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NOV 29 2011

King County Prosecutor
Appellate Unit

NO. 67309-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

KNUTE FENSTAD,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously required appellant to submit to a substance abuse evaluation and treatment as a condition of community custody.

2. The trial court also erroneously ordered appellant to obtain a mental health evaluation and treatment.

Issue Pertaining to Assignments of Error

Did the trial court err when it ordered appellant to submit to substance abuse and mental health evaluations and treatment as conditions of community custody where the statutory prerequisites for these conditions were not met?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Knute Fenstad with one count of Robbery in the First Degree. CP 1-6. The State's evidence revealed that on December 21, 2009, shortly before 1:00 p.m., Fenstad entered a Kirkland branch of Chase Bank and handed the teller a note demanding \$500.00. According to the teller, Fenstad had a knife, partially visible, sticking out from his jacket sleeve. The teller gave the money to Fenstad, who promised

to return the money within a month and then exited the bank. 2RP¹ 27-45.

The defense did not contest that Fenstad was the man identified as the robber. 3RP 103. Rather, the defense presented an involuntary intoxication claim, arguing that Fenstad did not have the requisite intent to commit robbery because he was suffering from an alcohol and drug induced blackout at the time. 3RP 101-113; CP 46.

In support of this claim, the defense called Dr. Robert Julien, a medical doctor with a subspecialty in anesthesiology and a Ph.D. in pharmacology. 3RP 28. Dr. Julien testified that according to medical records he had reviewed, Fenstad was at the hospital the late morning of December 20, 2009 for acute alcohol intoxication and possibly a seizure. His blood alcohol level was .258. 3RP 38-41. The hospital was unsuccessful in finding a facility that offered supervised detoxification. A doctor wrote Fenstad a prescription for Ativan and sent him on his way, a decision Julien questioned. 3RP 42.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 13, 2011; 2RP – April 14, 2011; 3RP – April 18, 2011; 4RP – April 19, 2011; 5RP – May 13 and June 1, 2011.

Ativan is the generic name for Lorazepam, a long-lasting sedative that can be used to treat anxiety. In higher doses, the drug can result in the inability to form memory, temporarily mimicking the effects of organic brain disorders such as Alzheimer's. 3RP 30-37. Fenstad reported that after he took the Ativan, he had no memory for a period of time, including the period in which the robbery occurred. 3RP 46-47.

Dr. Julien testified that the Ativan magnified the impact of Fenstad's already high blood alcohol level, causing "drug dementia" and, in effect, an alcohol blackout. 3RP 47. Julien was of the opinion that Fenstad's brain functions were still so depressed at the time of the robbery, he was not capable of satisfying the legal definition of intentional behavior. 3RP 48.

A jury found Fenstad guilty, and the Honorable Susan Craighead imposed a standard-range 129-month sentence and 18 months' community custody. CP 27, 56-57. As a condition of community custody, the court ordered "substance and alcohol abuse eval & treatment." CP 63. The court also ordered "mental health eval & treatment." CP 63. Fenstad timely filed his Notice of Appeal. CP 64-75.

C. ARGUMENT

THE COURT ERRED IN ORDERING SUBSTANCE ABUSE AND MENTAL HEALTH EVALUATIONS AND TREATMENT AS CONDITIONS OF COMMUNITY CUSTODY.

A court may impose only a sentence that is authorized by statute. "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). A condition of sentence imposed without statutory authority can be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993).

1. Substance Abuse Evaluation and Treatment

The trial court exceeded its authority in Fenstad's case when it required his participation in a substance abuse evaluation and treatment. There is no statutory authority for such a requirement under the circumstances of this case.

RCW 9.94A.505(8) directs that "[a]s part of any sentence, the court may impose and enforce crime-related prohibitions and

affirmative conditions as provided in this chapter.” Because Fenstad was convicted of a violent offense, he was subject to 18 months’ community custody. See RCW 9.94A.030(54); RCW 9.94A.701(2). And as a condition of community custody, Judge Craighead was authorized to require that Fenstad “[p]articipate in crime-related treatment or counseling services” and “[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably 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).

In addition, RCW 9.94A.607, a statute specifically aimed at chemical dependency, provides:

(1) 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.

(2) This section applies to sentences which include any term other than, or in addition to, a term of total confinement, including suspended sentences.

RCW 9.94A.607(1)-(2) (emphasis added).

Consistent with these statutory requirements, in State v. Jones, this Court held that any court-ordered counseling or treatment must address a deficiency that contributed to the offense at issue. Otherwise, it does not satisfy the statutory mandate that it be “crime-related.” Jones, 118 Wn. App. at 208. In Jones, the sentencing court erred in ordering alcohol counseling when the evidence showed that only methamphetamines were involved in the crime, not alcohol. Id. at 207-208.

In Fenstad’s case, the court ordered him to submit to a substance abuse evaluation and treatment despite the absence of any finding a substance abuse problem contributed to commission of the robbery. At most, the evidence showed that the hospital prescribed Ativan for Fenstad, a medical decision Dr. Julien questioned. But there was nothing to indicate Fenstad is addicted to this or any other prescribed substance. Judge Craighead expressly stated that she did not believe Ativan contributed to Fenstad’s offense. See 5RP 24 (“I’m not convinced you were acting, um, under the influence of the Ativan”).

Because the condition pertaining to substance abuse is unauthorized, it must be stricken.² Compare State v. Powell, 139 Wn. App. 808, 819-820, 162 P.3d 1180 (2007) (drug treatment proper where evidence showed defendant had used methamphetamine before committing offense and both the prosecution and defense requested treatment), reversed on other grounds, 166 Wn.2d 73, 206 P.3d 321 (2009).

2. Mental Health Evaluation and Treatment

Similarly, Judge Craighead was not statutorily authorized to order a mental health evaluation and treatment. RCW 9.94B.080³ 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

² The court also ordered an evaluation and treatment for alcohol abuse. See CP 63. Given the evidence of alcohol consumption, Fenstad does not contest this condition.

³ 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.

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 a order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 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." Jones, 118 Wn. App. at 202; accord State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007), review denied, 164 Wn.2d 1012 (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 71.24.025,⁴ there is no indication such a report

⁴ 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

was ordered in Fenstad's case. Nor does the record contain any "applicable mental status evaluations."

Moreover, nowhere did the court make the statutorily mandated finding that Fenstad is a "mentally ill person" as defined by RCW 71.24.025 and that a qualifying mental illness influenced his crime. The trial court thus erred in imposing the mental health treatment condition. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 353-54.

Defense counsel did indicate, at sentencing, that Fenstad "has had a number of mental health issues over the years," and asked Judge Craighead to order that his period of incarceration be served at the special commitment center in Monroe. 5RP 22-23. Judge Craighead responded that she had no authority to do so. 5RP 23. Defense counsel's representation is not a substitute for the statutory prerequisites in RCW 9.94B.080. And, in any event, counsel requested special accommodations for Fenstad's *incarceration*. He did not request mental health treatment following Fenstad's release.

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.

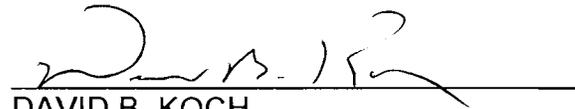
D. CONCLUSION

This Court should order the sentencing court to strike the conditions pertaining to evaluations and treatment for substance abuse and mental health issues.

DATED this 30th day of November, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "D.B. Koch", is written over a horizontal line.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67309-2-1
)	
KNUTE FENSTAD,)	
)	
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 NOVEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KNUTE FENSTAD
DOC NO. 858461
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF NOVEMBER 2011.

x *Patrick Mayovsky*