

688375

688375

NO. 68837-5-1

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

---

---

REC'D  
NOV 30 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CORNELIUS WILLIAMS,

Appellant.

---

---

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

The Honorable Richard Eadie, Judge

---

---

BRIEF OF APPELLANT

---

---

ERIC BROMAN  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373



**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	4
THE TRIAL COURT WRONGLY ORDERED SUBSTANCE ABUSE EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY. ....	4
D. <u>CONCLUSION</u> .....	8

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Bauer v. State Employment Sec. Dept.</u> 126 Wn. App. 468, 108 P.3d 1240 (2005).....	6
<u>Davis v. Department of Labor and Industries</u> 94 Wn.2d 119, 615 P.2d 1279 (1980) .....	7
<u>In re Marriage of Roth</u> 72 Wn. App. 566, 865 P.2d 43 (1994).....	6
<u>Kilian v. Atkinson</u> 147 Wn.2d 16, 50 P.3d 638 (2002).....	5
<u>State v. Anderson</u> 58 Wn. App. 107, 791 P.2d 547 (1990).....	7
<u>State v. C.G.</u> 150 Wn.2d 604, 80 P.3d 594 (2003).....	6
<u>State v. E.A.J.</u> 116 Wn. App. 777, 67 P.3d 518 (2003) .....	7
<u>State v. J.P.</u> 149 Wn.2d 444, 69 P.3d 318 (2003).....	7
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	4, 7
<u>State v. Keller</u> 143 Wn.2d 267, 19 P.3d 1030 (2001).....	4
<u>State v. Lopez</u> 142 Wn. App. 341, 174 P.3d 1216 (2007) <u>review denied</u> , 164 Wn.2d 1012 (2008) .....	8
<u>State v. Powell</u> 139 Wn. App. 808, 162 P.3d 1180 (2007) <u>reversed on other grounds</u> , 166 Wn.2d 73 (2009).....	6, 7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
RCW 9.94A.525 .....	3
RCW 9.94A.607 .....	4, 5, 6
RCW 9.94A.703 .....	4

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 CASE

On June 8, 2011, the King County prosecutor charged appellant Cornelius Williams with second degree assault and second degree unlawful possession of a firearm. The offense was committed June 4, 2011. CP 1-2. On April 9, 2012, as part of a plea deal, the state amended the information to charge second degree assault and Williams pled guilty. CP 9-24.

The plea included standard waivers and notices. CP 10-21. The state agreed to recommend a 22-month sentence, at the top of the 17- to 22-month standard range with an offender score of 5.

CP 11, 14, 23-24; 1RP 4.<sup>1</sup> After a colloquy, the court accepted the plea as knowing, intelligent, and voluntary. 1RP 1-7.

The state's offender score calculation included one point for each of four adult offenses. The state also added one total point for three prior class C juvenile felonies. Supp. CP \_\_\_ (sub no. 33, Prosecutor's Presentence Statement). The state provided a list of Williams' prior convictions, which included three juvenile felonies from 1997 and 1999. The four adult offenses were class C felonies committed in 2000 and 2001. The summary stated Williams had been found guilty of theft on July 3, 2003. Id.; 2RP 6.

At sentencing, the state argued the score was 5, the range was 17-22 months, and the state recommended a 22-month sentence. 2RP 3-6, 9. The defense argued the prior convictions washed out. 2RP 6-9.

The question was whether a misdemeanor interrupted the washout period for the above offenses. Williams was sentenced on the misdemeanor, identified as "obstruction," on October 15, 2006. Id. That was also about the date of his last release from custody.

---

<sup>1</sup> This brief refers to the transcripts as: 1RP – 4/9/12 (plea hearing); 2RP – 5/11/12 (sentencing).

2RP 5. The state argued there was not a 5-year period between 10/15/06 and 6/4/11, the date of the current offenses. 2RP 4-5

The defense did not contest there was no 5-year period between the 2003 release and the 2006 misdemeanor. The defense instead argued Williams was not convicted within the period between 10/15/06 and 4/9/12, the date of Williams' guilty plea in the present case. 2RP 6-7.

The prosecutor argued Williams was released on October 15, 2006. The current offenses were committed on June 4, 2011. The prosecutor asserted that under RCW 9.94A.525(2), the washout period is interrupted by the commission of a new crime, not the conviction for a new crime. It is the date of commission, not a guilty plea, that ends the washout period and from which there must be five years crime-free in the community. 2RP 5-9.

The court agreed with the state's reading of the statute and found the score to be five points. 2RP 9. The state recommended a 22-month sentence. 2RP 9. The defense recommended a 17-month sentence. 2RP 9-10.

The court imposed a 22-month sentence at the top of the range. 2RP 10; CP 30, 32. The court imposed \$600 in total legal financial obligations (LFOs) while waiving nonmandatory fines and

fees. CP 31. The court ordered a 12-month period of community custody, with standard conditions. CP 33, 37. The court also directed Williams to obtain a substance abuse evaluation and follow all treatment recommendations. CP 37.

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 Williams to "obtain substance abuse evaluation and follow all treatment recommendations." CP 37. This was error.

RCW 9.94A.703(3)(c) allows the court to impose "crime-related treatment or counseling services" 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.

RCW 9.94A.607(1) (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, courts assume 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 sentencing court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Williams' offense, nor did any evidence support such a finding. The court merely answered "yes" when the state asked if the court would impose the community custody "with the condition of substance abuse. . . . evaluation?" RP 10. 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. There was no allegation or admission that Williams had a substance abuse problem or that any such problem contributed to the commission of the offense.

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 Powell court's remarks 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 lacks 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 withsand the statute's plain reading. 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 Powell court 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).

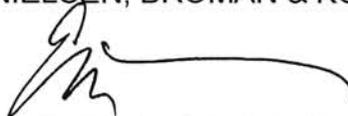
D. CONCLUSION

This Court should reverse the portion of the sentence relating to the challenged community custody condition and remand so the illegal condition may be stricken.

DATED this 30<sup>th</sup> day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



---

ERIC BROMAN, WSBA 18487  
Office ID. 91051  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68837-5-1
	)	
CORNELIUS WILLIAMS,	)	
	)	
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 30<sup>TH</sup> DAY OF NOVEMBER, 2012, 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 AND/OR VIA EMAIL.

[X] CORNELIUS WILLIAMS  
DOC NO. 810617  
REYNOLDS WORK RELEASE  
410 4<sup>TH</sup> AVENUE  
SEATTLE, WA 98104

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2012.

x *Patrick Mayovsky*

NOV 30 2012 11:14 AM  
CLERK OF COURT  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA