

66629-1

66629-1

NO. 66629-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROSCO BROWN, JR.,

Appellant.

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2011 JUN 25 PM 4:42

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

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**BRIEF OF RESPONDENT**

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King County Prosecuting Attorney

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**A. ISSUE PRESENTED**

Whether the trial court properly imposed a condition of community custody requiring Brown to continue with his substance abuse treatment where Brown admitted to having a drug addiction that led him to commit the offense.

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Rosco Brown, Jr., was charged by information with violation of the uniform controlled substances act; specifically, the State alleged that Brown possessed cocaine on November 2, 2009. CP 1-4.

Trial occurred in August of 2010. After the trial court denied Brown's motion to suppress the cocaine, he waived his right to a jury trial and proceeded by way of a stipulated trial. CP 72-76; 1RP 88-91; 2RP 2.<sup>1</sup> The court found Brown guilty as charged. CP 72-76; 2RP 5-8. The court denied Brown's motion for an exceptional sentence and imposed a standard-range sentence. CP 83-91; 5RP 13-14.

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<sup>1</sup> The verbatim report of proceedings consists of five volumes, which will be referred to as follows: 1RP (8/18/2010); 2RP (8/19/2010); 3RP (10/1/2010); 4RP (12/3/2010); and 5RP (1/7/2011).

## 2. SUBSTANTIVE FACTS.

On November 2, 2009, Seattle Police Officer Donald Johnson saw Cesar Hunter and Rosco Brown inspecting an item in Hunter's hand. CP 72-73. Based on his training and experience, Johnson suspected that the two men were involved in a drug transaction. CP 73. As Johnson and his partner, Officer Franklin Poblocki, approached, they saw a crack pipe in Hunter's hand. CP 74. The officers detained both men and found a small piece of crack cocaine in Brown's hand. CP 74. After being advised of his constitutional rights, Brown admitted that he had more crack in his pocket. CP 74. Officers recovered another rock, which the Washington State Patrol Crime Laboratory confirmed contained .23 grams of cocaine. CP 74.

At sentencing, Brown requested an exceptional sentence based on the small amount of drugs and his need for treatment. 4RP 2-7; 5RP 7-11. Instead of a standard-range commitment sentence, Brown proposed spending 13 months in an intensive, long-term treatment program at the Union Gospel Mission. 4RP 5. At the time of sentencing, Brown had already begun the treatment program. 4RP 5. Although the court was concerned that a standard-range sentence for Brown was not the best use of public

money, the court found that there was no legal basis to justify going outside the standard range. CP 83-91; 5RP 12-13. In addition to the 12 months and 1 day of confinement, the court imposed 12 months of community custody and ordered Brown to continue with his substance abuse treatment as a condition of community custody. CP 83-91; 5RP 14.

**C. ARGUMENT**

1. THE TRIAL COURT PROPERLY REQUIRED BROWN TO CONTINUE WITH SUBSTANCE ABUSE TREATMENT BECAUSE BROWN ADMITTED HE HAS A SERIOUS DRUG ADDICTION THAT LED HIM TO COMMIT THE CRIME AND BECAUSE THE TREATMENT WAS CRIME-RELATED.

Brown claims that the trial court erred in requiring him to continue with his substance abuse treatment as a condition of community custody. More specifically, he claims that the trial court erred because it did not make an express finding on the record "that the offender has a chemical dependency that has contributed to his or her offense" in accordance with RCW 9.94A.607. This claim should be rejected because Brown admitted that he has a serious drug problem that led to the commission of the offense, and the trial court was entitled to rely on that admission in imposing this

condition of community custody. Brown's claim should also be rejected because the trial court was permitted to impose crime-related treatment.

Brown is correct that treatment or counseling may be imposed as a condition of community custody only if the treatment condition is crime-related. See RCW 9.94A.703(3)(c). Moreover, Brown relies upon RCW 9.94A.607, which provides:

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).

As a result, Brown argues that the trial court improperly ordered a substance abuse evaluation and treatment as a condition of community custody because it did not make an express finding on the record that Brown "has a chemical dependency that has contributed to his . . . offense." Id.

In considering Brown's motion for an exceptional sentence, the trial court implicitly acknowledged that Brown has a substance

abuse problem. In fact, the court continued sentencing multiple times in the hopes of finding a way to justify Brown's sentence proposal. Nonetheless, Brown argues that the trial court could not order treatment without an express finding. Assuming for the sake of argument that the trial court was required to make an express finding that Brown's drug addiction contributed to the crime, Brown's claim still fails. Brown admitted that he has a substance abuse problem, and the trial court was entitled to rely on that admission.

In his brief in support of his motion for an exceptional sentence, Brown's attorney stated, "there is no dispute that his criminal history is directly related to his drug addiction." Supp. CP \_\_ (Sub 81, Defendant's Presentence Report, 12/17/10) (Appendix A). As Brown's attorney noted, most of his felony convictions were for drug crimes or crimes related to supporting his addiction. Supp. CP \_\_ (Presentence Report 12/17/10); CP 83-91. Brown's attorney urged the trial court to conclude that without substance abuse treatment, Brown would be "very likely" to reoffend. Supp. CP \_\_ (Presentence Report 12/17/10).

At sentencing, Brown's attorney explained that Brown had spent most of his life "addicted to substances." 5RP 8. Counsel

argued that Brown's risk of reoffending would be "substantially decreased" if he were allowed to participate in long-term, intensive treatment. 4RP 7. Counsel further argued that it was "quite apparent that Brown need[ed] treatment ... to ensure that he does not reoffend ...." 4RP 14. Brown himself asked for treatment in order that he have "a chance to straighten [his] life out." 5RP 11.

In the context of calculating a defendant's offender score, the trial court is allowed to rely on a defendant's affirmative acknowledgment of his criminal history, even though the State would otherwise bear the burden of proving the defendant's criminal history by a preponderance of the evidence. State v. Ross, 152 Wn.2d 220, 233, 95 P.3d 1225 (2004). In this case, Brown affirmatively acknowledged that he has a drug problem, and that he needed treatment in order to reduce his risk of reoffending. Following the premise of Ross, this Court should hold that requiring substance abuse treatment is proper when based on the defendant's affirmative acknowledgment that his drug use influenced the commission of the crime. Any other result would elevate form over substance to the point of absurdity.

Brown urges this Court not to follow State v. Powell, 139 Wn. App. 808, 818, 162 P.3d 1180 (2007), rev'd on other grounds, 166

Wn.2d 73, 206 P.3d 321 (2009), holding that a treatment condition is appropriate in the absence of an express finding under RCW 9.94A.607 if the record otherwise supports the treatment condition. This argument should be rejected for three reasons. First, Brown's position that this portion of Powell is dicta is not accurate.<sup>2</sup> Second, as demonstrated by this case, this aspect of Powell is sound, as it prevents needless, formalistic remands.

Third, this Court need not rely on Powell at all in rejecting Brown's claim. In Powell, the record supported the imposition of a treatment condition because the trial evidence showed that Powell had consumed methamphetamine. Powell, 139 Wn. App. at 820. In this case, by contrast, Brown affirmatively acknowledged that this offense occurred during a treatment relapse. Supp. CP \_\_\_ (Sub. 81, Defendant's Presentence Report 11/5/10) (Appendix B). Therefore, this case presents a different, more compelling reason to affirm the treatment condition than was present in Powell.

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<sup>2</sup> Division II reversed Powell's conviction based on the admission of what the court deemed to be inadmissible evidence of the defendant's drug use, but the Washington Supreme Court reversed Division II's decision. Therefore, the portion of Division II's decision that the condition of community custody was proper is completely necessary to the disposition of Powell's appeal, and hence, not dicta in any sense of the word.

The trial court was entitled to rely on Brown's express admission that a severe drug addiction resulted in the commission of his crime, and this Court should reject Brown's claim to the contrary.

Finally, unlike in Powell, Brown was convicted of a drug crime, rather than a non-drug crime that was influenced by his drug use. As a condition of community custody, courts may order defendants to participate in crime-related treatment or counseling services. RCW 9.94A.703(3)(c). Courts review sentencing conditions for abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such conditions are usually upheld if reasonably crime-related. Id. A condition is crime-related when it directly relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992) (citing statutory definition of "crime related prohibition"); see also State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (court cannot require alcohol counseling unless alcohol contributed to the offense).

There is no question that the treatment requirement is reasonably related to the crime Brown committed. When Brown was arrested, he appeared to be in the process of buying crack cocaine from Hunter. Brown also had a small rock of crack in his

pocket. Even without Brown's statements regarding his drug problem, the substance abuse treatment was clearly crime-related. Therefore, the trial court properly required Brown to continue with substance abuse treatment as a condition of his community custody.

**D. CONCLUSION**

The trial court properly imposed a substance abuse evaluation and treatment as a condition of community custody. This Court should affirm the judgment and sentence.

DATED this 25 day of July, 2011.

Respectfully submitted,

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King County Prosecuting Attorney

By: Bridget E Maryman  
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# Appendix A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

ROSCO BROWN,

Defendant.

Cause No. 10-1-00045-0 SEA

DEFENDANT'S PRESENTENCE REPORT

**Sentencing Judge:** The Honorable Susan Craighead

**Sentencing Date:** December 17, 2010 at 3:30 p.m.

**Charge(s):** VUCSA - Possession of Cocaine

**Standard Range:** 12+ to 24 months

**DEFENSE RECOMMENDATION**

The Defense is seeking an exceptional sentence downward of twelve months of intensive outpatient treatment at the Union Gospel Mission while on EHD to ensure compliance with the treatment recommendations of his substance abuse evaluation.

DEFENDANT'S PRESENTENCE REPORT - 1

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5 **BASIS FOR RECOMMENDATION**  
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7 Washington's Sentencing Reform Act (SRA) authorizes judges to impose sentences outside the  
8 standard range if, considering the purposes of the SRA, there are substantial and compelling reasons  
9 justifying an exceptional sentence. State v. Ha/Mim, 132 Wn.2d 834, 843, 940 P.2d 633 (1997); State v.  
10 Pascal, 108 Wash.2d 125 (1987); RCW 9.94A.535.

11  
12 Mr. Brown is making his request based on the factors set out in State v. Gaines, 122 Wn.2d 502  
13 (1993). In the Gaines case, the trial court made several findings to justify an exceptional sentence  
14 downwards. The trial court in Gaines entered the following findings of fact:

15 (1.3) The defendant is addicted and/or abused a number of substances, including alcohol,  
16 marijuana, heroin, amphetamines and cocaine. Defendant's prior and current criminal activity is directly  
17 related to his addiction and substance abuse dependency.

18 (1.4) That a standard sentencing range of total confinement would not promote the State's  
19 interest in both punishing the defendant for his criminal offenses and rehabilitating the defendant so that  
20 future criminal offenses do not occur. Treatment professionals indicate that the defendant requires  
21 intensive inpatient treatment, beyond that which is available in the Department of Corrections facilities.

22 (1.5) That the defendant is amenable to a long term residential drug treatment program.

23 (1.6) Without treatment for drug dependency, defendant is very likely to reoffend. Society would  
24 be better protected by placing defendant, at his own request, in a treatment program.  
25

1 The Washington Supreme Court in Gaines concluded that the findings of 1.3 and the first  
2 sentence of 1.6 supports the conclusion of law contained in the second sentence of finding 1.6 that  
3 society would be better protected if the defendant was given treatment for his addiction.

4 The finding in 1.4 stating that if the defendant needed drug treatment beyond what is available in  
5 DOC facilities and if the defendant's criminal activity is related to his drug addiction, then confinement  
6 in a DOC facility would not serve the State's interest in rehabilitation. The Supreme Court cited RCW  
7 9.94A.010 (5) - identifying rehabilitation as one of the SRA's goal. The Supreme Court concluded  
8 these findings did support reasons for imposing an exceptional sentence downward in Gaines.

9 In Mr. Brown's case, there is no dispute that his criminal history is directly related to his drug  
10 addiction. His felony history consists mainly of VUCSA convictions or crimes relating to support his  
11 addiction. With that finding, this Court can reasonably conclude that without treatment for his drug  
12 dependency, Mr. Brown is very likely to reoffend and society would be more protected if Mr. Brown was  
13 in a long term inpatient treatment program.

14 Mr. Brown does need drug treatment beyond what is available in the DOC facilities. He has  
15 been evaluated for his drug addiction and the experts at the Union Gospel Mission are recommending  
16 that he receive intensive outpatient treatment for one year minimum. This recommendation exceeds  
17 what DOC could provide Mr. Brown and therefore not serve the State's interest in rehabilitation.

18 Mr. Brown does want to complete the year of intensive outpatient treatment and would accept  
19 being on EHD to ensure compliance with the treatment program.

20 Mr. Brown does requests the Court to impose an exceptional sentence of twelve months of EHD  
21 to be served at the Union Gospel Mission in the Intensive Inpatient Treatment program.

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Victoria Freer, WSBA# 23152  
Attorney for the Defendant

DEFENDANT'S PRESENTENCE REPORT - 3

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# Appendix B

**COPY RECEIVED**

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CRIMINAL DIVISION  
KING COUNTY PROSECUTORS OFFICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

ROSCO BROWN,

Defendant.

Cause No. 10-1-00045-0 SEA

DEFENDANT'S PRESENTENCE REPORT

**Sentencing Judge:** The Honorable Susan Craighead

**Sentencing Date:** November 5, 2010 at 2:45 p.m.

**Charge(s):** VUCSA – Possession of Cocaine

**Standard Range:** 12+ to 24 months

**DEFENSE RECOMMENDATION**

The Defense would request the low end of the standard range with credit for all the time Mr. Brown has served on this matter. Mr. Brown would further request that all non-mandatory costs, fees, and assessments be waived.

DEFENDANT'S PRESENTENCE REPORT - 1

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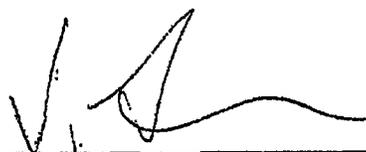
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3 BASIS FOR RECOMMENDATION  
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6 Mr. Brown is a fifty-four year old male before the Court for sentencing on one count of  
7 Possession of Cocaine that occurred on November 9, 2009. This incident occurred when Mr. Brown had  
8 a relapse from his treatment that he had been involved with at Sound Mental Health. Mr. Brown started  
9 attending Sound Mental Health approximately a year before he was arrested on this matter. He was  
10 seeking treatment both for substance abuse and major depression. At the time he was seeking treatment,  
11 Mr. Brown states that he was tired of the direction his life was taking him and with the death of his  
12 mother, he wanted to make changes and learn to cope with his losses. He was seeing a counselor on a  
13 regular basis to help him cope with his losses and his guilt associated with one of past crime victims.  
14 While in treatment, he was receiving assistance with in working to stabilizing his life such as applying  
15 for benefits and ensuring he had a place to live. Unfortunately for Mr. Brown some of his oldest  
16 convictions make it difficult for him to continue with services with this current case. Mr. Brown did not  
17 qualify for Drug Diversion Court nor did he have a qualifying diagnosis for Mental Health Court and  
18 because of his criminal history, the State was not willing to reduce charges. Since his release on this  
19 matter, Mr. Brown has continued with his dedication to stay away from drugs and other drug associates  
20 and to focus on taking care of his needs, such as his current medical issues for which were the basis of  
21 this hearing being continued from the last court date.  
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The Office of Public Defense has determined that Mr. Brown is indigent and no financial assets. Based on his financial circumstances, he requests this Court waive all non-mandatory costs, and assessments, including interest and trust fees, pursuant to State v. Hayes, 56 Wn.App. 451 (1989) and State v. Earls, 51 Wn.App. 192 (1988).

  
Victoria Freer, WSBA# 23152  
Attorney for the Defendant

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ROSCO BROWN, JR., Cause No. 66629-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame  
Name  
Done in Seattle, Washington

7/25/11  
Date

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STATE OF WASHINGTON  
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