

FILED

SEP 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29748-9-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JUSTIN LEE ROBERT FRAME,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a term of community custody for 24 months after it had revoked the DOSA sentence.

2. The trial court erred in imposing a condition of community custody that Mr. Frame not possess or sell alcohol.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the sentencing court not have the statutory authority to impose a sentence of community custody of 24 months once the DOSA sentence had been revoked?

2. Did the sentencing court violate due process and exceed its statutory authority by imposing a condition of community custody that Mr. Frame not possess or sell alcohol?

C. STATEMENT OF THE CASE

Justin Frame pled guilty to four counts of delivery of marijuana. CP 16-25. He received a sentence for residential DOSA that include 24 months of community custody. CP 35. The court also imposed the following condition: “The defendant shall not use, possess or sell . . . alcohol.” CP 39

Approximately four months later, the Court revoked the DOSA sentence and sentenced Mr. Frame to 12 months in the county jail. The

Court did not modify any of the conditions in the judgment and sentence after the revocation. RP 34-36. This appeal followed. CP 67.

D. ARGUMENT

1. The sentencing court did not have the statutory authority to impose a sentence of community custody of 24 months once the DOSA sentence had been revoked.

Sentencing is a legislative power, not a judicial power. *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. *State v. Mulcare*, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. *State v. Monday*, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by

statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). The general statute authorizing the superior court to impose a sentence of community custody is RCW 9.94A.701, which provides in pertinent part:

(3) A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for:

.....

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000 . . .

RCW 9.94A.701(3)(c).

In addition, RCW 9.94A.664(1) provides:

A sentence for a residential chemical dependency treatment-based alternative shall include a term of community custody equal to one-half the midpoint of the standard sentence range or two years, whichever is greater, conditioned on the offender entering and remaining in residential chemical dependency treatment certified under chapter 70.96A RCW for a period set by the court between three and six months.

Delivery of marijuana is a felony offense under chapter 69.50.

RCW 69.50.401(1) and (2)(c). Under RCW 9.94A.664(1), the amount of community custody authorized in the present case would be 24 months.

But that amount of community custody is conditioned on Mr. Frame entering and remaining in residential chemical dependency treatment.

Once the Court revoked the DOSA sentence and sentenced Mr. Frame to

12 months in the county jail, it lost the statutory authority under 9.94A.664(1) to order 24 months community custody. Instead, the court was now only authorized to impose 12 months community custody under RCW 9.94A.701(3)(c). Therefore, the sentencing court did not have the statutory authority to continue to impose a sentence of 24 months community custody after it revoked the DOSA sentence.

2. The sentencing court violated due process and exceeded its statutory authority by imposing a condition of community custody that Mr. Frame not possess or sell alcohol.

A trial court's sentencing authority is limited to that granted by statute. *State v. Moen*, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024 (1993)). If a trial court exceeds that authority, its order may be corrected at any time. *Paine*, 69 Wn. App. at 883. In some instances, conditions of community custody not directly related to the circumstances of the crime are not authorized by statute. A trial court lacks authority to impose such conditions. See *State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); *In re Carle*, 93 Wn.2d at 33, 604 P.2d. Sentencing

conditions are reviewed for abuse of discretion. See *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

Community custody conditions for the offense at issue here are governed by RCW 9.94A.703, which provides in pertinent part:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section. . . .

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to: . . .

(e) Refrain from *consuming* alcohol; or

(f) Comply with any crime-related prohibitions . . .

RCW 9.94A.703(3)(e) and (f) (emphasis added).

Here, the sentencing court imposed the following condition: “The defendant shall not use, possess or sell . . . alcohol.” CP 39. Mr. Frame challenges the condition that he not *possess* or *sell* alcohol. RCW 9.94A.703 (3)(e) allows the trial court to prohibit only the consumption of alcohol, not its possession or sale. The trial court had authority to prohibit Mr. Frame from consuming alcohol regardless of whether alcohol was related to the crime. *Id.* See also *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (holding that a trial court can order that a defendant sentenced to community custody not consume alcohol despite the lack of evidence that alcohol had contributed to his offense). However, because

there is no evidence that alcohol played a role in these crimes, the trial court could not go beyond the statutory authority, which allows only prohibition of the consumption of alcohol. The requirement that Mr. Frame not possess or sell alcohol was improperly imposed and should be stricken.

E. CONCLUSION

For the reasons stated, the unauthorized community custody condition should be stricken and the case remanded with instructions to reduce the amount of community custody to 12 months.

Respectfully submitted September 6, 2011.



David N. Gasch
Attorney for Appellant
WSBA #18270