

68295-4

68295-4

NO. 68295-4-I

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

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STATE OF WASHINGTON

Respondent

v.

BRIAN M. WARNOCK

Appellant

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BRIEF OF RESPONDENT

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## **I. ISSUE**

The legislature has defined alcoholism as a chemical dependency. The legislature authorized the court to order a chemical dependency evaluation and treatment if the court found the defendant's chemical dependency contributed to his offense. Was it error for the court to order a chemical dependency evaluation when it found alcohol contributed the defendant's crime?

## **II. STATEMENT OF THE CASE**

On August 19, 2010, at between 8:00 and 9:00 PM, the victim, Mr. Gilbert, and two friends went to the Cactus Moon Saloon in South Everett, Washington. They sat at a table, had a few drinks, and socialized. 11/10 RP 20-22. Around midnight, the defendant and several friends arrived at the Cactus Moon. They had been out to dinner. The defendant had at least one drink before arriving at the Cactus Moon. He had another drink at the Cactus Moon. 11/14 RP 71, 73.

At some point, the defendant and his co-defendant approached the table of the victim and challenged him to arm wrestle. The defendant pulled out "a large wad of money out of his pocket and slammed it down on the table." 11/10 RP 22-23. The victim told the defendant that arm wrestling was against the rules,

and refused. The defendant and co-defendant left and went back to their table. 11/10 RP 24.

A short time later, the defendant and co-defendant returned to the victim's table and asked him "if [he] wanted to take it outside." The victim asked "Take what outside?" The defendant said there was "some kind of problem." 11/10 RP 24-25, 34. The defendant then head-butted the victim, knocking him down. The co-defendant grabbed the victim's arm and hit him in the face several times. 11/15 RP 17. The entire incident was recorded by the security cameras of the Cactus Moon. 11/10 RP 28.

As a result of the assault, the victim's jaw was broken. It was wired shut the next day and took 8 weeks to heal. 11/10 RP 27-28.

A short time after the defendant and his companions left the Cactus Moon, he drove by a Snohomish County Sheriff's Deputy who was in a marked patrol car. The deputy noted that the defendant was driving "very, very fast." 11/10 RP 136. The deputy started to pursue the defendant, and noted that the defendant ran a stop sign. The deputy activated his emergency lights. Id.

The defendant eventually pulled into the parking area of a condominium. He immediately got out of the car, and the deputy

detained him. 11/10 RP 138-39. The deputy noticed the defendant staggered when he got out of his car. The defendant's eyes were red and watery and the deputy "could strongly smell the odor of intoxicants." 11/10 RP 143-44. At that point, the deputy arrested the defendant for reckless driving and driving under the influence of intoxicants (DUI). 11/10 RP 147.

The deputy took the defendant to take a breath test. The defendant refused the test. 11/10 RP 152, 158. The deputy noted in his report that the defendant's "impairment was extreme." 11/10 RP 159.

The State charged the defendant with second degree assault and driving under the influence of intoxicants. CP 57. At trial, the State's evidence was as stated above. The defendant testified that he refused the breath test because:

I'd rather lose my license for a year than get a DUI. I wasn't sure — I wasn't sure by what I had drank that night if it would put me over the legal limit or under the legal limit, but I just didn't want to find out.

11/14 RP 82.

The jury convicted the defendant of second degree assault, but could not reach a verdict on DUI. 11/16 RP 95-96.

At sentencing, the State recommended that the defendant have “a chemical dependency evaluation while incarcerated and follow any recommended treatment.” 2/7 RP 125. The defendant initially asked the court to “consider not requiring him to undergo an alcohol evaluation.” 2/7 RP 135. He then informed the court that he had been previously convicted of DUI in Lynnwood Municipal Court. He was on probation from that conviction, and had received a 30 day sanction from that court for this conviction. 2/7 RP 136. The defendant asked that the court run any confinement it imposed concurrently with the 30 day sanction. 2/7 RP 137.

The court sentenced the defendant to a standard range sentence. 2/7 RP 148, CP 3, 4. In considering conditions of community custody, the court stated, inter alia:

[C]ertainly there was drinking involved . . . if the CCO feels it's appropriate to have an evaluation and comply with recommended treatment in terms of substance abuse and alcohol, that would be appropriate.

2/7 RP 148-49.

The judgment and sentence included under community custody that the defendant participate in “chemical dependency evaluation . . . and fully comply with all recommended treatment.” CP 5.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW.**

“A sentencing court's statutory authority under the SRA<sup>1</sup> is a question of law, which we review de novo.” State v. Elmore, 154 Wn. App. 885, 904-05, 228 P.3d 760, review denied, 169 Wn.2d 1018 (2010).

#### **B. THE COURT HAD THE AUTHORITY TO ORDER A CHEMICAL DEPENDENCY EVALUATION.**

The defendant contends that “The trial court exceeded its authority . . . when it required his participation in a substance abuse evaluation and treatment.” Brief of Appellant 5. The defendant does not contend that “an evaluation and treatment for alcohol abuse” exceeded the court’s authority. Brief of Appellant 7 n. 2.

The relief the defendant asks for is that the court should be required to:

Strike the requirement that Warnock submit to a “chemical dependency evaluation” and treatment and instead restrict the requirement to alcohol dependency [evaluation] and treatment.

Brief of Appellant 7.

The court did not exceed its authority, accordingly, the defendant is not entitled to relief.

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<sup>1</sup> Sentencing Reform Act.

The defendant initially refers to the court's oral comments on conditions to be imposed during community custody. The condition that the defendant undergo a "substance abuse" evaluation was not included in the written judgment and sentence.

A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.

State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966).

Accordingly, the issue, properly framed, is whether the court exceeded its authority by ordering a chemical dependency evaluation and treatment. It did not.

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.

RCW 9.94A.607(1).

"Chemical dependency" means: (a) Alcoholism; (b) drug addiction; or (c) dependence on alcohol and one or more other psychoactive chemicals, as the context requires." RCW

70.96A.020(4). A chemical dependency assessment includes an assessment of alcohol dependency. WAC 388-805-310.<sup>2</sup>

Had the legislature intended that an alcohol dependency evaluation be separate from a drug dependency evaluation for assault, it would have said so. In RCW 9.94A.703(4)(b)(i), the legislature makes that distinction for traffic offenses: “In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency[.]”

Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.

State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196, (2005).

Accordingly, the legislature authorized a court to order a chemical dependency evaluation and treatment where the court found that alcohol contributed to the defendant’s crime of assault.

Here, the court found that alcohol contributed to the defendant’s assault. The defendant does not argue that an alcohol abuse evaluation and treatment exceeded the court’s authority. Consistent with RCW 9.94A.607 and RCW 70.96A.020(4), a

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<sup>2</sup> A copy of WAC 388-805-310 is at Appendix A.

chemical dependency evaluation is appropriate to determine if the defendant is dependent on alcohol.

The defendant relies on State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), and State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn.2d 73 (2009), to support his argument that the requirement exceeds the court's authority. Brief of Appellant 6-7. That reliance is misplaced.

In Jones, the sentencing court ordered an alcohol evaluation, even though there was only evidence that drugs, not alcohol, contributed to the crime. Since the condition was not crime-related, the order was error. Jones, 118 Wn. App. at 207-08.

Here, the order was for the more generic chemical dependency evaluation and treatment. Since there was evidence that alcohol contributed to the crime, and alcohol dependency is included in chemical dependency, there was no error.

In Powell, the sentencing court ordered the defendant to complete substance abuse treatment. There was evidence that the defendant used methamphetamine before committing the crime, and the defendant asked for substance abuse treatment as a condition of his sentence. Accordingly, there was no error. Powell, 139 Wn. App. at 814, 820.

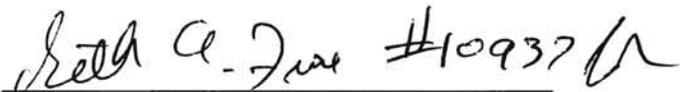
Likewise, here there was evidence to support the order for chemical dependency evaluation and treatment. As in Powell, there was no error.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on October 11, 2012.

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By:  #10937  
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WAC 388-805-310

388-805-310. What are the requirements for chemical dependency assessments?

A chemical dependency professional (CDP), or a CDP trainee under supervision of a CDP, must conduct and document an assessment of each patient's involvement with alcohol and other drugs. The CDP's assessment must include:

(1) A face-to-face diagnostic interview with each patient to obtain, review, evaluate, and document the following:

(a) A history of the patient's involvement with alcohol and other drugs, including:

- (i) The type of substances used;
- (ii) The route of administration; and
- (iii) Amount, frequency, and duration of use.

(b) History of alcohol or other drug treatment or education;

(c) The patient's self-assessment of use of alcohol and other drugs;

(d) A relapse history;

(e) A legal history; and

(f) In addition, for persons who have been charged with a violation under RCW 46.61.502 or 46.61.504 RCW, ensure the assessment includes an evaluation in the written summary of the patient's:

- (i) Blood or breath alcohol level and other drug levels or documentation of the patient's refusal at the time of the arrest, if available;
- (ii) Self reported driving record and the abstract of the patient's legal driving record; and
- (iii) If the initial finding is other than substance dependence, the assessment must also include:

(A) The police report or documentation of efforts to include this information;

(B) A court originated criminal case history or documentation of efforts to include this information; and

(C) The results of a urinalysis or drug testing obtained at the time of the assessment or documentation of efforts to include this information.

(2) If the patient is in need of treatment, a CDP or CDP trainee under supervision of a CDP must evaluate the assessment using PPC dimensions for the patient placement decision.

(3) If an assessment is conducted on a youth, and the patient is in need of treatment, the CDP, or CDP trainee under supervision of a CDP, must also obtain the following information:

(a) Parental and sibling use of alcohol and other drugs;

(b) History of school assessments for learning disabilities or other problems, which may affect ability to understand written materials;

(c) Past and present parent/guardian custodial status, including running away and out-of-home placements;

## APPENDIX A

- (d) History of emotional or psychological problems;
  - (e) History of child or adolescent developmental problems; and
  - (f) Ability of parents/guardians to participate in treatment.
- (4) Documentation of the information collected, including:
- (a) A diagnostic assessment statement including sufficient data to determine a patient diagnosis supported by criteria of substance abuse or substance dependence;
  - (b) A written summary of the data gathered in subsections (1), (2), and (3) of this section that supports the treatment recommendation;
  - (c) A statement regarding provision of an HIV/AIDS brief risk intervention, and referrals made; and
  - (d) Evidence the patient:
    - (i) Was notified of the assessment results; and
    - (ii) Documentation of treatment options provided, and the patient's choice; or
    - (iii) If the patient was not notified of the results and advised of referral options, the reason must be documented.
- (5) Completion and submission of all reports required by the courts, department of corrections, department of licensing, and department of social and health services in a timely manner.
- (6) Referral of an adult or minor who requires assessment for involuntary chemical dependency treatment to the county-designated chemical dependency specialist.

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DIVISION I

THE STATE OF WASHINGTON,

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v.

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Appellant.

No. 68295-4-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14<sup>th</sup> day of October, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

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1908 EAST MADISON STREET  
SEATTLE, WA 98122

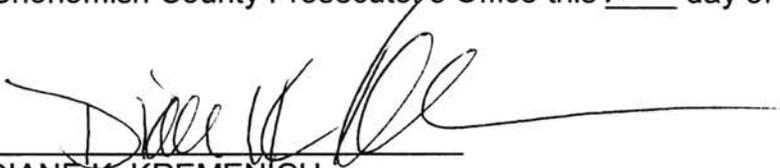
containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

2012 OCT 12 PM 4:5  
COURT OF APPEALS  
STATE OF WASHINGTON

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 11<sup>th</sup> day of October, 2012.

  
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DIANE K. KREMENICH  
Legal Assistant/Appeals Unit