

61378-2

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NO. 61378-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
TAIWANDRIC RUSSELL,
Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 JUN -9 PM 5:02

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE DEBORAH D. FLECK

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When imposing a misdemeanor sentence, the court, in its discretion, may include reasonable conditions that would tend to reduce the misdemeanant's future commission of crimes, whether the conditions are crime-related or not. At Russell's sentencing for fourth degree assault, the State asserted, without objection, that the victim thought Russell was under the influence of intoxicants at the time of the incident. Moreover, Russell's criminal history consists of myriad alcohol and drug-related crimes. Was the sentencing court's imposition of alcohol and drug conditions a proper exercise of its discretion?

B. STATEMENT OF THE CASE

After a jury convicted defendant Taiwandric Russell of assault in the second degree, tampering with a witness and four misdemeanors under a separate cause number, the State, for purposes of "judicial economy," reduced the charge in the instant case from assault in the second degree to assault in the fourth degree. 3/7/08RP 2-4; CP 1, 5. On February 4, 2008, Mr. Russell

entered a guilty plea, pursuant to North Carolina v. Alford,¹ to the reduced charge.

On March 7, 2008, the Honorable Deborah D. Fleck presided over a sentencing hearing that concerned both of Mr. Russell's cases — the case tried to jury and this case in which he entered a guilty plea. On this case, the State recommended that the court impose conditions that required Mr. Russell to obtain a substance abuse evaluation and to refrain from possessing alcohol or non-prescription drugs. 3/7/08RP 27. The deputy prosecutor explained the basis of her recommendation:

In this case, from the victim's statement to police, and from the interview that we did with [the victim] with [defense counsel] present, it is the position of [the victim] that the defendant appeared to be intoxicated, whether it was alcohol or drugs, he is not sure.

But, when [the victim] saw [the defendant] at the apartment when the argument started with [the victim's daughter] and then [the victim] spoke with [the defendant] then and when [the victim and the victim's daughter] got in their car and tried to leave and [the defendant] followed them [the victim] said both times that he had contact with the defendant he appeared to be either high or drunk.

3/7/08RP 27-28.

¹ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Defense counsel stated that when he reviewed the "probable cause statement," it was "hard to tell if alcohol or drugs was the issue that was responsible or had a nexus to the crime that Mr. Russell committed." 3/7/08RP 29. Counsel's "position" was "not to impose the substance abuse evaluation unless there is a nexus at this point." 3/7/08RP 29. Counsel did not, however, either contest the deputy prosecutor's offer of proof or object to any of the "crime-related" prohibitions. 3/7/08RP 28-29; see CP 31, 33. Counsel said, "I don't have any other objections to the sentence recommendation that the State has presented." 3/7/08RP 29.

Judge Fleck imposed a 12-month suspended sentence. CP 30-33. The "crime-related" prohibitions include: (1) Do not purchase, possess or use any controlled substances or drug paraphernalia without a valid prescription; (2) Do not purchase, possess or use alcohol (beverage or medicinal); and (3) Do not enter any business where alcohol is the primary commodity for sale. The "affirmative conduct requirements" mandate that within 30 days of release from custody Mr. Russell must obtain a chemical dependency evaluation.² CP 31, 33.

² Defense counsel's sole objection was to this affirmative conduct requirement. 3/7/08RP 28-29.

The sentence in this case was imposed concurrent with the four misdemeanor convictions, but consecutive to the two felony convictions, under the separate cause number. 3/7/08RP 37-38.

Mr. Russell timely appeals. CP 28.

C. ARGUMENT

THE SENTENCING COURT HAD THE AUTHORITY TO IMPOSE ALCOHOL AND DRUG CONDITIONS.

Russell contends that the sentencing court lacked the authority to impose alcohol and drug conditions as part of his misdemeanor sentence. Russell is incorrect. The sentencing court had credible information that alcohol or drugs played a part in the assault for which Russell was being sentenced. Additionally, given Russell's extensive criminal history, which includes multiple convictions for alcohol and drug-related offenses, the sentencing court had reason to believe that the conditions would tend to prevent Russell's future commission of crimes. Accordingly, Russell's claim fails.

Pursuant to a legislative grant of power, the sentencing court has the authority to suspend the execution of all or any portion of the sentence. RCW 9.95.200. The granting of a suspended sentence and the conditions attached are within the sentencing

court's discretion. State v. LaRogue, 16 Wn. App. 808, 810, 560 P.2d 1149, 1151 (1977). An abuse of discretion may exist "only where it can be said that no reasonable man would take the view adopted by the court." Id.

The Sentencing Reform Act of 1981 (SRA) does not control the imposition of probationary conditions on misdemeanants. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), review denied, 140 Wn.2d 1006 (2000). Rather, under RCW 9.95.210, a sentencing court that imposes a suspended sentence may "direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer." The court may impose any conditions on probation that restrain commission of future crimes. See Williams, 97 Wn. App. at 263 (citing State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143, 146 (1962))³; State v. Hall, 35 Wn. App. 302, 307-08, 666 P.2d 930, 933-34 (1983) (conditions of probation must have a logical connection with the ultimate objective of rehabilitation). A court may also impose

³ The sentencing court's statutory authority in Summers was RCW 9.92.060. That statute provides in relevant part that the court can suspend a sentence "upon such terms as the superior court may determine." RCW 9.92.060(1). The statute is inapplicable to felonies committed on or after July 1, 1984. See RCW 9.92.900.

treatment requirements or prohibit the use of alcohol or non-prescription drugs. See e.g., State v. Joy, 34 Wn. App. 369, 661 P.2d 994 (1983) (alcohol treatment); LaRoque, 16 Wn. App. at 809 (drug abuse treatment); State v. Jones, 118 Wn. App. 199, 206, 76 P.3d 258 (2003) (prohibition against consumption of alcohol); State v. Hultman, 92 Wn.2d 736, 739, 600 P.2d 1291 (1979) (forgo use, sale or possession of controlled substance).

In Williams, the defendant pled guilty to five misdemeanors. Williams, 97 Wn. App. at 259-60. There was no evidence that drugs or alcohol played a part in any of Williams's crimes. Id. at 260. The sentencing court nevertheless conditioned his misdemeanor probation on requirements that Williams abstain from alcohol and drugs and to get alcohol treatment. Id. This Court held that, unlike sentences imposed under the SRA, misdemeanor conditions of probation need not be crime-related. Id. at 259, 263. Thus, the Court concluded that the sentencing court had not abused its discretion in imposing the non crime-related conditions. Id. at 263.

Even though under Williams the sentencing court in the instant case could lawfully order Russell to obtain a chemical dependency evaluation and abstain from using alcohol and non-prescription drugs without evidence that the prohibitions were directly related to Russell's crime, here there was evidence that Russell was under the influence of some substance — whether alcohol or drugs — when he assaulted the victim. See 3/7/08RP 27-28 (State's offer of proof).⁴ Significantly, the defense attorney was present during the victim's statement concerning Russell's suspected use of intoxicants at the time of the incident, and counsel did not contest the State's offer of proof. In any event, the sentencing court did not abuse its discretion in imposing the conditions. See Williams, 97 Wn. App. at 262-63; Jones, 118 Wn. App. at 206; Hultman, 92 Wn.2d at 739.

⁴ In Williams, the State's sentencing brief asserted that two of Williams's crimes involved the use of intoxicants, but this Court noted that the police reports that documented this information were not in the record and Williams's use of intoxicants was not discussed at sentencing. Williams, at 260 n.1. Here, Russell's use of intoxicants was discussed at sentencing. 3/7/08RP 27-28.

Russell contends that the sentencing court imposed unlawful conditions because the record reveals "no involvement of drugs or alcohol" in Russell's assault. Russell is mistaken.

As a preliminary matter, Russell affirmatively waived any objection to the imposition of all conditions other than the chemical dependency evaluation.⁵ 3/7/08RP 29. Russell's challenge on appeal is statutory, not constitutional. See State v. Zimmer, 146 Wn. App. 405, 412, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Thus, Russell may not now claim error. See RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 488, 973 P.2d 452 (1999) (citing State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (failure to timely object at trial waives appellate review of nonconstitutional issues)).

In any case, as pointed out above, the victim's statement in the joint interview with the State and defense counsel suggested that Russell was under the influence of some intoxicant. Therefore, it was reasonable for the court to infer that alcohol or drugs played

⁵ Appellate counsel anticipates (incorrectly) that the State will argue abandonment. See Br. of Appellant at 8-10. The State believes that defense counsel's statement at sentencing, "I don't have any other objections to the sentence recommendation that the State has presented," is more aptly analyzed under waiver.

a part in the assault. It was also reasonable, especially in light of Russell's prolific criminal history (CP 15-17), for the sentencing court to impose the alcohol and drug-related conditions because the conditions would "tend to prevent the future commission of crimes."⁶ See Williams, 97 Wn. App. at 263.

Russell claims that there must be some factual nexus between "the defendant and the condition." Br. of Appellant at 16. Yet, his citation to Williams is unhelpful because, in that case, the facts did not establish Williams's use of intoxicants or that intoxicants played a part in the commission of Williams's crimes. Here, Russell's criminal history makes clear that there is a nexus between him and alcohol and drugs. CP 15-17. Thus, Russell's claim fails.

Next, Russell contends that the State's offer of proof at sentencing — the one to which he did not object — is inadequate because it did not form the "real facts" for sentencing purposes. Br.

⁶ Russell's criminal history includes two felony violations of the controlled substances act, and misdemeanor convictions for possession of marijuana, driving under the influence, drug trafficking and minor in possession. CP 15-16.

of Appellant at 17-19. This argument is misguided. The real facts doctrine, RCW 9.94A.530(2), is a component of the SRA, and the SRA does not control sentencing on a misdemeanor. Williams, 97 Wn. App. at 263. But even if the real facts doctrine applied (it prohibits information other than what is admitted, acknowledged or proved at sentencing), Russell's failure to object to the State's offer of proof constituted an acknowledgement; thus, the issue has not been preserved for review. See RCW 9.94A.530(2).⁷

In any event, even under the SRA, the imposition of a prohibition against alcohol or non-prescription drugs need not be "crime-related." Jones, 118 Wn. App. 199, 206-07, 206 n.17, 18, 207 n.19. Thus, Russell's reliance on the SRA's provisions is unhelpful. For all of these reasons, Russell's claim fails.

⁷ RCW 9.94A.530(2) provides, in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved . . . at the time of sentencing. . . . Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.

D. CONCLUSION

The sentencing court exercised proper discretion in imposing alcohol and drug conditions. This Court should affirm Russell's sentence.

DATED this 9 day of June, 2009.

Respectfully submitted,

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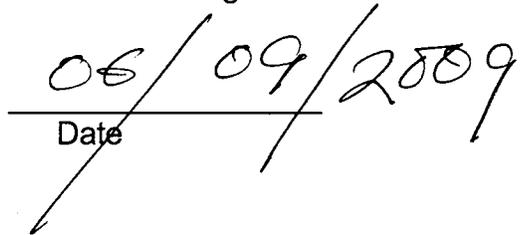
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. TAIWANDRIC RUSSELL, Cause No. 61378-2-I, in the Court of Appeals, Division I, for the State of Washington.

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2009 JUN -9 PM 5:03

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



Name: Bora Ly
Done in Seattle, Washington


Date