RE: NO 69393-0-I

No. 90253-4

SUPREME COURT OF THE STATE OF WASHINGTON

KERO RINY GIIR,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

KERO RINY GIIR

DOC# 312493, Unit GA28L
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

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A. IDENTITY OF PETITIONER

KERO R. GIIR, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of appeals in case:

It stated: Accordingly, the trial court had the benefit of a DOC "presentence report" when it imposed the mental health evaluation of community custody. Appendix A - P 5.

a copy of that decision is attached to this motion as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

To justify review, a COA decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another COA, (b)(2), present a significant question of law under a constitution, (b)(3), or involve an issue of substantial public interest, (b)(4).

(1) The court improperly imposed mental health evaluation and treatment as a condition of community custody because the court did not base its decision on the statutorily required presentence report. Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345.

(2) The court's order violated the requirement of RCW 9.94A.505(9). The court acknowledged appendix B and D as a presentence report after Giir had been sentenced violates his eligibility for a defense of insanity.

(3) The legislatives want DOC to contribute to the determination of whether an offender should be subject to mental health evaluation and treatment as a condition of community custody before the court imposes such a condition. Its statement of legislative intent makes this point abundantly clear. Law of 1998, ch. 260 § 1.

D. STATEMENT OF THE CASE

This is Giir's fifth appeal from trial court requiring him to obtain a mental health evaluation and follow treatment recommendations. The orders were imposed as community custody conditions. The first two appeals reversed the conditions. Appendix G and H. The third appeal was settled when the parties agreed the trial court's third order was fatally flawed and could not withstand appellate review. But fourth appeal proceeded as affirmed by the court of appeal, filed on April 28, 2014. Appendix A. p 1.

On August 15, 2007, Giir pled guilty to first degree murder and third degree assault. Appendix F. p 1. Giir requested an exceptional sentence of 240 months,

below 250-month bottom of standard range. Gill's request was based on evaluations from two psychologists, Dr. Kriegler and Dr. Wheeler. Both experts discussed the trauma Gill had suffered as a child soldier in Sudan war; refugee camp in Kenya, Africa. Appendix F. p 3-6.

On November 9, 2007, the Court sentenced him to concurrent terms of 300 months and 8 months in prison. The Court also imposed 24-48 months of community custody. Appendix F. One condition required Gill to "obtained a mental health evaluation and follow all treatment recommendations." Appendix C.

At the time of Gill's 2005 offenses, the relevant statute provided:

> (9) 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 believed 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 9.94A.505(9)(2004), recodified as RCW 9.94B.080 (Laws of 2008, ch. 231, § 53.

On appeal, Giir challenged the condition. The court of appeal rejected the state's procedural arguments, and held the trial court erred in imposing the conditions. Appendix G. p 2. Because the court had not complied with RCW 9.94A.505(9)(2004), the court remanded "for the trial court to strike the conditions or making the findings required by RCW 9.94A.505(9)." (citing State v. Jones, 118 Wn. App. 199, 212, 76 P.3d 258 (2003)).

On remand, Giir moved to strike the condition. He asserted Inte alia, the finding could not be made because DOC had not completed a presentence report. By order date April 23, 2010, the trial court entered findings over defense objection:

> The court finds that the defendant is a mentally ill person as defined in RCW 71.24.025 and 71.05 & that this condition is likely to have influenced the underlying offense. The finding is based on defense's presentence report, presentation at sentencing, and evaluation by Dr. Wheeler and Dr. Kriegler. Appendix E.

Giir also challenged the trial court's denial a motion to withdraw his guilty plea. Giir argued he was denied effective assistance because his trial counsel had failed to investigate competency as a basis to withdraw the plea. The court rejected the claim. Appendix G. p 14.

Giir again appealed and challenged the condition on Appendix E. The court again rejected the State's procedural

argument, and again held the erred in entering the finding and ordering the condition. Appendix H - p 8. The statute states that "[o]n order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluation that have been filed with the court to determine competency or eligibility for a defense of insanity." Appendix H. p5. Because there was no DOC presentence report, the condition exceeded statutory authority. Appendix H - p 1.

> 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 Cuir to undergo mental status evaluation and treatment, we reversed this condition of community custody and remand. Appendix H · p 8.

This court decision was dated march 7, 2011. on march 22, 2011, before the mandate was issued, the state proposed and the trial court signed an order directing DOC to complete a pre-sentence report, "pursuant to RCW 9.94A.500(1). Appendix B and D. The mandate was issued may 13, 2011.

On August 18, 2010, the trial court sua sponte put a cover sheet on, and filed, what identified as "presentence investigation." Appendix B. presentence investigation was prepared by Jeri Boe, a community corrections supervision with DOC. Supp. Appendix B, pre-sentence investigation." Appendix B - p 4. Boe noted that Cuir had already been sentenced. The "investigation" state "[a]ll the personal information located in this report was compiled from documents the offender provided to DOC at the time of intake and information that Kevin Cuir provided during his psychological Evaluation on 10/8/06." Id., at

p 4. A similar statement preceded the "risk/needs assessment." Id., at p 5.

In the "Emotional/personal" section, the investigation" states:

> At the time of the psychological Evaluation Cliff was noted to be suicidal, although there was no indication of the presentence of any psychotic or dissociative symptoms. There is some mention that he may suffer from PTSD, but collateral reports do not mention this diagnosis.

Id., at p 6. The "conclusion" section said "has been found guilty of murdering his girlfriend is an anger rage and sentenced to a term of 300 months. Due to fact that Cliff has already been sentenced there will be no mention of sentencing option." Id., at p 7. The report made no sentencing recommendation, "as his crime." Id. For "conditions of supervision," the report states "see attached Appendix F - community supervision (DOC 09-130). Id. Appendix B. p 7.

It is unclear whether the "investigation" was provided to defense counsel. It identified Richard Warner as Cliff's counsel, but Warner had withdrawn in December 2007, and other counsel had appeared and withdrawn by notice filed in March and April, 2011.

On August 16, 2011, it appears that the trial court, sua sponte, signed Appendix D, which imposed additional conditions of sentence. That document was filed August 19, 2011. Supp. Appendix D. p 1. These were identified as "Crime related prohibitions" and "conditions of supervision[sic]. Two conditions required:

(9) During term of community supervision[sic],

, submit to physical and/or psychological testing whenever requested by community corrections officer, at your own expense, to assure compliance with judgment and sentence or department of corrections' requirement.

Supp. (Appendix D - p 2. additional corrections of sentence). It appears that these were the conditions that BOC had attached to the DOC "investigation" and the court adopted them verbatim. Id

Unlike the first remand hearing, nothing in the court file suggests the State or the court notified Crim of any "re hearing" before the court entered this third order. Crim was not transported from prison to King County Jail. There are no clerks minutes in the file, nor is there any indication the court or state provided Crim with notice it had imposed new conditions on his judgment and sentence. There is no suggestion in the file that the court heard from Crim or any attorney acting on his behalf.

In mailing postmark April 12, 2012, Crim sought to appeal the trial court's third imposition of sentencing condition.[3] This court opened case number 68893-6-I and appellate counsel was appointed. Crim filed a motion in the court asking for the notice of appeal to be considered timely filed, or to enlarge the time, because he was not presented for the trial court's new hearing and had not been timely notified of the trial court appendix B. The state did not respond to the motion.

The parties instead returned to the trial "court", in the interest of judicial economy. On September 19, 2012, the trial court held a hearing. This time Crim was present and

presented by trial court. Appellate Counsel also appeared.

At the hearing the State moved the Court to strike the new Appendix D. The State agreed that Gill had the right to be present when a court modifies conditions of his judgment and sentence. The State also asked the Court to enter new finding, based on DOC "investigation" and the previous psychologists evaluations.

When the prosecutor asked to present telephonic testimony from Boe, defense counsel objected to taking additional testimony. Judge Spector responded, "[W]ell, this case is on remand. Of course I can take testimony. That is the whole point is that so the record can be fleshed out." Judge Spector responded, "[i]t was dated August 8, 2011. It's now - it's a year past that date. How much more time do you need?" Counsel assented taking additional testimony also would violate timeless requirements, and the trial court said "disagreed."

Boe was sworn in as a witness. The prosecutor asked if mental health treatment was a condition the DOC would recommend. Defense Counsel raised several additional objections. Judge Spector noted that Gill's Counsel had been recently appointed, but the Court had previous heard from experts support the defense request for an exceptional sentence based on Appendix E and F.

> In explaining her ruling, Judge Spector said:
> But our appellate courts, in their infinite wisdom, decided there wasn't enough of a record for the court to order this condition. And when the court based it on that, but then decided that the statute required somehow a DOC presentence report, which was then

supplemented. and in your estimate it would not be timely, also. But that was supplemented in August of 2011.

Boe was testifying telephonically, and was in her car on the side of the road at the time of hearing. Boe confirmed that she had relied on Dr. Wheeler's report. She also recalled a second report but could not recall its author. Boe relied on the reports in concluding that DOC would recommend mental health treatment while Crim was on community custody. Appendix B. P6.

During Boe testimony, Judge Spector said the scope of the remand allowed DOC to fulfill its "statutory requirements that somehow were not satisfactory on appeal." She hope "the appeal court read all of this." She wanted to avoid another remand, saying "[t]he court of appeal has nothing ... better to do."

When given the chance, appellate counsel discussed the procedural posture of the case, any why the parties had agreed to vacate the erroneous Appendix D. For the record, counsel confirmed the frustration apparent in Judge Spector's demeanor, but also said the parties believed "the Court of Appeals does have better things to to do." The parties had agreed to vacate Appendix D because it made no sense to appeal conditions of sentence where the errors in their entry were obvious.

Jude Spector than said she would "make the finding." She had previous read and considered Dr. Wheeler's and Dr. Krieger's reports. She thought Crim's counsel's 2007 sentencing presentation had been compelling, as Crim had been one of the "The lost Boys" of Sudan and had suffered

greatly during his youth. appendix F. p 3. When she had previous entered the finding she had not done so "lightly" or "in a cavalier manner." appendix E.

The court noted that Boe had basically taken Wheeler's and Kriegler reports "and made a presentence report so that it would comply, at least on its face, with the statute so that this court can make a finding that he is mentally ill" and can order mental health treatment as a condition of community custody. appendix B. The court believed it would be remiss "not to order some type of mental health treatment."

> And so my issue with the court of appeals is now they have their form, now the have their DOC report; and all [Boe has] done is taken all the reports and put it into their form, which I incorperate by reference, as a good little trial Judge, so that I comply with the statute; that they seem to think there was nothing before the court.

Judge Spector was referring to appendix B. The court condemned what it called "formalistic" and that "we have lost the whole point why we do these things." "[It] seems formalistic at best when we turn the statute on its head that I need the form so that the court [of] appeals know that the form has been complied with statutorily [.]" appendix B.

The court then signed the order vacating appendix D. The order also required to "obtain a mental health evaluation and follow any treatment recommendations as a condition of the DOC "report" Kriegler's and Wheeler's evaluations, and presentence report initially submitted by both counsel. appendix F.

The Court found that Giir was a mentally ill person as defined in RCW 71.24.025 and that the condition is likely to have influenced the underlying offense. Appendix E.

After the september 19th order was entered, the parties agreed to dismiss as moot the third appeal in no. 68893-6-I, and this Court's ruling dated september 27, 2012. Giir then filed a notice of appeal from the new order. Appendix B.

On the fourth appeal, Giir challenged that portion of the order entered September 19, 2012, that imposes a community custody requiring a mental health evaluation and treatment. Appendix H. p1.

The Court maintained and said:

on this, his fourth appeal, Giir contents that the trial Court erred by imposing a community custody that directed mental health evaluation and treatment. This is so, he assented, because a sentencing report prepared by DOC, the department of corrections after his second appeal doesn't qualify as a presentence report. In this statement of additional grounds, Giir also asks this to remand for reconsideration of his request for an exceptional sentence downward. We rejected both condition and affirm. Appendix A. p1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

1. Although the court ordered DOC to "complete a presentence report and provided it to the court pursuant to RCW 9.94A.500(1)," the opportunity for a presentence report had long since passed. The court should acknowledge Gill eligibility for a defense of insanity called diminished capacity with the respect to presentence report had the court held it true based on the appendices: A, B, C, D and F.

(a) Boe's report is not a "presentence report."

The Law governing Gill's sentence is the law in effect when Gill's offense occured May 28, 2005. RCW 9.94A.345.

A trial court's authority to imposed sentence is limited by the authority in the SRA at time of the offense. State v. Barnett, 139 Wn.2d 462, 464.

987 P.2d 626 (1999). This court reviews de novo whether a trial court exceeds its statutory authority in imposing community custody condition. State v. Murry, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

The controlling case law and statute are fully set forth in this court's opinion, and Ciiir incorporates them here. State v. Ciiir, noted at 160 Wn. App. 1026, 2011 WL 768839, *2-4 (No. 65302-4-I, March 07, 2011).

The court held the trial court erred in imposing a mental health evaluation and treatment "without the benefit of a presentence report prepared by the DOC." The rejected the State's harmless error argument for several reasons. One reason quoted Former RCW 9.94A.500(1), which provided "The court shall order the department to complete a presentence report before imposing a sentence." Another quoted Former RCW 9.94A.505(9), which states "[A]n order requiring mental status evaluation or treatment must based on a presentence report." In its conclusion, this court stated, "[B]ecause the trial court did not order the statutorily-required presentence report by the DOC and did not rely on such a report in ordering Ciiir to undergo mental status evaluation and treatment, we reversed this condition of community custody and remand." Sup. appendix H. P 2.

On the remand, the trial court apparently believed the cure for these errors was to DOC to produce what the court filed as a "pre-sentence investigation." But this did not for resentencing, and the report was prepared more than three years after sentencing. DOC's report is not a "presentence report" as envisioned by statute, rule, or case law.

Questions of statutory interpretation are also reviewed de novo. State v. T.P., 149 Wn. 2d 444, 449, 69 P.3d 318 (2003).

The goal is to carry out legislative intent. State v. Mendoza, 165 Wn. 2d 913, 921, 205 P.3d 113 (2009). Former RCW 9.94A.505(9)[2] provides:

> The court may order an offender whose sentence include 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 believed that the offender is mental ill person as defined in RCW 71.24.025, and that this condition is likely to have influence the offense. An order requiring mental status evaluation or treatment must be based on presentence report, and if applicable, mental evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity.

This basically referred to Appendix E The court did not acknowledge during sentencing. A menifest injustice started in this when the trial court denied Cuir is "pre-sentence statement of the defense counsel." Appendix F. On this Appendix the trial court denied "factual basis for defense recommendation," and declared "failed mental defense." The court found Cuir guilty of premediation murder in 1st degree and assault in 3rd degree. Then at the same time, the court turned around to recommend a mental health evaluation and treatment recommendations. Appendix G.

In re pers. restraint of Isadore, 151, Wn-2d 294, 298 88 P.3d 390 (2004). The conviction of an accused while legally incompetent violates the constitutional right to a fair trial under the due process clause of the fourth Amendment. Pate v.

Robinson, 383, U.S 375, 378, 385, S.ct 836, 15L-Ed.2d 815 (1966).

Ciir is mental problems included chronic PTSD, were documented. PTSD is a potential ground for incompetency Bouchillon, 907 F-2d at 592-94. The court was awared of Ciir-is traumatic history as a child soldier ground up in war-torn Sudan; which a reason the Judge ordered Ciir to be put on treatment before evaluation and sentencing at community custody Jail.

The prosector submitted a presenteme memorandom in which she vigorously denied any mental disorder played a role in crime. sup. cp- (sub no-76, state sentencing memorandom on 11-9-07). According to the prosecutor, there wasn't "no evidence that Ciir was suffering from any mental disorder in the months weeks or days preceding the murder" and the defense has pointed to nothing that connects any mental disorder to the circumstance of the crime," Id. at sentencing the prosecutor continued to insist "This case doesn't have anything to do with defendant's mental disorder and with his history." The state below adamantly maintained Ciir mental problems did not influenced the crime and yet still requested a mental health evaluation and treatment as a condition of community custody. The prosecutor did not attempt to resolve herself-contradiction position before the trial court.

The trial court for its part, rejected defense's counsel request for an exceptional sentence down based on a "failed mental defense," but when asked by the prosecutor about her unexplained request for a mental health evaluation and treatment, the court merely "yes." On the remand, the trial

court having the same lacke of statutorily-required findings by acknowledged a "failed mental defense." appendix F.

The court failure to acknowledge mental defense of insanity during sentencing reflected injustice; cruel punishment. an ignorance of something excistence, and statutorily defined can be viewed as a prejudice. The trial court disclaims there was anything contradictory about rejecting the exceptional sentence request based diminished capacity while finding a mental illness likely influenced the offense, but critizes the defense for deigning to argue the reverse. appendix E.

"When a sentence has been imposed for which there is no authority in Law, the trial court has the power and duty to correct the erroneous sentence, when error is discovered." State v. pringle, 83 Wn.2d 188, 193, 517 P.2d 192 (1973) (quoting in McNutt v. Delmove, 47 Wn.2d 563, 563, 565, 288 P.2d 848, 850 (1955).

Dr. Kriegler stated to the court after her evaluation that, "Gill was incapable of forming the necessary mental state of premeditation due to diminished capacity as a result of "chronic neuropsychiatric disturbances." But the trial court ignored this basic facts of Gill's eligibility for a defense of insanity; Charged Gill with premeditate murder and assault three.

The defense made it clear from the beginning that, "Kevo Gill suffers from PTSD acute enough that it demands that the King county Jail Health services medicate him. He is recieving medications for sleep disorder, his flushbacks and nightmares in the King county Jail. please look at the

"Kite" or request he made to the jail sergeant, a person he "see" as his commander, requesting an AK-47 to defend himself against Arabs, Arabs we know are in his nightmares but in his mind are real. He was clearly traumatize by his experiences growing up." Appendix F. P 5.

With all these facts, the trial court only benefit by not following the procedural - required the imposition of presentence report. Because there was resentencing in 2012, and BOE's report can not travel back in time to be the statutorily required "presentence report."

The only way this continuing error should be Corrected is, when the trial court acknowledge Cuir's eligibility for a defense of insanity; resentence him based on diminished capacity the defense had already introduced to the court. This will assure the fairness of justice, and also the interest of the laws which were in effect during Cuir's offense in 2005.

F. **CONCLUSION**

The review should be accepted because the legislatives want DOC to contribute to the determination of whether an offender should be subject to mental health evaluation and treatment as a condition of community custody before the court imposes such a conditions. The trial court's order violates Grir's right to an eligibility for a defense of insanity.

Respectfully submitted this 14 day of MAY, 2014.

KERO RINY GRIR

Print name:

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Stafford Creek Correction Center, Unit: GA28L
191 Constantine Way
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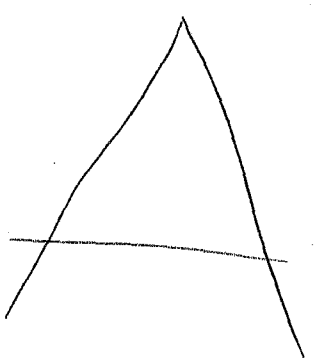
APPENDIX



APPENDIX A client copy

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 69393-0-I
State of Washington, Respondent v. Kero Riiny Giir, Appellant
King County, Cause No. 05-1-07847-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable Julie A. Spector
Kero Riiny Giir

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KERO RIINY GIIR, Appellant.	DIVISION ONE No. 69393-0-I UNPUBLISHED OPINION FILED: April 28, 2014

DWYER, J. — Kero Giir pleaded guilty to murder in the first degree and assault in the third degree. On this, his fourth appeal, Giir contends that the trial court erred by imposing a community custody condition that directed mental health evaluation and treatment. This is so, he asserts, because a sentencing report prepared by the Department of Corrections (DOC) after his second appeal does not qualify as a presentence report. In his statement of additional grounds, Giir also asks this court to remand for reconsideration of his request for an exceptional sentence downward. We reject both contentions and affirm.

I

In 2007, Giir pleaded guilty to murder in the first degree and assault in the third degree, after stabbing his girl friend to death and cutting a bystander who attempted to stop him. At Giir's initial sentencing hearing, Giir requested an

APPENDIX A

exceptional sentence below the standard range. The trial court denied Giir's request and imposed a standard range sentence.

The trial court sentenced Giir to 300 months in custody for the murder conviction and 8 months in custody for the assault conviction, to be served concurrently. The trial court also imposed 24 to 48 months of community custody and, as a condition thereof, ordered Giir to obtain a mental health evaluation and follow treatment recommendations. Giir appealed. In an unpublished opinion, we held that the trial court had erred by not making findings as to whether Giir was a mentally ill person and that his condition likely influenced his offenses, as required by statute. State v. Giir, noted at 153 Wn. App. 1015, 2009 WL 4024840, at *1 (2009) (Giir I). We remanded for further proceedings related to the imposition of the community custody condition. Giir I, 2009 WL 4024840, at *5.

On April 23, 2010, the trial court entered a sentence modification, again imposing mental health evaluation and treatment as a condition of community custody. Giir appealed. We again held that the trial court had erred by imposing the condition, this time because DOC had not prepared a statutorily-required presentence report. State v. Giir, noted at 160 Wn. App. 1026, 2011 WL 768839, at *2 (2011) (Giir II). We reversed the condition and remanded. Giir II, 2011 WL 768839, at *4.

Upon remand, the trial court ordered DOC to prepare a presentence report. The trial court's order was entered on March 22, 2011. DOC submitted its presentence investigation report on July 28, 2011. On August 16, 2011, the

trial court issued Appendix F, entitled "Additional Conditions of Sentence." Because the trial court had not held a sentencing hearing before issuing the conditions, Giir appealed for the third time. This appeal was dismissed as moot after the trial court struck Appendix F.

On September 19, 2012, the trial court held its final sentencing hearing. The DOC employee who had prepared the presentence report testified at this hearing. At the conclusion of the hearing, the trial court stated, "I would be remiss as a trial judge not to order some type of mental health treatment which this man so desperately needs." The trial court once again imposed mental health evaluation and treatment as a term of community custody. In its order, filed on September 19, 2012, the trial court held,

> This condition of sentence is based on the Department of Corrections report, the evaluations conducted by Dr. Wheeler and Dr. Kriegler, as well as the presentence reports submitted by both counsel. The Court additionally orders this condition because it finds, based on the same, that the defendant is a mentally ill person as defined in RCW 71.24.025 and that this condition is likely to have influenced the underlying offense.

Giir once again appeals.

II

Giir contends that the trial court erred by ordering a mental health condition of community custody, because the trial court did not have the benefit of a DOC presentence report when it imposed the condition. This is so, he asserts, because the presentence report must be written before any sentencing hearing occurs, which in this case was 2007. Giir argues, in the alternative, that

the 2012 hearing was not a "resentencing" hearing. Giir's contentions are not well taken.

Where a trial court determines that mental health evaluation and treatment may be a desired condition of community custody, the trial court must order DOC to complete a presentence report before imposing such a condition. Former RCW 9.94A.500(1) (2006). If a trial court imposes mental health conditions without considering a DOC presentence report, it errs. State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007).

Giir contends that the trial court did not have the benefit of a DOC presentence report when it imposed a mental health condition in 2012 because only a report filed before the 2007 hearing would qualify as a "presentence report." Giir's assertion simply has no basis in law. A final sentence can be rendered in more than one sentencing hearing. State v. Kilgore, 167 Wn.2d 28, 37, 216 P.3d 393 (2009) ("'[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more counts." (quoting In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980))); accord State v. Rowland, 160 Wn. App. 316, 331, 249 P.3d 635 (2011) aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012) ("Unlike the exceptional sentence (which we authorized the resentencing court to leave intact in Rowland II), Rowland's standard range sentence was not final."). Any event that occurs prior to the relevant final sentencing decision is a "prior" event with respect to that decision. Cf. State v. Collicott, 118 Wn.2d 649, 664-65, 827 P.2d 263 (1992) (holding that a conviction entered before the date of

resentencing, although entered after the date of the initial sentencing, was a "prior conviction" for purposes of calculating an offender score). Thus, a report prepared before the hearing at which the relevant, final sentencing decision is made qualifies as a "presentence report."

When we reversed and remanded Giir's condition of community custody, that portion of Giir's sentence was not yet final. The sentencing hearing at which the relevant, final condition of community custody was entered occurred on September 19, 2012. Any report submitted before that date that related to the not-yet-imposed condition thus qualified as a "presentence report." DOC submitted its report on July 28, 2011. Accordingly, the trial court had the benefit of a DOC "presentence report" when it imposed the mental health condition of community custody.

Giir's alternative contention, that the 2012 hearing was not a "resentencing," also lacks merit. Giir correctly asserts that "[t]he trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate." Kilgore, 167 Wn.2d at 42. However, when an appeals court gives an "open ended" mandate on remand, the trial court may exercise its discretion to consider resentencing. Kilgore, 167 Wn.2d at 42.

In reversing the mental health condition of Giir's community custody on his second appeal, we stated, "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." Giir II, 2011 WL

768839, at *4. We did not provide specific instructions to the trial court. Without specific instructions, the trial court had the discretion to consider resentencing Giir with respect to that condition. When the trial court herein exercised its discretion, its reconsideration of Giir's condition of community custody was necessarily a "resentencing."

The trial court did not err by imposing a mental health condition on Giir's community custody.

III

In his statement of additional grounds, Giir asks us to remand his sentence in order for the trial court to reconsider his request for an exceptional sentence below the standard range. A party who seeks review of the trial court's decision has the burden to provide a record adequate to establish the errors claimed. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). An "insufficient record on appeal precludes review of the alleged errors." Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Absent an affirmative showing of error, the trial court's judgment is presumed to be correct. Wade, 138 Wn.2d at 464.

Giir has not provided any record pertaining to the trial court's decision to impose a standard range sentence. With no record from which to review Giir's claim of error, we must presume that the trial court did not err by imposing a standard range sentence. We therefore affirm Giir's standard range sentence.

Affirmed.

We concur:

APPENDIX

B

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APPENDIX B

FILED
KING COUNTY, WASHINGTON
AUG 18 2011
SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON
Plaintiff/Petitioner,
vs.
KERO GIIR
Defendant/Respondent.

NO. 05-1-07847-9

[✓] SEA
[ ] KNT

PRE-SENTENCE INVESTIGATION is attached.

http://rcpq7000/forms/ccforms/gr14coversheet.doc

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION

TO: The Honorable Judge Julie Spector
King County Superior Court

NAME: Kero Giir

ALIAS(ES):

CRIME(S): Murder in the First Degree, DV
Assault Third Degree

DATE OF OFFENSE: 5/28/05

CHOOSE ONE ADDRESS:

DATE OF REPORT: 7/20/11

DOC NUMBER: 312493

COUNTY: King County

CAUSE #: 05-1-07847-9 SEA

SENTENCING DATE: 11/9/07

DEFENSE ATTORNEY: Richard Warner

I. OFFICIAL VERSION OF OFFENSE:

Kero Giir and victim, Ms. Roda Bec had been dating for approximately 4 years. Both came to the United States in 2001 from Sudan in Africa. Between 2002 and 2003 Ms. Bec twice became pregnant with Giir's children and each time underwent an abortion, terminating the pregnancies.

Their relationship started to deteriorate as Giir believed that Ms. Bec was involved with and dating another man.

On the afternoon of Friday, May 27, 2005, Bec returned to Seattle from Bellingham where she was attending school. She went to the apartment of her friend, victim, Ms. Abbas, intending to spend the weekend with her.

That night Giir called Ms. Bec and asked that she meet with him at her brother's apartment so they could talk about their relationship. Ms. Bec refused and that angered Giir. He threatened to kill her and one of her brothers if she did not meet with him. Ms. Bec told Giir that he could come over to Abba's apartment the next morning, but only if he came with his brother and not alone.

On the morning of May 28th, 2005 at approximately 0925 hours, Giir went to the "Tru-Value" hardware store located three blocks from his apartment. He purchased a set of

two Chicago Cutlery brand steak knives, one with a 5 inch blade and the other a 3 inch blade. Giir returned to his apartment and wrote a one page letter in which he documented his intent to kill Ms. Bec and his reasons for doing so.

At approximately 1030 hours on Saturday morning Giir arrived at Abbas apartment. Abbas and Bec were present along with Abbas 18 month old child. Giir knocked on the front door and when Abbas opened it he entered without permission and immediately confronted Bec who was sitting on a couch in the living room. They argued for several minutes about their relationship when Ms. Bec told him she did not want to talk anymore.

Giir then stood up, pulled a knife out of his left pant pocket and stabbed her in the back as she was sitting on the couch. She fell to the floor, where Giir continued to stab her repeatedly as she attempted to get away from him by crawling towards the back patio.

Abbs tried to stop Giir by grabbing the hand in which he was holding the knife. She sustained several lacerations to her right hand in doing so. She then picked up her child, seeing Giir continuing to stab Bec and fled out the front door to a neighbor's apartment to call 911.

The neighbor, Mr. Olson, heard sounds of a fight coming from Abbas apartment, and let Abbas come inside where he saw she was covered with blood and was bleeding. He witnessed Giir jump from Abbas second story patio to the ground below where he saw him run toward the front parking lot.

Responding Deputies found Abbas in the Olson's apartment bleeding from her wounds. She told them that Beck was upstairs "dying". Deputies found Bec in Abbas apartment lying across the threshold of the patio door. Medical personnel pronounced her dead at the scene. Two Chicago cutlery knives were found at the apartment, one covered with blood, found on the ground under the patio where witnesses seen Giir jump and the other next to her body on the patio.

Eight minutes after receiving the 911 call, a report was received that a black male adult had jumped onto HWY 509 from 160th street overpass in an apparent suicide attempt. The physical description and clothing matched that of Kero Giir and the vehicle parked on the overpass was registered in his name. He was transported to Harborview Hospital where it was confirmed that he was Kero Giir.

On May 29 an autopsy of Bec was performed at the King County Medical Examiner's Office. This examination revealed that she sustained over 20 stab wounds, including 4 wounds to the chest that penetrated her heart, lungs, stomach and liver. All were fatal wounds. Numerous defensive wounds were found on her wrists and hands and left arm. Cause of death was determined to be at the result of homicidal violence.

On May 29th 2005 Giir was interviewed where he admitted he had been dating Bec since 2001 when they arrived in the US from Sudan. During the relationship Bec underwent two abortions that Giir did not agree with. He then found out Bec had begun to have a

relationship with another man who lived in Atlanta, Georgia and she told Giir that she loved this man and did not want to see Giir anymore.

Giir stated that he saw Bec riding in one of her brother's car on Friday afternoon, May 27 2005 and later made a call to her asking to meet with him to discuss their relationship. She refused but told him to meet at Abbas apartment the next morning. Giir admitted that during that conversation he threatened to kill Bec.

Giir reported that on Saturday morning he did go to Tru-Value hardware store near his apartment and purchased a set of steak knives because he knew that if Bec was rude or impolite to him he would kill her. After purchasing the knives he returned to his apartment and wrote a letter explaining why he intended to kill Bec and left it for someone to see because he intended to commit suicide afterwards.

Giir confessed that after he arrived at Abbas apartment he argued with Bec and when she said she didn't want to talk anymore, she was impolite to him so he took a knife from his pocket and stabbed her in the back. He confessed he continued to stab Bec as she crawled towards the rear patio and that when Abbas tried to stop him he accidently injured her. He confessed that he knew he had killed Bec so he fled the apartment and went to the overpass. He attempted to call his brother to tell him what had happened but he didn't answer. Giir then stated he jumped off the overpass to kill himself.

On May 29th, 2005 officers located a one page letter written by Giir. In this letter he stated that Bec was "taking advantages of me", "I am not killing her because she broke up with, I am killing her because she was impolite to me." "I always pray not to take someone life, but stupid people like Bec made me to", and "Bec is a prostitute and she took my life with her."

II. VICTIM CONCERNS:

III. DEFENDANT'S STATEMENT REGARDING OFFENSE:

This offender has already been sentenced and is currently serving a sentence of 300 months for this crime in a Washington State Correctional Facility. He instructed his prison counselor that he was unwilling to discuss this case with me. Therefore I am unable to provide a Defendant's Statement. All the personal information located in this report was compiled from documents the offender provided to DOC at the time of intake and information that Kero Giir provided during his Psychological Evaluation on 10/8/06.

IV. CRIMINAL HISTORY:

No other criminal history

SOURCES:
1. DISCIS
2. OBTS
3. NCIC/WACIC

JUVENILE HISTORY

No record

ADULT HISTORY

No record

V. SCORING:

	SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I	XV	I	From 250 to 333 Months
Count II	III	I	From 3 to 8 Months

VI. COMMUNITY CUSTODY (If applicable):

	SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I			24 Months
Count II			12 Months

VII. RISK / NEEDS ASSESSMENT:

A risk / needs assessment interview was completed with the offender. The following risk / needs area(s) and strengths have implications for potential risk, supervision, and interventions. Unless otherwise noted, the following information was provided by the offender and has not been verified. The information below is compiled from Giir's Psychological Evaluation dated 10/8/06 and from reports that Giir filled out during the intake process at the DOC facility.

Criminal History (Including RM Level Information): No previous documented criminal history.

Education / Employment: Giir reported during his intake process at Prison Reception Center that he completed the 12 grade and received his diploma while living in a Refugee Camp in Kenya. He reports that he attended Seattle Vocational institute in 2002 earning his Certified Nursing Assistant degree, Seattle Central Community College from 2002 to 2005, South Seattle Community College 2004-2005.

He lists Providence Elder Place as his last employer where he worked as a nurse from 2001 up to the time of his arrest. He also mentioned that he taught English as a Second Language at St James ESL Program.

Financial: Giir does not report any financial issues

Family / Marital: Kero Giir reports that he was born in Sudan. Ethnically he is a member of the Dinka tribe of southern Sudan. He is the youngest of seven siblings. He was raised in a village whose residents tended farm animals and cultivated crops. He believes when he was 9 the civil war began. Apparently his village was attacked, the villagers scattered and he has never seen his family members since then. He is unsure whether they are alive. After fleeing himself, he joined the rebel forces for his own survival. He traveled with the rebel forces crossing the desert and eventually arrived in Ethiopia where he received military training. He remained in Ethiopia at a refugee camp for several years. He attended school and received military training at this camp. In 1991 the camp was attacked and he was forced to fight and then flee to border of Sudan. He reports witnessing much suffering and death. He eventually found his way to a refugee camp of Kakuma and remained there from 1992 to 2001 when he immigrated to the US.

Accommodation: At the time of Giir's arrest he reports that he was living with his uncle Bol Arol on a temporary basis. Also living in the residence was Wol Giir, cousin, Bol Riimy, cousin, Adut Yiik, niece and Olivia Poe, friend.

Leisure / Recreation: Giir reports that in his spare time he reads, writes in his journals, and plays chess and other board games.

Companions: In reviewing reports there is no mention of what companions Giir may have had prior to his arrest.

Alcohol / Drug Use: Giir denies using any illicit drugs or alcohol. There is no evidence in any reports to provide any evidence of a drug or alcohol use.

Emotional / Personal: At the time of the Psychological Evaluation Giir was noted to be suicidal, although there was no indication of the presence of any psychotic or dissociative symptoms. There is some mention that he may suffer from PTSD, but collateral reports do not mention this diagnosis.

Attitude / Orientation: in reading recent documents submitted by Giir it appears that he has a fairly positive view of his current situation. He wrote, "To sum up this place, prison is the end of my worst things I failed during the war of Sudan and in America. On this earth, no one can live alone without other people; no one can help it if people don't know his/her situations and this is little bit of my information, what is my hope, next in life."

VIII. CONCLUSIONS:

At the time of this report Kero Giir is a 33 year old male, who had no prior criminal history. He immigrated to the United Sates at the age of 23 from a refugee camp in Kakuma Africa. He has been found guilty of murdering his girlfriend in an angry rage and sentenced to a term of 300 months. Due to the fact Giir has already been sentenced there will be no mention of sentencing options.

IX. SENTENCE OPTIONS:

- ☐ Confinement within the Standard Range Sentence
- ☐ Work Ethic Program
- ☐ Exceptional Sentence
- ☐ First-time Offender Waiver (FTOW)
- ☐ Drug Offender Sentencing Alternative (DOSA)
- ☐ Special Sex Offender Sentencing Alternative (SSOSA)
- ☐ Mentally Ill Offender Sentencing Option (MIOSO)
- ☐ Community Custody Board (CCB) RCW 9.94A.712

X. RECOMMENDATIONS:

No recommendations are noted as this offender has been sentenced to 300 months for this crime.

Sentence Type / Option:

Confinement: of months

OAA Cases:

Conditions of Supervision: (See attached Appendix F – Community Supervision (DOC 09-130))

The Department of Corrections imposes the conditions necessary to monitor this offender upon his release from prison.

X. MONETARY OBLIGATIONS:

Legal financial obligations to be determined at the time of sentencing at the discretion of the court.

Submitted By:

Jeri Boe — 7/28/11
Jeri Boe
Community Corrections Supervisor
Office of Community Corrections
228 West 1st Street, Suite R
Port Angeles, WA 98362
360-417-8577

Approved By:

Jeri Boe — 7/28/11
Jeri Boe
Community Corrections Supervisor

APPENDIX C

13975389

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 05-1-07847-9 SEA
vs.	)	JUDGMENT AND SENTENCE APPENDIX H
KERO RIINY GIIR Defendant,	)	COMMUNITY PLACEMENT OR COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location;
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
7) Notify community corrections officer of any change in address or employment; and
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

[ ] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: the family of Paola Bec and Veronica Abors, except through the attorneys

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit:

[X] The defendant shall participate in the following crime-related treatment or counseling services: obtain a mental health evaluation and follow thru treatment recommendations

[ ] The defendant shall comply with the following crime-related prohibitions:

[ ]

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 11/9/07

JUDGE JULIE SPECTOR

APPENDIX D

APPENDIX D

COPY TO COUNTY JAIL AUG 22 2011

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF King

STATE OF WASHINGTON Plaintiff v. Kero Giir Defendant DOC No. 312493	Cause No.: 05-1-07847-9 SEA JUDGEMENT AND SENTENCE (FELONY) APPENDIX F ADDITIONAL CONDITIONS OF SENTENCE

CRIME RELATED PROHIBITIONS:

C. CONDITIONS OF SUPERVISION:

1) You shall comply with the statutory requirements of community placement and other conditions as set forth in Judgment and Sentence.
2) You shall report as directed to the office of Community Corrections or the Court.
3) You shall notify the Superior Court Clerk and office of Community Corrections prior to any change of address or employment.
4) You shall pay monetary obligations as set forth in the Judgment and Sentence.
5) You shall remain within the prescribed geographical boundaries as follows: as directed by DOC
6) You shall not have direct or indirect contact with the following specified individuals: family of Roda Bec, and Veronica Abbes
7) You shall abstain from the possession or use of alcohol and remain out of places where alcohol is the chief item of sale.
8) You shall abstain from the possession or use of drugs and drug paraphernalia unless prescribed by a medical professional, and shall provide copies of all prescriptions to Community Corrections Officer within seventy-two (72) hours.

9) During term of community supervision, you shall submit to physical and/or psychological testing whenever requested by Community Corrections Officer, at your own expense, to assure compliance with Judgment and Sentence or Department of Corrections' requirements.

10) You shall undergo out-patient treatment as prescribed by the Court or Office of Community Corrections as follows:

11) Do not use or possess firearms.

12) Must consent to allow home visits by the Department to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access.

13) Refrain from further violations of the law.

14) You shall pay the cost of counseling to the victim that is required as a result of your crime or crimes.

15) Your residence and living arrangements shall be subject to the prior approval of the Department of Corrections.

AFFIRMATIVE CONDUCT REQUIREMENTS: (First Time Offender Waiver Only)

8/16/2011
DATE

JUDGE COUNTY SUPERIOR COURT

TYPIST/CCO/09-130.rtf
DATE

Kero Giir
312493
07/28/2011
Page 2 of 2

DOC 09-130 (F&P Rev. 4/2000) OCO

APPENDIX

E

13975389

APPENDIX E

FILED
KING COUNTY, WASHINGTON
APR 23 2010
SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON Plaintiff,

vs.

Kevo Gir
Defendant.

NO. 05-1-07847-9SEA

ORDER ON CRIMINAL MOTION

The above-entitled Court, having ~~heard a motion~~ Conducted a remand hearing re: condition of original judgment & sentence requiring the defendant to obtain a mental health evaluation and follow treatment recommendations

IT IS HEREBY ORDERED that
The court finds that the defendant is a mentally ill person as defined in RCW 71.24.025 and 71.05.153 that the condition is likely to have influenced the underlying offense. The finding is based on defense's presentence report, presentation at sentencing and evaluations by Dr. Wheelerand Dr. Kneglet

DATED: 4/23/10

JUDGE
JULIE SPECTOR

#09585
Deputy Prosecuting Attorney

Attorney for the Defendant

POSTED

Order on Criminal Motion (ORCM) 04/01

APPENDIX F

APPENDIX F

COPY RECEIVED
NOV 07 2007
CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

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ATTN: JESSICA BERLINER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff, v. KERO R. GIIR, Defendant	NO. 05-1-07847-9 SEA PRE-SENTENCE STATEMENT OF DEFENSE COUNSEL

Sentencing Judge: Hon. Julie A. Spector
Sentencing Date: November 9, 2007 at 1:45 p.m.

CHARGES

Mr. Kero Giir pled guilty to one count of Murder 1st degree and one count of Assault 3rd degree. Murder 1st degree is a Class A, Level XV, felony with a maximum sentence of life and/or a $50,000. fine and the Assault 3rd degree is a Class C, Level III felony with a maximum sentence of 5 years and/or a $10,000. fine. Mr. Giir has 1 point making his

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standard sentencing range for the Murder 1 count 250-333 months and on the Assault 3 count, 3-8 months in custody.

STATE'S RECOMMENDATIONS

The State is recommending the top of the standard sentencing ranges on each count to run concurrently for a total of 333 months in custody, with credit for time served, the mandatory $500 VPA, 24-48 months Community Custody, court costs, recoupment of defense counsel costs, $100 DNA collection fee, obtain a mental health evaluation and follow all treatment recommendations and have NCO with the family of Roda Bec or Veronica Abbas.

DEFENSE RECOMMENDATIONS

Defense Counsel is recommending that the Court sentence Mr. Giir to an exceptional sentence downwards pursuant to RCW 9.94A.55, to 15 years or 180 months, the mandatory $500 VPA, 24 months Community Custody, a NCO with either the Bec family or Veronica Abbas, obtain a mental health evaluation and following all treatment recommendations, and waiving all non-mandatory fees, fines, and interest. To impose an exceptional sentence the court must find substantial and compelling reasons justifying an exceptional sentence and must put its reasons for its decision in written findings of fact and conclusions of law. The court may consider mitigating circumstances insufficient to constitute a complete defense but which significantly affected his or her conduct and whether the defendant's capacity to conform his conduct to the requirements of the law was significantly impaired. The defense feels that there are sufficient facts and

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circumstances about the defendant's "failed mental defense" and life that warrant an exceptional sentence downwards.

FACTUAL BASIS FOR DEFENSE RECOMMENDATIONS

Mr. Giir is one of the "Lost Boys of Sudan." He arrived in Seattle in 2001 following a harrowing journey that began in 1987. He is Dinka, specifically a member of one of the seven Dinka sub-tribes, the Bahr al Ghazal in the Gogrial district. Kero was born in the village of Agouth in the Southern Sudan roughly in 1978. He was given the birth date of January 1, 1978 by the then INS based upon his physical appearance when he was being considered for receiving refugee status and admission to the U.S.

The war between the Arab northern portion of Sudan and the animistic/Christian southern Sudan has been going on since 1956 when the Sudan became an independent nation. The root causes of the war are not simple but it breaks down to a lighter-skinned Arab north [Muslims] fighting with the dark-skinned Christian over the South's oil and other natural resources. It is a Genocide with over 2 million people killed and upwards of 4 million displaced. Kero was one of those displaced when the northern army bombed his village in 1987. Kero was 9 years old tending his family's cattle when the planes attacked.

As the bombings grew ever closer and closer, Kero's mother told him that if he heard bombs to run, run away and not return to their village. The bombs fell and Kero ran deeper into the forest. When he came out of the forest, he discovered his village gone, bodies lying in burned out huts, and his family, his mother, brothers and sisters missing.

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Kero joined a group of children walking East towards Ethiopia. This exodus covered over 1000 miles parts of it over the Pibor desert. Where Kero's journey diverges from many of the other Lost Boys is after they fled Ethiopia where the government was overthrown by a military regime sympathetic with Khartoum. The Lost Boys left Pinyedo [Ethiopia] and fled back into Sudan being shot at by both sides. While some Lost Boys turned south and went to the Kakuma refugee camp in Kenya, Kero was captured by the rebel army, the SPLA or Sudanese Peoples' Liberation Army, given an AK-47 and trained to fight. The AK-47 became his "mother and father." He was 12.

Kero was in actual combat on the front lines. One of the boys he tended cattle with, Athin Majak, was severely burned over his whole body and it was Kero who held Athin's hand when he was crying in pain until someone took Athin to a hospital. Six to eight months later he saw Athin in Kakuma, alive but disfigured from his burns. The two of them hugged and cried with relief after finding each other still alive.

Many of the Lost Boys received some military training in Pinyedo, Ethiopia, and in Kapoeta [a town in SE Sudan] but only a handful, including Kero and Athin, were taken to the front line and saw actual combat. Kero described how he has seen the person sitting feet away from him across a campfire killed by a mortar round. Kero survived but lost part of his hearing in his right ear. Kero did not escape the war unharmed. He was shot in the leg. After he recovered, in a remarkable moment in a chaotic time, he became separated from his company behind enemy lines, when a northern tank commander saw him hiding and rather than killing him right there, asked him, "Why are you here? You're

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just a child. Run away." Kero did. He fled to the Lochienko staging area where he encountered some people with a non-governmental organization [NGO], the International Rescue Committee [IRC], who helped him get to Kenya and the Kakuma refugee camp where he would live for the next eight years.

The Dinka and Nuer tribes are both from the Southern Sudan. The Nuer tribe is the largest tribe in the South followed by the Dinka. Most of the Lost Boys are Dinka. Roda's mother is from the Nuer tribe; her father Dinka. Both the Nuer and Dinka tribal customs support restorative justice to preserve the harmony within the tribe. There is no formalized criminal code in the Sudan; the North relies upon Shari'a and the South upon a restorative justice system established over centuries. In the attachments to this memorandum are some of the laws and customs that apply in the Sudan. Obviously, they are not dispositive but the parties in this case before the court are in a type of conflict between the two cultures' dictates. In the Sudan, the parties would pay "*apuk*," the act of paying cattle or other property as damages (or compensation) by the accused and his relatives to the relatives of the person whom he has killed or injured. This concept is *"awec"* or appeasement, reparation, making good the wrong, with the objective of restoring good social relations. It does not minimize the loss it keeps the tribe intact. There is not a single Lost Boy or Girl who does not identify themselves as "Sudanese" first, and as an American, second. It is my understanding that within the last week the families of Kero and Roda remaining in the Sudan have reached such a settlement.

The family is an intricate part of the Dinka way of life with the elders teaching the

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children. They believe that family is everything; without it, they are nothing. This is why the loss of his mother so affects Kero. In a tribe the focus on children is because they are the link between the past and the future. In the case of a daughter, a child may provide a bride wealth, often measured in the number of cows given to her parents by the groom's family and with sons it provides continuity of the patriarchal lineage. It is the children who will remember us. That is why Roda's two abortions [one was his child] so affected Kero. There isn't a present link to his identity as a Dinka tribal member.

Kero Giir suffers from PTSD acute enough that it demands that the King County Jail Health Services medicate him. He is receiving medications for his sleep disorder, his flashbacks and nightmares in the King County Jail. Please look at the "kite" or request he made to the Jail Sergeant, a person he "sees" as *his* commander, requesting an AK-47 to defend himself against the Arabs, Arabs we know are in his nightmares but in his mind are real. He was clearly traumatized by his experiences growing up. Trauma in childhood creates a lack of self-cohesiveness, e.g., multiple personality disordered individuals. Kero's world as he knew it was coming apart. With a dissociate state there is a coming apart of our usually cohesive selves; there is no self integration. There is no here and now. He was getting abandoned again, this time by Roda. The fear of abandonment is one of the deepest we have. He lost his family, his country, and was now in fear of losing his identity as a Dinka.

CONCLUSION

For the foregoing reasons, Defense Counsel requests the Court sentence Mr. Giir to an

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exceptional sentence of 180 months, the mandatory $500 VPA, 24 months Community Custody, NCO with the Bec family and Veronica Abbas, and obtaining a mental health evaluation and following all treatment recommendations, and waiving all non-mandatory fees, costs, interest and surcharges.

Respectfully submitted,

Richard Warner, WSBA #21399
Attorney for Kero Riiny Giir

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APPENDIX G

APPENDIX G

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
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November 23, 2009

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King Co Pros/App Unit Supervisor
W554 King County Courthouse
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Donna Lynn Wise
Attorney at Law
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Casey Grannis
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Kero Riiny Giir
DOC #312493
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Nielsen Broman Koch PLLC
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Seattle, WA. 98122

CASE #: 62419-9-I
State of Washington, Respondent v. Kero Riiny Giir, Appellant
King County, Cause No. 05-1-07847-9 SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the denial of Giir's motion to withdraw his guility plea. We reverse the conditions of community custody and remand for further proceedings."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish must be filed within 20 days of the date of this letter.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable Julie Spector
The Honorable Nicole MacInnes
Kero Riiny Giir

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

STATE OF WASHINGTON,	)	NO. 62419-9-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
KERO RIINY GIIR,	)	
	)	
Appellant.	)	FILED: November 23, 2009

BECKER, J. -- Kero Giir appeals the trial court order denying his motion to withdraw his guilty plea, arguing that his counsel was ineffective in failing to investigate Giir's competency to enter the plea. We conclude that Giir has not shown counsel's representation was deficient. Giir also contends that the trial court erred in imposing mental health treatment as a condition of community custody. Because the trial court failed to make the findings required by RCW 9.94A.505(9), we reverse and remand for further proceedings.

In 2005 Giir was charged with murder in the first degree with a deadly weapon for the May 28, 2005 stabbing death of Roda Bec and with assault in

the second degree with a deadly weapon for cutting the hand of Veronica Abbas, who tried to stop Giir's attack on Bec.

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.

Two experts evaluated Giir's mental state at the time of the offense, defense expert psychologist Dr. Julie Kriegler and State expert psychologist Dr. Robert Wheeler. Both psychologists noted the extensive and intensive trauma Giir suffered during childhood. Dr. Kriegler opined that Giir suffers from "extensive dissociative phenomena as well as indicators of [a] mood disorder with psychotic features," "accompanying paranoia," and "visual and auditory hallucinations of . . . 'enemies' that he responds to as a real and present danger." Dr. Kriegler further opined that Giir "also experiences cognitive dysfunction in the form of a lost ability to think, reason, concentrate, or remember." Dr. Kriegler concluded that based on these "chronic neuropsychiatric disturbances," at the time of the homicide Giir was not capable

of forming the necessary mental state of premeditation due to his diminished capacity.[1]

Dr. Wheeler diagnosed Giir with chronic Post Traumatic Stress Disorder (PTSD) and a chronic depressive disorder. The depressive disorder included symptoms of sadness, suicidal ideation, reduced energy, disturbed sleep, and feelings of hopelessness. PTSD symptoms included recurrent and intrusive recollection of events, distressing dreams, psychological distress to cues symbolizing traumatic events, and feelings of detachment and estrangement from others.[2] Dr. Wheeler concluded that there was no indication that at the time of the offense Giir was suffering from a mental disorder that would constitute insanity or a mental disorder or defect that impaired or diminished his capacity to intend or plan his actions, reason, or understand the consequences of his actions.

Regarding Giir's current mental status, Dr. Wheeler reported that there was some evidence Giir's symptoms had improved during the 18 months since the crime. Dr. Wheeler opined that Giir showed no signs of delusions or hallucinations, and Giir did not appear to be experiencing any mental disorder

[1] Clerk's Papers at 42.
[2] Clerk's Papers at 63.

that affected his capacity to rationally and coherently discuss his thinking and behavior.[3]

After extensive investigation and plea negotiations, in August 2007, Giir pleaded guilty to murder in the first degree and assault in the third degree, with no deadly weapon enhancements.

On November 9, 2007, Giir appeared for sentencing. The standard range for the murder conviction was 250 to 333 months. The State recommended 333 months, and defense counsel asked for an exceptional sentence of 240 months. The court imposed concurrent sentences of 300 months and 8 months. The court also imposed 24 to 48 months of community custody and as a condition ordered Giir to obtain a mental health evaluation and follow treatment recommendations.

On March 10, 2008, with the assistance of a new attorney, Giir moved to withdraw his guilty plea as not knowing, intelligent and voluntary on two grounds: his plea was based on misinformation or inconsistent information regarding the sentence the court could impose; and his guilty plea was the product of coercion. Giir also asserted that he was unable to fully understand the proceedings due to a language barrier. Giir provided a declaration in

[3] Clerk's Papers at 62.

support of his motion and testified at the hearing. His former counsel also testified.

Regarding the alleged sentencing misinformation, the court found that Giir's English language skills were adequate to understand the proceedings and noted that Giir had consistently declined the assistance of an interpreter. The court also found that trial counsel's version of his conversations with Giir about sentencing was more credible than Giir's version. Regarding Giir's claim that his plea was coerced based on his mental health and feelings of his will being overborne by counsel, the court found: Giir's self-serving affidavit failed to establish coercion, and there was no credible evidence Giir was coerced; while it was uncontroverted Giir suffered significant abuse and harm that may have led to his actions which constituted the crime, there was insufficient evidence the abuse caused his will to be overborne and render his plea involuntary; Giir's testimony that he could not defy counsel, whom he considered an "elder," was not credible; and current counsel had proffered no evidence that Giir was not competent to enter a plea due to mental health issues, rendering his argument conjecture. The court also noted that Giir did not bring his motion to withdraw until three months after sentencing. The court denied Giir's motion to withdraw his guilty plea.

Giir appeals.

Ineffective Assistance of Counsel

Giir contends that the attorney who represented him on his motion to withdraw his guilty plea was ineffective in failing to investigate Giir's competency as a basis to withdraw his plea. To prevail on this claim, Giir must show (1) that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness considering all the circumstances, and (2) that counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.2d 17 (2002); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). Giir must show that counsel's conduct was not based on legitimate strategic or tactical reasons. Elmore, 162 Wn.2d at 252. We must begin with a strong presumption that counsel's representation was effective and must base our decision on the record below. Hutchinson, 147 Wn.2d at 206.

To be competent to stand trial, a defendant must be able to understand the nature of the proceedings and be capable of assisting in his defense. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). The competency standard for pleading guilty is the same as for standing trial. Fleming, 142 Wn.2d at 864. Giir contends that his counsel provided inadequate

assistance in failing to properly investigate Giir's competency at the time of the plea hearing. He contends that there was good reason to investigate his competency and that there was no legitimate strategic or tactical reason not to do so.

We disagree. There is no reason to think that Giir's defense counsel at the hearing on the motion to withdraw was unaware of the hospital mental status exam conducted three days after the assault, which found no psychotic or dissociative symptoms, as well as the two psychological evaluations conducted prior to the plea, which included Dr. Wheeler's report that there was evidence Giir's symptoms had improved during the 18 months since the crime and that Giir did not appear to be experiencing any mental disorder that affected his capacity to rationally and coherently discuss his thinking and behavior. Giir does not argue otherwise. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (At the very least, a defendant seeking relief under a failure to investigate theory must show a reasonable likelihood that the investigation would have produced useful information not already known to counsel.).

Moreover, there is no evidence in the record that defense counsel did not further investigate Giir's competency. It is possible that counsel investigated and came up with no evidence useful to a claim that Giir was incompetent when

he pleaded guilty. See In re Pers. Restraint of Gentry, 137 Wn.2d 378, 404, 972 P.2d 1250 (1999) (record does not support petitioner's current counsel's claim that trial counsel neglected issue of psychological evaluation; it is possible an evaluation was performed but provided no useful information).

In addition, counsel may have made a strategic or tactical decision not to pursue or emphasize Giir's mental competency to plead guilty. Giir argued vigorously that his trial counsel misinformed him regarding the sentence that the court could or would impose. Giir testified that he wanted to go to trial, but he agreed to plead guilty because based on trial counsel's explanation of the mandatory minimum, credit for time served, and earned early release time, Giir understood that he would be sentenced to approximately 17 years and would serve approximately 10 years, instead of the approximately 30 years he would serve if he went to trial and lost.[4] Giir's testimony showed a fairly sophisticated, albeit faulty, understanding of the available sentencing options. Presenting evidence that Giir was not competent to plead guilty, i.e., that he was unable to understand the nature of the proceedings and was incapable of assisting in his defense, would have severely undercut Giir's claim that trial counsel misinformed him regarding sentencing.

[4] Report of Proceedings (June 26, 2008) at 53, 60-64.

Because we have determined that Giir has not shown counsel's representation was deficient, we need not consider whether the alleged deficient representation prejudiced Giir. Hutchinson, 147 Wn.2d at 208.

Community Custody Condition

Giir contends that the trial court erred in ordering as a condition of community custody that Giir obtain a mental health evaluation and follow treatment recommendations. He contends that the condition must be stricken because the trial court failed to make the findings required by RCW 9.94A.505(9), that reasonable grounds exist to believe Giir is a mentally ill person and that his mental health condition likely influenced his offense.

In response, the State filed a motion to dismiss Giir's notice of appeal of the judgment and sentence as untimely. Giir pleaded guilty in August 2007 and was sentenced on November 9, 2007. Giir was provided a written notice of his rights on appeal and that he must file an appeal within 30 days. The judgment and sentence was entered on November 15, 2007. Giir did not file a notice of appeal. On March 10, 2008, Giir filed his motion to withdraw his guilty plea. The trial court denied the motion on September 19, 2009. On September 30, 2008, Giir filed a notice of appeal, challenging the order denying his motion to withdraw and the earlier judgment and sentence.

The State contends that Giir's challenge to the condition of sentence is not within the scope of appeal of the order denying the motion to withdraw. We agree. See State v. Gaut, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (scope of review of order denying motion to withdraw plea is limited to the trial court's exercise of its discretion in deciding the issues raised in the motion).

The State also contends that Giir's notice of appeal was untimely as to the judgment and sentence and that accordingly the assignment of error to the community custody condition must be stricken. Giir responds that the State has not shown Giir made a knowing, intelligent, and voluntary waiver of his right to appeal because the court did not orally advise Giir of his appeal rights, the notice of rights form improperly states only the limited right to appeal a sentence higher than the standard range, and two key paragraphs on the notice are inexplicably stricken.

In a criminal case, there can be no presumption in favor of the waiver of a right to appeal, and the State bears the burden of demonstrating that a defendant made a knowing, intelligent, and voluntary waiver of the right to appeal. State v. Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). A criminal appeal may not be dismissed as untimely unless the State meets this burden. See State v. Devin,

158 Wn.2d 157, 166, 142 P.3d 599 (2006); State v. Kells, 134 Wn.2d 309, 313, 949 P.2d 818 (1998).

We do not know the source of the small mark on the notice form, but nothing in the record indicates that defense counsel, the State, or the court intended to strike or did strike any rights listed on the notice of rights form or that Giir would have filed an appeal but for the unexplained mark on the form. See Devin, 158 Wn.2d at 166 n.4 (In the absence of an affidavit or declaration establishing that defendant told his counsel to file an appeal and counsel ignored it, the court cannot conclude defendant did not waive right to appeal.).

Relying on Devin, the State contends that the notice of rights form contained all the rights required by CrR 7.2(b), Giir signed the notice in open court, and he therefore was warned that he would irrevocably waive his right to appeal if he failed to file a notice of appeal within 30 days. In Devin, the defendant was warned that he would irrevocably waive his right to appeal if he failed to pursue it within 30 days, he did not timely file a notice of appeal, and he presented no evidence to the contrary. Devin, 158 Wn.2d at 166. Giir received a similar written warning.

But the State has not responded to Giir's argument that the court did not orally advise Giir of his appeal rights or that the notice of rights form improperly stated only the limited right to appeal a sentence higher than the standard

range, i.e., that it did not inform Giir he had the right to appeal conditions of community custody. This situation is more like Kells, where the issue was whether the defendant could voluntarily waive a right he was not told he had. Kells, 134 Wn.2d at 820-21; accord Devin, 158 Wn.2d at 166-67. The State has not demonstrated that Giir knowingly, intelligently, and voluntarily waived his right to appeal. We deny the State's motion to strike Giir's assignment of error challenging the conditions of community custody. See State v. Jones, 118 Wn. App. 199, 203, 76 P.3d 258 (2003) (Supreme Court reversed dismissal of untimely appeal).

A trial court may order mental health treatment as a condition of community custody only if it finds that reasonable grounds exist to believe the defendant is a mentally ill person as defined in RCW 71.24.025 and that this condition is likely to have influenced the offense. RCW 9.94A.505(9); State v. Jones, 118 Wn. App. at 209. The order must be based on a presentence report and, if applicable, mental status evaluations. Jones, 118 Wn. App. at 209. The issue can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (An illegal or erroneous sentence may be challenged for the first time on appeal.); Jones, 118 Wn. App. at 204. Giir relied on his mental health problems at sentencing, the issue apparently was addressed in

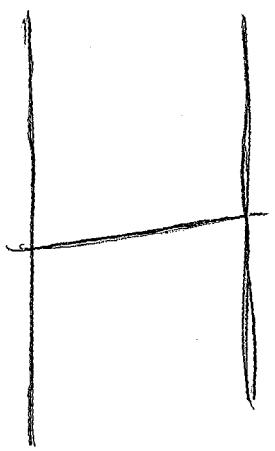
his presentence report, and both evaluators addressed it in their reports. But the trial court did not make the findings. Accordingly, we remand for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9). Jones, 118 Wn. App. at 212.

We affirm the denial of Giir's motion to withdraw his guilty plea. We reverse the conditions of community custody and remand for further proceedings.

Becker, J.

WE CONCUR:

APPENDIX



APPENDIX H

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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March 7, 2011

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CASE #: 65302-4-I
State of Washington, Resp. vs. Kero Giir, App.
King County, Cause No. 05-1-07847-9.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Accordingly, we reverse and remand."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

c: The Honorable Julie A. Spector

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KERO RIINY GIIR, Appellant.	)	DIVISION ONE No. 65302-4-I UNPUBLISHED OPINION FILED: March 7, 2011

DWYER, C.J. — Under certain circumstances, a sentencing court may order a defendant to submit to a mental status evaluation and to comply with any recommended treatment. Here, however, the trial court ordered Kero Giir to undergo a mental health evaluation without satisfying the applicable statutory requirement that the order be based on a presentence report prepared by the Department of Corrections (DOC). The trial court exceeded its authority and erred when it imposed this condition. Accordingly, we reverse and remand.

I

In 2005, Kero Giir murdered his girlfriend and injured another woman during the same incident. The State charged him with murder in the first degree and assault in the third degree. In August 2007, Giir pleaded guilty to both charges. The trial court sentenced him to 300 months for the charge of murder in the first degree and 8 months for the charge of assault in the third degree. The

trial court also ordered Giir to undergo mental health evaluation and treatment.

Giir appealed to this court, contending both that his counsel was ineffective for failing to investigate Giir's competency to enter the guilty plea and that the trial court erred by imposing mental health evaluation and treatment as a condition of community custody. In an unpublished opinion, we rejected Giir's ineffective assistance of counsel claim, but we held that the trial court had erred by imposing mental health evaluation and treatment as a condition because the statutorily-required findings had not been made. State v. Giir, noted at 153 Wn. App. 1015, 2009 WL 4024840, at *1. We remanded for further proceedings related to the imposition of the community custody condition. Giir, 2009 WL 4024840, at *5.

At the resentencing hearing, Giir asserted that the trial court could not impose mental health evaluation and treatment as a condition of community custody because the DOC had not completed a presentence report. The trial court determined that, while there may not have been a formal presentence report, the mental health reports and evaluations submitted by the parties' experts provided a basis to make the requisite findings. Report of Proceedings (April 23, 2010) at 13-14. The trial court entered the necessary findings that "the defendant is a mentally ill person as defined in RCW 71.24.025 and 71.05 & that this condition is likely to have influenced the underlying offense." Clerk's Papers at 88.

Giir appeals.

II

Girr contends that the trial court again erred by imposing mental health evaluation and treatment as a condition of community custody because the trial court's order was not based on the statutorily-required presentence report. The State contends that Giir waived this claim of error because he failed to raise the issue in his first appeal.

The controlling rule is RAP 2.5, which provides in relevant part:

> If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1). Our Supreme Court has explained that this rule allows an issue not raised in an earlier appeal to become "an appealable question" where "the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). Where the "trial court's duty on remand is not merely ministerial, the trial court must exercise discretion." State v. Rodriguez Ramos, No. 84891-2, slip op. at 3 (Wash. Feb. 10, 2011).

Here, in Giir's first appeal, we held that the mental health-related condition of community custody was improperly imposed because the trial court had not made the statutorily-required findings. The absence of the requisite factual findings was the only issue raised by Giir with respect to the community custody conditions. We remanded "for the trial court to strike the conditions or make the findings required by RCW 9.94A.505(9)." Giir, 2009 WL 4024840, at *5.

Thus, because the trial court had the discretion to impose conditions of community custody on remand, the trial court's duty was not merely ministerial. See Rodriguez Ramos, No. 84891-2, slip op. at 3. The trial court then exercised its discretion in determining that mental health evaluation and treatment should, once again, be imposed. The trial court thereby "exercised its independent judgment, reviewed and ruled again on such issue." Barberio, 121 Wn.2d at 50. The propriety of imposing the condition of community custody was thus made "an appealable question." Barberio, 121 Wn.2d at 50. Giir did not waive this claim of error.

III

We now turn to the substantive question before us. Girr contends that the trial court erred by imposing the mental health-related condition of community custody because the trial court's order was not based on a statutorily-required presentence report. We agree.

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). Pursuant to the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, in effect at the time that Giir committed his crimes, the trial court was authorized to order a defendant whose sentence included a term of community custody "to undergo a mental status evaluation and to participate in available outpatient mental health treatment." Former RCW 9.94A.505(9) (2004), recodified as RCW 9.94B.080 (Laws of 2008,

ch. 231, § 53).[1] However, former RCW 9.94A.505(9) authorizes the imposition of such a condition only where the trial court follows certain procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008).

Specifically, the trial court must find "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." Former RCW 9.94A.505(9). Further, "[a]n 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." Former RCW 9.94A.505(9) (emphasis added).

A trial court may not, therefore, order an offender to participate in a mental health evaluation and any recommended treatment as a condition of community custody "unless the court finds, based on a presentence report and any 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, 353-54, 174 P.3d 1216 (2007). Former RCW 9.94A.505(9) does not itself state any further requirements for the presentence report, such as who can create the presentence report or what it must contain. However, another statutory

[1] Notwithstanding that the heading of chapter 9.94B RCW states that the chapter applies to crimes committed prior to July 1, 2000, RCW 9.94B.080, which authorizes the trial court to order an offender to undergo mental status evaluation and mental health treatment, is applicable to crimes committed after 2000. See Laws of 2008, ch. 231, § 55.

provision[2] plainly indicates that the required presentence report must be prepared by the DOC:

> *If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025*, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, *the court shall order the department*[3] *to complete a presentence report before imposing a sentence.*

Former RCW 9.94A.500(1) (2004) (emphasis added). Moreover, the legislature indicated that it was authorizing "[t]he courts to request presentence reports *from the department of corrections* when a relationship between mental illness and criminal behavior is suspected." Laws of 1998, ch. 260, § 1 (emphasis added).

The term "presentence report" is not ambiguous in the context of former RCW 9.94A.505(9). Cf. State v. Mendoza, 165 Wn.2d 913, 924, 205 P.3d 113 (2009) (stating that "the meaning of the term 'presentence report' appears ambiguous" in the context of RCW 9.94A.530(2), which provides that a defendant's acknowledgement to criminal history "includes not objecting to information stated in the presentence reports"). Where the trial court determines that mental health evaluation and treatment may be a desired condition of community custody, the trial court must order the DOC to complete a presentence report before imposing such a sentence. Former RCW 9.94A.500(1). When the trial court then imposes such a sentence, the trial

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[2] "An act must be construed as a whole, considering all provisions in relation to each other and, if possible, harmonizing all to insure proper construction of each provision." In re Pers. Restraint of Piercy, 101 Wn.2d 490, 492, 681 P.2d 223 (1984).

[3] The term "department" means the Department of Corrections. Former RCW 9.94A.030(17) (2004).

court's order imposing this condition of community custody must be based on the presentence report prepared by the DOC. The statute is unambiguous.

While it is apparent from the record herein that mental health evaluation and treatment may be desirable for Giir, the record does not establish compliance with the required statutory procedures. Specifically, the trial court imposed mental health evaluation and treatment as a condition of community custody without the benefit of a presentence report prepared by the DOC. The mental health evaluations prepared by the parties' experts do not fully satisfy the statutory requirement that "[a]n order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations." Former RCW 9.94A.505(9). The legislature required that particular procedures must necessarily be followed in order for such conditions to be imposed. The trial court thus imposed a sentence that was not authorized by statute.[4] See Barnett, 139 Wn.2d at 464.

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[4] The State urges us to find that this error was harmless. Even assuming that the harmless error standard would apply in a situation such as this and that the error was harmless as to the parties to this appeal, we could not find the error to be harmless. This is because the legislature has provided the DOC with an interest in preventing incorrectly-imposed sentences by creating a statutory procedure for the DOC to challenge and correct erroneous sentences in court. RCW 9.94A.585(7), formerly RCW 9.94A.210(7). Where a sentencing condition is imposed that is not authorized by the SRA, the DOC may petition the court for correction of the erroneous sentence. See, e.g., In re Postsentence of Childers, 135 Wn. App. 37, 143 P.3d 831 (2006); In re Sentence of Jones, 129 Wn. App. 626, 120 P.3d 84 (2005); In re Sentence of Chatman, 59 Wn. App. 258, 796 P.2d 755 (1990). Such a procedure is fitting given that one purpose of the SRA is to "[m]ake frugal use of the state's and local governments' resources." RCW 9.94A.010(6). We cannot find the erroneous sentence here to be harmless as to the DOC, which is not a party to this appeal and which was not given an opportunity to provide input into Giir's suitability for mental health evaluation and treatment.

Moreover, our legislature has authorized the trial court to sentence a defendant to mental health evaluation and treatment as a condition of community custody, but it determined that this particular condition of community custody may be imposed *only* where specific procedural requirements have been met. Specifically, "the court shall order the department to complete a presentence report before imposing a sentence," former RCW 9.94A.500(1), and "[a]n order

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.

Dwyer, C.J.

We concur:

Leach, A.C.J.

Cox, J.

requiring mental status evaluation or treatment must be based on a presentence report." Former RCW 9.94A.505(9). We cannot say that the absence of a presentence report, which our legislature has concluded is a necessary prerequisite to imposing this sentencing condition, is harmless.