IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32517-2-III

STATE OF WASHINGTON, Respondent,

v.

JASON MICHAEL TAIT, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

a. Because chemical dependency is a fact not admitted or proven, the trial court lacked authority to enter the finding of chemical dependency and impose treatment on the record available

The State contends that the trial court was justified in finding that Tait suffered from a chemical dependency and imposing drug evaluation and treatment because "[f]rom numerous contacts, police knew the Defendant to have been in possession of illegal drugs and the paraphernalia to personally consume them." The State also points to information the police received a few days before that Tait "was involved" with methamphetamine, and the fact that he was found to be in possession of a glass pipe with methamphetamine residue. *Respondent's Brief* at 10.

The State's position overlooks the real facts doctrine, under which the sentencing court must base its decision upon the defendant's current conviction, criminal history, and the circumstances of the crime. *State v. Morreira*, 107 Wn. App. 450, 458, 27 P.3d 639 (2001). As a matter of statute, the court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2) (*held unconstitutional on burden-shifting grounds in State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012)).

Here, the only facts stipulated by the parties concerned generic information received by the police about possible drug involvement and Tait's possession of a pipe containing residue. CP 61-62. Tait was not in possession of any usable amount of methamphetamine, nor was he apparently under the influence at the time of his arrest. Under these facts, applying the State's interpretation would convert effectively any association with illicit substances, whether past or present, whether casual or chronic, into "dependency" for purposes of imposing evaluation and treatment requirements.

For the same reasons, the State's reliance on *State v. Powell*, 139 Wn. App. 808, 162 P.3d 1180 (2007), *reversed on other grounds*, 166 Wn.2d 73, 206 P.3d 321 (2009), is misplaced. In *Powell,* evidence was introduced at trial that the defendant consumed methamphetamine shortly before committing a burglary, and the defense requested that drug treatment be imposed as a condition of the sentence. 139 Wn. App. at 820. No such evidence or advocacy is present in this case.

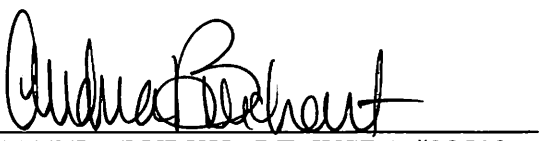
Finally, the State's interpretation is inconsistent with the requirements of RCW 9.94A.500(1), which permits the sentencing court to order the Department of Corrections to conduct a chemical dependency screening before sentencing

> a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW, a criminal solicitation to commit such a violation under chapter 9A.28 RCW, or any felony where the court finds that the offender has a chemical dependency that has contributed to his or her offense.

It is clear from this language that the Legislature recognized both that controlled substance offenses do not universally indicate dependency warranting treatment requirements, and that controlled substance offenses are not *per se* evidence of a chemical dependency that has contributed to the offense.

For these reasons, the trial court lacked authority to require Tait to submit to drug evaluation and treatment as a condition of his sentence.

RESPECTFULLY SUBMITTED this 7th day of January, 2015.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 7th day of January, 2015 in Walla Walla, Washington.

Breanna Eng