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AUG 15 2011

King County Prosecutor  
Appellate Unit

NO. 66862-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

KURT BOERNER,

Appellant.

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

The Honorable Michael Hayden, Judge

BRIEF OF APPELLANT

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 AUG 15 PM 4:18

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A. ASSIGNMENT OF ERROR

The trial court erred when it ordered appellant, as a condition of community custody, to obtain a mental health evaluation and follow all recommended treatment.

Issue Pertaining to Assignment of Error

The trial court is only authorized to order a mental health evaluation and treatment where certain statutory prerequisites are satisfied. These prerequisites were not met in appellant's case. Should this community custody condition be stricken?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Kurt Boerner with one count of Assault in the Second Degree, including a deadly weapon sentence enhancement. CP 1-4. A jury found him guilty as charged and the trial court imposed a standard range 24-month sentence. CP 18-19, 41.

The court also imposed an 18-month term of community custody. CP 42. Included among the conditions of community custody is a requirement that Boerner "obtain mental health evaluation and follow all treatment recommendations." CP 46. Boerner timely filed his Notice of Appeal. CP 69-79.

C. ARGUMENT

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

Sentencing errors derived from the court's failure to follow statutorily mandated procedures can be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). The trial court had no authority to order that Boerner submit to a mental health evaluation and recommended treatment.

RCW 9.94B.080<sup>1</sup> provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds 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. An order requiring mental status evaluation or 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. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080 authorizes a trial court to order mental

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<sup>1</sup> Although the heading to RCW 9.94B.080 indicates that it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may not order an offender to participate in mental health treatment as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." Jones, 118 Wn. App. at 202; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); Brooks, 142 Wn. App. at 850-52.

Although RCW 9.94A.500(1) authorizes trial courts to order a presentence report where the defendant may be a mentally ill person under RCW 71.24.025,<sup>2</sup> there is no indication such a report was ordered in Boerner's case. Nor does the record contain any "applicable mental status evaluations." And nowhere did the court

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<sup>2</sup> RCW 9.94A.500(1) provides, in pertinent part:

If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

make the statutorily mandated finding that Boerner is a "mentally ill person" as defined by RCW 71.24.025 and that a qualifying mental illness influenced his crime. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

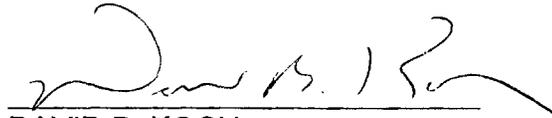
D. CONCLUSION

This Court should order the trial court to strike the community custody condition pertaining to mental health treatment. Lopez, 142 Wn. App. at 354.

DATED this 15<sup>th</sup> day of August, 2011.

Respectfully submitted,

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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66862-5-II
	)	
KURT BOERNER,	)	
	)	
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 15<sup>TH</sup> DAY OF AUGUST, 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] KURT BOERNER  
DOC NO. 348679  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF AUGUST, 2011.

x Patrick Mayovsky

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