

66529-4

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NO. 66529-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DONNIE GREER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK, JUDGE

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Whether the trial court properly imposed a condition of community custody requiring Greer to continue with his substance abuse treatment where the evidence shows the trial court's requirement of a substance abuse evaluation and treatment if recommended was clearly crime related when the defendant was convicted of possession of cocaine and marijuana.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Defendant Donnie Greer was charged by amended information with the crimes of violation of the uniform controlled substances act; specifically, the State alleged that Greer possessed cocaine and less than forty grams of marijuana on August 8, 2009. CP 46-47. The State further alleged that the defendant drove a motor vehicle while under the influence of or affected by intoxicating liquor or any drug and that he drove a motor vehicle with wanton and willful disregard for the safety of persons or property. CP 46-47.

A jury trial occurred in November 2010. The jury found the defendant guilty of one count of possessing cocaine, one count of

possessing less than 40 grams of marijuana, and one count of reckless driving. CP 42-43, 45-47; 4RP 14<sup>1</sup>. The jury found the defendant not guilty of driving while under the influence of alcohol<sup>2</sup>. CP 44; 4RP 14. The court imposed a standard range sentence for the possession of cocaine charge and a suspended sentence for the misdemeanor possession of marijuana and reckless driving charges. CP 49-59; 4RP 34.

## **2. SUBSTANTIVE FACTS**

On August 8, 2009, at 3:50 am, Auburn Police Officer Glen stopped Greer's vehicle for traveling an estimated 80 to 100 MPH in a 35 MPH zone. 2RP 34-40. During the traffic stop, Officer Glen noticed the Greer had droopy, bloodshot eyes, slurred speech, and a moderate odor of intoxicants on his breath. 2RP 44-45. Officer Glen asked Greer if he wanted to take voluntary field sobriety tests.

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<sup>1</sup> The verbatim report of proceedings consists of four volumes, which will be referred to as follows: 1RP (11/3/10); 2RP (11/9/10); 3RP (11/10/10); and 4RP (11/12/10, 12/10/10, and 1/14/11).

<sup>2</sup> The trial court granted the defense motion to dismiss the DUI prong relating to the allegation that the defendant was driving under the influence of any drug. 3RP 136. The court found that there was no evidence and no testimony that Greer had consumed any drugs, that the officer made any conclusions that Greer had been influenced by any drugs, and found that it would be mere speculation on the part of any juror to conclude that Greer's driving was influenced by consumption of drugs. 3RP 136.

2RP 46-47. Greer agreed to the tests. 2RP 48. At the conclusion of the tests, Officer Glen arrested the defendant for driving under the influence. 3RP 9.

After Officer Glen placed the defendant under arrest, he searched Greer. 3RP 10. Officer Glen found four baggies of what he suspected to be marijuana and one baggie of rock cocaine in Greer's pants pocket. 3RP 10-14. A forensic scientist from the Washington State Patrol Crime lab tested the substance Officer Glen believed to be rock cocaine and confirmed the substance contained cocaine. 3RP 118, 120. A marijuana leaf technician from Auburn Police Department tested the substance Officer Glen believed to be marijuana and confirmed the substance contained marijuana. 3RP 123-24, 128.

After the verdict, the attorneys and the court had a discussion regarding sentencing. The court asked the attorneys if Greer was eligible for a residential DOSA. 4RP 19. The defendant's attorney indicated to the court his belief that Greer may be eligible for a residential DOSA. 4RP 20. In response, the court stated, "Well, I think that's what we should be looking into." 4RP 20.

At sentencing, the State recommended a standard range sentence of 6 months of confinement on the possession of cocaine

charge to run concurrent with the misdemeanor counts. 4RP 27-28. Greer requested that the court not impose any confinement, and claimed that sending him to jail would not serve any interest. 4RP 30. Instead of confinement, Greer's attorney suggested community service and stated, "If the court has concerns about substance abuse, he understands he's going to have to do a substance abuse evaluation." 4RP 30-31.

Just prior to imposing a sentence, the court pointed out that he had listened to the trial, and was very familiar with the facts and evidence. 4RP 34. The court found, "that Mr. Greer, based upon the facts presented at trial, did pose a threat to the community by his driving and may very well have been high on something." 4RP 34.

The court imposed a sentence of 30 days electronic home detention<sup>3</sup>, 12 months community custody, mandatory fines, and ordered the defendant to obtain an alcohol and substance abuse evaluation, to follow all treatment recommendations, and have no further violations of law. 4RP 34-35.

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<sup>3</sup> Greer only challenges the sentence imposed for the possession of marijuana charge. Greer was also sentenced to one day confinement for the possession of marijuana charge, and 30 days EHD and 120 hours community service for the reckless driving charge. 4RP 34-36.

C. **ARGUMENT**

1. **THE TRIAL COURT PROPERLY REQUIRED GREER TO OBTAIN A SUBSTANCE ABUSE EVALUATION AND TO FOLLOW ALL TREATMENT RECOMMENDATIONS BECAUSE THE TREATMENT WAS CRIME RELATED.**

Greer claims that the trial court erred in requiring him to obtain a substance abuse evaluation and follow all treatment recommendations. More specifically, he claims that the trial court erred because the evidence did not show substance abuse contributed to the offense. Greer also claims that the trial court erred because the court did not make an express finding on the record "that a chemical dependency contributed to the offense" in accordance with RCW 9.94A.607. These claims should be rejected because the trial court was permitted to impose crime related treatment as a condition of the defendant's sentence.

Courts review sentencing conditions for an abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). As a condition of community custody, courts may order defendants to participate in crime-related treatment or counseling services. RCW 9.94A.703(3)(c). Such conditions are usually upheld if reasonably crime-related. Warren, at 32. A condition is crime related when it directly relates to the circumstances of the crime.

State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P. 2d 239 (1992) (citing statutory definition of "crime related prohibition"); see also State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003) (court cannot require alcohol counseling unless alcohol contributed to the offense).

Greer is correct that treatment or counseling may be imposed as a condition of community custody only if the treatment condition is crime related. See RCW 9.94A.703(3)(c). Greer relies upon RCW 9.94A.607, which provides:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1).

As a result, Greer argues that the trial court improperly ordered a substance abuse evaluation and treatment as a condition of community custody because the evidence did not show substance abuse contributed to the offense and the court did not make an express finding on the record that Greer "has a chemical

dependency that has contributed to his ... offense. Id. However, the defendant is mistaken.

A condition is crime related if it directly relates to the circumstances of the crime. RCW 9.94A.030(9). No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. See State v. Paramore, 53 Wn. App. 527, 768 P.2d 530 (1989) (community supervision condition requiring defendant convicted of selling marijuana to submit to urinalysis was directly related to his drug conviction despite absence of evidence on whether defendant smoked marijuana).

In the present case, when Greer was arrested he had four baggies of marijuana and one baggie of rock cocaine in his pants pocket. 3RP 10-14, 118, 120. The jury found the defendant guilty of possession of cocaine, possession of less than forty grams of marijuana, and reckless driving. CP 42-43, 45-47; 4RP 14. At the sentencing hearing, the trial court also found, "that Mr. Greer, based upon the facts presented at trial, did pose a threat to the community by his driving, and may very well have been high on something." 4RP 34. Here, the condition that the defendant obtain a substance abuse evaluation and follow all treatment

recommendations *is* directly related to the circumstances of the crimes for which Greer was convicted.

At sentencing, Greer urged the court to reject the State's recommendation for six months of confinement, and instead impose no confinement, claiming that sending him to jail would not serve any interest. 4RP 30. Instead of confinement, Greer's attorney suggested community service and stated, "if the court has serious concerns about substance abuse, he understands he's going to have to do a substance abuse evaluation." 4RP 30-31.

Former RCW 9.94A.713(1) (2006) grants authority to the Sentencing Review Board and DOC to impose additional "rehabilitative" conditions of community custody and there is no requirement that these additional rehabilitative conditions may be crime related. If imposed, the rehabilitative conditions must be based upon a "risk to community safety." Former RCW 9.94A.713(1). Here, the court had the authority to impose the condition of a substance abuse evaluation and follow up because such an evaluation is appropriate as a rehabilitative condition of Greer's sentence.

In urging this Court to strike the condition pertaining to a substance abuse evaluation and treatment on remand, Greer is

asking this Court not to follow State v. Powell, 139 Wn. App. 808, 818, 162 P.3d 1180 (2007), rev'd on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009), holding that a treatment condition is appropriate in the absence of an express finding under RCW 9.94A.607 if the record otherwise supports the treatment condition.

This argument should be rejected for three reasons. First, Greer's position that this portion of Powell is dicta is not accurate. Division II reversed Powell's conviction based on the admission of what the court deemed to be inadmissible evidence of the defendant's drug use, but the Washington Supreme Court reversed Division II's decision. Therefore, the portion of Division II's decision that the condition of community custody was proper is completely necessary to the disposition of Powell's appeal, and hence, not dicta in any sense of the word. Second, as demonstrated by this case, this aspect of Powell is sound, as it prevents needless, formalistic remands.

Finally, unlike in Powell, Greer was convicted of a drug crime, rather than a non-drug crime that was influenced by his drug use. There is no question that the treatment requirement is reasonably related to the crime Greer committed. When Greer was arrested he had four baggies of marijuana and one baggie of rock

cocaine in his pants pocket. 3RP 10-14, 118, 120. The jury found the defendant guilty of possession of cocaine, possession of less than forty grams of marijuana, and reckless driving. CP 42-43, 45-47; 4RP 14. At the sentencing hearing, the trial court also found, "that Mr. Greer, based upon the facts presented at trial, did pose a threat to the community by his driving, and may very well have been high on something." 4RP 34. The substance abuse treatment was clearly crime related. Therefore, the trial court properly imposed a substance abuse evaluation and treatment as a condition of community custody.

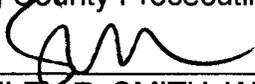
**D. CONCLUSION**

The trial court properly imposed a substance abuse evaluation and treatment as a condition of community custody. The court should affirm the judgment and sentence.

DATED this 9 day of November, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Nelson, the attorney for the appellant, at Nelson, Broman, and Koch, 1908 E. Madison Street, Seattle, WA 98122 containing a copy of the Brief of Respondent, in STATE V. DONNIE GREER, Appellate Case Number 66529-4-I, in the Court of Appeals, Division I, for the State of Washington.

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

Mary Heinger  
Name  
Done in Kent, Washington

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Date

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