69393-0

69393-0

NO. 69393-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. This Court reversed the trial court's 2010 order requiring mental health evaluation and treatment as conditions of community custody in this murder case, holding the trial court did not comply with the statutory procedure required by former RCW 9.94A.505(9) because it did not obtain a Department of Corrections (DOC) presentence report before imposing those conditions. Upon this Court's remand, the trial court ordered a DOC presentence report, a report was filed, and the court considered that report and the DOC recommendation of mental health treatment conditions in again imposing mental health treatment conditions of community custody. Did the trial court follow the statutory procedure required by former RCW 9.94A.505(9) on remand in imposing conditions of community custody requiring Giir to obtain a mental health evaluation and follow any treatment recommendations?

B. STATEMENT OF THE CASE

Kero Giir was charged with murder in the first degree for the killing of Roda Bec and assault in the second degree for the stabbing of Veronica Abbas, both occurring on May 28, 2005, and

both including deadly weapon enhancements. CP 8-9. On direct appeal this Court summarized the facts of the case as follows:

> Giir was born in and spent his early years in Sudan. When he was eight years old, civil war broke out. Giir suffered significant violence, abuse, and extraordinary hardship for several years in Sudan and then in a refugee camp in Kenya. Roda Bec also fled Sudan as a child and met Giir at the Kenyan refugee camp, where they spent several years before immigrating to the United States in 2001. Giir and Bec dated for several years, but their relationship deteriorated in the months preceding the assault. Bec wanted to end the relationship, and Giir objected. In February 2005, Giir went uninvited to Bec's dormitory room, where they argued and he threatened to kill her. Bec's roommate reported the incident to police, but Bec told police Giir had apologized and she declined to pursue a complaint. On May 27, 2005, Bec was visiting her friend Veronica Abbas. Giir called and asked Bec to meet him to discuss their relationship. When Bec refused, Giir threatened to kill her and one of her brothers. Abbas told Giir he could come to the apartment the next morning if he did not come alone. The next morning, Giir went to a hardware store, where he bought two knives, and then returned to his apartment, where he wrote a letter explaining that he intended to kill Bec because she had mistreated him. Giir later told police that he wrote the letter and left it for someone to find because he intended to commit suicide after he killed Bec. Giir went to Bec's apartment. After they argued for a while, Giir pulled out a knife and stabbed Bec in the back while she was sitting on a couch, and he stabbed her multiple times as she tried to crawl away. Abbas saw the attack and tried to stop Giir, but could not do so. Abbas suffered a severe cut to her hand. She fled to a neighbor's apartment and called for help. Not long after, police received a report that a man later identified as Giir had jumped from an overpass onto a highway in an apparent suicide attempt. Giir survived the injuries he sustained.

State v. Giir, 153 Wn. App. 1015 (2009) (table); CP 38-39.

Giir plead guilty to amended charges of murder in the first degree and assault in the third degree with no deadly weapon enhancements. CP 10-11, 23, 41. Giir requested an exceptional sentence below the presumptive range based on a failed mental defense. 9/19/12 RP 3, 16. The sentencing court rejected that request and imposed a standard range sentence of 300 months of confinement. CP 23-27. The court imposed the mandatory community custody and a crime-related condition of community custody, that Giir "obtain a mental health evaluation and follow all treatment recommendation [sic]." CP 27, 30.

Giir appealed. One of his claims was that the trial court improperly imposed mental health conditions of community custody because it did not make findings required by former RCW 9.94A.505(9)(2004), recodified as RCW 9.94B.080 (Laws of 2008, ch. 231, § 53). Giir, 153 Wn. App. 1015; CP 37-50. This Court agreed and remanded "for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9)." CP 50.

On remand, on April 23, 2010, the trial court made the findings required by former RCW 9.94A.505(9), "based on

defense's presentence report, presentation at sentencing and evaluations by Dr. Wheeler and Dr. Kriegler." CP 142.

Giir appealed, claiming that the court did not have statutory authority to impose mental health conditions of community custody because it did not have a presentence report from the Department of Corrections (DOC), which he asserted was required by former RCW 9.94A.505(9). State v. Giir, 160 Wn. App. 1026 (2011) (table); CP 54-61. This Court agreed and remanded, stating:

> Because the trial court did not order the statutorily-required presentence report prepared by the DOC and did not rely on such a report in ordering Giir to undergo mental status evaluation and treatment, we reverse this condition of community custody and remand.

CP 61. That opinion was filed on March 7, 2011, and became final May 23, 2011. CP 53.

On March 22, 2011, the trial judge signed an order to DOC to complete a presentence report pursuant to RCW 9.94A.500(1), based on the court's finding that Giir is a mentally ill person as defined in RCW 71.24.025. CP 71-95. The order was presented by the prosecutor and signed "approved as to form" by defense counsel. CP 71-72. The reports of the mental health experts relied upon by the parties were included in that order for a presentence report. CP 71-95.

A copy of a DOC pre-sentence investigation report was filed on August 18, 2011.[1] CP 97-104. On August 19, 2011, the Court filed a new Appendix F (Additional Conditions of Sentence) to the Judgment and Sentence. CP 105-06. That Appendix F apparently was prepared by DOC as part of its report[2] and apparently was signed and filed without notice to the parties. CP 106; 9/19/12RP 5. It included a requirement that the defendant "undergo outpatient treatment as prescribed by the Court or Office of Community Corrections as follows:" but did not specify the outpatient treatment. CP 106.

Defendant Giir did receive a copy of the Appendix F filed on August 19, 2011; he filed a document including a notice of appeal from it April 17, 2012. CP 107-38 (notice of appeal at CP 110; App. F at CP 128-29). Giir included in that document a copy of the DOC pre-sentence investigation report. CP 130-37.

On September 19, 2012, defendant Giir appeared in the trial court, represented by counsel (trial and appellate). 9/19/12 RP 1,

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[1] This copy of the report has a stamp indicating that it was received by the trial judge on August 8, 2011. CP 98.

[2] The Appendix F footer indicates that it is a DOC form and underneath the signature line, it provides "TYPIST/ CCO/ 09-130.rtf". CP 106 CCO is the standard abbreviation for a DOC community corrections officer. See RCW 9.94A.704 (offender supervised by community corrections officer); State v. Sanchez, 146 Wn.2d 339, 342, 46 P.3d 774 (2002) (abbreviation used). The prosecutor in this case later observed that this Appendix F was submitted as part of the DOC report. 9/19/12RP 5.

3. Giir's appellate counsel asserted that the court had improperly modified the Judgment and Sentence in the case without Giir's presence. Id. at 5, 14-15. The State agreed and asked the court to strike the Appendix F filed on August 19, 2011. Id. at 5. The court did so. CP 62. The appeal filed in April 2012 (No. 68893-6-I) was dismissed as moot on September 28, 2012, after this Court permitted entry of the order of September 19, 2012. CP 143-44.

During this September 2012 hearing, the court took telephonic testimony from the author of the DOC report, who stated that mental health assessment and treatment would be recommended by the DOC for Giir while he is on community custody.[3] 9/19/12RP 12-13. The court ordered that, as a condition of community custody, Giir "must obtain a mental health evaluation and follow any treatment recommendations." CP 62. The court stated that its conclusion was based on the DOC presentence report and testimony, the presentence reports of both parties, and the evaluations of Giir by Dr. Wheeler and Dr. Kriegler, the mental health experts relied upon by the parties. CP 62; CP 73-93 (report

[3] That conclusion also appears to be reflected in the DOC's draft Appendix F, which requires the defendant to comply with outpatient treatment, although it does not specify that treatment. CP 106.

of Dr. J. Robert Wheeler, Ph.D.); CP 94-95 (report of Dr. Julie A. Kriegler, Ph.D.).

Giir now appeals from the order of September 19, 2012.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY RELIED ON THE DOC PRESENTENCE REPORT, AND PROPERLY IMPOSED MENTAL HEALTH CONDITIONS OF COMMUNITY CUSTODY.

In this appeal, Giir's only challenge to the mental health evaluation and treatment conditions imposed is that the report prepared by DOC cannot be considered a presentence report. That argument should be rejected. The trial court ordered a DOC presentence report and relied upon it in imposing the mental health conditions. The court complied with the statutory requirements for imposition of those conditions and Giir has not challenged the substance of the court's findings in support of the conditions.

This Court remanded the case to the trial court after reversing the mental health conditions imposed in 2010, concluding that former RCW 9.94A.505(9) required a DOC presentence report before a sentencing court could impose such conditions. CP 61. The trial court immediately ordered a DOC presentence report

pursuant to RCW 9.94A.500 – both parties were aware of that order. CP 71-72.

Giir argues that the trial court did not have authority to order the DOC presentence report because sentencing already had occurred. His claim that there can only be one sentencing hearing does not take into account the effect of an appeal of the sentence.[4] There must be a new sentencing hearing if the sentence imposed is reversed.

The Sentencing Reform Act (SRA) itself recognizes that there can be more than one sentencing hearing, providing: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.530(2) (emphasis added). The section of the SRA relating to aggravating circumstances that must be found by a jury also refers to the necessity for "a new sentencing hearing" and to cases in which a jury is impaneled solely for "resentencing." RCW 9.94A.537(2), (4).

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[4] State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989), upon which Giir relies, is inapposite because it involved modification of a sentence five months after it was imposed, when the defendant requested early release; it was not a resentencing on remand from an appeal of the sentence.

This Court, in its 2011 decision remanding this case, referred to the prior hearing on remand as a "resentencing hearing." CP 55.

There is no legal bar to resentencing after an appeal. State v. Pascal, 108 Wn.2d 125, 131-35, 736 P.2d 1065 (1987). The hearing on remand is a "resentencing hearing" even if the issues being addressed are limited. The Supreme Court has referred to a hearing on remand that addresses only the conditions of community custody as a "sentencing hearing." State v. Rodriguez Ramos, 171 Wn.2d 46, 47, 246 P.3d 811 (2011) (holding the defendant had the right to appear at that sentencing hearing). See also State v. Parmelee, 172 Wn. App. 899, 904-05, 907, 292 P.3d 799 (2013) ("resentencing" addressed exceptional sentence but not offender score). A trial court exercises its discretion in resentencing even if it does not address all issues presented at an original sentencing. Rodriguez Ramos, 171 Wn.2d at 48-49; Parmelee, 172 Wn. App. at 907-08.

The 2011 DOC presentence report was timely ordered pursuant to RCW 9.94A.500 as to the issue of the propriety of mental health conditions, the issue that was before the court on remand. The report was provided to defendant Giir some time before April 2012, satisfying the requirement of CrR 7.1 that it be

provided at least 10 days before the September 2012 hearing.[5] Giir had the opportunity to object to the contents of the report although he did not do so.

Giir also contends that the DOC report could not be a presentence report because this Court did not remand for resentencing. A trial court's authority on remand is limited by the order of the appellate court that remands. State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), affirmed, 163 Wn.2d 664, 676, 185 P.3d 1151 (2008). This Court did not limit the authority of the trial court on remand, however. It reversed the mental health conditions and remanded. CP 61. It did not order the trial court simply to strike the mental health conditions. So, the State's request for mental health conditions was again before the trial court. The trial court understood that the remand directed that the trial court comply with the statutory procedure by ordering a DOC presentence report and taking into account the DOC position on the issue before imposing mental health conditions. 9/19/12RP 6. That is exactly the course it took.

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[5] The only case cited by Giir as support for his argument that a DOC presentence report must be filed before the original sentencing hearing is a case that addresses the issue of whether a CCO who authors a DOC report can make a recommendation as to the sentence and, if so, whether the CCO must make a recommendation that is consistent with the State's plea agreement; the timing of the report was not an issue in the case. Sanchez, 146 Wn.2d at 353-54.

Giir is correct that his appeal from the September 2012 hearing and order is limited to the issues as to which the trial court exercised its discretion – the imposition of the mental health conditions of community custody. Parmelee, 172 Wn. App. at 908. That does not change the nature of the hearing – it is still a resentencing as to that issue and the defendant does have a right to appeal as to that issue. Id. at 909-18 (considering on appeal the exceptional sentence imposed at the "resentencing" hearing on remand).

The September 19, 2012, hearing was a sentencing hearing as to the request for mental health conditions. The defense had notice that a DOC presentence report had been ordered in 2011 and had a copy of the report more than five months before the September 2012 hearing. Giir believed it was a hearing at which community custody conditions were at issue and at which the trial judge would be exercising its discretion, as Giir contended that the his presence was necessary for the court's ruling. 9/19/2012RP at 5, 14-15. The hearing was held with Giir present, represented by counsel. The trial court correctly followed the statutory procedure necessary to impose mental health conditions. Giir does not

dispute that the evidence before the court supported the imposition of these conditions. The order should be affirmed.

D. CONCLUSION

For the foregoing reasons, Giir's claim should be rejected. The State respectfully asks this Court to affirm the mental health requirements imposed by the trial court as conditions of Giir's community custody.

DATED this 7TH day of October, 2013.

Respectfully submitted,

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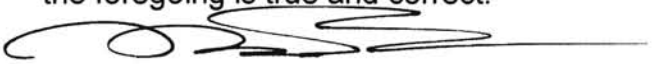
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KERO GIIR, Cause No. 69393-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

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Done in Seattle, Washington