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King County Prosecutor
Appellate Unit

NO. 66008-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

MUSTAFA ARTEH,

Appellant.

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

The Honorable Suzanne Barnett, Judge
The Honorable Kimberley Prochnau, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in requiring the appellant to submit to mental health evaluation and treatment as a condition of community custody.
2. The no-contact order pertaining to the possession of stolen property (PSP) witnesses exceeds the maximum sentence for the crime.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it required mental health treatment and evaluation as a condition of community custody without following statutory procedures?
2. Does the 10-year no-contact order prohibiting contact with the witnesses to the PSP exceed the five-year statutory maximum sentence for the crime?

B. STATEMENT OF THE CASE¹

The State charged appellant Mustafa Arteh with second degree robbery and second degree PSP based on separate incidents occurring a few hours apart on November 11-12, 2009. CP 1-7, 17-18.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 6/2/10; 2RP – 6/3/10; 3RP – 6/7/10; 4RP – 6/8/10; 5RP – 7/7 and 7/8/10; 6RP – 7/7/10; 7RP – 7/12/10; 8RP – 7/13/10; 9RP – 7/14, 7/15, 7/16, and 8/18/10; 10RP – 4/22/11; 11RP – 4/27/11; 12RP – 5/12/11; and 13RP – 11/4/11.

A jury convicted Arteh as charged. CP 63-65. The court sentenced him to concurrent standard range sentences of totaling 70 months. CP 108. The court also imposed 12 months of community custody for robbery. CP 109. As a condition of community custody, the court ordered Arteh to engage in “mental health treatment / eval[uation] / follow prescribed med[ications].” CP 113.

The court also ordered Arteh have no contact “[f]or the maximum term of 10 years” with April Anderson, the complaining witness as to the robbery, and Matthew Swann, the witness to Anderson’s pursuit of Arteh following the robbery. CP 108; 5RP 18; 8RP 309-17. The court also prohibited contact for 10 years with Sarah Fauquet and Rhonda Prentice, witnesses with respect to the PSP only. CP 108; 5RP 74-79.

C. ARGUMENT

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

Sentencing errors derived from the court's failure to follow statutorily mandated procedures may be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 210, 76 P.3d 258 (2003).

A trial court may order an offender to undergo mental health treatment as a condition of community custody only if it complies with statutory procedures. RCW 9.94B.080; State v. Brooks, 142 Wn. App. 842,

850, 176 P.3d 549 (2008). The court must find that reasonable grounds exist to believe the offender is a mentally ill person as defined in RCW 71.24.025,² and that the mental health condition likely influenced the offense. RCW 9.94B.080; Brooks, 142 Wn. App. at 851; accord, State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (2008). An order requiring mental health 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. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. These requirements are mandatory. Id.; Jones, 118 Wn. App. at 210.

After being evaluated at Western State Hospital, Arteh was found competent to stand trial. CP 9-16.

During the sentencing hearing, Arteh's counsel argued for an exceptional sentence downward, consisting of time served and community custody, based on the fact that Arteh had struggled with mental health problems and was off his medications at the time of the crimes. 9RP 530-37. During allocution, Arteh informed the court he learned from his mistake and resumed taking his medications. 9RP 536.

² The statute is attached as an Appendix.

The prosecutor argued that Arteh's present and past claims that he was mentally ill were merely an attempt to manipulate the system, and she pointed out that Arteh was found competent to stand trial. 9RP 538-39.

The court imposed a standard range sentence, including 12 months of community custody on the robbery count. 9RP 551. The prosecutor then asked the court to impose a condition that Arteh complete a mental health evaluation and treatment and take prescribed medication; the court agreed, stating only, "the court will order that." 9RP 552.

The sentencing court did not, however, make the statutorily mandated finding that Arteh was a "mentally ill person" as defined by RCW 71.24.025. Nor did it find mental illness influenced the crime for which Arteh was convicted. RCW 9.94B.080. The trial court thus erred in imposing the mental health treatment condition. Brooks, 142 Wn. App. 850-52.

Despite taking a contrary position at trial,³ the State may argue that Arteh's or counsel's statements provide a basis to impose the challenged condition. In Jones, defense counsel stated that Jones was bipolar, that he was off his medications at the time of his crimes, and that this combination "obviously resulted" in the crimes. 118 Wn. App. at 209. The appellate court nonetheless found the trial court lacked authority to order Jones to

³9RP 539.

participate in mental health evaluation and treatment because in ordering the condition the court did not (1) find Jones was a person whose mental illness had contributed to his crimes or (2) rely on the appropriate reports in ordering such a condition. Id.

Jones controls here; the trial court thus erred when it ordered Arteh to complete a mental health evaluation and treatment as a condition of community custody. This Court should remand with an order directing the trial court to strike this community custody condition. Lopez, 142 Wn. App. at 354.

2. THE NO-CONTACT ORDER RELATING TO THE PSP WITNESSES EXCEEDS THE STATUTORY MAXIMUM SENTENCE FOR THE CRIME.

Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wash.2d 472, 477, 973 P.2d 452 (1999). A no-contact order may be entered as a condition of a sentence, but it may not exceed the statutory maximum term for the sentence. RCW 9.94A.505(8); State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). Second degree possession of stolen property is a class C felony that carries a maximum sentence of five years. RCW 9A.56.160(2); RCW 9A.20.021(1)(c). The 10-year no-contact order relating to Fauquet and Prentice, who were witnesses as to the PSP only, exceeds the five-year

statutory maximum for that crime. Remand for correction of the sentence is therefore required.

D. CONCLUSION

For the foregoing reasons, this Court should remand to strike the mental health-related conditions and to correct the excessive no-contact order.

DATED this 20th day of April, 2012.

Respectfully submitted,

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APPENDIX

Westlaw

West's RCWA 71.24.025

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West's Revised Code of Washington Annotated Currentness
Title 71. Mental Illness (Refs & Annos)
Chapter 71.24. Community Mental Health Services Act (Refs & Annos)
→ → **71.24.025. Definitions**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

- (1) "Acutely mentally ill" means a condition which is limited to a short-term severe crisis episode of:
- (a) A mental disorder as defined in RCW 71.05.020 or, in the case of a child, as defined in RCW 71.34.020;
 - (b) Being gravely disabled as defined in RCW 71.05.020 or, in the case of a child, a gravely disabled minor as defined in RCW 71.34.020; or
 - (c) Presenting a likelihood of serious harm as defined in RCW 71.05.020 or, in the case of a child, as defined in RCW 71.34.020.
- (2) "Available resources" means funds appropriated for the purpose of providing community mental health programs, federal funds, except those provided according to Title XIX of the Social Security Act, and state funds appropriated under this chapter or chapter 71.05 RCW by the legislature during any biennium for the purpose of providing residential services, resource management services, community support services, and other mental health services. This does not include funds appropriated for the purpose of operating and administering the state psychiatric hospitals.
- (3) "Child" means a person under the age of eighteen years.
- (4) "Chronically mentally ill adult" or "adult who is chronically mentally ill" means an adult who has a mental disorder and meets at least one of the following criteria:
- (a) Has undergone two or more episodes of hospital care for a mental disorder within the preceding two years; or
 - (b) Has experienced a continuous psychiatric hospitalization or residential treatment exceeding six months' duration within the preceding year; or

(c) Has been unable to engage in any substantial gainful activity by reason of any mental disorder which has lasted for a continuous period of not less than twelve months. "Substantial gainful activity" shall be defined by the department by rule consistent with Public Law 92-603, as amended.

(5) "Clubhouse" means a community-based program that provides rehabilitation services and is certified by the department of social and health services.

(6) "Community mental health program" means all mental health services, activities, or programs using available resources.

(7) "Community mental health service delivery system" means public or private agencies that provide services specifically to persons with mental disorders as defined under RCW 71.05.020 and receive funding from public sources.

(8) "Community support services" means services authorized, planned, and coordinated through resource management services including, at a minimum, assessment, diagnosis, emergency crisis intervention available twenty-four hours, seven days a week, prescreening determinations for persons who are mentally ill being considered for placement in nursing homes as required by federal law, screening for patients being considered for admission to residential services, diagnosis and treatment for children who are acutely mentally ill or severely emotionally disturbed discovered under screening through the federal Title XIX early and periodic screening, diagnosis, and treatment program, investigation, legal, and other nonresidential services under chapter 71.05 RCW, case management services, psychiatric treatment including medication supervision, counseling, psychotherapy, assuring transfer of relevant patient information between service providers, recovery services, and other services determined by regional support networks.

(9) "Consensus-based" means a program or practice that has general support among treatment providers and experts, based on experience or professional literature, and may have anecdotal or case study support, or that is agreed but not possible to perform studies with random assignment and controlled groups.

(10) "County authority" means the board of county commissioners, county council, or county executive having authority to establish a community mental health program, or two or more of the county authorities specified in this subsection which have entered into an agreement to provide a community mental health program.

(11) "Department" means the department of social and health services.

(12) "Designated mental health professional" means a mental health professional designated by the county or other authority authorized in rule to perform the duties specified in this chapter.

(13) "Emerging best practice" or "promising practice" means a practice that presents, based on preliminary information, potential for becoming a research-based or consensus-based practice.

(14) "Evidence-based" means a program or practice that has had multiple site random controlled trials across heterogeneous populations demonstrating that the program or practice is effective for the population.

(15) "Licensed service provider" means an entity licensed according to this chapter or chapter 71.05 RCW or an entity deemed to meet state minimum standards as a result of accreditation by a recognized behavioral health accrediting body recognized and having a current agreement with the department, that meets state minimum standards or persons licensed under chapter 18.57, 18.71, 18.83, or 18.79 RCW, as it applies to registered nurses and advanced registered nurse practitioners.

(16) "Long-term inpatient care" means inpatient services for persons committed for, or voluntarily receiving intensive treatment for, periods of ninety days or greater under chapter 71.05 RCW. "Long-term inpatient care" as used in this chapter does not include: (a) Services for individuals committed under chapter 71.05 RCW who are receiving services pursuant to a conditional release or a court-ordered less restrictive alternative to detention; or (b) services for individuals voluntarily receiving less restrictive alternative treatment on the grounds of the state hospital.

(17) "Mental health services" means all services provided by regional support networks and other services provided by the state for persons who are mentally ill.

(18) "Mentally ill persons," "persons who are mentally ill," and "the mentally ill" mean persons and conditions defined in subsections (1), (4), (27), and (28) of this section.

(19) "Recovery" means the process in which people are able to live, work, learn, and participate fully in their communities.

(20) "Regional support network" means a county authority or group of county authorities or other entity recognized by the secretary in contract in a defined region.

(21) "Registration records" include all the records of the department, regional support networks, treatment facilities, and other persons providing services to the department, county departments, or facilities which identify persons who are receiving or who at any time have received services for mental illness.

(22) "Research-based" means a program or practice that has some research demonstrating effectiveness, but that does not yet meet the standard of evidence-based practices.

(23) "Residential services" means a complete range of residences and supports authorized by resource management services and which may involve a facility, a distinct part thereof, or services which support community living, for persons who are acutely mentally ill, adults who are chronically mentally ill, children who are severely emotionally disturbed, or adults who are seriously disturbed and determined by the regional support network to be at risk of becoming acutely or chronically mentally ill. The services shall include at least

evaluation and treatment services as defined in chapter 71.05 RCW, acute crisis respite care, long-term adaptive and rehabilitative care, and supervised and supported living services, and shall also include any residential services developed to service persons who are mentally ill in nursing homes, boarding homes, and adult family homes, and may include outpatient services provided as an element in a package of services in a supported housing model. Residential services for children in out-of-home placements related to their mental disorder shall not include the costs of food and shelter, except for children's long-term residential facilities existing prior to January 1, 1991.

(24) "Resilience" means the personal and community qualities that enable individuals to rebound from adversity, trauma, tragedy, threats, or other stresses, and to live productive lives.

(25) "Resource management services" mean the planning, coordination, and authorization of residential services and community support services administered pursuant to an individual service plan for: (a) Adults and children who are acutely mentally ill; (b) adults who are chronically mentally ill; (c) children who are severely emotionally disturbed; or (d) adults who are seriously disturbed and determined solely by a regional support network to be at risk of becoming acutely or chronically mentally ill. Such planning, coordination, and authorization shall include mental health screening for children eligible under the federal Title XIX early and periodic screening, diagnosis, and treatment program. Resource management services include seven day a week, twenty-four hour a day availability of information regarding enrollment of adults and children who are mentally ill in services and their individual service plan to designated mental health professionals, evaluation and treatment facilities, and others as determined by the regional support network.

(26) "Secretary" means the secretary of social and health services.

(27) "Seriously disturbed person" means a person who:

(a) Is gravely disabled or presents a likelihood of serious harm to himself or herself or others, or to the property of others, as a result of a mental disorder as defined in chapter 71.05 RCW;

(b) Has been on conditional release status, or under a less restrictive alternative order, at some time during the preceding two years from an evaluation and treatment facility or a state mental health hospital;

(c) Has a mental disorder which causes major impairment in several areas of daily living;

(d) Exhibits suicidal preoccupation or attempts; or

(e) Is a child diagnosed by a mental health professional, as defined in chapter 71.34 RCW, as experiencing a mental disorder which is clearly interfering with the child's functioning in family or school or with peers or is clearly interfering with the child's personality development and learning.

(28) "Severely emotionally disturbed child" or "child who is severely emotionally disturbed" means a child who has been determined by the regional support network to be experiencing a mental disorder as defined in chapter 71.34 RCW, including those mental disorders that result in a behavioral or conduct disorder, that is clearly interfering with the child's functioning in family or school or with peers and who meets at least one of the following criteria:

(a) Has undergone inpatient treatment or placement outside of the home related to a mental disorder within the last two years;

(b) Has undergone involuntary treatment under chapter 71.34 RCW within the last two years;

(c) Is currently served by at least one of the following child-serving systems: Juvenile justice, child-protection/welfare, special education, or developmental disabilities;

(d) Is at risk of escalating maladjustment due to:

(i) Chronic family dysfunction involving a caretaker who is mentally ill or inadequate;

(ii) Changes in custodial adult;

(iii) Going to, residing in, or returning from any placement outside of the home, for example, psychiatric hospital, short-term inpatient, residential treatment, group or foster home, or a correctional facility;

(iv) Subject to repeated physical abuse or neglect;

(v) Drug or alcohol abuse; or

(vi) Homelessness.

(29) "State minimum standards" means minimum requirements established by rules adopted by the secretary and necessary to implement this chapter for: (a) Delivery of mental health services; (b) licensed service providers for the provision of mental health services; (c) residential services; and (d) community support services and resource management services.

(30) "Treatment records" include registration and all other records concerning persons who are receiving or who at any time have received services for mental illness, which are maintained by the department, by regional support networks and their staffs, and by treatment facilities. Treatment records do not include notes or records maintained for personal use by a person providing treatment services for the department, regional support networks, or a treatment facility if the notes or records are not available to others.

West's RCWA 71.24.025

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(31) "Tribal authority," for the purposes of this section and RCW 71.24.300 only, means: The federally recognized Indian tribes and the major Indian organizations recognized by the secretary insofar as these organizations do not have a financial relationship with any regional support network that would present a conflict of interest.

CREDIT(S)

[2008 c 261 § 2, eff. June 12, 2008; 2007 c 414 § 1, eff. July 22, 2007; 2006 c 333 § 104, eff. July 1, 2006. Prior: 2005 c 504 § 105, eff. July 1, 2005; 2005 c 503 § 2, eff. July 24, 2005; 2001 c 323 § 8; 1999 c 10 § 2; 1997 c 112 § 38; 1995 c 96 § 4; prior: 1994 sp.s. c 9 § 748; 1994 c 204 § 1; 1991 c 306 § 2; 1989 c 205 § 2; 1986 c 274 § 2; 1982 c 204 § 3.]

West's RCWA 71.24.025, WA ST 71.24.025

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

STATE OF WASHINGTON)

Respondent,)

v.)

MUSTAFA ARTEH,)

Appellant.)

COA NO. 66008-0-1

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 20TH DAY OF APRIL 2012, 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] MUSTAFA ARTEH
DOC NO. 759022
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF APRIL 2012.

x *Patrick Mayovsky*

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