

NO. 66356-9-I

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

REC'D

MAY 31 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP RUDY GARCIA,

Appellant.

2011 MAY 31 PM 4:18  
CLERK OF COURT  
APPELLATE UNIT

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erroneously imposed a substance abuse evaluation and treatment as a condition of community custody.

Issue Pertaining to Assignment of Error

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

B. STATEMENT OF THE CASE<sup>1</sup>

Appellant Phillip Rudy Garcia is appealing the judgment and sentence entered following his jury trial and conviction for second degree assault. CP 30 (Verdict); CP 47 (Notice of Appeal); CP 71-79 (Judgment and Sentence). The evidence at trial showed Garcia punched Phillip Hiatt in the eye while the two (strangers to each other) were at Ozzie's Restaurant and Lounge in Seattle's lower Queen Anne neighborhood on November 21, 2009. 2RP 6-20

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<sup>1</sup> This brief refers to the transcripts as follows: 1RP – 11/16/10; 2RP – 11/17/10; 3RP – 11/18/10; and 4RP – 12/10/10.

At trial, Hiatt testified he and his friends were drinking beer and playing pool when he noticed Garcia walk over from a nearby table, take his (Hiatt's) beer and return to his (Garcia's) table, where he was sitting and talking with another man and two women. 2RP 7, 10-14.

Confused, Hiatt went to Garcia's table and asked why he took the beer. 2RP 14. Reportedly receiving no response, Hiatt reclaimed his beer, returned to his table and set it down. 2RP 14. But all of a sudden, according to Hiatt, Garcia "got up and got in my face." 2RP 14. Hiatt testified he did not want trouble and turned to walk away. 2RP 14. As he turned, however, Garcia reportedly punched him in the right eye. 2RP 14, 19. Witnesses described Hiatt falling backwards and grabbing his eye. 2RP 51, 67-68.

Meanwhile, upon seeing Garcia approach Hiatt, Hiatt's friend Kyle Johnson rushed to Hiatt's aid. 2RP 18, 49. After the punch, Johnson pushed Garcia away, but was reportedly punched himself by Garcia's companion, who also had rushed to the altercation. 2RP 50-52. Bouncers quickly broke up the fight and escorted Garcia and his companion out without incident. 3RP 43. He was arrested outside when police arrived several minutes later. 3RP 51.

Following a trip to the emergency room, Hiatt learned the orbital floor of his eye was fractured and would require surgery as a piece of muscle was stuck in a small crack. 2RP 24-25; 3RP 29; 3RP 64. Hiatt had surgery the following week. 2RP 25.

At trial, Hiatt testified he could not tell if Garcia had been drinking. 2RP 18. When Garcia was supposedly "in [Hiatt's] face," Hiatt did not smell alcohol. 2RP 17.

In closing, the prosecutor did not argue Garcia's actions were influenced by alcohol or intoxication. Rather, he acknowledged Garcia's motivation was unclear:

Everybody knows that there was no justification for rearing his fist back and just punching him. Who knows if he's just mad, who knows if he's just trying to impress those girls that he's at the table with. Who knows what the reason was.

3RP 86.

At sentencing, however, the prosecutor asked the court to impose, as a condition of community custody, that Garcia undergo a substance abuse evaluation and follow all treatment conditions:

In addition to the forty-three months we are recommending that the Defendant have no contact with Phil Hiatt that he be placed on community custody for the mandatory eighteen months and that as a condition of his community custody that he obtain an alcohol and substance abuse evaluation within 30 days of release and follow all treatment

recommendations. I would ask the Court to make a finding that is rationally related to the offense as, Your Honor, knows this happened at Ozzy's Bar[.]

4RP 5.

The court imposed the high end of the standard range, 18 months of community custody and required Garcia "obtain an alcohol or substance abuse evaluation either in the – in prison or within thirty days of the release in prison, follow up treatment recommendations as a condition of community custody and commit no crimes." 4RP 8; see also CP 79. The court did not make any finding that substance abuse contributed to the offense.

C. ARGUMENT

THE TRIAL COURT WRONGLY ORDERED A SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered that "w/in 30 days of release or while in custody, the defendant shall obtain an alcohol/substance abuse evaluation and follow all recommendations." CP 79. Because the court acted outside its authority in doing so, the condition should be vacated.

Former RCW 9.94A.700(5)(c) (2003)<sup>2</sup> allows the court to impose "crime-related treatment or counseling services" only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment). And before such rehabilitative treatment may be imposed, RCW 9.94A.607(1) requires the court to 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.

(Emphasis added).

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, the appellate court assumes the Legislature means exactly what it says, giving

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<sup>2</sup> RCW 9.94A.700 was recodified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

criminal statutes literal interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

Here, the evidence did not show the alleged problem in need of treatment contributed to the offense, as required under Jones. Although the altercation took place at a bar, and Garcia reportedly took Hiatt's beer, Hiatt testified he could not tell if Garcia had been drinking and did not recall smelling alcohol on his breath. Moreover, Garcia left without incident. There was no evidence he was intoxicated or that alcohol or another substance contributed to the offense. Indeed, the prosecutor acknowledged in closing that Garcia's motivation was unclear and that he may have been trying to impress his female companions.

Nor did the court make the required finding under RCW 9.94A.607(1) that a chemical dependency contributed to the offense. The court was therefore without authority to impose the substance abuse evaluation and treatment condition.

In State v. Powell, Division Two remarked the trial court correctly imposed substance abuse treatment as a community custody condition despite the lack of a finding as required by RCW 9.94A.607(1) because the trial evidence showed the defendant consumed methamphetamine before committing the offense and

the defense asked the court to impose substance abuse treatment. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73, 206 P.3d 321 (2009). The court's remarks in Powell are dicta because the court had already decided to reverse 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 court of appeals reversed on separate issue, its 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 have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Regardless, the court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the 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. The Powell

Court's approach renders the statutory language referring to the need for a finding superfluous. "Statutes 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).

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 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 court in Powell ran afoul of these well-established principles when it independently reviewed the record and, in effect, made a finding the sentencing court never made.

But perhaps most importantly, the evidence here did not show alcohol or any other substance contributed to the offense. Accordingly, the condition was not crime-related.

Sentencing errors may be raised for the first time on appeal. State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This Court should order the sentencing court to strike the condition

pertaining to the substance abuse 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).

D. CONCLUSION

For the reasons stated above, the sentencing court was without authority to require Garcia to undergo a substance abuse evaluation and follow recommended treatment. The condition should be stricken from the judgment and sentence.

Dated this 31<sup>st</sup> day of April, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	COA NO. 66356-9-1
vs.	)	
	)	
PHILLIP GARCIA,	)	
	)	
Appellant.	)	

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**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 31<sup>ST</sup> DAY OF MAY 2011, 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] PHILLIP GARCIA  
DOC NO. 890741  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MAY 2011.

x Patrick Mayovsky

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