

65302-4

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COA NO. 65302-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

REC'D
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King County Prosecutor
Appellate Unit

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julie Spector, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

Giir argues the trial 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 DOC presentence report. Opening Brief at 1, 5-18.

The State claims the presentence report is not required because former RCW 9.94A.505(9), with its specific requirements limiting the circumstances under which the mental health condition can lawfully be imposed, was repealed and replaced by the broad provision of RCW 9.94A.703(3). Response Brief at 9. According to the State, the legislature had completely repealed the restrictions imposed in former RCW 9.94A.505(9). Response Brief at 11. From this premise, the State argues legislative intent shows a presentence report is not required. Response Brief at 11-12.

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. The date of Giir's offense was May 28, 2005. CP 12. The law in effect at the time of Giir's offense was former RCW 9.94A.505(9) (Laws of 2002, ch. 290 § 17).

But setting that aside, the State is mistaken that the restrictions imposed by former RCW 9.94A.505(9) have been repealed and replaced by RCW 9.94A.703(3). Former RCW 9.94A.505(9) simply moved, verbatim, to a different location. It is currently codified at RCW 9.94B.080 (Laws of 2008 ch. 231 § 53, eff. Aug. 1, 2009). Legislative intent remains the same.

The State elsewhere asserts the lack of a DOC presentence report is harmless error. Response Br. at 1. A court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "A trial court's sentencing authority is limited to that expressly found in the statutes. If the statutory provisions are not followed, the action of the court is *void*." State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (quoting State v. Theroff, 33 Wn. App. 741, 744, 657 P.2d 800 (1983) (citing State v. Eilts, 94 Wn.2d 489, 495, 617 P.2d 993 (1980), overruled by statute on other grounds as stated in State v. Barr, 99 Wn.2d 75, 78, 658 P.2d 1247 (1983)). Harmless error analysis is inapplicable in this context. "When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." State v. Murray, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003). The appropriate remedy is reversal of the erroneous, void portion of the sentence. Eilts, 94 Wn.2d at 496.

The State claims Giir waived the error because he could have raised it in his first appeal but did not do so. Response Br. at 1. The State is wrong.

The threshold error presented in the first appeal was the trial court's total failure to 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). Those findings are the predicate for valid entry of an order imposing the mental health condition.

Any order including those findings "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." *Id.* On remand, the trial court accordingly entered an order finding Giir "is a mentally ill person as defined in RCW 71.24.025 and 71.05 and that this 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. Wheeler and Dr. Kriegler.*" CP 88 (emphasis added).

Where the requisite findings are lacking, the issue of whether an order including those findings is properly based on a presentence report is not reached. Simply put, the presentence report error did not yet exist at

the time of the first appeal because its predicate (an order including the requisite findings) did not yet exist. The State would have Giir anticipate in his first appeal that the trial court would not follow the law on remand.

Even if the presentence report error could have been raised in the first appeal, the error is still not waived.

The State cites State v. Sauve, 100 Wn.2d 84, 87, 666 P.2d 894 (1983) for the proposition that an issue cannot be raised in a second appeal if it could have been raised in a first appeal. Br. at 5. But there is more to the law of the case doctrine than that.

The applicable rule, not cited by the State, is RAP 2.5(c)(1), which provides:

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. 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) applies where the trial court, exercising its independent judgment on remand, reviewed and ruled again on an issue that was not raised in the first appeal. State v. Barberio, 121 Wn.2d 48, 50,

846 P.2d 519 (1993). In such instance, the issue becomes appealable. Id. Barberio read Suave in this manner. Barberio, 121 Wn.2d at 51.¹

The deciding fact is whether the trial court in this case independently reviewed, on remand, whether imposition of the community custody condition was factually justified and supported by a presentence report. Barberio, 121 Wn.2d at 51. It clearly did. The trial court's order imposing the condition expressly states its finding supporting imposition of the condition was based on the defense's presentence report. CP 88. The trial court sought to follow the statute by relying on the defense's presentence report. As set forth in the opening brief, the court was mistaken that the defense's presentence report could substitute for a DOC presentence report. Opening Brief at 1, 5-18.

Finally, "[w]hen a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the [e]rroneous sentence, when the error is discovered." State v. Pringle, 83 Wn.2d 188, 193, 517 P.2d 192 (1973) (quoting In re McNutt v. Delmore,

¹ "In State v. Sauve, *supra*, this court declined to consider on a second appeal issues that could have been presented in a prior appeal but were not. It is significant that there the issues were not considered by the trial court on remand. It is significant that there the issues were not considered by the trial court on remand. In fact, the Court of Appeals in Sauve recognized that RAP 2.5(c)(1) would have applied in that case if the issues had been considered and decided anew on remand." Barberio, 121 Wn.2d at 51.

47 Wn.2d 563, 565, 288 P.2d 848, 850 (1955)). There is no sound reason why that broad principle should not apply to the error asserted here, regardless of whether it could have been raised in the first appeal. Requiring Giir to raise the issue in a personal restraint petition, as advocated by the State, is senseless. Response Brief at 5. The record is complete. The void nature of the sentencing condition remains regardless of the procedural posture of appeal. Requiring Giir to pursue the matter through a personal restraint petition when it can quickly be disposed of in this direct appeal would be wasteful.

B. CONCLUSION

This Court should strike that portion of the sentence relating to the challenged condition of community custody.

DATED this 3rd day of November 2010.

Respectfully Submitted,

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STATE OF WASHINGTON,)	
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Respondent,)	
)	
v.)	COA NO. 65302-4-1
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KERO GIIR,)	
)	
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 3RD DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KERO GIIR
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2010 NOV -3 PM 4:06
KERO GIIR

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF NOVEMBER, 2010.

x Patrick Mayovsky