

FILED

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**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

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

THE STATE OF WASHINGTON,)	No. 29767-5-III
Respondent,)	
)	
v.)	
)	
WILLIAM DEAN MILLER,)	
)	UNPUBLISHED OPINION
Appellant.)	
)	

Siddoway, J. — William Dean Miller was sentenced as a first-time offender to 26 days of work crew to be followed by 12 months of community custody. He challenges three conditions imposed on his community custody: a prohibition on his association with probationers and parolees, a requirement that he obtain chemical dependency treatment, and an order that he submit to HIV (human immunodeficiency virus) testing. We find that two of his challenges are moot and decline to address them. The order that he submit to HIV testing, which the record suggests may not be moot, was not supported by a required finding. We reverse the condition requiring HIV testing and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In August 2010, William Dean Miller was arriving home when he was approached by a police officer who intended to place him under arrest for second degree theft. Mr. Miller was suspected of taking and using a bank card that a customer had inadvertently left at an automatic teller machine. Mr. Miller physically resisted the arrest, while attempting to close and lock the door of his pickup truck. In light of his suspicious behavior, the officer called in a canine unit that alerted on the truck, after which the officer obtained a search warrant. Search of the truck resulted in the discovery and seizure of approximately a gram of marijuana in a baggie and a glass pipe with what turned out to be methamphetamine residue on it.

Mr. Miller eventually pleaded guilty to a charge of third degree theft in exchange for dismissal of the second degree theft charge. Additional charges of possession of methamphetamine, possession of less than 40 grams of marijuana, use of drug paraphernalia, and third degree assault against the arresting officer proceeded to a jury trial.

The jury found Mr. Miller guilty of the assault and the drug-related charges. The trial court sentenced him as a first-time offender to 30 days of confinement with credit for 4 days served, which the court then converted to 26 days of work crew. Service on work crew was to be followed by 12 months of community custody.

Among crime-related prohibitions and other requirements that the trial court imposed as conditions on Mr. Miller's community custody were the following three, which are the subject matter of his appeal:

That defendant will not associate with any individuals who are on probation or parole or any person his probation officer or the court specifically restricts him/her from associating with.

Clerk's Papers (CP) at 85. Having found that Mr. Miller "has a chemical dependency that has contributed to the offense(s)," CP at 76, it imposed the condition

[t]hat defendant will participate in an outpatient drug program at his expense, at the discretion of his probation officer. That the duration of treatment is to be at the discretion of his probation officer.

CP at 85. Finally, it imposed the following requirement:

HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

CP at 82.

ANALYSIS

Mootness

The record reveals that the trial court sentenced Mr. Miller in February 2011 without granting his request that the sentence be stayed pending this appeal. Accordingly, it appears that at least two of the community custody provisions became moot at about the time the appeal was presented for our decision. A case is moot if a

court can no longer provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). This court may raise the issue of mootness sua sponte. *See In re Det. of C.W.*, 105 Wn. App. 718, 723, 20 P.3d 1052 (2001), *aff'd*, 147 Wn.2d 259, 53 P.3d 979 (2002).

Whether an alleged sentencing error is rendered moot by the appellant's completion of the contested sentence hinges on whether the alleged error would bind a future court to impose greater consequences on the appellant if convicted of another offense. *Compare State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (finding that an appeal was moot where it could not "provide [appellant] with any effective relief, i.e., less confinement due to a lower offender score"), *with State v. Vike*, 125 Wn.2d 407, 409 n.2, 885 P.2d 824 (1994) (recognizing that an appellant's challenge to the sentencing court's same criminal conduct finding was not mooted by his release from confinement because that determination would bind a future sentencing court).

Community custody conditions imposed at sentencing do not bind a future sentencing court to impose greater consequences if the offender is subsequently convicted of another crime. RCW 9.94A.703, the statute addressing the imposition of community custody conditions, functions independently from the imposition of conditions on prior offenses. The propriety of community custody conditions is therefore ordinarily moot once the term of community custody has been completed.

Only the third sentencing condition challenged by Mr. Miller—the HIV testing requirement—authorizes the Department of Health to engage in mandatory testing and counseling that is arguably not subject to a time limitation. We therefore address Mr. Miller’s challenge to that condition.

HIV Testing and Counseling

Mr. Miller argues that the record does not support the trial court’s decision to impose a condition requiring him to submit to HIV testing under RCW 70.24.340. He may raise this challenge to the sentencing condition on appeal even though he failed to object below. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

RCW 70.24.340 appears in the chapter of the revised code that includes legislative measures to “deal[] efficiently and effectively with reducing the incidence of sexually transmitted diseases,” jurisdiction of which is vested in the Department of Health and the secretary of health. RCW 70.24.015, .005. The chapter generally provides that no one may undergo HIV testing without his or her consent, but is subject to a limited number of statutory exceptions. The exception relied upon by the trial court here, RCW 70.24.340, provides:

- (1) Local health departments authorized under this chapter shall conduct or cause to be conducted pretest counseling, HIV testing, and posttest counseling of all persons:
 - (a) Convicted of a sexual offense under chapter 9A.44 RCW;

(b) Convicted of prostitution or offenses relating to prostitution under chapter 9A.88 RCW; or

(c) *Convicted of drug offenses under chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.*

(2) Such testing shall be conducted as soon as possible after sentencing and shall be so ordered by the sentencing judge.

(Emphasis added.)

While Mr. Miller was convicted of three drug offenses under chapter 69.50 RCW, the trial court made no finding that his drug offenses were associated with the use of hypodermic needles, despite the statute's requirement that such a determination be made before ordering testing. *See State v. Jones*, 118 Wn. App. 199, 209, 76 P.3d 258 (2003) (concluding that the court erred by ordering mental health treatment and counseling without making a required finding, regardless of whether there was an evidentiary basis for the order); *United States v. Mike*, 632 F.3d 686, 698 (10th Cir. 2011) (vacating conditions of supervised release and remanding for entry of statutorily-required findings). Where such a finding is missing, the proper procedure is to remand to allow the trial court to determine whether it can make the required determination.¹ *Jones*, 118 Wn. App. at

¹ For purposes of future proceedings, we note that while no published decision has interpreted or otherwise passed upon the meaning of RCW 70.24.340(1)(c), unpublished decisions have suggested two possible constructions of the determination that is required. *Compare State v. Miller*, noted at 105 Wn. App. 1044, 2001 WL 333818, at *2 (concluding that “the delivery of heroin is a crime ‘associated with the use of hypodermic needles’”), *with State v. Perry*, noted at 116 Wn. App. 1031, 2003 WL 1775990, at *1 (requiring evidence linking the defendant to needle use). The parties have not raised the issue of how the statute should be construed. We generally decide cases only on the basis

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The State argues that remand is unnecessary here, because the Department of Health would be authorized to conduct HIV testing regardless of any court order. But chapter 70.24 RCW clearly provides otherwise. RCW 70.24.340(2) conditions testing upon the order of the sentencing judge and RCW 70.24.330 disallows nonconsensual testing except as expressly authorized by that provision or other provisions of chapter 70.24 RCW.

Alternatively, the State argues that we may uphold the sentencing condition under RCW 9.94A.703(3)(d), which gives courts discretion to require that an offender “[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” It argues that HIV testing fits within this grant of discretion and is reasonably related to Mr. Miller’s offense because “[he] was using methamphetamine, which may be ingested intravenously” and “[his] home and car were littered with drug paraphernalia and at least four pipes, suggesting that he did not use alone, but with others.” Br. of Resp’t at 11-12. Reference to the drug paraphernalia and pipes found in Mr. Miller’s home improperly relies on the fruits of an unlawful search of

of issues set forth by the parties in their briefs. RAP 12.1(a). We may raise an issue sua sponte if necessary to properly decide the case, RAP 12.1(b), but decline to do it on this record.

the home following his arrest, evidence from which was suppressed by the trial court. A sentencing 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); *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010).

Setting aside the evidence the State relies on, we question whether mandating HIV testing as a part of a defendant’s sentence *is* within a trial court’s discretion. The express terms of RCW 70.24.340 and RCW 70.24.330 disallow nonconsensual testing except as provided therein or “[a]s otherwise expressly authorized by *this chapter*.” (Emphasis added.) And a construction of RCW 9.94A.703(3)(d) that makes HIV testing broadly discretionary would negate and render superfluous RCW 70.24.340(1)(c)’s express requirement of a determination that the offense is associated with the use of hypodermic needles. *Cf. Jones*, 118 Wn. App. at 210 (declining to read former RCW 9.94A.715(2)(b) (2000) to negate and render superfluous findings required before ordering mental health counseling under another sentencing act provision).

We need not decide that issue, which was not briefed by the parties, because the State’s argument even more fundamentally ignores the fact that the trial court did not rely on RCW 9.94A.703(3)(d) (assuming it could apply) and never exercised discretion under that statute.

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The court relied on RCW 70.24.340(1)(c) to impose the condition. A court may not order HIV testing under that provision without making the required finding. On remand, the trial court shall strike the condition relating to HIV testing unless it determines that it can presently make the required finding. Mr. Miller's judgment and sentence is otherwise affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, C.J.

Kulik, J.