

FILED
March 16, 2015
Court of Appeals
Division III
State of Washington
NO. 32954-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HERSHAW,

Appellant.

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

The Honorable M. Scott Wolfram, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred in ordering mental health treatment.

Issue Pertaining to Assignment of Error

Did the court err in ordering mental health treatment where the statutory prerequisites were not met?

B. STATEMENT OF THE CASE

The Walla Walla County Prosecutor's Office charged Joshua Hershaw with Burglary in the Second Degree in connection with his unlawful entry into a garage on September 19, 2014. CP 1-5. In exchange for a guilty plea, prosecutors agreed to recommend a first-time offender waiver. CP 11. Prosecutors also indicated they would recommend drug and mental health treatment. CP 11.

Hershaw pled guilty. RP 1-3; CP 8-18. Per the plea agreement, defense counsel argued for a first-time offender waiver and, noting that Hershaw's behavior was driven by a substance abuse problem, asked that he be required to participate in drug and mental health treatment. RP 4-5. The prosecutor concurred in the recommendation, agreed Hershaw had "a serious substance abuse problem" and "probably some mental health issues as a result of being a war veteran." RP 5.

The court granted the first-time offender waiver, imposing 33 days' confinement and 12 months of community custody. CP 25; RP 7. The court entered a finding that Hershaw has a chemical dependency that contributed to his offense and, as a condition of his sentence, ordered Hershaw to participate in drug treatment at his own expense. CP 20, 29 (condition 11); RP 7-8. Among other conditions, the court also ordered Hershaw to complete mental health counseling at his own expense. CP 29 (condition 16). Hershaw timely filed his Notice of Appeal. CP 35-48.

C. ARGUMENT

THE SENTENCING COURT WAS NOT AUTHORIZED TO ORDER MENTAL HEALTH TREATMENT.

The sentencing judge erred when he ordered mental health treatment as part of Hershaw's sentence.

The first-time offender waiver statute, RCW 9.94A.650, contemplates treatment as a condition of community custody. See RCW 9.94A.650(3) (authorizing community custody for up to one year in order to address treatment needs). Indeed, the first-offender waiver statute authorizes any community custody condition found in RCW 9.94A.703. RCW 9.94A.650(4). And RCW 9.94A.703 authorizes the sentencing court to order

participation in “crime-related treatment or counseling services” and “rehabilitative programs . . . related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(c)-(d).

But these provisions are subject to another provision pertaining specifically to mental health treatment. RCW 9.94B.080¹ 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.

¹ 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.

Brooks, 142 Wn. App. 842, 851-852, 176 P.3d 549 (2008). A court may not order an offender to participate in mental health treatment as a condition of community custody "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." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003); accord State v. Locke, 175 Wn. App. 779, 804, 307 P.3d 771 (2013), review denied, 179 Wn.2d 1021, 336 P.3d 1165 (2014); State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012, 195 P.3d 87 (2008); 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 71.24.025,² there is no indication such a report was ordered in Hershaw's case. Nor does the record contain any "applicable mental status evaluations." And nowhere did the court

² 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.

make the statutorily mandated finding that Hershaw is a “mentally ill person” as defined by RCW 71.24.025 and that a qualifying mental illness influenced his crime. The judge thus erred in imposing mental health treatment. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

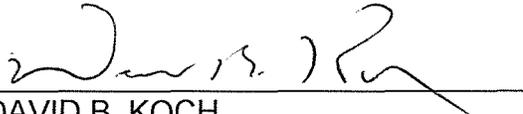
D. CONCLUSION

Hershaw may obtain mental health treatment if he is so inclined, but it could not be imposed as a requirement of his sentence. This Court should strike the sentencing condition that Hershaw obtain mental health treatment.

DATED this 16th day of March, 2014.

Respectfully submitted,

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