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NO. 67535-4-I

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

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FEB 13 2012
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Appellate Unit

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK A. WYCOUGH,

Appellant.

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

The Honorable Jay V. White, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it ordered Patrick A. Wycough, as a condition of community custody, to obtain a substance abuse evaluation and follow all recommended treatment.

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

Issues Pertaining to Assignments of Error

1. The trial court may order an offender to participate in treatment or counseling services only if the services are crime-related. There was no evidence establishing substance abuse played a role in Wycough's crimes. Should the trial court's order requiring Wycough to participate in a substance abuse evaluation and recommended treatment be stricken?

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

B. STATEMENT OF THE CASE

Patrick A. Wycough and Natoya Wycough (Natoya) married in 2006 and divorced two years later. 5RP 41-44.[1] Natoya initiated a reconciliation attempt on November 20, 2010. 5RP 45-46, 78-79. They discussed the matter earlier in the day, and Wycough returned to Natoya's house later that night. 5RP 45-46. Wycough asked for Natoya's son, Quentin Reed, but Reed was not home. Natoya handed Wycough her cordless telephone so he could call Reed. He went outside, returned five or 10 minutes later, gave the phone back to Natoya, and left. 5RP 48-49.

Wycough returned about 20 minutes later. When Natoya opened the door, she saw a gun in the waistband of Wycough's pants. 5RP 52, 73-75. Wycough was very anxious and wanted to talk. 5RP 53. Natoya dialed 911 on the cordless phone and set the phone down without speaking with the operator. 5RP 54-55, 57-58. Meanwhile, Wycough stood outside the door and never entered the house at any time. 5RP 59, 73, 75. Nor did he ever take the gun out of his waistband. 5RP 59.

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[1] Wycough cites to the verbatim report of proceedings as follows: 1RP – 5/4/2011; 2RP -- 5/9/2011; 3RP – 5/10 – 5/11/2011; 4RP – 5/12/2011; 5RP – 5/16/2011; 6RP 5/17/2011; 7RP 5/18/2011; 8RP – 6/17/2011; 9RP – 8/12/2011.

Natoya told Wycough to get out of the house because she considered the outside doorway area part of her house. 5RP 60. After repeatedly saying he wanted to talk with Natoya, Wycough left. 5RP 61. During this time, Natoya's "friend," David, was in the back of the house. 5RP 49-50. Wycough said nothing that would have indicated he knew David was there. 5RP 61.

Shortly after Wycough left, Natoya heard police officers commanding him to get on the ground. 5RP 61-62. Several officers had responded to Natoya's address. 4RP 32-33, 58-61; 5RP 99-102; 6RP 12-14, 49-51. They saw Wycough standing next to his truck, which was parked in the street in front of Natoya's house. Wycough did not comply with the officers' repeated command to get on the ground. He instead walked behind his truck and out of view. 4RP 35-41, 63-64; 5RP 105-07; 6RP 15-16.

At about this time Reed drove around the officers and parked his car on the other side of the street from Wycough's truck. He got out, spoke with Wycough for a brief time, and also walked behind Wycough's truck. 4RP 40-42; 5RP 26-27, 64, 107-08; 6RP 15-17. Wycough re-emerged and both he and Reed were eventually arrested, handcuffed and placed into police cars. 4RP 42-43, 64; 5RP 109-10; 6RP 18-20, 55-56.

One officer found a pistol in some leaves near where Wycough had walked behind his truck. 4RP 45-47, 55-56; 5RP 9-10. There was a bullet in the chamber, meaning the gun was ready to fire. 5RP 12-13. An officer showed Natoya the gun, which she identified as the weapon carried by Wycough. 5RP 64; 6RP 59. Natoya told another officer her life flashed before her eyes when she saw the gun and she thought Wycough was going to kill her. 6RP 60, 62-63. She also disclosed that Wycough came inside the house with the gun. 6RP 60. The officer described Natoya as "upset." 6RP 64. Another officer who took a formal written statement called Natoya "scared and nervous." 4RP 48.

Meanwhile, another officer drove Wycough to the police station. On the way, Wycough spontaneously announced, "I did the crime, I'll do the time." 5RP 111-12.

A different officer transported Reed to the same station. Wycough was already in a holding cell when Reed arrived. 6RP 20-22. Wycough was upset that Reed had been arrested and began yelling and screaming. 6RP 25-26. Wycough told the officer Reed had done nothing and said "the gun was mine." 6RP 26. While he did additional paperwork, the officer overheard Wycough tell Reed they found the gun, which was his. He also said, "I had the gun like I was going to kill her and shit. She was scared

and called the police." 6RP 31. Reed asked Wycough got the gun, and Wycough responded that it did not matter. 6RP 31. Wycough told Reed, "I have a fuck the world mentality." 6RP 31-32. He then said, "I never planned on intentionally hurting your momma." 6RP 32.

After that, Wycough leaned forward from his cell and looked at the officer. He then said, "That gun wasn't mine," and "lots of stuff happens o[n] that street. It could belong to anyone." 6RP 33. The officer said Wycough's statements were directed at him. 6RP 33.

Based on this series of events, the State charged Wycough with first degree burglary by being armed with a deadly weapon and by assaulting Natoya, first degree unlawful possession of a firearm, and felony harassment. The state further alleged Wycough committed the burglary and harassment while armed with a firearm. CP 36-38.

Jurors heard the evidence set forth above. And because Natoya called 911 and left the line open when she set down the phone, jurors also heard the dialogue that took place between Natoya and Wycough as she requested him to put the gun away. 5RP 42, 65-66; Ex. 9 (recording); Ex. 11 (transcript given to jury as listening aid). The jury ultimately found Wycough guilty of first degree burglary and first degree unlawful possession of a firearm, and not guilty of felony harassment. CP 71, 73-

74. The jury also found Wycough was armed with a firearm while committing the burglary. CP 72; 7RP 75-76.

The trial court imposed concurrent, standard range sentences and 18 months community custody. CP 85-93; 9RP 15-16.

C. ARGUMENT

1. THE TRIAL COURT ACTED OUTSIDE ITS STATUTORY AUTHORITY BY ORDERING A SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A COMMUNITY CUSTODY CONDITION.

The trial court imposed an 18-month community custody term. CP 89. As a condition of community custody, the court ordered Wycough to undergo an "alcohol/substance abuse" evaluation and treatment. CP 93. The trial court exceeded its statutory sentencing authority because there was no evidence indicating substance abuse played a role in Wycough's offense.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing

to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

As a condition of community custody, a trial court may order an offender to "[p]articipate in crime-related treatment or counseling services[.]" RCW 9.94A.701(3)(c). A court may also order participation in rehabilitative programs or performance of affirmative conduct "reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" RCW 9.94A.701(3)(d).

There was no evidence substance abuse was related to Wycough's burglary. State v. Jones[2] governs here.

Jones pleaded guilty to first degree burglary and other crimes. During the plea hearing, defense counsel explained Jones was bipolar and not only off of his medication, but also using methamphetamine, at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

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[2] 118 Wn. App. 199, 76 P.3d 258 (2003).

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

The Court of Appeals struck this condition. Jones, 118 Wn. App. at 212. The court held the evidence failed to show alcohol contributed to the offenses or the trial court's alcohol counseling condition was "crime-related," as required by former RCW 9.94A.700(5)(c). Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, that former RCW 9.94A.715(2)(a) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208.

The Court held:

> If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-

> related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Wycough's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence substance abuse contributed to Wycough's offense.

Therefore, that portion of the community custody condition requiring Wycough to obtain a substance abuse evaluation and follow recommended treatment is too broad and not reasonably related to the circumstances of the offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

For these reasons, the "substance abuse" community custody condition should be stricken from Wycough's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

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

The trial court also ordered Wycough to undergo a mental health evaluation and follow treatment recommendations. CP 93. The court lacked statutory authority to so order.

RCW 9.94B.080[3] 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 condition of community custody

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[3] 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.

"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), review denied, 164 Wn.2d 1012; 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,[4] there is no indication such a report was ordered in Wycough's case. Nor does the record contain any "applicable mental status evaluations." And nowhere did the court make the statutorily mandated finding that Wycough 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.

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[4] 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.

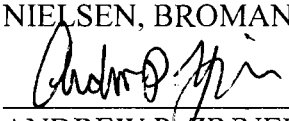
D. CONCLUSION

This Court should order the trial court to strike the "substance abuse" and "mental health" community custody conditions. Lopez, 142 Wn. App. at 354.

DATED this 13 day of February, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER
WSBA No. 18631
Office ID No. 91051
Attorneys for Appellant

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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67535-4-I
	)	
PATRICK WYCOUGH,	)	
	)	
Appellant.	)	

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 13TH DAY OF FEBRUARY 2012, 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] PATRICK WYCOUGH
DOC NO. 811188
MONORE CORRECTIONAL CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF FEBRUARY 2012.

x Patrick Mayovsky