

NO. 41742-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN M. ZORN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 10-1-00329-1

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	1
D. ARGUMENT	2
THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING ZORN NOT TO POSSESS ALCOHOL AND TO HAVE A MENTAL HEALTH EVALUATION AND COMPLETE ALL RECOMMENDED TREATMENT	2
E. CONCLUSION	6

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	3
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	3
<u>State v. Brooks</u> , 142 Wn. App. 842, 176 P.3d 549 (2008)	5
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	3, 4, 5
<u>State v. Julian</u> , 102 Wn. App. 296, 9 P.3d 851 (2000), <u>reviewed denied</u> , 143 Wn.2d 1003 (2001).....	3
<u>State v. McKee</u> , 141 Wn. App. 22, 167 P.3d 575 (2007)	4
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	3
 <u>Statutes</u>	
RCW 9.94A.030.....	4
RCW 9.94A.505.....	5
RCW 9.94A.700.....	3
RCW 9.94B.050.....	4, 5
RCW 9A.36.021.....	1

A. ASSIGNMENTS OF ERROR

01. The trial court erred in ordering Zorn not to possess alcohol.
02. The trial court erred in ordering Zorn to have a mental health evaluation and complete all recommended treatment.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court acted without authority in ordering Zorn not to possess alcohol and to have a mental health evaluation and complete all recommended treatment? [Assignment of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

John M. Zorn (Zorn) was charged by information filed in Mason County Superior Court on October 21, 2010, with assault in the second degree, contrary to RCW 9A.36.021(1)(a). [CP 6].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 48]. Trial to a jury commenced on December 15, the Honorable Tony A. Sheldon presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 141].

The jury returned a verdict of guilty as charged. Zorn was sentenced within his standard range and timely notice of this appeal followed. [CP 6,-20, 22, 36].

02. Substantive Facts

On October 18, 2010, at approximately 3:44 in the afternoon, police were dispatched to a local Wal-Mart on a report of a disturbance in progress. [RP 21, 43]. Zorn had been observed walking through the store yelling about the government hacking his computer and cell phone and saying “how he was going to talk to a CEO or the FBI or somebody....” [RP 118]. After Adrian Leonard, a customer at the store, walked by Zorn and said something to the effect of “him being a crack head [RP 80],” Zorn walked out of the store before returning to punch Leonard in the face with his closed fist. [RP 80, 105]. As a result, Leonard sustained a broken nose and several acute facial fractures. [RP 65, 67, 72, 96].

Zorn rested without presenting evidence. [RP 134].

D. ARGUMENT

THE TRIAL COURT ACTED
WITHOUT AUTHORITY IN
ORDERING ZORN NOT TO
POSSESS ALCOHOL AND
TO HAVE A MENTAL HEALTH
EVALUATION AND COMPLETE
ALL RECOMMENDED TREATMENT.

At sentencing, as conditions of community custody, the court, in part, ordered that Zorn:

[x] ...not possess or consume any mind or

mood-altering substances. to include the drug alcohol....

- [x] ...shall have a mental health evaluation within 30 days of release from custody, provide a copy of the evaluation to the CCO, successfully participate in and completed all recommended treatment, and sign all releases necessary to ensure that the CCO can consult with the treatment provider to monitor progress and compliance....

[CP 17].

A defendant may raise claims relating to sentencing conditions for the first time on appeal. State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), reviewed denied, 143 Wn.2d 1003 (2001); State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003); State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court had statutory authority to impose community custody conditions, is reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). This court reviews the imposition of community custody conditions for abuse of discretion, reversing only if the decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition is manifestly unreasonable if it is beyond the court's authority to impose. State v. Jones, 118 Wn. App. at 207-08.

The conditions of community custody may include “crime-related prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW

9.94B.050(5)(e). A “crime-related prohibition” is defined as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted....” RCW

9.94A.030(10).

01. Possession of Alcohol

There was no evidence at trial that alcohol played any part in Zorn’s crime. In Jones, supra, the defendant pleaded guilty to several offenses and the court imposed conditions of community custody relating to alcohol consumption and treatment. As here, nothing in the evidence indicated that alcohol contributed to the defendant’s offenses. State v. Jones, 118 Wn. App. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant “to participate in alcohol counseling(,)” Id. at 208, reasoning that the legislature intended a trial court to be able “to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense.” Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d

1049 (2008). And while RCW 9.94B.050(4) outlines various conditions that are mandatory unless waived by the court, one of which under subsection (c) that the “offender shall not possess or consume controlled substances(,)” there is no mandatory condition under this authority that an offender “not possess or consume any mind or mood-altering substances, to include the drug alcohol....”

Here, while the condition prohibiting Zorn from consuming alcohol is valid since it need not be crime-related per RCW 9.94B.050(5)(d) and Jones, 118 Wn. App. at 206-07, the condition prohibiting Zorn from possessing alcohol is invalid because there is no evidence that alcohol played any part in Zorn’s offense.

02. Mental Health Evaluation

Under RCW 9.94B.050(5)(c), the court may order an offender to “participate in crime-related treatment or counseling services.” However, the trial court lacks authority to order a mental health evaluation and treatment as a condition of community custody without finding that (1) reasonable grounds exist to believe that the person is mentally ill, and (2) this condition most likely influenced the offense. State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008); State v. Jones, 118 Wn. App. at 209-10; RCW 9.94A.505(8). The trial court made no such findings and there is nothing in the record to support them, with

the result that the trial court acted without authority to impose the mental health evaluation and possible treatment thereafter.

E. CONCLUSION

Based on the above, Zorn respectfully requests this court to remand this case to the trial court with an order to strike from Zorn's sentence the conditions pertaining to possession of alcohol and mental health evaluation and treatment consistent with the arguments presented herein.

DATED this 2nd day of September 2011.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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