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REC'D
DEC 29 2011
King County Prosecutor
Appellate Unit

NO. 67571-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

VANLA INTHIRATHVONGSY,

Appellant.

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

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 29 PM 4:28

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A. ASSIGNMENT OF ERROR

The trial court erroneously imposed substance abuse evaluation and treatment as a condition of community custody.

Issue Pertaining to Assignment of Error

Did the trial court err when it ordered appellant to submit to substance abuse evaluation and treatment as a condition of community custody where the court did not make a statutorily required finding that a chemical dependency contributed to the offense?

B. STATEMENT OF THE CASE¹

The State charged appellant Vanla Inthirathvongsy with delivery of cocaine. CP 1-8. Inthirathvongsy waived his right to a jury trial and his case was tried to the bench. CP 20. Judge Douglass North found him guilty as charged. CP 21-25; 2RP 34-35.

The court sentenced Inthirathvongsy to a low-end standard range sentence of 12 months plus one day of incarceration, in addition to 12 months of community custody. CP 29. Mentioning only that such condition was “appropriate,” the court ordered Inthirathvongsy to obtain a substance abuse evaluation and follow all treatment recommendations as a condition of community custody. CP 34; 3RP 7.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 8/1/11; 2RP – 8/2/11; and 3RP – 8/16/11.

C. ARGUMENT

THE TRIAL COURT WRONGLY ORDERED SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered Inthirathvongsy to "obtain a substance abuse evaluation and follow all treatment recommendations." CP 34.

RCW 9.94A.703(3)(c) allows the court to impose "crime-related treatment or counseling services" only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment).

Before such rehabilitative treatment may be imposed, however, RCW 9.94A.607(1) requires the court to find a chemical dependency contributed to the offense:

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.

(Emphasis added).

The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, the appellate court assumes the Legislature means exactly what it says, giving criminal statutes literal interpretation. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Inthirathvongsy's offense, but merely remarked the State's request for such treatment was "appropriate." CP 26-34; 3RP 7. Under the plain terms of RCW 9.94A.607(1), the court was required to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment. And while Inthirathvongsy acknowledged he used and was addicted to drugs, he explicitly denied using drugs the date of the offense. 1RP 132; 2RP 20-21; 3RP 4.

In State v. Powell, Division Two remarked the trial court correctly imposed substance abuse treatment as a community custody condition despite the lack of a finding as required by RCW 9.94A.607(1) because the trial evidence showed the defendant consumed methamphetamine before committing the offense and the defense asked the court to impose substance abuse treatment. State v. Powell, 139 Wn. App. 808, 819-20, 162 P.3d 1180 (2007), reversed on other grounds, 166 Wn2d 73, 206 P.3d 321 (2009). The

Court's remarks in Powell are dicta because the Court had already decided to reverse conviction on a separate issue when it addressed the viability of the community custody condition. See State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003) (where court of appeals reversed on separate issue, its discussion of another issue likely to arise on remand was dicta); In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta have no precedential value. Bauer v. State Employment Sec. Dept., 126 Wn. App. 468, 475 n.3, 108 P.3d 1240 (2005).

Regardless, the court's reasoning in Powell does not stand up to a plain reading of the statute. Under RCW 9.94A.607(1), the court may impose substance abuse treatment only "[w]here the court finds that the offender has a chemical dependency that has contributed" to the offense. Powell ignored this unambiguous mandate in reasoning the condition is valid even if the court makes no finding on the matter so long as the trial record could support such a finding. Powell, 139 Wn. App. at 819-20. The Powell Court's approach renders the statutory language referring to the need for a finding superfluous. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (citation and internal quotation marks omitted).

Moreover, "[a]ppellate courts are not fact-finders." State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "[I]t is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses." Davis v. Department of Labor and Industries, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). The court in Powell ran afoul of these well-established principles when it independently reviewed the record and, in effect, made a finding the sentencing court never made.

Sentencing errors may be raised for the first time on appeal. Jones, 118 Wn. App. at 204; State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This Court should order the sentencing court to strike the condition pertaining to substance abuse treatment and counseling on remand. See State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (striking community custody condition where court did not make statutorily required finding that mental illness contributed to crime), review denied, 164 Wn.2d 1012 (2008).

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

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 67571-1-I
)	
VANLA INTHIRATHVONGSY,)	
)	
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 29TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] VANLA INTHIRATHVONGSY
1411 S. WALKER STREET
SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF DECEMBER 2011.

x *Patrick Mayovsky*