

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 65676-7-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
THOMAS WILLIAMS,)	
)	FILED: September 19, 2011
Appellant.)	
_____)	

Becker, J. — Before ordering a defendant to participate in crime-related substance abuse treatment as a condition of community custody, a trial court must make an express finding that the offender has a chemical dependency that has contributed to the offense for which the defendant is being sentenced. Because the required finding was not made in this case, the condition requiring appellant to obtain treatment for substance abuse must be reconsidered on remand.

Appellant Thomas Williams pled guilty to second degree assault with domestic violence. He had attacked his former girl friend, causing a serious head injury. Williams asked the court for an exceptional downward sentence based on diminished capacity. He claimed he had a seizure disorder that rendered him incapable of forming the necessary intent.

Williams suffered a shattered ankle more than 20 years ago when a heavy beam fell on him during his employment as a steelworker. For a long period of time before committing this offense, he was consuming very high doses of cocaine and opioids. He submitted a doctor's opinion that he abused drugs likely as self-medication for untreated major depression following the industrial injury and that the heavy drug use caused or exacerbated an underlying seizure condition.

The court denied the defense request for an exceptional sentence downward and sentenced Williams to 63 months, the low end of the standard range. In addition, the sentence imposed an 18-month term of community custody.

The State asked the court to include a requirement for treatment as a condition of community custody:

[Prosecutor]: Beg your pardon. Is the court going to order any domestic violence treatment and/or substance abuse treatment?

The Court: Yes.

[Prosecutor]: I notice it's not in. Thank you very much.

The Court: I think that's appropriate under the circumstance. Thanks.

....

THE COURT: I'd hate to see Mr. Williams back here in the future for any reason whatsoever.

The judgment and sentence, appendix H, orders Williams to obtain a substance abuse evaluation and follow all treatment recommendations. Williams assigns error to this condition. Because the issue is whether the court lacked statutory authority for imposing the condition, Williams may raise it for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

The statute authorizing a court to require a defendant to participate in drug treatment requires a finding "that the offender has a chemical dependency that has

contributed to his or her 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). The trial court did not enter a written finding that Williams has a chemical dependency that contributed to his offense.

The State argues that the requirement for a finding is satisfied either by the trial court’s remark that substance abuse treatment was “appropriate under the circumstances” or by Williams’ affirmative acknowledgment of his serious drug problem. We disagree. Where there is evidence that an offender abuses drugs, it is not hard to come to the conclusion that drug treatment is “appropriate.” The statute requires more; the chemical dependency must have contributed to the offense that is before the court. Jones and similar cases strictly enforce the requirement for a finding to ensure that this distinction does not get lost.

The State contends that the requirement for an express finding was excused in State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), reversed on other grounds by 166 Wn.2d 73, 206 P.3d 321 (2009). The State relies on the following sentence in the opinion: “Even though the trial court failed to check the box indicating that Powell had a chemical dependency, the record amply supports its decision.” Powell, 139 Wn. App. at 820. This statement, however, is dicta when read in context. The language was unnecessary to the court’s decision. The court had reversed the judgment and

sentence and was merely addressing the issue of sufficiency of the evidence to support the treatment condition in case the issue arose again on remand. Powell, 139 Wn. App. at 818. Presumably, in the event the defendant was convicted after a new trial, the trial court would remember to check the box, the issue of lack of an express finding would not arise again, and the appellate court would never have to decide the issue.

Failure to make the statutorily required finding is reversible error, even where substantial evidence would otherwise have supported such a finding. See Jones, 118 Wn. App. at 209-10. As Jones indicates, this court will not infer that a trial court necessarily would have made the required finding.

In Jones, the trial court erred when it ordered mental health treatment and counseling without making a finding that Jones was a person whose mental illness had contributed to his crimes. Jones, 118 Wn. App. at 209. Such a finding was required by the pertinent statute. The trial court was ordered to “strike the condition pertaining to mental health treatment and counseling unless it determines that it can presently and lawfully comply with” the pertinent statute. Jones, 118 Wn. App. at 212. Following Jones, we order the trial court to strike the condition pertaining to a substance abuse evaluation and treatment recommendations unless the court determines that it can presently and lawfully comply with the statutory requirement for a finding that Williams has a chemical dependency that contributed to his offense.

Williams has filed a statement of additional grounds for review under RAP 10.10. He claims that the court ordered defense counsel to provide him “with a copy of my discovery” and counsel failed to provide it. Neither the court’s order nor evidence of

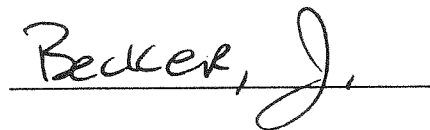
counsel's compliance with such an order is in the record. We therefore have no basis on which to review this claim.

Williams says that he was denied a "proper" medical evaluation that would have proved the severity of his condition and aided in his defense. Williams did present an opinion by a medical expert. He does not explain how he was denied the opportunity to obtain or present a "proper" medical evaluation. We are not obligated to search the record in support of this claim. RAP 10.10(c).

Williams asserts that on "numerous occasions the prosecuting attorney was intentionally found to be less than forthcoming with pertinent information that would have proved beneficial to my defense." We find nothing in the record concerning this claim and thus have no basis upon which to review it.

Finally, Williams claims that a "charge of assault was dismissed without prejudice, but was drawn into a higher court with key parts omitted to help the prosecution convict me." We do not understand this argument and therefore decline to review it.

On remand, the trial court must address the community custody condition under Jones as discussed above. In other respects, the judgment is affirmed.

A handwritten signature in cursive script that reads "Becker, J." is written over a horizontal line.

WE CONCUR:

Leach, a.c.f.

Schiveller, J