NO. 43472-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SPENCER OBERG,

Appellant.

ON APPEAL FROM THE SUPERIOR PIERCE COUNTY

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing community custody conditions directing appellant to undergo drug and alcohol evaluations and treatment. CP 56, 60, 112, 116.

2. In imposing sentence for third degree assault, the sentencing court erred in imposing a term of confinement and community custody that exceed the 60-month statutory maximum. CP 55.

Issues Related to Assignments of Error

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

2. Did the sentencing court err in directing an "alcohol" evaluation and treatment where no evidence or admissions suggested alcohol was a factor in the current offenses?

3. Did the sentencing court err in failing to reduce the community custody term on the third degree assault sentence, to ensure that the combination of confinement and community custody did not exceed the 60-month statutory maximum?

B. STATEMENT OF THE CASE[1]

1. Case 1, 10-1-03778-2:

On September 3, 2010, the Pierce County prosecutor charged appellant Spencer Oberg with two counts: unlawful possession of methadone and unlawful possession of oxycodone. CP 62-63. Oberg moved to suppress evidence resulting from an unlawful seizure and arrest. CP 65-90. The state filed a response, but no hearing on the motion occurred. Instead, following several scheduling orders and bench warrants, the parties entered a global plea agreement. RP 23. On November 15, 2011, the state filed an amended information charging Oberg with two counts: second degree identity theft and unlawful possession of oxycodone. CP 93-94.

The Alford[2] plea was signed and accepted on November 15, 2011. CP 95-103. The statement of defendant on plea of guilty included standard waivers of trial and appeal rights. CP 96. The

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[1] The statement of facts includes information not directly related to the assignments of error and arguments. Although counsel is familiar with RAP 10.3(a)(5), counsel understands that Oberg may plan to file a statement of additional grounds for review. Counsel believes the additional factual context and citations to the record will aid in the presentation and review of Oberg's pro se claim(s).

[2] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

offender score was listed as "9+" and the count 1 standard range was 43-57 months, with 12 months of community custody. CP 96.

The form advised that the state would recommend sentences at the top of the range, to run concurrent with the other pending Pierce County matters and with King County superior court causes.[3] The recommendation included $600 in Legal Financial Obligations (LFOs), drug/alcohol treatment, and restitution. CP 98. The plea form further advised that the judge did not have to follow anyone's sentence recommendation. CP 98.

2. Case 2, 11-1-00523-4:

On January 31, 2011, the Pierce County prosecutor charged Oberg with two counts: residential burglary and third degree malicious mischief. CP 1-2. After several scheduling orders and bench warrants, the state filed an amended information on November 15, 2011 charging one count of residential burglary. CP 5.

A similar Alford plea was filed and accepted November 15, 2011. CP 6-14. The standard range was 63-84 months. CP 7. The state agreed to recommend an 84-month term, concurrent with all

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[3] The record identifies the King County cause numbers as 11-1-06655-6 and 11-1-06585-1. CP 55, 111. Appeals were filed in those cases (No. 68917-7-I and 68918-5-I), and remained pending in Division One at the time this motion was filed.

other Pierce and King County causes. CP 9. The form again advised that the judge was not obligated to follow anyone's sentence recommendation. CP 9.

3. Case 3, 11-1-02533-2:

On June 22, 2011, the Pierce County prosecutor charged Oberg with four counts: attempting to obtain oxycodone by misrepresentation, unlawful possession of oxycodone, third degree assault, and possession of another's identification. CP 31-32. In an amended information filed November 15, 2011, the state charged two counts: attempting to obtain oxycodone by misrepresentation, and third degree assault. CP 34-35.

A similar Alford plea was filed and accepted November 15, 2011. CP 36-44. The standard range for the third degree assault was 51-60 months. CP 37.[4] The state agreed to recommend a 51-month term, concurrent with all other Pierce and King County causes. CP 39. The form again advised that the judge was not obligated to follow anyone's sentence recommendation. CP 39.

[4] The standard ranges in all three cases were based on stipulated criminal history. CP 15-17, 45-47, 118-20.

4. Plea and Sentencing, November 15, 2011

Judge Edmund Murphy presided at plea and sentencing hearing. RP 1. The parties informed the court that the pleas were part of a "global resolution" of several King and Pierce County charges. The Pierce County plea and sentencing trailed closely behind the plea and sentencing in King County. The King County court had imposed a 76-month sentence. RP 2-4, 24.

The court accepted the amended informations and then engaged Oberg in a plea colloquy. RP 4-17. The court explained the charges, the offender scores and standard ranges for the various offenses. RP 5-8. The court explained the prosecutor's recommended sentences, and noted the court is not bound by any recommendation. The court explained it could run the sentences in these Pierce County cases consecutively to any other sentences already imposed. RP 8-10.

The court explained an Alford plea was still a finding of guilt and would be treated as an admission of the elements of the charged offenses. RP 12-14. The court reviewed the certificates for determination of probable cause and concluded there were sufficient factual bases to support the charges. RP 15. Oberg then pled guilty

to each amended charge. RP 16-17. The court accepted the pleas as knowing and voluntary. RP 17.

Sentencing immediately followed. RP 17. The prosecutor offered several statements in support of the agreed high-end recommendation of 84 months on the residential burglary charge. The state theorized the "crime spree" in two counties largely resulted from Oberg's drug problem. RP 17-19.

The assistant attorney general argued that time on a prior sentence should be ordered to run consecutively to the King and Pierce County sentences. RP 19-20.[5]

Oberg's wife spoke in favor of a 76-month sentence, concurrent with the King County sentence. She supported him, saying he is a good man, with an opportunity for a productive future. She said drug problems led to these offenses. RP 21-23.

Defense counsel agreed the offenses resulted from a drug problem. RP 23-24. Counsel informed the court that Oberg had recently been sentenced to a 76-month term in King County, which

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[5] This was a prior theft conviction from a different cause number, 10-1-02337-4. It is appellate counsel's understanding that no notice of appeal has been filed in that case. RP 1-2, 4, 26, 33.

was eight months below the agreed 84-month recommended sentence. RP 24.

In accordance with the plea agreement, counsel recommended the court impose the 84-month term, to run concurrently with the King County sentences. That was what the parties agreed in their global plea deal. RP 20, 24-25.

Counsel also asked to impose only one $100 DNA fee and waive non-mandatory legal financial obligations, to avoid creating financial barriers to Oberg's reentry into society. RP 25-27. Counsel asked the court to run the revoked sentence for the prior theft conviction concurrently with the Pierce and King County convictions. RP 26. In response to the court's questions, defense counsel said Oberg had previously failed in drug court, prior to a DOSA sentence. RP 27-28.

In his allocution, Oberg said he was ready to make the necessary changes and to move away from drugs. He was working the twelve steps with a sponsor. He had substantial family support. RP 28.

The court asked if his family members were there for him when he had been released from prison the last time. Oberg said they were. RP 29. He admitted he had been mistaken in thinking he could

stay off drugs on his own, relying on his own willpower. That was a "very grave miscalculation" resulting from too much shame and false pride. He would now reach out and ask others for help. RP 29.

In sentencing Oberg, the court mentioned the substantial number of prior and current offenses resulting from "what appears to be several different crimes [sic] sprees." RP 29. The court found Oberg to be articulate and fortunate to have family support. RP 29-30. The court asked Oberg to think how hard it was for his mother to watch him plead guilty to and be sentenced to prison for multiple felonies. RP 30.

The court said it was concerned that Oberg had previous opportunities to address drug issues. RP 30-31. The court noted counsel's remarks as to how difficult it can be to overcome addiction and surrender and get needed help. RP 31.

The court said it was troubled by the "sheer volume of the crimes here," including the commission of multiple crimes not only in Pierce County, but also in King County. Some of those crimes occurred while Oberg was under supervised release. RP 31-32.

The court said it was basically being asked to do was "wrap up what would be 12 felonies into one sentence, 76 months, which is about six months a felony, on top of somebody who has already

maxed out, even before you consider those." RP 32. The court recognized the work of the various attorneys on both sides, and the King County court's imposition of a 76-month sentence. RP 32.

The court then characterized its option as "going along with the concurrent sentence or doing a consecutive sentence." RP 32. The court concluded "the bottom line is I don't think 76 months is enough for everything that has gone on here." RP 32.

The court then imposed a 43-month low-end standard-range sentence for the second degree identity theft conviction (case 1, count 1). The court ran that sentence consecutively to the King County cause numbers. RP 32-33; CP 110-11. The court said the bottom line would be an additional 43 months for the five felonies committed in Pierce County. RP 33. The total consecutive term would be 119 months: the 76 months in King County, followed by the 43 consecutive months in Pierce County. CP 111.

For the residential burglary, the court imposed the recommended 84-month term, concurrent with all other King and Pierce County sentences. The court imposed standard range sentences on the remaining counts. CP 22, 24, 52, 54, 108, 110-11.

The court also imposed a sentence of 365 days on the fourth cause number,[6] to run concurrently with the current convictions. RP 34.

The court imposed 12 months of community custody on four offenses. CP 55, 111. The conditions of community custody included standard conditions, and also directed Oberg to undergo a substance abuse evaluation, and "drug/alcohol evaluation and treatment per CCO." CP 56, 60, 111-12, 116.

For the third degree assault conviction, the court imposed a 51-month sentence and 12 months of community custody. The court included the handwritten notation that "the total confinement and community custody shall not exceed the statutory maximum of . . . 60 mos (Ct. III). CP 54-55; RP 34-35.

This appeal timely follows.

C. ARGUMENT

1. THE SENTENCING COURT WRONGLY ORDERED DRUG/ALCOHOL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

When imposing a sentence under Washington's Sentencing Reform Act (SRA), a court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW

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[6] See note 5, supra.

9.94A.345; In re Restraint of Carrier, 173 Wn.2d 791, 798, 809, 272 P.3d 209 (2012); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The trial court imposed community custody for four current offenses: (1) second degree identity theft, (2) unlawful possession of oxycodone (CP 106, 111), (3) attempting to obtain oxycodone by fraud, and (4) third degree assault (CP 50, 55-56). Washington's sentencing reform act (SRA) authorizes community custody for these offenses. RCW 9.94A.505(2)(a)(ii) (authority to impose community custody is set forth in RCW 9.94A.701); RCW 9.94A.701(3)(a) (crimes against persons, including third degree assault); RCW 9.94A.701(3)(c) (felony violations of chapter 69.50 RCW).

As a condition of community custody, the court ordered "Drug/Alcohol evaluation and treatment per CCO" (CP 60) and "Drug/alcohol treatment per CCO." CP 116. This was error.

The SRA allows the court to impose "crime-related treatment or counseling services" if the evidence shows the problem in need of treatment contributed to the offense. RCW 9.94A.703(3)(c); State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing

alcohol treatment). But before such rehabilitative treatment may be imposed, the court must find a chemical dependency contributed to the offense:

> *Where the court finds that the offender has a chemical dependency that has contributed to his or her offense*, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1) (emphasis added). Because the court made no such finding here, the conditions should be stricken and the case remanded. Jones, 118 Wn. App. at 209-10; accord, State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, appellate courts assume the Legislature meant exactly what it said, giving criminal statutes literal interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The sentencing court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Oberg's offenses. CP 50-61, 106-117. Under the plain terms of RCW

9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment.

In response, the state may cite State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009). In Powell, the sentencing court failed to enter the chemical dependency finding required by RCW 9.94A.607(1), but still imposed substance abuse treatment as a community custody condition. Division Two concluded the condition could be properly imposed because trial evidence showed that Powell consumed methamphetamine before committing the offense and the defense asked the court to impose substance abuse treatment. Powell, 139 Wn. App. at 819-20.

But the Powell Court's remarks are dicta because the Court had already decided to reverse Powell's conviction on a separate issue when it addressed the viability of the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where conviction is reversed on separate grounds, the discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case.").

Dicta lacks precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Nor does the Powell dicta withstand a plain reading of the statute. Under RCW 9.94A.607(1), a court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense. Powell ignored this unambiguous mandate in reasoning the condition is valid even if the court makes no finding on the matter, so long as the trial record *could* support such a finding. Powell, 139 Wn. App. at 819-20. This reading would render superfluous the statutory requirement of a finding. But "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).[7]

Moreover, "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the

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[7] This brief's discussion of Powell derives in large part from several unpublished Division One decisions, and an unpublished portion of a Division Two decision, all of which criticize and reject the Powell dicta. Oberg cannot, and does not, cite those decisions as precedential authority. See GR 14.1(a); State v. Arreola, ___ Wn.2d ___, 290 P.3d 983, 990 n.1 (2012).

trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The Powell court overlooked these well-established principles when it independently reviewed the record and, in effect, made a finding the sentencing court did not make.

In addition, although the issue of drug addiction was discussed at sentencing, there was no discussion of alcohol dependency. The condition imposing "drug/alcohol" evaluation and treatment at the CCO's discretion is therefore overbroad and unsupported. Jones, 118 Wn. App. at 207-08.

This Court should order the sentencing court to strike the condition pertaining to "drug/alcohol" evaluation and treatment on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

2. THE SENTENCING COURT ERRED IN FAILING TO REDUCE THE LENGTH OF COMMUNITY CUSTODY FOR THE THIRD DEGREE ASSAULT CONVICTION.

The parties and the court properly recognized that the 51-month prison term for third degree assault, when coupled with a 12-month community custody term, would exceed the statutory maximum

of 60 months. RP 34-35; CP 55.[8] The court nonetheless erred in not reducing the community custody term to 9 months.

The sentencing court's handwritten notation would have been correct under prior case law. See State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011) (under prior statutes, the Department of Corrections was allowed to recalculate community custody terms to ensure the combination of confinement and community custody did not exceed the statutory maximum), accord, In re Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). But the legislature amended the pertinent statute in 2009, and in 2012 the Supreme Court made it clear that sentencing courts must reduce the community custody term to ensure the combination does not exceed the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012) (citing RCW 9.94A.701(9)). The proper remedy is to remand to the trial court to specify a term of community custody that does not exceed the statutory maximum. Boyd, 174 Wn.2d at 473; State v. Land, __ Wn. App. __, __ P.3d __, 2013 WL 57900, *4 (2013).

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[8] Third degree assault is a class C felony with a 60-month maximum sentence. RCW 9A.36.031(2); RCW 9A.20.021(1)(c).

D. CONCLUSION

This Court should strike the community custody conditions directing Oberg to undergo drug and alcohol evaluations and treatment. CP 56, 60, 112, 116. This Court also should remand the sentence for third degree assault with directions to reduce the term of community custody to nine months. CP 55.

DATED this 13th day of March, 2013.

Respectfully Submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 43472-5-II
	)	
SPENCER OLBERG,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SPENCER OLBERG
DOC NO. 306121
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MARCH 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 13, 2013 - 1:28 PM

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