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NO. 94305-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON E. TURNER,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks this court to deny review of the issues set out in the Petition for Review. The respondent asks the court to grant review of the issue identified in part III.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed the defendant's conviction in an unpublished opinion filed February 27, 2017. The opinion also struck certain sentencing requirements imposed by the trial court and directed correction of the judgment and sentence. A copy of the opinion is attached to the Petition for Review.

III. ISSUE RAISED BY RESPONDENT

Under RCW 9.94A.703(3)(d), a sentencing court may require an offender to "participate in rehabilitative programs ... reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Can a court require substance abuse counseling that is related to the risk of reoffending, if the counseling is not *also* related to the circumstances of the offense?

IV. STATEMENT OF THE CASE

The defendant (petitioner), Clifton Turner, met L. when they were both in inpatient drug treatment. 3 RP 344, 347. L. had two daughters: A. (born 7/96) and M. (born 7/98). Because of L.'s drug and alcohol abuse, A. and M. lived most of their lives with their aunt D. 3 RP 288.

About 2½ years after they met, the defendant and L. began living together. During some period, M. visited them about every other weekend. 2 RP 82. M. testified that the defendant sexually abused her on several occasions. The last incident occurred in spring, 2012. 2 RP 71-91. M. later reported the abuse to her sister, who told her aunt. 2 RP 95, 214-15. The aunt, in turn, told their mother, who took M. to the police. 3 RP 300; 2 RP 100. The first report to police occurred on January 24, 2013. 3 RP 270.

At trial, both M. and her aunt testified about changes in her behavior that began during her sophomore year at school, which was the school year after she disclosed the abuse. She began using marijuana and drinking alcohol almost every day. She also became depressed and suicidal. She was burning and cutting herself. In describing these events, the witnesses did not

characterize them as symptoms of any mental disorder. 2 RP 119-20; 3 RP 303-05.

In his trial testimony, the defendant denied abusing M. 3 RP 368-75. He also testified concerning the intensity of his efforts to maintain his sobriety. He generally attended three NA or AA meetings a week. 3 RP 344. Every day, he spent at least an hour reading self-help or recovery books. 3 RP 345. He believed that being around someone who was using drugs "would put my life in jeopardy." 3 RP 350.

The jury found the defendant guilty of two counts of second degree child molestation. CP 72-78. At sentencing, the State introduced certified documents showing that the defendant had two prior convictions. 1 CP 4-9, 11-17. The court ruled that these documents provided sufficient evidence of the defendant's criminal history. These convictions led to offender scores of 5 on each count. Sent. RP 23-24. The Judgment and Sentence listed offender scores of 5, with sentences near the top end of the range for that offender score. The Judgment, however, only listed one of the two prior criminal convictions. CP 29-30.

The court also imposed 36 months of community custody. CP 31. The conditions of community custody included the following:

"Participate in substance abuse treatment as directed by the supervising Community Corrections Officer." CP 41. No objection to this condition was raised at sentencing. Sent. RP 29.

The Court of Appeals affirmed the conviction. Slip op. at 3-5. The court held, however, that the trial court lacked the authority to require substance abuse treatment. Slip op. at 6-11. The Court also ordered the trial court to modify the judgment to include the defendant's correct prior convictions. Slip op. at 11-12.

The defendant is now asking this court to review the portions of the decision that affirmed the conviction and upheld the computation of the sentence range. The State asks the court to review the portions of the decision that overturned the sentencing condition.

V. ARGUMENT WITH RESPECT TO PETITIONER'S ISSUE

A. THIS COURT HAS ALREADY UPHELD THE ADMISSBILITY OF LAY TESTIMONY CONCERNING TRAUMA SUFFERED BY THE VICTIM OF SEXUAL ABUSE.

At trial, the State introduced evidence concerning changes in the victim's behavior following the abuse. The petitioner argues that this evidence was inadmissible without supporting expert testimony. As the Court of Appeals recognized, this argument is contrary to

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). Slip op. at 4-6. The petition for review does not even mention Black.

In Black, the State offered expert testimony on "rape trauma syndrome." That is, the State sought to establish that certain emotional and behavioral symptoms indicated that the person had been raped. Black, 109 Wn.2d at 342. This court held that such testimony was scientifically unreliable and unduly prejudicial. Id. at 348. Changing the label to "post-traumatic stress disorder" would not make the testimony admissible. Id. at 349.

Although expert testimony on this subject is inadmissible, lay testimony is admissible:

> We do not imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape prosecution. The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.

Id.

In the present case, the petitioner is claiming that the State was *required* to do what Black forbids: offer expert testimony of post-traumatic stress disorder (PTSD) to prove that the victim had been subject to abuse. Absent such expert testimony, the petitioner claims that the State is *forbidden* from doing what Black allows:

offer lay testimony concerning the trauma suffered by an abuse victim. The petitioner offers no reason, however, why Black should be overruled. As a result, this issue does not warrant review.

B. THE CORRECTION OF A SCRIVENER'S ERROR DOES NOT WARRANT REVIEW.

The petitioner also asks this court to review the calculation of the offender score. As the Court of Appeals recognized, the judgment in this case failed to reflect a conviction that was found by the trial court. The court remanded the case for correction of that error. Slip op. at 11-12. The petitioner does not explain why this mistake in the sentencing document warrants review.

VI. ARGUMENT WITH RESPECT TO RESPONDENT'S ISSUE

SINCE THE COURT OF APPEALS ELIMINATED SENTENCING AUTHORITY THAT WAS CLEARLY GRANTED BY THE LEGISLATURE, ITS DECISION SHOULD BE REVIEWED BY THIS COURT.

The Court of Appeals held that the trial court improperly imposed a sentencing condition. Slip op. at 6-11. This holding creates an issue of substantial public interest that should be reviewed by this court. RAP 13.4(b)(4).

RCW 9.94A.703(3) gives sentencing courts broad authority to impose conditions of community custody:

> As part of any term of community custody, the court may order an offender to:

...

> (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community...

The statute authorizes the court to require participation in rehabilitative program if they are related to "the circumstances of the offense, the offender's risk of reoffending, **or** the safety of the community." If a program is related to "the offender's risk of reoffending," it is not necessary that it also be related to "the circumstances of the offense." Here, the defendant's own testimony showed that he was at grave risk of resuming illegal drug use if he did not continue to participate in drug abuse treatment activities. 3 RP 344-45. Based on this testimony, the sentencing court could reasonably conclude that drug treatment was "reasonably related to ... the offender's risk of reoffending." The requirement was therefore justified whether or not it was "crime-related."

Notwithstanding the clear language of this provision, a prior Court of Appeals decision limited the statutory provision to rehabilitative programs that are "crime-related." State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258, 262 (2003). The court looked at a separate provision of the same statute, which authorizes sentencing courts to require offenders to "[p]articipate in crime-

related treatment or counseling services." Former 9.94A.700(5)(c) (now codified as RCW 9.94A.703(3)(c)). The court reasoned as follows:

> If reasonably possible, [the "rehabilitative programs" provision][1] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (citations omitted).

In the present case, the State's brief pointed out two fundamental flaws in this reasoning. First, the rule against rendering a portion of a statute superfluous is a maxim of statutory construction. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). If a statute is unambiguous, application of such maxims is unwarranted. State v.

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[1] At the time, this provision was codified as former RCW 9.94A.715(2)(b). The language of the provision was identical to the current RCW 9.94A.700(3)(d).

Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). There is no ambiguity in the statutory authorization to require rehabilitative programs that are "reasonably related to ... the offender's risk of reoffending, or the safety of the community."

Second, the analysis of Jones simply trades one superfluity for another. Under Jones, the authorization to require "crime-related treatment or counseling" is not superfluous – but the authorization for "rehabilitative programs that are reasonably related to ... the offender's risk of reoffending" *is* superfluous. That provision authorizes nothing that does not also fall under the authorization for programs that are "reasonably related to the circumstances of the offense."

In responding to these arguments, the Court of Appeals first held that the cumulative effect of the two statutory provisions created an ambiguity. Slip op. at 7-8. The Court then held that the "rehabilitative programs" provision was limited to programs other than counselling or treatment or counselling. Slip op. at 9. The court did not suggest what kind of programs these might be. Almost all rehabilitative programs involve some form of treatment or counselling. If there are any that do not, they are rare. The decision of the Court of Appeals virtually eliminates the authority of

sentencing courts to require participation in rehabilitative programs that are intended to minimize the risk of re-offense or protect community safety.

This conclusion is particularly disturbing in view of a statutory grant to authority to the Department of Corrections (DOC). When a person is serving a period of community custody under supervision of DOC, it "may require the offender to participate in rehabilitative programs." RCW 9.94A.704(4). If such a requirement is challenged by the offender, it "shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.704(10)(a). Thus, the statute gives authority to the sentencing court and DOC in almost identical language. But under existing case law, the sentencing court's authority is limited to crime-related conditions, while DOC's authority is not. This distinction makes no sense.

The Court of Appeals has deprived sentencing courts of authority that the Legislature conferred in clear language. In doing so, it has prevented courts from imposing requirements that may be clearly necessary to protect the community or reduce the risk of re-

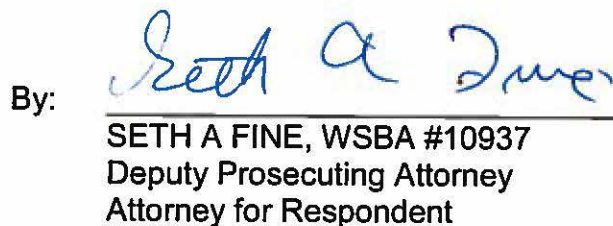
offense. Whether or not this court grants the Petition for Review, it should grant review of this issue.

VII. CONCLUSION

The defendant's Petition for Review should be denied. This court should grant review of the issue designated in this Answer. With regard to this issue, the Court of Appeals should be reversed. The sentencing requirements imposed by the trial court should be reinstated.

Respectfully submitted on April 24, 2017.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 24th day of April, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Maureen Marie Cyr, Washington Appellate Project; wapofficemail@washapp.org; maureen@washapp.org

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

Dated this 24th day of April, 2017, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTORS OFFICE

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