² The verbatim report of proceedings is referenced as follows: 1RP - 2/2/11, 3/21/11, 4/6/11, 4/7/11, 6/14/11; 2RP - 3/14/11, 6/20/11 (first hearing), 7/8/11; 3RP - four consecutively paginated volumes consisting of 6/20/11 (second hearing), 6/21/11, 6/22/11, 6/23/11.

if convicted. CP 34. The evaluator also opined Ali "is capable or providing relevant information and he can reasonably communicate with his defense counsel. Mr. Ali would be able to participate in a planned defense strategy, to make reasoned choices during courtroom proceedings and to testify relevantly." CP 34.

The evaluator diagnosed Ali with "psychotic disorder not otherwise specified." CP 33. Ali's insight into his mental illness was poor — he denied having a mental disorder and a need for medication. CP 33.

The Western State report referenced a previous forensic psychological report conducted in the King County Jail in December 2010 and January 2011 that concluded Ali was mentally ill but competent to proceed. CP 31-32. Ali had a history of displaying paranoia and delusional beliefs. CP 32. Ali had been psychiatrically hospitalized for a psychotic break in 2009 and refused medication. CP 31-32. A 2009 hospital evaluation indicated Ali would likely decompensate if he refused psychiatric medication. CP 32. Ali was not prescribed psychiatric medication at the time of the Western State evaluation. CP 33.

On March 14, 2011, the State and Makus agreed Ali was competent to stand trial based on the Western State evaluation. 2RP 3. Judge Kessler concluded Ali was competent and entered an order to that effect. 2RP 3; CP 28-29. At that hearing, Makus indicated Ali wanted to

proceed pro se, indicating that while Ali may have an ability to communicate with defense counsel and assist in his representation, there was not a willingness to do so. 2RP 4.

The court asked Ali about his desire to proceed pro se. 2RP 4. Ali said his attorney was not helping and the case had not gone in the direction he hoped. 2RP 5. The court asked Makus if this was a tactical dispute. 2RP 5. Makus responded no, there was an absolute breakdown in communication and a "refusal to make decisions." 2RP 5-6. Further colloquy between the court and Ali took place, during which Ali responded "yes" when asked if he understood the charges and the potential sentencing consequences if convicted. 2RP 6-13. The court continued the matter to enable Ali to speak with another attorney. 2RP 13-17.

Christopher Swaby was subsequently appointed as substitute counsel for Ali. 1RP 12. At the April 6, 2011 hearing, Swaby said the assigned trial prosecutor was still willing to negotiate and that Ali indicated he did not want to go to trial. 1RP 15. Ali wanted to represent himself. 1RP 15. A hearing on the motion to proceed pro se was continued to the following day. 1RP 15-17.

At the April 7 hearing presided over by the Honorable Teresa Doyle, Ali said the case was taking too long. 1RP 19-20. Judge Doyle asked what Ali was asking her to do. 1RP 20. Ali said he needed to know

"what I am being held again, what can I do -- . . . -- besides just doing time?" 1RP 20. The court asked if he wanted to know the charge against him. 1RP 21. Ali said yes. 1RP 21. The prosecutor said Ali was charged with second degree assault with the possible addition of a bail jumping charge. 1RP 21. Ali wondered why he needed to go to trial because "it would be four months." 1RP 21.

Swaby informed the court that his client had immigration issues if convicted of second degree assault and for that reason was working on a plea deal that would not have immigration implications. 1RP 22. Swaby indicated he was not going to let Ali plead guilty to second degree assault and that no competent attorney would let him so plead. 1RP 22-23.

The judge said she understood Ali was irritated because he had done the time he would get if convicted. 1RP 23. The judge said the issue was whether Ali understood that he would be deported if convicted as charged. 1RP 24. Ali said "I get myself here to begin with. So, me leaving, you know, with the direction I wanted to won't be a problem, ma'am." 1RP 24. The court said it would not take action because there was no motion before the court. 1RP 24.

After an off the record discussion, Swaby again raised the issue of Ali wanting to proceed pro se. 1RP 25. When asked by the court, Ali said he wanted to represent himself and alluded to delay in resolving the case.

1RP 25-26. The court asked if counsel thought they would be able to come up with an agreement. 1RP 26. The prosecutor was willing to work on a plea offer and defense counsel thought they could agree on a third degree assault charge that avoided immigration implications. 1RP 26-27. Ali said he wanted to get his case resolved. 1RP 27. The court continued the motion to proceed pro se. 1RP 27-28.

At a June 14, 2011 hearing presided over by Judge Doyle, defense counsel announced there was a plea offer to a reduced charge of third degree assault. 1RP 30-31. When counsel brought the offer to Ali, Ali made it clear he would not speak to Swaby. 1RP 31. Swaby said he could not communicate the plea offer to Ali and "I cannot say that I'm ready to go to trial because I don't believe he's prepared to cooperate with me on a trial issue." 1RP 31. According to Swaby, Ali "believes the case is already over." 1RP 31. Swaby said his client was "not willing to talk." 1RP 31.

When the prosecutor said he thought defense counsel would be seeking a second evaluation, Ali interrupted, asking, "Do I have to listen to this?" and stating "I'm not gonna listen to you." 1RP 32. He also said "This is over. I'm not gonna come here again" and "have people talk to me this way." 1RP 32. Ali said there was nothing else to talk about. 1RP 32.

When Judge Doyle sought to confirm that he did not wish to plead guilty, Ali complained about the case being continued. 1RP 32-33. He said "I'm not understanding what the trial's about, I'm not understanding the way you operate this case." 1RP 33. Ali complained this is "my seventh month." 1RP 33. The court asked Ali to speak with his attorney for a few minutes. 1RP 34-36. Following a recess, Swaby reported his client maintained there was nothing to talk about. 1RP 37. Swaby again referred to the third degree assault plea offer, which would result in Ali's release at the time of sentencing. 1RP 37. Ali indicated he would not take the plea deal. 1RP 38.

Swaby represented "to the extent that Mr. Ali can assist me in the preparation of a defense, I don't believe that to be the case. I am not sure if that is a competency issue where there are mental health issues at stand [sic] about which we all agree. Or simply Mr. Ali does not trust or want to work with me. Um, I do not hear him saying he wants to go on his own." 1RP 38.

The court asked if it was a question of ability versus a desire to assist. 1RP 38. Swaby said he truly did not know. 1RP 38. The prosecutor jumped in, saying this was the critical issue. 1RP 38. One possibility was that "there's something more organically occurring here" requiring a competency evaluation to determine whether Ali could

meaningfully assist and understand the process. 1RP 38. The other possibility was that Ali simply rejected "all the options" and wanted to exercise his constitutional rights. 1RP 38.

The court referenced the earlier March 2011 Western State evaluation in which Ali was found competent. 1RP 39. The prosecutor said the issue was whether Ali had decompensated to a point of incompetence and requested that the court conduct a brief colloquy with Ali. 1RP 39.

The prosecutor confirmed the current plea offer involved charges of third degree assault with a deadly weapon, for which he would receive credit for time served, and a bail jumping charge, for which a first time offender waiver would be requested that included two years of mental health treatment. 1RP 40-41. Ali would have already served all his time if he pled guilty in accordance with the offer. 1RP 41. Ali faced a sentence of 18-24 months confinement if found guilty at trial to the current charges of second degree assault with a deadly weapon and bail jumping. 1RP 42.

The court asked for Ali's understanding of his two options. 1RP 42. Ali said he "knew everything that's going on." 1RP 42-43. The court told Ali he had the option of pleading guilty to the reduced charge and probably getting out of jail within the next few weeks or a month and the

option of going to trial, where he could get two years if found guilty. 1RP 43. Ali responded, "Yeah, I'm not willing to do either one." 1RP 43. The court reiterated he had to either plead guilty or go to trial. 1RP 43. Ali again responded, "I'm not planning to either one." 1RP 43.

The court explained the options again and asked him if he understood that he would go to trial if he did not want to plead guilty. 1RP 44. Ali answered, "Right." 1RP 44. The court asked for his decision. 1RP 44. Ali responded, "I'm not willing to accept either one" and alluded to being in court seven times since last July without an offered resolution. 1RP 44-45.

The court asked Ali what he thought his choices were. 1RP 45. Ali expressed surprise at being asked that question. 1RP 45. He said "I'm not understanding why all is said and done I'm, you know, the blind guy who can't see what's going on." 1RP 45. Ali asked the judge what she wanted him to do. 1RP 45-46. The judge said he could not tell him what to do, but that it sounded like he wanted to go to trial. 1RP 46. Ali asked what else he could do. 1RP 46-47.

Swaby offered his opinion that Ali did not understand what Swaby had told him and did not understand the plea option: "I don't actually think he us understanding in the way I need him to understand what is going on." 1RP 47. Ali said he understood but complained Swaby told him

different things every time they spoke. 1RP 47-48. Swaby did not think Ali was being difficult, but was rather "someone who seems to be lost in the system and doesn't understand it in the way that, uh, I need him to understand it." 1RP 48.

The prosecutor opined Ali did not care to understand and that he made a decision to create his own reality or set of options to throw the process into disarray. 1RP 49. The prosecutor believed Ali "just doesn't like his options and this case needs to be tried." 1RP 49.

Judge Doyle stated, "given my interaction, uh, with Mr. Ali today and previously, and the information gleaned from the file and the prior reports, I find no reason to doubt his ability to go forward. I think there's an issue of coming to grips with the options that are available, but not an ability to understand or assist Counsel. And I agree that this case needs to move forward at this point." 1RP 49-50.

On June 20, 2011, the parties initially appeared before Judge Kessler. 2RP 18. Defense counsel announced Ali did not want to go forward with current counsel and "we have had a fundamental breakdown in communication." 2RP 18. Counsel thought it was partially related to his client's current lack of competence. 2RP 18. According to counsel, Ali felt strongly that "his case has already been resolved, and that . . . a trial at this point has no legal status because his case has already been

resolved and this matter is done. So, he doesn't really understand why he's here." 2RP 18. Counsel asked the court to have a colloquy with Ali. 2RP 18.

Judge Kessler asked Ali what he wanted to say. 2RP 18. Ali responded "Nothing really." 2RP 18. Judge Kessler stated "Nothing really. Okay. Motion's denied. Matter's assigned out to Judge Rogers for trial." 2RP 18. Defense counsel said he did not believe he could ethically go forward because he did not believe Ali was competent. 2RP 19. Judge Kessler said, "The Court's already - . . . - ruled on this, sir. Your ethics are taken care of. You've brought the competency to the Court numerous times. The Court's ruled on competency. Now, it's time to go to trial. And you can appeal." 2RP 19.

The parties appeared before the Honorable Michael Heavey later that day. 3RP 2-15. Defense counsel informed Judge Heavey of what happened before Judge Kessler. 3RP 4. Counsel reiterated he had real concerns about Ali's competency but that Judge Kessler said he could take it up on appeal. 3RP 4. Counsel said he would let the court know if anything came up during the course of the trial that offered new support for his opinion. 3RP 4.

Counsel summarized the history of plea negotiations, starting with Ali's rejection of Mental Health Court and a plea to third degree assault

and bail jumping — a plea that would have eliminated potential immigration issues. 3RP 5. Counsel said "I think that Mr. Ali doesn't believe that this case -- he also is not wanting a trial. I think that Mr. Ali believes that this case is already done. The case is already over. So, he is not, I don't believe that he will actively participate in this trial." 3RP 5. Ali agreed he did not want counsel to speak for him at trial and that counsel did not understand and could not really help him. 3RP 5.

Given an opportunity to speak, Ali again complained about the case taking too long to resolve itself. 3RP 6-7. After confirming the plea offer and potential sentencing consequences with the attorneys, the court asked Ali if he understood he was here to go to trial. 3RP 7-9. Ali responded "Yes, sir." 3RP 9. Ali also said "yes" when asked if he understood he would do at least 20 months in prison if convicted. 3RP 10. The court asked if Ali wanted more time to talk to his attorney about the plea offer. 3RP 11. Ali said "Sure." 3RP 11.

Following a recess, defense counsel asked Ali if he wanted to do a plea. 3RP 12. Ali's response was unclear, but appeared to allude to being prevented from talking about other things associated with his case. 3RP 12-13. The court reiterated the plea offer to Ali and the sentencing consequences. 3RP 13-15. The court asked if that made sense. 3RP 15. Ali said, "Yes." 3RP 15.

On June 21, defense counsel told the court that he had tried to meet with Ali earlier that morning but that Ali had declined to meet with him. 3RP 18. Counsel then represented that Ali just indicated to him that he was not going to accept the plea offer and would like to go to trial. 3RP 18. Counsel continued, "I believe that he understands the immigration issues and the potential sentence, were he to be convicted at trial." 3RP 18.

Following a recess, counsel put on the record that he talked with his client again and "Mr. Ali continues to say that he is going through things here in the jail that have nothing to do with this case and that this is not a court. If this is not a court, then it is clear that Mr. Ali is not understanding what is going on here, because this is a court. I really don't feel -- let me rephrase. I really feel that Mr. Ali is not understanding what has been happening here. It may be an issue, Your Honor, of cultural competence. It may very well be that he has a different understanding or expectation of the criminal justice system." 3RP 23.³ Counsel's sense was that "he feels that because he is a nice person, because this really involves family, that this all ought to be done. He has served seven months in jail. That this all ought to just be over. He won't do anything like this again. So we are done." 3RP 23-24. Counsel asked the court to have a colloquy

³ According to the Western State Hospital report, Ali was born in East Africa and relocated to the United States in 2000. CP 31.

with Ali, "but I really strongly believe that we shouldn't be going forward." 3RP 24.

The prosecutor wanted a colloquy as well "to eliminate, if possible, the issue of competency." 3RP 24. The prosecutor was disappointed that Judge Kessler did not earlier engage in a colloquy. 3RP 24. The prosecutor said "I, obviously, have no information in regards to whether Mr. Ali is tracking, can assist counsel. Obviously, we don't want to do this trial several years from now." 3RP 25-26.

After confirming there was an evaluation from Western State, Judge Heavey said, "The message that I received from Judge Kessler, essentially, is that he has ruled on that sort of things. [sic] He has addressed Mr. Swaby's concerns about his ability to assist. I just don't want to revisit all of that." 3RP 25.

The court asked Ali if he understood that if he pled guilty to third degree assault and bail jumping, he would get out of jail that day or shortly thereafter. 3RP 25. Ali said "Yes, sir." 3RP 25. The court asked if he still wanted to go to trial and take the risk of doing 20 months in prison and possibly being deported. 3RP 25. Ali said "Yes, sir" but "as of right now, I have had it with this case." 3RP 25. Ali rambled on for a while. 3RP 26-28. During its course, he said, "as of right now, what I'm looking for is not arguing, not going to trial. I came across a lot of things

that I have not authorized, but at least to my account I am not -- you know, it doesn't help me being here at this time knowing what it is and knowing the situation that I am in. There is other ways to resolve this, try to do that." 3RP 26. He said, "this case, doesn't need a trial. This case could not go on, you know, beyond today, at least, you know, with my acknowledgment of what is going on." 3RP 27. Ali wondered if he could "get out of this case without having finger pointing, having any one complain about what is going on?" 3RP 28.

The court said he could not get out of the case unless he pled guilty. 3RP 28. Ali said he was not planning to do that. 3RP 28. The court said by pleading guilty he would not get deported, he would get out of jail, he would receive mental health treatment, and could later get his conviction vacated. 3RP 29. Ali said he was not planning to do that. 3RP 29. The court said "All right." 3RP 29.

Discussion turned to the bail jumping allegation. 3RP 30-31. Ali said "I don't believe that is the case. I am not willing to acknowledge any more of what this case is about more than what it was, I did the time." 3RP 31. He also said "This is something that is so unusual for me. I am not willing to continue with this type of an environment that I have been subjected to. This case alone took so much of my time and my life, that I

am not willing to do any more of it." 3RP 32. He was looking to "just move on." 3RP 32.

Discussion began about the CrR 3.5 hearing. 3RP 32-33. Ali interjected that he needed an attorney that he paid for. 3RP 33-36. The court denied his request for new counsel. 3RP 36. Ali asked if he would be "judged today." 3RP 36. The court said they were proceeding with the trial, starting with a preliminary hearing. 3RP 36.

A CrR 3.5 hearing was held, at which Ali responded affirmatively to whether he understood various aspects of the CrR 3.5 hearing in relation to his right to testify. 3RP 70-72. Ali testified at the hearing. 3RP 73-78. Ali then waived his right to a jury trial. 3RP 83-87. Ali said he wanted to go to trial after the judge told him that he was unsure if Ali was making a good decision. 3RP 87.

3. Trial

Ali's cousin, Amal Ali, called 911 one night in July 2010. 3RP 213-14; Ex. 40. According to the testifying officers, police dispatch reported a family member was acting crazy on unknown street drugs and needed to go to the hospital. 3RP 103, 165. Officers Callahan and Bates responded to the scene. 3RP 165-66. Amal contacted officer Bates and identified herself as the person who called. 3RP 166-67.

Officer Callahan decided to do a welfare check and opened the door to the residence. 3RP 105-06. Ali was standing at the top of the stairs. 3RP 106. Officer Callahan asked him to come down and talk. 3RP 107. Ali responded, "I am not coming inside." 3RP 107. This response did not make sense to Callahan. 3RP 107. Callahan ordered Ali to come down. 3RP 107. Ali did not respond. 3RP 107. When Callahan stepped inside and approached, Ali reached behind his back, which Callahan described as a furtive movement that concerned him. 3RP 108.

As officers went up the stairs, Amal grabbed onto Bates in an attempt to keep her from going. 3RP 169-70, 181-82. Bates shoved and swatted Amal back. 3RP 169-70, 181-82. Ali ran off when Callahan approached. 3RP 109. By the time Callahan reached the top of the stairs, Ali went into a bedroom and shut the door. 3RP 109. Callahan immediately kicked the door down. 3RP 109, 162. The door hit Ali. 3RP 120, 150.

Officer Callahan testified Ali quickly walked toward him with a kitchen knife in his hand, down at his side. 3RP 109-11. Callahan felt his life was threatened. 3RP 111. Officer Bates testified Ali came running out of the bedroom "lunging toward us" or "charging" with the knife at his side. 3RP 170-71, 183, 186.

Officer Callahan said he would have shot Ali with his gun if he had time to do so. 3RP 111-12. Instead, the officer shot Ali with a Taser from four to six feet away. 3RP 112-15. The officer claimed Ali's arm and shoulder flexed like he was trying to use the knife as he was being tased. 3RP 115-16, 151. Ali's momentum carried him into the officer. 3RP 115-16. Ali went to the ground. 3RP 116. The officer commanded Ali to roll on his stomach with his hands behind his back. 3RP 116. Ali rolled on his stomach with the knife in his hand. 3RP 116.

Officer Callahan held the trigger down on his Taser, which continued to send electrical voltage into Ali's body. 3RP 115-16, 123. Callahan continued to deploy the Taser until Ali's said "okay" and his hands came out. 3RP 124. At that point Bates placed Ali in handcuffs. 3RP 124. Ali had blood on his head from being hit by the door that Callahan kicked in. 3RP 125, 150-51. There was blood on the floor. 3RP 143-44. The cut over his eye required stitches. 3RP 194. He was quiet and cooperative after being taken into custody. 3RP 175-76.

At the close of trial, defense counsel told the court there was no evidence from the defense regarding the bail jumping charge without Ali's testimony. 3RP 245. Counsel was not sure if he effectively communicated that to Ali. 3RP 245. Counsel asked the court to go through the standard colloquy regarding Ali's right to testify. 3RP 245.

The court did so and Ali declined to testify. 3RP 245-246. In finding Ali guilty as charged, the court remarked, "While Mr. Ali is deemed by the court to be competent to stand trial, I do believe that he has some very serious mental health issues." 3RP 265.

C. ARGUMENT

1. THE BAIL JUMPING CONVICTION MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE.

There was insufficient evidence to support Ali's conviction for bail jumping. A person is guilty of bail jumping when he has been released by court order or admitted to bail and fails to appear for a scheduled court hearing, having knowledge that his presence is required. RCW 9A.76.170(1). The State did not produce sufficient evidence showing Ali knew of a scheduled omnibus hearing and, even if it did, still failed to prove Ali knew his presence was required at that hearing. The State also failed to prove Ali did not appear for the hearing on the scheduled date.

The State's proof on the matter consisted solely of documentary evidence. 3RP 203-208; Ex. 31-39. On July 15, 2010, the court set bail at \$40,000. Ex. 31. A surety bond for that amount was filed. Ex. 33. On November 4, 2010, the court entered an order of continuance based on a pre-printed form that was signed by Ali and his attorney, which stated:

This matter came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby ORDERED that the trial, currently set for 11/6/10 is continued to 12/13/10 *Upon agreement of the parties [CrR 3.3(f)(1)] or required in the administration of justice [CrR 3.3(f)(2)] for the following reason: plaintiff's counsel in trial; defense counsel in trial; other: mental health evaluation

It is further ORDERED:

Omnibus hearing date is 12/3/10

Expiration date is 12/13/10

Ex. 36.

The continuance order does not specify a time for the omnibus hearing. The minute entry for November 4, 2010 states "Omnibus hearing continued to 12-3-10" and "Trial date continued to 12-13-10." Ex. 37.

On December 3, 2010, the court signed an order for a bench warrant, which states in part that "the defendant failed to appear" for the omnibus hearing. Ex. 39. The minute entry for December 3, 2010 states "Defendant not appearing in person but by counsel Eric Makus." Ex. 38. Neither the bench warrant order nor the December 3 minute entry indicates when the attorneys appeared for the hearing.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction only if,

viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

RCW 9A.76.170(1) provides "[a]ny person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of the state, and who knowingly fails to appear as required[,] is guilty of bail jumping." "The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004).

The State failed to establish the second element of bail jumping. First, the evidence is insufficient to show Ali had knowledge of the December 3, 2010 omnibus hearing. Ali signed the continuance order that references the omnibus hearing. Ex. 36. But the box next to "Omnibus hearing date is 12/3/10" was left unchecked, indicating the hearing date was inapplicable. Ex. 36; see State v. Minor, 162 Wn.2d 796, 800-04, 174 P.3d 1162 (2008) (failure to check box indicating felony firearm prohibition on order affirmatively misled defendant into believing there was no such prohibition); State v. Wilson, 136 Wn. App. 596, 604-05, 611, 150 P.3d 144 (2007) (boxes left unchecked for provisions in no-contact

order showed inapplicability). Other boxes on the continuance order were checked. Ex. 36. The minute entry, meanwhile, reflects the clerk's entry that the omnibus hearing was scheduled, but is silent as to whether that fact was communicated to Ali. Ex. 37. Under these circumstances, there is insufficient evidence to show Ali knew of the December 3 omnibus hearing date.

Even if the evidence is sufficient to show Ali knew of the December 3 omnibus hearing, it is still insufficient to establish that he knew his presence was *required* at that hearing. To satisfy the knowledge element of bail jumping, the State must prove beyond a reasonable doubt that the defendant knew, or was aware, that he was *required* to appear at the scheduled hearing. State v. Ball, 97 Wn. App. 534, 536, 987 P.2d 632 (1999) (citing State v. Bryant, 89 Wn. App. 857, 870, 950 P.2d 1004 (1998), review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1999)).

The question is thus whether evidence showed Ali was aware that he was required to appear at the omnibus hearing on December 3. Ball, 97 Wn. App. at 536. In Ball, the element was satisfied due to a notice of trial setting containing language in bold print stating:

THE DEFENDANT SHALL APPEAR FOR ALL OF THE ABOVE SCHEDULED COURT HEARINGS. Failure to appear by the defendant is a crime, and may result in a bench warrant being issued authorizing the arrest of the defendant.

Id. (emphasis omitted).

Unlike in Ball, the order for continuance in this case did not contain any language apprising Ali that his presence was required. Ex. 36. The entry of the bench warrant on December 3 is similarly ineffective to prove that Ali knew his presence was mandatory because it only shows he was not there. Ex. 38, 39. Evidence that Ali knew of his court date is not a proxy for proving that he knew his presence was required at that court date. The evidence is insufficient for this reason. The court therefore erred in concluding Ali "had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court." CP 49 (CL 6).

The evidence is insufficient for another reason. The State failed to prove that Ali failed to appear for the omnibus hearing on December 3, 2010. The November 4 order of continuance does not set a time for the omnibus hearing to take place. The significance of that omission becomes apparent in light of State v. Coleman, 155 Wn. App. 951, 963, 231 P.3d 212 (2010).

In that case, evidence showed Coleman signed a trial continuance order that directed him to appear before the court on February 4, 2009 at 9:00 a.m. Coleman, 155 Wn. App. at 963. Coleman did not appear at the

8:30 status hearing. Id. Coleman argued this evidence was insufficient to convict him of bail jumping because it did not show he failed to appear at the time indicated on his notice—9:00 a.m. Id. This Court agreed. "Taking all the evidence and reasonable inferences in the light most favorable to the State, nothing before the jury established that Coleman was absent at the time specified on his notice." Id. at 964.

The reasoning of Coleman establishes the State must prove a defendant's absence at the time specified for the hearing. In Ali's case, there was no time specified for the omnibus hearing. Ex. 36, 37. On this record, it is speculation that Ali did not appear in court at some time on December 3. The record only establishes he was not there when the attorneys appeared for the hearing, whenever that was. Ex. 38, 39. In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). The absence of evidence showing Ali needed to appear at a particular time for the December 3 hearing is fatal to the State's case. The court therefore erred in concluding Ali "failed to appear before a Court, an Omnibus hearing on that date in King County Superior Court." CP 49 (CL 6).

The conviction for bail jumping must be reversed and the charge dismissed with prejudice due to insufficient evidence. State v. DeVries,

149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where evidence insufficient to sustain conviction). The constitutional prohibition against double jeopardy forbids retrial. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE COURT VIOLATED ALI'S CONSTITUTIONAL AND STATUTORY RIGHTS WHEN IT FAILED TO ORDER A COMPETENCY EVALUATION.

Whenever there is reason to doubt competency, the trial court must order an evaluation under RCW 10.77.060. In determining whether there is reason to doubt competency, a trial court must give considerable weight to defense counsel's opinion and take facts into account supporting that opinion. The trial court abused its discretion in failing to order a competency evaluation as required by RCW 10.77.060 and due process because it failed to follow the controlling legal standard and the circumstances otherwise show a legitimate reason to doubt competency.

a. Due Process Requires The Court To Follow Mandatory Evaluation Procedures Whenever There Is A Reason To Doubt Competency.

"It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an accused while incompetent violates his constitutional right to a fair trial as a matter of due process. Pate v.

Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed.2d 815 (1966); U.S. Const. amend. 14; Wash. Const. art. 1, § 3. Washington law provides "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (quoting RCW 10.77.050).

The constitutional standard for competency to stand trial is whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." Fleming, 142 Wn.2d at 861-62 (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed.2d 824 (1960)) (internal quotation marks omitted).

Under Washington statute, a criminal defendant is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010(14). "A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." Fleming, 142 Wn.2d at 863. Given the gravity of the right at stake, "Chapter 10.77 RCW outlines procedures courts must follow once any reason to doubt a defendant's competency arises before a trial judge." State v. Heddrick, 166 Wn.2d 898, 900, 215 P.3d 201 (2009). RCW 10.77.060(1)(a) provides "Whenever . . . there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant."

Once there is a legitimate reason to doubt competency of the accused, the trial court must comply with RCW 10.77.060 and order an evaluation. Marshall, 144 Wn.2d at 279. The failure to order a competency evaluation where one is warranted is a denial of due process. Id.; Heddrick, 166 Wn.2d at 909 ("so long as a defendant maintains a challenge to competency, the chapter 10.77 RCW procedures are mandatory to satisfy due process.").

b. Defense Counsel's Opinion And Supporting Facts Establish A Reason To Doubt Competency.

The issue here is whether the court erred in failing to find a reason to doubt Ali's competency subsequent to an earlier finding of competency based on the Western State Hospital evaluation. If a reason to doubt competency existed, the court necessarily erred in failing to order a competency evaluation pursuant to RCW 10.77.060.

A determination of whether there is reason to doubt the defendant's competency is within the trial court's sound discretion. State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46- 47, 940 P. 2d 1362 (1997). On the other hand, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right, such as the right to due process implicated here, is reviewed de novo. Iniguez, 167 Wn.2d at 280.

In any event, because the competency determination is a mixed question of law and fact, the reviewing court must "independently apply the law to the facts." Marshall, 144 Wn.2d at 281. Courts consider a variety factors in determining competence, including the defendant's

appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. Fleming, 142 Wn.2d at 863. Courts must consider the input of defense counsel when making this determination. Drope v. Missouri, 420 U.S. 162, 177 n.13, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975) ("[a]lthough we do not . . . suggest that courts must accept without question a lawyer's representations concerning the competence of his client . . . an expressed doubt in that regard by one with the closest contact with the defendant . . . is unquestionably a factor which should be considered.").

Trial courts in Washington must not only consider defense counsel's opinion but also give it "considerable weight." State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004) (citing State v. Swain, 93 Wn. App. 1, 10, 968 P.2d 412 (1998)). The role of defense counsel in determining the competency of his client is unique. The attorney represents his client, but he is also an officer of the court. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). Since the lawyer has "the closest contact with the defendant," the court must give considerable weight to the lawyer's representations regarding his client's competency and ability to assist in the defense. Israel, 19 Wn. App. at 779 (quoting Drope, 420 U.S. at 177 n.13).

The trial court failed to comply with this settled legal standard and abused its discretion in not recognizing sufficient facts existed to show a legitimate reason to doubt competency.

The most significant determination is the one made by Judge Doyle on June 14, 2011. 1RP 49-50. Judge Doyle is the first judge who found there was no reason to doubt competency when the issue was raised subsequent to Judge Kessler's earlier finding of competency in March 2011. 2RP 3. Judge Kessler subsequently refused to revisit the issue after Judge Doyle found no reason to doubt Ali's competency to proceed. 2RP 19. Judge Heavey, for his part, expressed a desire not to revisit the issue based on Judge Kessler's message that the competency issue was settled. 3RP 25. Although Judge Heavey engaged in some colloquy with Ali regarding whether Ali wished to plead guilty, Judge Heavey made no determination regarding whether there was a reason to doubt competency. 3RP 25-29. For these reasons, Judge Doyle's determination that there was no reason to doubt competency on June 14, 2011 is the primary focus of analysis on appeal.

At the June 14, 2011, defense counsel Swaby informed Judge Doyle that he could not communicate an extremely favorable plea offer to Ali because Ali would not speak with him. 1RP 30-31. According to Swaby, believed "the case is already over." 1RP 31. When Judge Doyle

sought to confirm that he did not wish to plea guilty, Ali responded in part "I'm not understanding what the trial's about, I'm not understanding the way you operate this case." 1RP 33.

Swaby told the court he did not believe Ali could assist in the preparation of a defense, but he did not know if it was a question of inability to assist due to incompetency or lack of desire to assist. 1RP 38. The prosecutor recognized one possibility was that there was a competency issue requiring further evaluation. 1RP 38. The other possibility identified by the prosecutor was that Ali simply wanted to exercise his constitutional rights. 1RP 38. After the court referenced the earlier March 2011 Western State evaluation in which Ali was found competent, the prosecutor said the issue was whether Ali had decompensated to a point of incompetence. 1RP 39.

The court told Ali that he had two options: plead guilty or go to trial. 1RP 42-43. Ali responded, "Yeah, I'm not willing to do either one." 1RP 43. The court reiterated he had to either plead guilty or go to trial. 1RP 43. Ali again responded, "I'm not planning to either one." 1RP 43.

The court explained the options again and asked him if he understood that he would go to trial if he did not want to plead guilty. 1RP 44. Ali answered, "Right." 1RP 44. The court asked for his decision. 1RP 44. Ali responded, "I'm not willing to accept either one." 1RP 44-45.

Swaby offered his opinion that Ali did not understand what Swaby had told him and did not understand the plea option. 1RP 47. The prosecutor believed Ali "just doesn't like his options and this case needs to be tried." 1RP 49. Judge Doyle ruled, "given my interaction, uh, with Mr. Ali today and previously, and the information gleaned from the file and the prior reports, I find no reason to doubt his ability to go forward. I think there's an issue of coming to grips with the options that are available, but not an ability to understand or assist Counsel. And I agree that this case needs to move forward at this point." 1RP 49-50.

Competency requires an understanding of the nature of the proceeding and a rational as well as factual understanding of the proceedings. Fleming, 142 Wn.2d at 861-62; RCW 10.77.010(14). The nature of a criminal proceeding is that resolution occurs in one of two ways: the defendant pleads guilty or chooses to go to trial. At the June 14, 2011 hearing, Ali refused to engage either option, casting doubt on his ability to understand the nature of the proceedings. 1RP 43-45.

According to defense counsel, Ali thought the case was already over. 1RP 31. Judge Doyle concluded there was simply an issue of Ali not "coming to grips" with the available options. 1RP 49-50. But the court arrived at that conclusion without giving any weight to Swaby's opinion. Moreover, a reason to doubt competency does not require a

showing of only one conclusion to be drawn from the circumstances. The standard is deliberately broad to encompass situations where differing inferences may be drawn. There need only be a legitimate reason to doubt competency in order to trigger the mandatory evaluation requirements of RCW 10.77.060, not a necessary doubt. Marshall, 144 Wn.2d at 279. There was a reason to doubt Ali's ability to understand the nature of proceedings based on Swaby's opinion and facts supporting that opinion. Ali's diagnosed psychotic disorder and history of mental illness provided further support for that opinion. CP 31-33.

The other facet of competency at issue is whether Ali could rationally assist his counsel. 1RP 38. The accused must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." State v. Gwaltney, 77 Wn.2d 906, 907, 468 P.2d 433 (1970) (quoting Dusky, 362 U.S. at 402). Swaby had the closest contact with Ali and was in the best position to know whether Ali could provide such assistance. Although counsel indicated at the June 14 hearing that he did not know whether Ali's failure to assist stemmed from incompetency or willful refusal, it is important to keep in mind that Ali need not prove he was incompetent in order to prevail on appeal. 1RP 38. He need only show the trial court abused its discretion in failing to find a reason to doubt competency. Counsel's lack of certainty did not rule out

willful refusal, but neither did it rule out incompetency. An evaluation was needed to get to the source of the problem.

Defense counsel's expressed doubt about a client's competency must have a factual basis. Lord, 117 Wn.2d at 901 (citing City of Seattle v. Gordon, 39 Wn. App. 437, 442-43, 693 P.2d 741 (1985)). Facts support counsel's concern here. Ali refused to even talk with counsel about a favorable plea deal that would not only have alleviated Ali's expressed concern over continued incarceration but also avoided the potential for deportation from this country. 1RP 31. Counsel told the court that Ali did not understand the plea option. 1RP 47.

Judge Doyle, in ruling there was no reason to doubt Ali's competency, gave no consideration to Swaby's opinion. 1RP 49-50. This was error. In determining whether there is a reason to doubt competency, the trial court must give "considerable weight" to defense counsel's opinion. Israel, 19 Wn. App. at 779. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

To the extent Judge Kessler's remarks on June 20, 2011 are construed as relying on Judge Doyle's determination, then Judge Kessler

abused his discretion in failing to doubt competency because it is predicated on Judge Doyle's erroneous determination. 2RP 19. To the extent Judge Kessler's remarks could be construed as relying on his own March 2011 competency determination, his refusal to revisit the issue was an abuse of discretion. 2RP 19.

Once the trial court makes an initial competency determination, the court should revisit the issue when new information is presented on the issue. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). "[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181.

The March 2011 competency determination was agreed on by defense attorney Makus, who discontinued his representation of Ali that same month. 1RP 12; 2RP 3. By the time the competency issue arose again in June, defense attorney Swaby had spent three months in contact with Ali. Swaby was in a unique position to offer a *current* opinion on Ali's competence based on first-hand information that Ali could not currently assist counsel or understand the nature of the proceedings. Since the March 2011 determination, new information in the form of Ali's refusal to talk about the latest plea offer and a belief that the case was over

provided a specific factual basis for Swaby's concerns related to both Ali's ability to assist and capacity to understand the nature of proceedings.

At the June 20 hearing in front of Judge Kessler, Swaby announced "we have had a fundamental breakdown in communication" and believed it was partially related to his client's current lack of competence. 2RP 18. According to Swaby, Ali felt strongly that "his case has already been resolved, and that . . . a trial at this point has no legal status because his case has already been resolved and this matter is done. So, he doesn't really understand why he's here." 2RP 18.

Judge Kessler, however, gave no consideration to Swaby's concerns because he considered earlier competency determinations conclusive. 2RP 19. This was error because the court must give considerable weight to defense counsel's opinion. Israel, 19 Wn. App. at 779. This was also error because Judge Kessler failed to be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence. Drope, 420 U.S. at 181.

Judge Heavey, who ultimately presided over the trial, did not make a competency ruling. By the time the issue reached him, Judge Kessler had already shut the issue down. But Swaby again expressed his concern about Ali's competency to Judge Heavey, and the judge's colloquy with

Ali provides further factual support that there was a reason to doubt competency.

Swaby put on the record that "Mr. Ali continues to say that he is going through things here in the jail that have nothing to do with this case and that this is not a court. If this is not a court, then it is clear that Mr. Ali is not understanding what is going on here, because this is a court." 3RP 23. Counsel really felt that Ali was "not understanding what has been happening here." 3RP 23. Counsel, again speaking with candor, believed it may be an issue of "cultural competence," but still expressed his strong belief that proceedings should not go forward. 3RP 23-24.

While Ali responded in an affirmative, albeit perfunctory manner, to whether he understood his options and consequences of the proceedings, he continued to indicate he would neither plead guilty nor go to trial. 3RP 25-29. Ali maintained, "this case, doesn't need a trial. This case could not go on, you know, beyond today, at least, you know, with my acknowledgment of what is going on." 3RP 27. He was not "willing to continue with this type of an environment that I have been subjected to." 3RP 32. Such remarks again call into doubt whether Ali understood the nature of the proceedings against him. Ali appeared to believe the case could not go to trial because he was unwilling to proceed. Ali refused to even acknowledge the bail jumping charge. 3RP 31. Ali chose not to

testify at trial, even though the sole defense to the bail jumping charge was dependent on Ali's testimony. 3RP 245, 262.

As recited above, there were enough facts to prompt a reasonable person to have a legitimate doubt as to Ali's competency. The court abused its discretion in failing to order another competency evaluation given the facts known to the court regarding Ali's mindset and documented mental health issues, as well as defense counsel's opinion that his client may be incompetent. The failure to follow mandatory evaluation procedures under RCW 10.77.060 where there is reason to doubt competency requires reversal. Marshall, 144 Wn.2d at 280.

3. THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a special condition of community custody, the court ordered Ali to "obtain mental health treatment and follow treatment recommendations and take medications as directed." CP 58. Such a sentencing condition may be imposed only when specific statutory prerequisites are followed. The court's failure to follow the mandated procedure requires reversal of this portion of the sentence.

A court may impose only a sentence that is authorized by statute.

State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW

9.94B.080⁴ provides:

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.

RCW 9.94B.080 authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080). A court may therefore not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any

⁴ The heading of chapter 9.94B RCW states the chapter applies to crimes committed prior to July 1, 2000, but RCW 9.94B.080 is applicable to crimes committed after 2000. See Laws of 2008, ch. 231, § 55(1) ("Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective date of this section.").

applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007). The court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn.App. at 851. The term "mentally ill person" is specifically defined under RCW 71.24.025(18) and only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of RCW 9.94B.080.

The court, in sentencing Ali, did not make the statutorily mandated finding that Ali was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced the crimes for which he was convicted based on a presentence report and applicable mental status evaluations. The court simply stated Ali is "ordered into a mental health evaluation and to follow all treatment recommendations." 3RP 32. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "[A]

sentencing error can be addressed for the first time on appeal under RAP 2.5 even if the error is not jurisdictional or constitutional." In Re Pers. Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (citing State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)).

The rule applies to erroneous community custody conditions in general and the erroneous imposition of mental health evaluation and treatment in particular. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (in general); Jones, 118 Wn. App. at 204 (mental health evaluation and treatment). This Court should order the trial court to strike the conditions pertaining to mental health treatment unless it can presently and lawfully comply with the requirements of RCW 9.94B.080. Lopez, 142 Wn. App. at 354; Jones, 118 Wn. App. at 212.

4. PROHIBITION ON USE OF NON-PRESCRIBED DRUGS AS A CONDITION OF COMMUNITY CUSTODY IS UNAUTHORIZED BY THE STATUTE AND MUST BE REMOVED FROM THE JUDGMENT AND SENTENCE.

As a special condition of community custody, the court ordered Ali to "not consume any . . . non-Rx drugs." CP 58. The condition must be removed from the judgment and sentence because consumption of any non-prescribed drugs is too broad to be considered a valid crime-related prohibition.

The court's decision to impose a crime-related prohibition is generally reviewed for abuse of discretion. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). But a court may impose only a sentence that is authorized by statute. Barnett, 139 Wn.2d at 464. "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

A condition is "crime-related" only if it "directly relates to the circumstances of the crime." State v. Motter, 139 Wn. App. 797, 802, 162 P.3d 1190 (2007), overruled on other grounds, State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).⁵ Substantial evidence must support a determination that a condition is crime-related. Motter, 139 Wn. App. at 801.

⁵ RCW 9.94A.030(10) provides "'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct."

The court at sentencing did not articulate any factual basis for prohibiting consumption of any non-prescribed drug, simply stating "He's not to be using any alcohol or drugs- illegal drugs, non-prescribed drugs." 2RP 32. Officer Myers testified at the CrR 3.5 hearing that Ali did not appear under the influence of any intoxicating substance. 3RP 66. At trial, Officer Callahan testified that Ali's strange behavior was consistent with someone taking a narcotic. 3RP 145. During the 911 call, Amal said Ali had smoked two different drugs for a long time. Ex. 40. Police described the information received via dispatch as Ali being high on unknown street drugs. 3RP 39, 45, 103, 165.

These facts do not establish consumption of a legal, non-prescribed drug had anything to do with the offense. At most, these facts establish consumption of illicit drugs. As a mandatory condition of community custody, RCW 9.94A.703(2)(c) states an "offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions." The court here correctly imposed this condition on Ali because the law required it absent affirmative waiver. CP 58.

But it lacked authority to additionally order Ali, as a non-mandatory condition of community custody, not to use any non-prescribed drugs. The unqualified prohibition on non-prescribed drugs encompasses legal, non-prescribed drugs. CP 58. The non-prescribed drug condition is

not limited to use of controlled substances and encompasses any legal drug not prescribed by a medical professional, including something as benign as aspirin or cold medicine. The condition prohibiting use of such drugs is not crime related and therefore unauthorized by statute. A community custody condition cannot be imposed if it is unauthorized by statute. Motter, 139 Wn. App. at 801.

"Courts have the duty and power to correct an erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). Community custody conditions prohibiting conduct that are not crime-related must be stricken from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). This Court should therefore order the sentencing court to strike the condition pertaining to non-prescribed drugs.

D. CONCLUSION

For the reasons stated, Ali requests that this court reverse the convictions, dismissing the bail jumping charge with prejudice. In the event it declines to do so, then the challenged community custody conditions should be reversed.

DATED this 27th day of February 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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APPENDIX A

FILED
KING COUNTY, WASHINGTON

JUL 08 2011

SUPERIOR COURT CLERK
BY Ed Gucco
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JAMAL A. ALI,

Defendant.

No. 10-1-06231-5 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d)

THE ABOVE-ENTITLED CAUSE having come on for trial from June 20, 2011 through June 23, 2011, before the undersigned judge in the above-entitled court; the State of Washington having been represented by Senior Deputy Prosecuting Attorney Jim Ferrell; the defendant appearing in person and having been represented by his attorney, Christopher Swaby; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

The following events took place within King County, Washington:

II.

1. The defendant was at home on July 12, 2010, at 15001 15th Avenue NE, #310, Shoreline, Washington. He lived at this address with his cousin, Amal Ali.
2. On that evening Amal Ali called 911 requesting assistance with her cousin, the defendant, who she reported was "going crazy" and that he was talking to himself and she feared was using drugs.



FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

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- 1 3. King County Sheriff Deputies Benjamin Callahan and Paula Bates responded to this address. Deputy Callahan was first to arrive and he went to the door first, followed by Deputy Bates.
- 2 When receiving no answer at the door Deputy Bates opened the front door and looked inside. He immediately saw the defendant, Jamal A. Ali, at the top of the stairs. Deputy Bates was also able
- 3 to see the defendant through the crack in the door.
- 4 4. Deputy Callahan directed and ordered the defendant to come down the stairs. The defendant refused to do so.
- 5 5. Instead, the defendant said to the deputies, "I will not come in."
- 6 6. At this time the deputies saw the defendant reaching for something or pulling something from his pocket. The deputies could not tell what it was, but it appeared white in color.
- 7 7. As Deputy Callahan stepped inside the house the defendant ran to an upstairs bedroom and closed the door. Both deputies followed the defendant.
- 8 8. Amal Ali had made herself known to Deputy Bates and as Deputy Bates ran up the stairs, following Deputy Callahan, Ms. Ali followed Bates. Deputy Bates testified that Ms. Ali grabbed her from behind several times, eventually resulting in Deputy Bates having to shove Ms. Ali
- 9 against a wall and out of the way. Deputy Bates directed Ms. Ali to go downstairs. Ms. Ali denied at trial that she grabbed the deputy.
- 10 9. When Deputy Callahan reached the bedroom where the defendant had gone, he kicked the door open. The door swung inside the room and struck the defendant, appearing to have caused the injury to the defendant's head.
- 11 10. The defendant came out of the room and approached Deputy Callahan. Deputy Callahan and Deputy Bates both saw the defendant advance on Deputy Callahan in a quick manner and as he did so he was holding a knife in one of his hands.
- 12 11. As the defendant got within several feet of Deputy Callahan, the deputy deployed his taser on the defendant. The taser prongs both attached to the right shoulder of the defendant. The deputy then activated the taser which resulted in the defendant falling to the ground and being
- 13 immobilized.
- 14 12. Deputy Callahan retreated to the end of the hallway before he was able to bring the defendant to the ground. The deputy testified at trial that he was in fear for his life when the defendant approached him with the knife, based on the manner and circumstances of the
- 15 defendant's conduct. Deputy Callahan testified that he believed he was about to be assaulted by the defendant with the knife. He further testified that if he could have gotten to his firearm in
- 16 time he would have used that. His testimony was that as he was heading up the stairs he made the decision to arm himself with his department issued taser.
- 17 13. After the defendant was arrested and handcuffed, both deputies saw the black-handled knife the defendant had been holding, on the floor underneath the defendant, as he was rolled over to
- 18 be stood up.
- 19 14. Both deputies escorted the defendant down the stairs and outside the home. He was then transferred to the custody of Deputy Myers who transported him to the hospital for treatment and then to the jail.
- 20 15. When deputies Callahan and Bates went back to the apartment to retrieve the knife and take pictures of the scene they discovered the front door was locked. They were able to gain entry through the assistance of Ms. Amal Ali and another female relative that was located at a nearby
- 21 residence. The deputies were allowed back into the home by Ms. Ali.
- 22 16. When the deputies reached the location where the knife had been left they discovered the knife had been moved by someone.
- 23
- 24

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 2

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1 17. In the bedroom where the defendant had retreated to, the deputies located white plastic
 2 packaging for a new knife and took it into evidence. This item became State's exhibit number 4.

3 18. While looking for the knife that had been moved, the deputies searched the kitchen and
 4 located a black handled knife that matched the appearance they had seen the defendant with
 5 earlier, during the assault on Deputy Callahan. This item was taken into evidence and was
 6 admitted at trial as State's exhibit number 3. The Court later concluded that this knife was not
 7 the knife used in the assault, but the packaging of State's Exhibit number 4 was likely the
 8 package the actual knife was contained in.

9 19. At the hospital Deputy Myers read the defendant his Miranda/Constitutional Warnings, in
 10 their entirety from his department issued Miranda card. The defendant acknowledged the rights
 11 and agreed to speak with the deputy about this incident.

12 20. The defendant said he was standing at the top of the stairs when deputies arrived. He told
 13 them to inside the home. He said that he had done nothing wrong so he went to his room. Once
 14 in his room he said that Deputy Callahan kicked the door open and it hit him in the face. He
 15 denied having a knife but showed the deputy a half inch laceration to his thumb and he said he
 16 had a new knife in the bedroom.

17 21. The Court found both Deputy Callahan and Deputy Bates "totally credible."

18 22. The Court also noted the following conclusions, based on the trial testimony: That the
 19 defendant had been in the home for seven straight days and was acting in a paranoid fashion.
 20 His cousin, Amal Ali, was greatly concerned for his welfare and for her own as well, based on
 21 her description of him acting crazy, possibly taking drugs, and that she considered him
 22 dangerous.

23 23. The Court also noted this event was traumatizing for the officers and that Mr. Ali was
 24 fortunate that the officers had tasers.

25 24. The Court noted the packaging for State's Exhibit #4 was for a "fine edge" knife, and that the
 26 knife in the possession of the Police, State's Exhibit #3 was not a fine edge, but was serrated.

The Court noted that Exhibit #3 is not the weapon used in this assault, but that Exhibit #4 was
 the likely packaging for the knife used.

25. The Court finds that the defendant had a knife and that Deputy Callahan tased him.

26. The Court incorporates the oral rulings on this case into these findings:

And having made those Findings of Fact, the Court also now enters the following:

CONCLUSIONS OF LAW

I.

The above-entitled court has jurisdiction of the subject matter and of the defendant, Jamal
 A. Ali, in the above-entitled cause.

II.

The following elements of the crime(s) charged have been proven by the State beyond a
 reasonable doubt:

Assault in the Second Degree: The Court Finds, beyond a reasonable doubt:

1. The crime occurred on July 12, 2010;
2. It occurred in King County, Washington;

1 3. The defendant, Jamal A. Ali;

2 4. Assaulted Benjamin Callahan with a deadly weapon, a knife, and that this weapon, in
the manner in which it was used, attempted to be used or threatened to be used was readily
3 capable of causing death or substantial bodily harm;

4 5. The Court also noted that the second and third paragraphs of WPIC 35.50 (below),
regarding the definition of Assault, are the applicable sections to this assault and the Court found
that under these two alternatives the defendant assaulted Benjamin Callahan:

5 An assault is also an act, with unlawful force, done with intent to inflict bodily injury
6 upon another, tending but failing to accomplish it and accompanied with the apparent
present ability to inflict the bodily injury if not prevented. It is not necessary that bodily
7 injury be inflicted.

8 An assault is also an act, with unlawful force, done with the intent to create in
9 another apprehension and fear of bodily injury, and which in fact creates in another a
reasonable apprehension and imminent fear of bodily injury even though the actor did not
actually intend to inflict bodily injury. WPIC 35.50, in pertinent part.

10 6. For purposes of the deadly weapon allegation, the Court finds beyond a reasonable doubt
that the defendant was armed with a deadly weapon, a knife, during the commission of this crime.

11 Bail Jumping: The Court Finds beyond a reasonable doubt:

12 1. The crime occurred on December 3, 2010;

13 2. It occurred in King County, Washington;

14 3. The defendant failed to appear to appear before a Court, an Omnibus hearing on that date
in King County Superior Court;

15 4. That at that time the defendant was charged with the crime of Assault in the Second
Degree, a Class B felony; and

16 5. The defendant had been released by court order or admitted to bail with knowledge of the
requirement of a subsequent personal appearance before that court. The Court finds specifically that
the defendant previously posted bail and that bail was reinstated prior to his non-appearance on
December 3, 2010.

17 III.

18 The defendant is guilty of the crimes of: Assault in the Second Degree, with a deadly weapon
19 allegation (a knife), and Bail Jumping, as charged in the Second Amended Information.

20 IV.

21 Judgment should be entered in accordance with Conclusion of Law III.

22 DONE IN OPEN COURT this 8th day of July, 2011.


HON. JUDGE MICHAEL HEAVEY

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Presented by:


Jim Ferrell, WSBA #24314
Senior Deputy Prosecuting Attorney

refused
Defendant

 30293
Christopher Swaby, WSBA #
Attorney for Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 5

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