

67309-2

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NO. 67309-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KNUTE FENSTAD,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the trial court properly ordered Fenstad to submit to a substance abuse evaluation and treatment as a condition of community custody where Fenstad contended the drug Ativan contributed to the crime.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Knute Fenstad was charged by information with one count of robbery in the first degree. CP 1-6.

Trial began on April 13, 2011. 1RP 2¹. A jury found Fenstad guilty as charged. CP 27. The Honorable Susan Craighead imposed the low end of the standard range of 129 months and 18 months of community custody. CP 56-57. As a condition of community custody, the court ordered Fenstad to obtain a substance and alcohol abuse evaluation and treatment. CP 63; 5RP 25. The court also ordered Fenstad to undergo a mental health evaluation and follow any treatment recommendations. CP 63; 5 RP24-25. At the sentencing hearing, Fenstad asked for an exceptional sentence below the standard range, contending that his

¹ The verbatim report of proceedings consists of five volumes, which will be referred to as follows: 1RP (April 13, 2011); 2RP (April 14, 2011); 3RP (April 18, 2011); 4RP (April 19, 2011); 5RP (May 13 and June 1, 2011).

"ability to appreciate the wrongfulness of his actions was clearly diminished based on his consumption of prescribed medications".

5RP 13.

2. SUBSTANTIVE FACTS.

Shortly before one o'clock on December 21, 2009, Ashley Welch, a bank teller, was working at Chase Bank located at 14400 124th Ave Northeast in Kirkland, Washington. 2RP 28-29. A white male, later identified as Knute Fenstad, approached Welch and presented a handwritten note on a deposit/withdrawal slip. 2RP 37-45. The note read, "I need \$500 cash right now. Look at my arm." 2RP 40. Welch pulled out her stack of one hundred dollar bills, counted out five hundred dollars and handed the money to the Fenstad. 2RP 44. Fenstad then said, "I'll come back and give you back the money in a month." 2RP 44. Fenstad walked out. 2RP 44 Welch turned to a co-worker and told her, "I was just robbed". 2RP 45.

The defendant did not dispute he was the robber. 3RP 103, 110. The defendant presented a hybrid voluntary and involuntary intoxication claim, arguing that Fenstad did not have the requisite intent to commit robbery because he was suffering from an alcohol and dru- induced blackout at the time he committed the robbery.

3RP 46-48, 101-13; 5RP 14. In support of Fenstad's claims, the defense called Dr. Robert Julien, a doctor specializing in anesthesiology and pharmacology. 3RP 28. According to medical records, Fenstad was admitted into a hospital on December 20, 2009 at 11:16 a.m. 3RP 38. At that time, he was found to have a blood alcohol level of .258 grams percent. 3RP 40-41. Fenstad was then prescribed 16 - two milligram pills of Ativan. 3RP 42. Dr. Julien agreed that Ativan is sometimes prescribed to assist in detoxification. 3RP 42. Based on Fenstad's own account of what happened, he went to the pharmacy after being discharged from the hospital, obtained the prescription and took at least one, perhaps two of the prescribed tablets at the pharmacy and remembered nothing after that. 3RP 46. Speculating that Fenstad took two pills, Dr. Julien opined that the pills magnified the impact of Fenstad's already high blood alcohol level causing an alcohol blackout. 3RP 47. Dr. Julien was also of the opinion that Fenstad was so depressed from alcohol and drugs, he could not fulfill the legal definitions of intent. 3RP 48.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ORDERED FENSTAD TO OBTAIN A SUBSTANCE ABUSE EVALUATION AND TREATMENT BECAUSE THE TREATMENT WAS CRIME-RELATED.

Fenstad 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 there was an "absence of any finding a substance abuse problem contributed to commission of the robbery" in accordance with RCW 9.94A.607. Fenstad's claim should be rejected because the trial court was permitted to impose crime-related treatment.

Fenstad 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). Fenstad 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, Fenstad 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 Fenstad has a substance abuse problem which contributed to him committing the offense and "nothing to indicate Fenstad is addicted to [Ativan] or any other prescribed substance."

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). Treatment conditions are appropriate in the absence of an express finding under RCW 9.94A.607 if the record otherwise supports the treatment condition. Courts review sentencing conditions for abuse of discretion. 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), 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, 455, 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 Fenstad committed. Fenstad's entire defense was based on the abuse of alcohol and prescribed drugs. The substance abuse evaluation was reasonably ordered to determine what if any treatment should be recommended.

D. RESPONDENT'S CONCESSION OF ERROR

1. THE STATE ASKS THIS COURT TO ACCEPT ITS CONCESSION THAT THE TRIAL COURT DID NOT FOLLOW PROPER PROCEDURE BEFORE REQUIRING FENSTAD TO SUBMIT TO A MENTAL HEALTH EVALUATION AND TREATMENT

Fenstad argues that the trial court erred when it ordered him to obtain a mental health evaluation and follow all treatment recommendations. The State concedes that the trial court did not follow the statutorily-required procedure before ordering mental health treatment.

A trial court may order a mental health evaluation and treatment only when the court has considered a presentence report and has made findings that the defendant's mental illness contributed to his crimes. RCW 9.94B.080;² State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). Failure to follow this procedure can be raised for the first time on appeal. Jones, 118 Wn. App. at 204. At sentencing, Fenstad's counsel on his behalf told the court that Mr. Fenstad had "endorsed that he has had a number of mental health issues over the years." 5RP 22. Counsel went on further to ask, if the court "would consider specifically ordering whatever period of commitment to the department of Corrections that he will be serving, that he be ordered to serve that at the special commitment center in Monroe based on those mental health issues. 5RP 23.

The trial court reasonably considered Fenstad's own admissions of mental health concerns, however, there was no presentence report for the trial court to consider and the court did not make the requisite findings. 5RP 1-28.

E. CONCLUSIONS

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.

Under Jones, Lopez, and Brooks, the trial court erred when it ordered mental health treatment. This matter should be remanded for the trial court to consider whether a mental health evaluation is appropriate under RCW 9.94B.080. Jones, 118 Wn. App. at 211.

DATED this 17th day of February, 2012.

Respectfully submitted,

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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 David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Brief of Respondent, in STATE V. KNUTE FENSTAD, Cause No. 67309-2-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.



Name Tuyen Lam
Done in Kent, Washington

2/17/12

Date 2/17/2012