

NO. 67063-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCK OYENGA,

Appellant.

REC'D  
SEP 30 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Susan J. Craighead, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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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 Franck Oyenga with one count of delivering cocaine. CP 1-4.

Prior to trial, the court ordered Oyenga to undergo a competency evaluation. Supp. CP \_\_\_\_ (sub no. 11, Order for Pretrial Competency Evaluation). The evaluating psychologist found Oyenga "did not present with signs of a major mental illness (such as psychosis or mood instability) or significant cognitive impairment (such as mental retardation)" and concluded he was competent for trial. CP 20. The court found that Oyenga understood the nature of the proceedings and was able to effectively assist his attorney. CP 6.

A jury found Oyenga guilty, and the trial court imposed a standard range sentence of 12 months and a day. CP 48, 52. The court also imposed a 12-month term of community custody. CP 52. Included among the conditions of community custody is a requirement that Oyenga "obtain a mental health evaluation and follow all treatment recommendations."<sup>1</sup> CP 55. Oyenga timely filed his Notice of Appeal. CP 60-67.

C. ARGUMENT

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

A court may impose only a sentence that is authorized by statute. "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Sentencing errors derived from the court's failure to follow statutorily mandated procedures can be raised for the first

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<sup>1</sup> The court also required a drug/alcohol evaluation and recommended treatment. CP 55. At sentencing, Oyenga agreed that drugs and alcohol were the sources of his problems. RP (3/28/11) 6. This condition is not at issue.

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 Oyenga submit to a mental health evaluation and recommended treatment. RCW 9.94B.080<sup>2</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 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

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<sup>2</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.

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>3</sup> there is no indication such a report was ordered in Oyenga's case. Nor does the record contain any "applicable mental status evaluations." The competency report from Western State Hospital revealed no major mental illness or cognitive impairment.<sup>4</sup> CP 20.

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<sup>3</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.

<sup>4</sup> In a presentence report, defense counsel described Oyenga as "mentally ill." CP 58. But counsel is not a psychologist and his opinion conflicts with the assessment from Western.

Moreover, nowhere did the court make the statutorily mandated finding that Oyenga 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.

In response, the State may point out that defense counsel did not object to a mental health evaluation and treatment. In answer to an inquiry by the court about a drug and alcohol evaluation, defense counsel stated, “So if the court was going to order one of those things, I would ask that it be a mental health type assessment.” RP (3/28/11) 5-6.

In State v. Powell, Division Two remarked that the trial court in that case correctly imposed substance abuse treatment as a community custody condition – despite the lack of a finding under RCW 9.94A.607(1) that chemical dependency contributed to the offense – 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 the defendant's conviction on a separate issue when it addressed the community custody condition. See Powell, 139 Wn. App. at 818; see also State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (calling portion of opinion in State v. Savaria, 82 Wn. App. 832, 838-839, 919 P.2d 1263 (1996), dicta where court of appeals reversed on separate issue and discussion only included because issue likely to arise on remand).

Moreover, the court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94B.080, the court may not impose a mental health evaluation or treatment unless the court makes the requisite findings based on the requisite reports and evaluations. The Powell Court's approach renders statutory language 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).

Finally, in addition to being dicta and wrongly decided, Powell is distinguishable. Powell was based on *both* evidence in

the record to support the ordered treatment and defense counsel's agreement to the treatment. See Powell, 139 Wn. App. at 819-20.

There is no evidentiary support for a mental health evaluation or treatment in Oyenga's case. Moreover, to the extent a defense attorney could agree to an otherwise unauthorized condition, defense counsel here merely agreed to an evaluation, not treatment. RP (3/28/11) 5-6 ("if the court was going to order one of those things, I would ask that it be a mental health type assessment.").

D. CONCLUSION

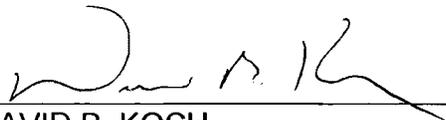
This Court should order the trial court to strike the community custody condition pertaining to mental health treatment.

Lopez, 142 Wn. App. at 354.

DATED this 30<sup>th</sup> day of September, 2011.

Respectfully submitted,

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Respondent,	)	
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FRANCK OYENGA,	)	
	)	
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 30<sup>TH</sup> DAY OF SEPTEMBER 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]    FRANCK OYENGA  
      C/O PIKE PLACE CLINIC  
      1930 POST ALLEY  
      SEATTLE, WA 98101

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2011.

x *Patrick Mayovsky*