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STATE OF WASHINGTON
BY

NO. 41674-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN DOUGLAS JACKSON,

Appellant.

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

The Honorable Edmund Murphy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REMAND IS REQUIRED FOR THE TRIAL COURT TO STRIKE COMMUNITY CUSTODY CONDITIONS WHICH WERE NOT CRIME RELATED.

a. Mental health evaluation and treatment.

Misstating the record, the State argues that the trial court properly ordered a mental health evaluation and treatment. Brief of Respondent at 8-9. A review of RP 475-76 cited by the State reveals that the court was discussing a psychosexual evaluation, not a mental health evaluation. The court did not order a mental health evaluation until the prosecutor brought to the court's attention that DOC "wanted" it. RP 477. The court responded, "If Department of Corrections is requesting it, I'll order that as well. They'll make a determination about whether there is an issue in regards to that." RP 477. The record belies the State's assertion that "the court ordered that defendant undergo the recommended mental health evaluation as there was clearly a concern that defendant's mental state influenced the crime."

Remand is required for the court to strike the condition because the court had no authority to order a mental health evaluation where there was no evidence that Jackson was a mentally ill person whose condition

influenced the offense as required under RCW 9.94A.505(9) and RCW 9.94A.700(5).

b. Chemical dependency evaluation and treatment.

The State mistakenly relates Jackson's alcohol use to chemical dependency and argues that the trial court "relied" on the pre-sentence report to order a chemical dependency evaluation and treatment but only cites to the DOC report to support its assertion. Brief of Respondent at 10. The State obviously did not cite to the verbatim report of proceedings because the record reflects that the court never referred to the DOC report regarding a chemical dependency or substance abuse evaluation. The court only told Jackson, "I think it is important that you get a chemical dependency evaluation." RP 476.

Remand is required for the court to strike the condition because the the court did not find, and there was no evidence, that Jackson has a chemical dependency that contributed to the offense as required under RCW 9.94A.607(1).

c. Moral Reconation Therapy.

The State argues that the "court did not err in ordering MRT as a condition of community custody, where the condition was reasonably related to the offender's risk of reoffending," but fails to cite any authority to support its argument. Brief of Respondent at 11-12. Contrary to the

State's unfounded assertion, the record is void of any evidence that the MRT was reasonably related to the offense, the offender's risk of reoffending, or the safety of the community. The pre-sentence report merely states that Jackson "will need to participate in DOC's Moral Recognition Therapy (MRT) program after release from incarceration while being supervised." CP 105. DOC provided no further information about what the program involves, the court never inquired about the program during sentencing, and the prosecutor stated that he did not know why DOC recommended the MRT. RP 467.

The State attempts to distinguish State v. Vasquez, 95 Wn. App. 12, 972 P.2d 109 (1999), arguing that Jackson was sentenced under RCW 9.94A.715. Brief of Respondent at 11. However, the record reflects that the trial court mistakenly sentenced Jackson to community custody under RCW 9.94A.712. CP 103. In any event, even though Vasquez was sentenced under RCW 9.94A.120, the Court's analysis applies here because there is clearly insufficient evidence to determine whether the MRT was crime-related or related to Jackson's risk of reoffending. Vasquez, 95 Wn. App. at 16-17.

Consequently, remand is required for the trial court to strike the MRT condition.

d. Access to internet without child blocks in place.

The State argues that the trial court properly placed conditions on Jackson's access to the internet relying on State v. Castro, 141 Wn. App. 485, 170 P.3d 78 (2007). Division Three of this Court held that the trial court had authority to order Castro not to use the internet without approval from his sex offender therapist. Without any analysis, the Court concluded that Castro's internet restriction is a "valid affirmative act." Castro, 141 Wn. App. at 494. Brief of Respondent at 12.

To the contrary, in State v. O'Cain, 144 Wn. App. 772, 184 P.3d 1262 (2008), Division One of this Court held that the trial court erred in imposing a community custody condition prohibiting O'Cain from accessing the internet without approval from his community custody officer or treatment provider. O'Cain, 144 Wn. App. at 773. The Court determined that "the internet condition does not involve affirmative conduct reasonably related to the circumstances of the offense." Id. at 775. Concluding that the condition is a prohibition and must therefore be crime-related, the Court remanded to the trial court to strike the condition because there was no evidence that O'Cain's internet use contributed to the crime. Id.

Under the persuasive and sound reasoning of O'Cain, remand is required for the trial court to strike the internet access condition because

the record substantiates that there was no evidence that internet access contributed to the crime.

2. REMAND IS REQUIRED FOR THE TRIAL COURT TO CORRECT THE ERRONEOUS JUDGMENT AND SENTENCE WHICH STATES THAT JACKSON WAS CONVICTED OF CHILD MOLESTATION INVOLVING DOMESTIC VIOLENCE AND CORRECT THE COURT'S ERRONEOUS DOMESTIC VIOLENCE NO CONTACT ORDER.

The State argues that the trial court "did not err in finding that the crime involved domestic violence," but there is nothing in the record that shows that the court made such a finding. Brief of Respondent at 13-14. Unlike in State v. Winston, 135 Wn. App. 400, 404, 144 P.3d 363 (2006), where the court checked the box on the judgment and sentence finding that the crime involved domestic violence, there is no such finding in the judgment and sentence here and the court made no finding of domestic violence during sentencing. CP 86-102; RP 465-81. Consequently, with no finding by the jury or the court that the crime involved domestic violence, the erroneous judgment and sentence must be corrected.

Furthermore, contrary to the State's argument, because there was no finding of domestic violence, the court erred in entering a domestic violence no contact order and remand is required for the court to correctly enter a sexual assault protection order under RCW 7.90.150(6).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should remand to the trial court for the court to correct its sentencing errors. In any case, remand is required because, as the State conceded, the trial court erred in ordering Jackson not to possess or peruse pornographic materials and sentencing Jackson to community custody under RCW 9.94A.712.

DATED this 30th day of December, 2011.

Respectfully submitted,

VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Kevin Douglas Jackson

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kimberley DeMarco, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of December 2011, in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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