

65302-4

65302-4

COA NO. 65302-4-I

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

REC'D
JUL 30 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

KERO GIIR,

Appellant.

2010 JUL 30 PM 4:07

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

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erroneously sentenced appellant to submit to mental health evaluation and treatment as a condition of community custody.

Issue Pertaining to Assignment of Error

Did the trial court err when it imposed mental health treatment as a condition of community custody because its order was not based on the statutorily required presentence report?

B. STATEMENT OF THE CASE

The State charged Kero Giir with the first degree murder of Roda Bec and the second degree assault Veronica Abbas. CP 10-11. Defense counsel raised the defense of diminished capacity. CP 92. Giir underwent mental health evaluations by Dr. Julie Kriegler for the defense and Dr. Robert Wheeler for the State. CP 159-82.

Dr. Kriegler opined Giir was incapable of forming the necessary mental state of premeditation due to diminished capacity as a result of "chronic neuropsychiatric disturbances." CP 160. Dr. Wheeler diagnosed Giir with "Post-Traumatic Stress Disorder, Chronic" and "Adjustment Disorder with Depressed Mood, Chronic, vs. Major Depressive Disorder, Single Episode, In Partial Remission." CP 182. According to Wheeler, Giir's criminal conduct was not the result of these mental disorders. CP 182.

Kero Giir ultimately pleaded guilty to first degree murder and third degree assault. CP 94-116. At sentencing, Giir's attorney Richard Warner requested an exceptional sentence down based on the failed defense of diminished capacity. CP 73-77.

The prosecutor vigorously denied any mental disorder played a role in the crime, arguing in his sentencing memorandum that there was "no evidence that he was suffering from any mental disorder in the months, weeks or days preceding the murder" and "the defense has pointed to nothing that connects any mental disorder to the circumstances of the crime." CP 124, 125.

At the sentencing hearing, the prosecutor maintained:

[T]his case does not have anything to do with the defendant's mental disorder and with his history. The facts themselves reflect that this murder was committed for no other reason than jealousy, anger, selfishness on the part of the defendant. There is nothing in the facts to suggest that at the time he committed this offense, he was anything but sane, coherent and purposeful. And I don't think the Court even needs to rely on Dr. Wheeler's report to realize what this case is about . . .

The State is not even contesting that the defendant has or does suffer from a mental disorder such as posttraumatic stress disorder based on his experiences growing up. But that's not why he killed Roda Bec . . . And the defense has put forth nothing, and there is nothing in the facts and circumstances of the case which suggest that what he went through in the past and any impact that has had on him had anything to do with what happened on that day.

CP 56-57.

The trial court rejected defense counsel's request for an exceptional sentence down based on a mental defense, stating "The crime is too horrific. There was too much purpose to your actions, Mr. Giir. There was too much of a distinction in your ability to differentiate your rage and your anger between Roda and Ms. Abbas." CP 83.

The court sentenced Giir to 300 total months of confinement and 24 to 48 months of community custody. CP 12, 15. As per the State's recommendation, one of the conditions of community custody required Giir to "obtain a mental health evaluation and follow all treatment recommendation [sic]." CP 19, 55, 97, 144.

After sentencing, Giir, represented by Nancy Mattson, unsuccessfully sought to withdraw his guilty plea. CP 29-33. Giir appealed the denial of the motion to withdraw his plea as well as the judgment and sentence. CP 20-33.

On appeal, Giir argued the trial court erred in ordering as a condition of community custody that Giir obtain a mental health evaluation and follow treatment recommendations because the trial court failed to make the findings required by former RCW 9.94A.505(9). State v. Giir, 153 Wn. App. 1015, 2009 WL 4024840 at *5 (2009). This Court remanded "for the trial court to strike the conditions or make the findings

required by RCW 9.94A.505(9)." Id. (citing State v. Jones, 118 Wn. App. 199, 212, 76 P.3d 258 (2003)).

On remand, Mattson argued the mental health condition should be struck for several reasons. CP 51-52. First, Giir did not meet the definition of a mentally ill person as defined in RCW 71.24.025. CP 51. Second, even if he met the definition, the sentencing court implicitly concluded the condition was not likely to have influenced the offense in rejecting Giir's exceptional sentence request. CP 51-52; RP¹ 6-8. Third, a presentence report was needed to form the basis for this condition and there was none here. CP 52 (citing Jones); RP 12-13.

The State, standing by its original sentencing comments, deferred to the trial court on the issue of whether a mental illness influenced the offense. RP 4-5. The State asserted the defense was disingenuous in claiming Giir did not suffer from a mental illness. RP 3-4. Mattson pointed out there was no dispute Giir suffered from a mental illness, but whether that mental illness met the requisite statutory definition was a different question. RP 5-6, 10.

The trial court stated there was no dispute at sentencing that Giir suffers from post traumatic stress disorder (PTSD). RP 8-9. Relying on

¹ The verbatim report of proceedings is referenced as follows: RP - 4/23/10.

the mental evaluations prepared by Kriegler and Wheeler, the court said Giir's PTSD influenced the offense. RP 13-14. The court also said "I didn't think there was enough of a showing to connect that PTSD to the offense in question" for purposes of an exceptional sentence. RP 15. The trial court rejected defense counsel's argument that the mental health condition could not be imposed in the absence of a presentence report by equating the mental health evaluations prepared by Kriegler and Wheeler with informal presentence reports. RP 13.

The trial court entered an order finding "the defendant is a mentally ill person as defined in RCW 71.24.025 and 71.05 and that this condition is likely to have influenced the underlying offense. The finding is based on defense's presentence report, presentation at sentencing and evaluations by Dr. Wheeler and Dr. Kriegler." CP 88. This appeal follows. CP 89-90.

C. ARGUMENT

THE COURT ERRED IN ORDERING MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court improperly imposed mental health evaluation and treatment as a condition of community custody because the court did not base its decision on the statutorily required presentence report. This Court should strike the sentencing condition.

- a. The Court Could Not Impose This Condition Of Community Custody Because The Trial Court Did Not Base Its Decision On A "Presentence Report" Prepared By The Department Of Corrections.

Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Questions of statutory interpretation are also reviewed de novo. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). The goal is to carry out legislative intent. State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009).

Former RCW 9.94A.505(9)² 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

² Laws of 2002, ch. 290 § 17. All statutory references are to the version in effect at the time of Giir's offense. Any sentence imposed under the authority of the Sentencing Reform Act must be in accordance with the law in effect at the time the offense was committed. RCW 9.94A.345.

court may order additional evaluations at a later date if deemed appropriate.

(emphasis added).

The term "presentence report," as used in RCW 9.94A.505(9), means a report prepared by the Department of Corrections (DOC). The plain language of former RCW 9.94A.500(1)³ makes this clear. It provides:

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.

RCW 9.94A.500(1) (emphasis added).

The term "department" means the "Department of Corrections."

Former RCW 9.94A.030(16).⁴

Considered in isolation, the meaning of the term "presentence report" in RCW 9.94A.505(9) may be considered ambiguous as to who may prepare it. But particular statutory provisions are not read in isolation. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). This Court considers all provisions in relation to each other

³ Laws 2001, ch. 10, § 6 (recodifying former RCW 9.94A.110(1) (Laws of 2000 ch. 75 § 8).

⁴ Laws of 2003 ch.53 § 55.

and harmonizes them whenever possible. In re Pers. Restraint of Piercy, 101 Wn.2d 490, 492, 681 P.2d 223 (1984).

Reading RCW 9.94A.500(1) in conjunction with RCW 9.94A.505(9) compels the conclusion that the required "presentence report" referred to in RCW 9.94A.505(9) means a report prepared by DOC. Both statutory provisions relate to imposition of a sentence where the defendant may be a mentally ill person as defined by RCW 71.24.025.

In 1998, the Legislature passed S.S.B. No. 5760 — "AN ACT Relating to mentally ill offenders." That bill created the mental health provisions found in both RCW 9.94A.500(1)⁵ and RCW 9.94A.505(9).⁶ The Legislature's statement of intent removes any doubt that a DOC presentence report is needed:

It is the intent of the legislature to decrease the likelihood of recidivism and reincarceration by mentally ill offenders under correctional supervision in the community by authorizing:

(1) The courts to request presentence reports from the department of corrections when a relationship between mental illness and criminal behavior is suspected, and to order a mental status evaluation and treatment for offenders whose criminal behavior is influenced by a mental illness; and

(2) Community corrections officers to work with community mental health providers to support participation in treatment by mentally ill offenders on community placement or community supervision.

⁵ Former RCW 9.94A.110 (Laws of 1998, ch. 260 § 2).

⁶ Former RCW 9.94A.120(20) (Laws of 1998, ch. 260 § 3).

Laws of 1998, ch. 260 § 1.

CrR 7.1(a), meanwhile, explicitly treats the presentence report as one prepared by DOC. That report contains "the circumstances affecting the defendant's behavior as may be relevant in imposing sentence or in the correctional treatment of the defendant" and "such other information as may be required by the court." CrR 7.1(b).

The trial court based its finding in part on the "defense's presentence report." CP 88.⁷ That is not good enough. The court did not base its finding on a presentence report prepared by DOC. The court's order violates the requirement of RCW 9.94A.505(9). For this reason, the court erred in imposing mental health evaluation and treatment as a condition of community custody.

On remand, defense counsel argued the mental health condition could not be imposed because it needed to be based on a presentence report. RP 12-13. The court responded:

Well, you know, the thing -- there might have not been a formal what we used to always look forward to reading, whoever -- whatever the position one had in the courtroom, the prosecutor, the judge or the defense attorney, we may not have had a formal presentence report, but we have

⁷ At the sentencing hearing, Warner referred to what he described as "my presentence report." CP 74, 75. On remand, the prosecutor referred to the defendant's "presentence report." RP 3. This presentence report was not filed.

significant mental health reports and mental health evaluations that were provided by defense, and the Court can certainly incorporate those by reference, and does so today, as a basis to find that there were the reasonable grounds to find that his PTSD influenced the offense.

RP 13.

The trial court conflated a presentence report with a mental status report, which is contrary to the plain language of the statute. Those are two different things. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." J.P., 149 Wn.2d at 450 (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)).

The State filed a "Presentence Statement of King County Prosecuting Attorney." CP 131-44.⁸ A prosecutor's presentence statement is not a DOC presentence report. The statement of a prosecuting attorney does not even come within the definition of a presentence report under former RCW 9.94A.500(1). Mendoza, 165 Wn.2d at 925.

In sum, a court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94A.505(9) authorizes a trial court to order mental health evaluation and

⁸ Apart from referencing its unilateral recommendation for mental health treatment as part of the State's sentencing recommendation, the prosecutor's statement does not address Giir's mental health condition. CP 131, 144.

treatment as a condition of community custody only when the court follows specific procedures. One specific procedure is reliance on the statutorily required presentence report prepared by DOC.

This interpretation of the statute is not absurd. DOC is the agency responsible for actually supervising the offender in the community and must delegate its limited resources to provide for that supervision. Former RCW 9.94A.720(1)(a).⁹ DOC has institutional experience in assessing an offender's mental health condition and attendant risk to the community. See Former RCW 9.94A.715(2)(b)¹⁰ ("The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs."); Former 9.94A.634(3)(e) and (4)¹¹ (community correction officers monitor compliance with sentencing conditions related to mental health).

The Legislature wanted DOC to contribute to the determination of whether an offender should be subject to mental health evaluation and treatment as a condition of community custody before the court imposes

⁹ Laws of 2003, ch. 379 § 7.

¹⁰ Laws of 2003, ch. 379 § 6.

¹¹ Laws of 2002, ch. 175 § 8.

such a condition. Its statement of legislative intent makes this point abundantly clear. Laws of 1998, ch. 260 § 1.

Even if the phrase "presentence report" as used in former RCW 9.94A.505(9) remains ambiguous, the rule of lenity requires this Court to construe the statute in Giir's favor. In a criminal case, the rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979); see also Mendoza, 165 Wn.2d at 925 n.5 (any ambiguity in meaning of "presentence report" in former RCW 9.94A.500(1) must be resolved in favor of defendant).

"The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). Under the rule of lenity, this Court must interpret former RCW 9.94A.505(9) as requiring the trial court to base its decision on a DOC presentence report before mental health related conditions of community custody may lawfully be imposed.

b. The Plain Language Of The Statute Does Not Allow A Mental Status Report To Be Substituted For A Presentence Report.

Consistent with Giir's argument, Jones stated "We hold . . . that a court may not order an offender to participate in mental health treatment or counseling 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." Jones, 118 Wn. App. at 202 (emphasis added).

Unfortunately, the Jones court was not so careful with its language elsewhere in its decision. After referencing the statutory requirement that the trial court must base its decision "on a presentence report *and* any applicable mental status evaluation," the court stated "we hold that mental health treatment and counseling 'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, only if the court obtains a presentence report *or* mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense." Jones, 118 Wn. App. at 210 (emphasis added). Subsequent cases have cited to this language as the holding in Jones without discussion. See State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008); State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007).

The Jones court's unexplained substitution of "or" for "and" was likely the result of the fact that the issue in that case was not whether a mental health evaluation, standing alone, was a sufficient basis for imposition of the condition. The issue was whether the trial court had authority to order Jones to participate in mental health treatment and counseling without following any of the requisite statutory procedures. Jones, 118 Wn. App. at 208-210.

The issue in Giir's case is more specific. The issue is whether the trial court, before it may impose this condition, must at minimum base its order on a DOC presentence report, regardless of whether it also bases its decision on a separate mental health evaluation.

Jones does not control this inquiry. An appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises that legal theory. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Furthermore, cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

To the extent, if any, Jones and those cases that rely on Jones can be read to authorize imposition of a mental health condition in the absence

of a presentence report, those cases must be rejected under basic principles of statutory construction. "As a default rule, the word 'or' does not mean 'and' unless legislative intent clearly indicates to the contrary." Tesoro Refining and Marketing Co. v. State, Dept. of Revenue, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (citing HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs., 148 Wn.2d 451, 473 n. 95, 61 P.3d 1141 (2003)); see also Cerrillo v. Esparza, 158 Wn.2d 194, 204, 142 P.3d 155 (2006) (Court has consistently read clauses separated by the word "or" disjunctively) (citing State v. Bolar, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996) (in interpreting statutory language, "or" serves a disjunctive purpose and does not mean "and"))). There is no clear legislative intent that the trial court could impose the condition in the absence of a presentence report. On the contrary, clear legislative intent points the other way. Laws of 1998, ch. 260 § 1; RCW 9.94A.500(1); CrR 7.1.

Even if "and" could be read as "or," the rule of lenity once again operates in Giir's favor. Under this rule, any ambiguity as to whether "and" means "or" must be resolved in favor of Giir. McDonald, 92 Wn.2d at 37-38.

c. Defense Counsel's Original Sentencing Argument Did Not Give The Trial Court Statutory Authorization To Impose The Condition.

The trial court based its decision in part on the defense "presentation at sentencing," which it described in oral remarks as focusing "on the essentially conceded mental illness." CP 88; RP 16. It believed defense counsel's position at sentencing was "180 degrees" different than the different counsel's current position of objecting to the mental health condition. RP 14.

At the original sentencing, defense counsel argued Giir had a mental illness in the form of PTSD. CP 73-77. As pointed out by Mattson, whether Giir suffered from a mental illness in relation to a failed diminished capacity defense does not mean he conceded the specific statutory requirements for imposing the community custody condition had been met. RP 5-6, 10. Those are separate issues.

A mentally ill person for purposes of imposing a mental health condition of community custody is specifically defined in former RCW 71.24.025(12).¹² The mental disorder necessary to establish a diminished capacity defense is not statutorily defined but is rather left up to expert witnesses. See State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) ("To maintain a diminished capacity defense, a defendant must produce

¹² Laws of 2001, ch. 323 § 8.

expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged.").

This case does not lack for irony. The trial court disclaims there was anything contradictory about rejecting the exceptional sentence request based on diminished capacity while finding a mental illness likely influenced the offenses, but criticizes the defense for deigning to argue the reverse. RP 8-9, 13-17. The State, meanwhile, recommends imposition of a mental health condition of community custody requiring the court to find a reasonable basis that a mental illness influenced the offense yet, in accordance with its own expert's opinion, steadfastly maintains Giir's mental condition had absolutely nothing to do with the offense. RP 4; CP 56-57, 97, 144.

In any event, Warner's sentencing argument did not give the trial court authority to impose mental health treatment as a sentencing condition. "[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980); see also State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (defendant's request to receive mental health treatment as part of community custody does not give the court authority to impose it). Without the requisite DOC presentence report, the court lacked

statutory authority to impose mental health evaluation and treatment as a condition of community custody.

D. CONCLUSION

This Court should strike that portion of the sentence relating to the challenged condition of community custody.

DATED this 30th day of July 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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Office ID No. 91051
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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|----------------------|---|-------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 65302-4-1 |
| |) | |
| KERO GIIR, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KERO GIIR
DOC NO. 312493
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JULY, 2010.

x *Patrick Mayovsky*

2010 JUL 30 PM 4:07