



piece of the crack cocaine and arrested Brown. Brown then admitted he had more crack in his jacket pocket. Indeed, Officer Poblocki searched his jacket and found more crack cocaine. The state crime lab confirmed that the confiscated material contained cocaine. The cocaine from Brown's pocket weighed .23 grams, and the cocaine from his hand weighed less than .1 grams. After Brown waived his right to a jury trial, the court found him guilty of possession of cocaine.

At sentencing, Brown asked for an exceptional sentence due to the small amount of cocaine. At that time, Brown had entered a rehabilitation program with Union Gospel Mission. He requested that, rather than serve his sentence in prison, he be allowed to complete a 13 month program with Union Gospel. Brown's attorney explained that Brown had been addicted to substances for most of his life, and that his risk of reoffending would be substantially decreased if he could serve his time at Union Gospel instead of in confinement. Brown himself told the court he wanted to go back to treatment. Further, Brown's presentence report stated that, "there is no dispute that [Brown's] criminal history is directly related to his drug addiction." His attorney explained that Brown's felony history consists mostly of drug crimes or crimes related to supporting his addiction. His attorney also argued that Brown would be very likely to reoffend if he was not placed in a long-term inpatient treatment program.

The trial court explained that, although it did not believe confinement was necessarily appropriate in this case, there was no legal basis to go outside the standard range. It ordered Brown to 12 months and 1 day of confinement. The trial court also ordered 12 months of community custody. It required Brown to continue substance abuse treatment as a condition of community custody.

## DISCUSSION

Brown argues that the trial court abused its discretion by conditioning community custody on Brown's participation in substance abuse treatment without entering an explicit finding that his drug use contributed to the offense. We review a crime-related community custody condition for an abuse of discretion. State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008). A trial court abuses its discretion when its decision is based on untenable grounds, including those that are contrary to law. Id.

The trial court may require, as conditions of community custody, that an offender participate in crime-related treatment or services. RCW 9.94A.703(3). But, the court may only order rehabilitative treatment if it finds that 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.

The trial court here made no such finding. But, the State contends that we should excuse the requirement for a finding pursuant to State v. Powell because, as in that case, the record amply supports such a finding. 139 Wn. App. 808, 820, 162 P.3d 1180 (2007), reversed on other grounds by 166 Wn.2d 73, 206 P.3d 321 (2009).<sup>1</sup> It argues that no finding is necessary, because the trial court implicitly acknowledged that

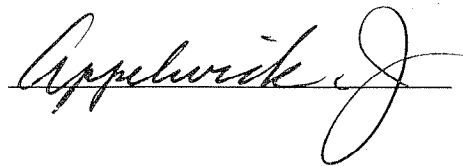
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<sup>1</sup> In Powell, the court evaluated the trial court's community custody condition after it reversed the appellant's conviction, in case the issue arose again on remand. 139 Wn. App. at 818.

Brown had a substance abuse problem, Brown's presentence report stated that his criminal history is related to his drug addiction, and Brown asked for treatment so he could straighten his life out. We agree that the record in this case contains substantial evidence to support a finding that Brown has a substance abuse problem and that it was appropriate to condition community custody on substance abuse treatment. But, the statute plainly requires an explicit finding of fact made by the trial court, not this court.

In State v. Jones, the trial court erred by ordering mental treatment without making a finding that the defendant was mentally ill and that the illness contributed to the crime. 118 Wn. App. 199, 202, 209, 76 P.3d 258 (2003). The court remanded with instructions for the trial court to "strike the condition pertaining to mental health treatment and counseling unless it determines that it can presently and lawfully comply with" the statute. Id. at 212.

Rather than affirm, when we decide on appeal that the trial court could have made the necessary finding, we conclude that the better practice is to require the trial court either to enter the statutorily mandated finding or to strike the condition. Accordingly, we remand for entry of the necessary findings or for striking the condition.



WE CONCUR:

