

72355-3

FILED  
October 26, 2015  
Court of Appeals  
Division I  
State of Washington

72355-3

NO. 72355-3-I-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES WIGGIN,

Appellant.

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

The Honorable Millie Judge, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in entering its order requiring appellant to obtain a mental health evaluation and follow any treatment recommendations as a condition of community custody. CP 50.

Issues Related to Assignments of Error

1. Did the trial court err in imposing a community custody condition requiring mental health treatment without first following necessary statutory procedures?

2. In response, the state may contend that Wiggin requested the court to impose the condition, and thereby invited the error. Is this potential response meritless for the three reasons set forth in argument 2, infra?

B. STATEMENT OF THE CASE

On March 22, 2010, the Snohomish County prosecutor filed an amended information charging appellant James Wiggin with one count of failing to register during the period April 7 – May 30, 2009. CP 379-80; RCW 9A.44.130. Following a bench trial, the Honorable Gerald Knight found Wiggin guilty as charged. CP 66.

Sentencing occurred March 22, 2010. The confinement range was zero- to 12-months in jail. The court imposed 30 days with credit

for time served. Judge Knight also imposed 36 months of community custody. CP 66.

In Wiggin's first appeal (No. 65215-0-I), he argued the 36-month community custody term was erroneous and the court was limited to a zero- to 12-month range.<sup>1</sup> The state conceded error, agreeing that the period of community custody could not exceed one year. CP 66, 130. This Court accepted the concession and remanded "for resentencing." CP 136 (citing former RCW 9.94A.505(2)(b) and In re Restraint of Acron, 122 Wn. App. 886, 888, 95 P.3d 1272 (2004)). CP 66. After this Court denied reconsideration and the Supreme Court denied discretionary review, the mandate was issued November 1, 2011. CP 129.

"Following remand, the trial court made several attempts to resentence Wiggin." CP 67. After those several flawed attempts, followed by several interim appeals, the trial court finally held a resentencing hearing on June 8 and 12, 2012, where the court imposed a 12-month period of community custody. CP 68-69; 118-19.

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<sup>1</sup> Wiggin also raised other arguments not relevant to this appeal. CP 378-89.

Wiggin appealed that resentencing order. In that appeal, No. 69120-1-I, Wiggin raised numerous claims as to why the order should be reversed and why Judge Okrent erred in denying Wiggin's motion for recusal. CP 70-73. This Court disagreed with several claims, but ultimately held that Wiggin was denied his statutory right of allocution, and remanded for resentencing before a different judge. CP 73-74.

The resentencing hearing was held before the Honorable Millie Judge on July 23, 2014. Two main questions were presented: (1) what length of community custody the court would impose within the zero- to 12-month range, and (2) whether the court would impose mental health treatment as a community custody condition.

Defense counsel asked the court to impose no community custody. RP 3-4 (counsel referred to community custody as "probation"). Wiggin then exercised his right to allocution, and touched on several mental health issues he was having during the charging period for this offense. RP 4-6. He complained that he had a lengthy sentence on another conviction, but was not receiving mental health treatment while he was in prison. He wanted to receive treatment while in the Department of Corrections (DOC), and felt that DOC's failure to provide that treatment would set him up for failure upon his release. RP 6-7.

The court then asked if Wiggin wanted the court to “order mental health treatment as part of any community--”, but Wiggins interrupted before the court could finish, saying “I would love if the Court would do that. I really would, because I need it.” RP 7. Defense counsel then asked if Wiggin understood “if [the court] makes that a condition of probation [sic], she has to give you probation [sic]? RP 7. Wiggin said he understood and would rather do that to get the help he needed. RP 7-8. He clarified that he preferred mental health treatment to

this run-around with the Department of Corrections and them actually really I feel sabotaging my transition. If I was ordered to mental health in Monroe or something, they have got a good program there, then I could work on my mental health issues and then even go through Lincoln Park and have a smoother transition. The last time I was miserable and I attempted suicide many times over.

RP 7-8.

The court then asked the prosecutor if anything would prevent the court from requiring Wiggin “to seek a mental health evaluation and follow any and all treatment recommendations as part of community custody?” RP 8. The prosecutor responded that the court would have to find that Wiggin has mental health issues and would benefit from it and that the issues were related to this case. RP 8-9.

The prosecutor believed that the evidence supported that finding, and opined that Wiggin could not appeal the condition because he requested it. RP 9.

The court then orally stated that mental illness played a role in these convictions, and that “evaluation and treatment is necessary and important for recovery.” RP 11. The court imposed 12 months of community custody with that condition. RP 11.

Wiggin immediately asked if he would be able to participate in treatment while in DOC, because DOC had “all kinds of programs and I’m just sitting idle time.” RP 11. The court asked the prosecutor if it could order DOC to provide mental health treatment while Wiggin was in prison, and the prosecutor said he did not know. RP 11-12. The court was hesitant without hearing from an Assistant Attorney General. RP 12. Defense counsel then stated her belief that the court lacked authority to order DOC to require treatment during the prison portion of the sentence. The court could include a recommendation and state it was the “court’s preference if it could be accommodated.” RP 12.

The court then entered a written order modifying the judgment and sentence. The written order imposed a concurrent 12-month term of community custody with cause number 10-1-00078-4. “As a

condition of community custody defendant shall obtain a mental health evaluation and undergo any recommended treatment.” CP 50. Following an asterisk on page 2, the order states, “[i]t is the court’s desire that defendant receive a mental health evaluation while in custody and begin any recommended treatment while in custody.” CP 51.

Wiggin timely appeals. CP 1.

C. ARGUMENT

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

As a special condition of community custody, the court ordered Wiggin to “obtain a mental health evaluation and undergo any recommended treatment.” CP 50. This condition cannot be imposed until statutory prerequisites are followed. The court’s failure to follow the mandated procedure requires reversal of this condition.

A trial court’s authority to impose sentence is limited by the authority in the SRA at the time of the offense. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). The law governing Wiggin’s sentence is the law in effect on April 7 – May 30, 2009. CP 156; RCW 9.94A.345. This Court reviews de novo whether a trial court exceeds its statutory authority in imposing community custody

conditions. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Former RCW 9.94A.505(9) (2009) provided:<sup>2</sup>

(9) 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.

The statute authorizes a trial court to order mental health evaluation and treatment only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9)). A court may not impose this community custody condition “unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender

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<sup>2</sup> The section has been reenacted as RCW 9.94B.080. The heading of chapter 9.94B RCW states the chapter applies to crimes committed prior to July 1, 2000, but RCW 9.94B.080 applies to crimes committed after 2000. See Laws of 2008, ch. 231, § 55(1) (“Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective date of this section.”).

suffers from a mental illness which influenced the crime.” State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007).

The court must find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term “mentally ill person” is defined in RCW 71.24.025 (18). Only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of RCW 9.94B.080 and former RCW 9.94A.505(9) (2009).

a. There Was No Presentence Report

Although the parties each filed resentencing memoranda, the trial court did not order a “presentence report” as required. That report is prepared by the Department of Corrections (DOC), not the parties.

Statutory terms should be accorded their plain meaning in the context in which they appear. State v. Jones, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). Several Washington statutes use the term

“presentence report.” The most relevant, RCW 9.94A.500,<sup>3</sup> makes it clear that a “presentence report” must be completed before the sentencing hearing. RCW 9.94A.500(1). A court may not enter an order requiring a mental health evaluation or treatment without first considering a “presentence report.” RCW 9.94B.080. A defendant may be found to have waived objections to information contained in a presentence report if the objections are not raised at sentencing (RCW 9.94A.530(2)); of course, this can only happen if the presentence report is completed before the sentencing hearing.

Court rules further cement this basic truth. The governing rule is titled, “Procedures Before Sentencing” and includes a subsection authorizing the court to order a presentence report be prepared by DOC, and a subsection discussing the contents of such a report. CrR 7.1(a) and (b) (emphasis added). The presentence report should be filed “at least 10 days before sentencing.” CrR 7.1(a)(3).

The case law is in accord. See generally, State v. Sanchez, 146 Wn.2d 339, 353-57, 46 P.3d 774 (2002) (presentence report is prepared by community corrections officer before sentencing). In

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<sup>3</sup> The statute is titled, 9.94A.500. “Sentencing hearing—Presentencing procedures—Disclosure of mental health services information[.]”

short, the term “presentence report” has a plain meaning in this context, and requires the report to be prepared by the DOC before sentencing.

b. The Court did not Make the Required Finding

Second, the court did not make the statutorily mandated finding that Wiggin was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced the crime for which he was convicted. CP 50-51. Whatever else this shortcut procedure might be called, it was not based on a presentence report, and the court did not enter the statutorily required finding. The court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

The errors also substantially affect Wiggin’s rights. The court has commanded Wiggin to allow a stranger to probe his thought processes. Any type of mental examination entails an invasion of privacy. Guilford Nat'l Bank of Greensboro v. Southern Ry. Co., 297 F.2d 921, 924 (4th Cir. 1962); Russenberger v. Russenberger, 623 So.2d 1244, 1245 (Fla. Dist. Ct. App. 1993). An involuntary psychological examination entails the revelation of intimate details of a person’s life. An analyst conducting a mental examination undertakes “by careful direction of areas of inquiry to probe, possibly

very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition.” Edwards v. Superior Court, 16 Cal.3d 905, 911, 130 Cal. Rptr. 14 (Cal. 1976).

Moreover, one purpose of the SRA is to “[m]ake frugal use of the state's and local governments’ resources.” RCW 9.94A.010(6). That purpose would be frustrated if resource-intensive psychological evaluations and treatment could be imposed as community custody conditions following any conviction. The Legislature did not intend to throw open the doors to such evaluation whenever a person commits a crime. The Legislature instead required specific statutory steps before evaluation and treatment can be imposed, showing its intent to limit this condition to a narrow class of offenders.

An unlawful community custody condition can be challenged for the first time on appeal. The rule applies to erroneous community custody conditions in general and the erroneous imposition of mental health evaluation and treatment in particular. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (in general); Jones, 118 Wn. App. at 204 (mental health evaluation and treatment). The condition requiring a mental health evaluation and treatment must be stricken from the judgment and sentence. Lopez, 142 Wn. App. at 354.

2. WIGGIN'S REQUEST FOR MENTAL HEALTH TREATMENT DID NOT AND COULD NOT INVITE THE COURT'S ERROR.

In response, the state may contend that Wiggin requested the court to impose mental health treatment as a community custody condition, and therefore invited any error. See RP 9 (prosecutor states that Wiggin could not appeal this condition because he asked for it). This potential response lacks merit for three reasons.

First, Wiggin's allocuted request was ambiguous, at best. At several points he made it clear that he wanted the court to order DOC to provide mental health treatment during his prison term. His time at DOC was otherwise idle, and without treatment in prison the DOC's community custody conditions would sabotage his transition back to society. RP 6-7, 11. On this record, the state cannot convince this Court that Wiggin fully understood or requested the sentencing court to add an onerous condition to his community custody.

Second, the sentencing court specifically asked the prosecutor if the court could impose the condition, but the prosecutor did not inform the court that a DOC presentence report was a prerequisite to the condition. RP 8-9. Where the state had as much opportunity to avoid the error as did the defense, the court's error should not be blamed on the defense.

Third, and perhaps most importantly, a court has only that sentencing authority provided by statute. State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (“[A] defendant cannot empower a sentencing court to exceed its statutory authorization.”) The defense cannot expand a court’s authority by agreement or invitation. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (Motter’s request to receive mental health treatment as part of community custody does not give the court authority to impose it), review denied, 163 Wn.2d 1025 (2008), overruled on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010); see also State v. Wallin, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (rejecting state’s argument that defendant invited error when he agreed to previous court order that unlawfully extended community custody after defendant violated terms of release), review denied, 155 Wn.2d 1012 (2005); State v. Phelps, 113 Wn. App. 347, 354-55, 357, 57 P.3d 624 (2002) (reversing part of sentence extending statute of limitations as void: “Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.”) (citing In re Restraint of Moore, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991) (“Since the sentence to which petitioner agreed

and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.”)

D. CONCLUSION

This Court should reverse and direct the trial court to strike the community placement condition. CP 50.

DATED this 26th day of October, 2015.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "Eric Broman", is written over a horizontal line.

ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72355-3-1
	)	
JAMES WIGGIN,	)	
	)	
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 26<sup>TH</sup> DAY OF OCTOBER, 2015 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] JAMES WIGGIN  
DOC NO. 730559  
WASHINGTON STATE PENITENTIARY  
1313 N. 13TH AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF OCTOBER, 2015.

X *Patrick Mayovsky*