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Court of Appeals No. 73905-1-I
(published at _ Wn. App. _, 384 P.3d 668 (2018))

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON BIGSBY,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner, Brandon Bigsby, asks the Court grant review of the published opinion of the Court of Appeals in *State v. Bigsby*,__ Wn. App. __, 2016 WL 6948763.

B. OPINION BELOW

In a published opinion the Court of Appeals concluded the Legislature's careful delineation in RCW 9.94A.6332 of authority to sanction individuals for violating the conditions of their sentence did not preclude the trial court from imposing sanctions even where the statute expressly vests only the Department of Corrections with authority to do so. The court summarily denied Mr. Bigsby's motion to reconsider.

C. ISSUE PRESENTED

Trial courts derive their sentencing authority solely from statutes. RCW 9.94A.6332 authorizes the Department of Corrections and not the trial court to impose sanctions on individuals who violate the conditions of their sentence while under the department's supervision. Where Mr. Bigsby was under the department's supervision and the department had already sanctioned Mr. Bigsby for the

violation, did the trial court have authority as well to sanction him for violating a condition of his community custody?

D. STATEMENT OF THE CASE

Following Mr. Bixby's guilty plea to one count of possessing a controlled substance, the trial court imposed a sentence which included 12 months of community custody. CP 32. As a condition of community custody, the court required Mr. Bigsby obtain a drug evaluation and comply with the recommended treatment. *Id.* The court set a review hearing for August 5, 2015, at which time Mr. Bigsby was required to present the evaluation or other documentation of his involvement in treatment. CP 34.

On August 6, 2015, the Department of Corrections (DOC) found Mr. Bigsby had violated the conditions of his sentence, including among others failing to obtain a treatment evaluation. CP 5. DOC imposed a sanction of 18 days confinement, which apparently included credit for time served as Mr. Bigsby was due to be released on August 10, 2015. *Id.*

Despite the fact that at the time of the August review hearing, Mr. Bigsby was apparently serving a DOC sanction for failing to obtain an evaluation, the court issued an arrest warrant for Mr. Bigsby because

he failed to appear in court on August 5, 2015. At a hearing following his arrest, Mr. Bigsby argued he was in custody at the time of the August hearing. 9/14/15 RP 2-4. In addition he contended RCW 9.94A.6332 vested DOC, and not the court, with the authority to sanction him for community custody violations. *Id.*

The trial court concluded it had inherent authority to sanction Mr. Bigsby, imposed 30 day term of incarceration, and invited Mr. Bigsby to appeal. *Id.* at 7-9

In a published opinion, the Court of Appeals affirmed the trial court's actions.

E. ARGUMENT

The Department of Corrections alone and not the trial court had the authority to sanction Mr. Bigsby for any violation of his sentence.

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Relying on the plain language of RCW 9.94A.6332, Mr. Bigsby argued below that the trial court did not have authority to sanction him. RCW 9.94A.6332, titled "**Sanctions—Which entity imposes**", provides:

> The procedure for imposing sanctions for violations of sentence conditions or requirements is as follows:

(1) If the offender was sentenced under the drug offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.660.

(2) If the offender was sentenced under the special sex offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.670.

(3) If the offender was sentenced under the parenting sentencing alternative, any sanctions shall be imposed by the department or by the court pursuant to RCW 9.94A.655.

(4) If a sex offender was sentenced pursuant to RCW 9.94A.507, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(5) If the offender was released pursuant to RCW 9.94A.730, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(6) If the offender was sentenced pursuant to RCW 10.95.030(3) or 10.95.035, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(7) In any other case, if the offender is being supervised by the department, any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. If a probationer is being supervised by the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, upon receipt of a violation hearing report from the department, the court retains any authority that those statutes provide to respond to a probationer's violation of conditions.

(8) If the offender is not being supervised by the department, any sanctions shall be imposed by the court pursuant to RCW 9.94A.6333.

(Emphasis added).

The opinion concludes the underlined language above does not actually mean what it says, and that despite this language the legislature actually intended to permit both the court and department to impose sanctions in cases such as this where a person is under. The Legislature

plainly knew how to grant authority to both the "department or . . . the court" as it did precisely that in subsections (1), (2) and (3), and yet employed different language in subsection (7). "[I]ndividual subsections are not addressed in isolation from the other sections of the statute." *In re Adams*, 178 Wn.2d 417, 424, 309 P.3d 451 (2013). Instead, when interpreting the meaning of subsections within a statute courts look to the preceding and subsequent subsections as well as the remainder of the statute. *Id.* The fact that the legislature employed the phrase "department or . . . the court" in subsections (1), (2) and (3), and yet employed different language in subsection (7) and (8) illustrates the legislature did not intend to permit both the court and department to have authority to sanction in those circumstances

If the language of a statute is unambiguous that language alone controls. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Here, RCW 9.94A.6332 is unambiguous; its seven subsections carefully delineate which entity has authority to sanction in which circumstances. That language must control.

Rather than heed the plain language of RCW 9.94A.6332, the opinion instead concludes RCW 9.94B.040 authorizes a trial court to

sanction a person any time. Initially, that conclusion ignores the limitation in RCW 9.94B.010 that that chapter is intended to apply only to offense committed prior to 2000. RCW 9.94B.010, entitled **"Application of Chapter,"** provides

> (1) This chapter codifies sentencing provisions that may be applicable to sentences for **crimes committed prior to July 1, 2000**.
> (2) This chapter supplements chapter 9.94A RCW and should be read in conjunction with that chapter.

Here. Mr. Bigsby committed his offense in 2014. Thus, RCW 9.94B.040 cannot apply to him. If that limitation is given effect, there is no conflict between RCW 9.94A.6332 and RCW 9.94B.030.

"The drafters of legislation . . . are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute." *Roggenkamp*, 153 Wn.2d at 624 (Internal citations and brackets omitted); *accord State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014). Each statutory provision is intended to "effect some material purpose." *Vita Food Products, Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). But if RCW 9.94B.040 authorizes the court to impose sanctions in any and all circumstances, RCW 9.94A.6332 means nothing and is wholly superfluous. To be sure, the opinion offers no explanation of the meaning of that statute if

RCW 9.94B.040 authorizes the court to impose sanctions in all cases.

The opinion conjures ambiguity where none exists. But, to the extent any ambiguity actually exists, the rule of lenity requires the court must instead construe the statute in the light most favorable to Mr. Bigsby. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 462, 219 P.3d 686 (2009).

The opinion relies on *State v. Gamble*, 146 Wn. App. 813, 192 P.3d 399 (2008) to conclude the trial court had authority to act. But that case did not address RCW 9.94.6332(7) as it did not involve a crimes to which that statute applies. Instead, at the time of the offense at issue in *Gamble* RCW 9.94B.040 did not exist and instead former RCW 9.94A.634(1) expressly authorized the trial court to sanction an offender who violated the conditions of sentence. In 2008, former RCW 9.94A.634(1) was recodified as RCW 9.94B.040. Importantly, prior to its recodification former RCW 9.94A.634(1) contained no limitation on the timeframe of the offense(s) to which that statute applies. That is plainly not the case for RCW 9.94B.040. Thus, *Gamble* did nothing more than interpret the statute that then existed, a statute that did not expressly vest DOC with authority and which did not contain and limitation as to the date of offense. Since then, the statutory

landscape has changed and *Gamble* has no impact on the plain meaning of RCW 9.94A.6332.

The legislature could not have provided a clearer statement of which entity possesses authority to sanction in given circumstances than it did in RCW 9.94A.6332. The opinion of the Court of Appeals renders that clear delineation wholly meaningless. The opinion does so by failing to heed the long-established rules of statutory construction contrary to numerous cases from this Court. In the end, the opinion vastly expands the authority of trial court's beyond that permitted by the Legislature raising both constitutional issues as well as significant issues of public interest. This Court should grant review under RAP 13.4.

F. CONCLUSION

For the reasons set forth above, this Court should grant review.

Respectfully submitted this 28th day of December, 2016.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON BIGSBY, Appellant.	)	No. 73905-1-I ORDER DENYING APPELLANT'S MOTION TO RECONSIDER

Appellant Brandon Bigsby filed a motion to reconsider the opinion filed in the above matter on November 28, 2016. A majority of the panel has determined this motion should be denied.

NOW THEREFORE,

It is hereby ordered that the motion to reconsider is denied.

Dated this 16th day of December 2016.

FOR THE COURT:

Presiding Judge

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON BIGSBY, Appellant.	)	No. 73905-1-I DIVISION ONE PUBLISHED OPINION FILED: November 28, 2016

SPEARMAN, J. — Under the Sentencing Reform Act, a trial court has authority to enforce the requirements of sentences that it imposes. The trial court sanctioned Brandon Bigsby for failing to meet a sentence requirement. Bigsby challenges the sanction, arguing that, because he was on community custody under the supervision of the Department of Corrections (DOC), only DOC had authority to sanction him. But, because the trial court also had authority to impose sanctions, we affirm.

FACTS

Bigsby pleaded guilty to possession of a controlled substance. The trial court sentenced him to 75 days confinement and 12 months community custody under DOC supervision. As conditions of community custody, the trial court ordered Bigsby to obtain a chemical dependency evaluation and comply with

treatment recommendations. The court set a review hearing for August 5, 2015. The trial court informed Bigsby that it would issue a warrant for his arrest if he failed to appear for the hearing. The court also informed Bigsby that if, at the review hearing, he failed to produce paperwork showing that he had obtained a drug evaluation and begun treatment he would go back to jail for 30 to 60 days.

Bigsby received credit for time served and completed his term of confinement on May 27, 2015. Over the next two months, he violated several conditions of community custody. The DOC alleged that Bigsby absconded from supervision, used controlled substances, failed to report to his community corrections officer (CCO), failed to attend a training program, failed to complete a substance abuse treatment program, and failed to abide by monitoring for drug use. DOC took Bigsby into custody, found him guilty of all violations, and imposed a sanction of 18 days confinement.

Bigsby was serving this sanction on August 5, the day of his review hearing. He did not attend the hearing or communicate with the trial court. The court issued a bench warrant for his arrest.

DOC released Bigsby on August 10. Bigsby failed to report to his CCO and DOC took him back into custody until September 8. DOC then held Bigsby under the trial court's bench warrant.

On September 14, 2015, Bigsby appeared in court for a review hearing. He had not completed a chemical dependency evaluation or begun treatment. Bigsby argued that he would have gotten a drug evaluation as soon as he was released from DOC custody on August 10, if he had not been detained under the

trial court's bench warrant. He also argued that, because he was under the supervision of DOC, only DOC had authority under the Sentencing Reform Act (SRA) chapter 9.94A RCW to impose sanctions.

The trial court found that Bigsby violated the conditions of the judgment and sentence by failing to get a drug evaluation.[1] The court imposed a sanction of 30 days confinement and set another review hearing for December 14. The court stated that, if Bigsby was not yet in treatment by that time, it would set further periodic review hearings and impose sanctions for any noncompliance.

Bigsby served the sanction imposed. He failed to appear for the December 14 review hearing but appeared for a hearing on December 31. He has failed to appear for subsequent review hearings and a bench warrant for his arrest is outstanding.

DISCUSSION

Bigsby appeals the trial court's sanction. He asserts that, under the 2008 amendments to the SRA, only DOC may enforce conditions of community custody.

As a preliminary matter, we note that Bigsby's appeal is moot because he has already served the sanction imposed by the trial court. See In re Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (stating that a case is moot "if a court can no longer provide effective relief") (citing State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). But we may consider a moot issue if it involves a matter of

[1] Bigsby asserts that the trial court sanctioned him for failing to appear at the August 5 review hearing. Brief of App. at 4-5. This misconstrues the record. The trial court sanctioned Bigsby for failing to complete a chemical dependency evaluation.

"'continuing and substantial public interest.'" Id. (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)). To determine whether an issue presents a matter of substantial public interest, we consider (1) whether the issue is of a public nature, (2) whether a determination is necessary to guide public officers, and (3) whether the question is likely to recur. Id.

Whether the trial court may sanction an offender on community custody is an issue that affects the public. It appears that Washington courts have not addressed the issue since the 2008 amendments to the SRA and a determination is necessary to provide guidance to public officers. The likelihood of recurrence is high, as even in this case Bigsby may face further sanctions. We conclude that Bigsby's appeal presents an issue of substantial and continuing public interest that warrants review.

Bigsby asserts that, under the SRA as amended in 2008, only DOC may sanction offenders who are under DOC supervision. The State contends that the trial court and DOC continue to have concurrent authority to impose sanctions, as they did prior to the 2008 amendments.

Interpretation of the sanction provisions of the SRA is a question of law that we review de novo. State v. Ashenberner, 171 Wn. App. 237, 246, 286 P.3d 984 (2012) (citing State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010)). Our goal in interpreting a statute is to discern and implement the intent of the legislature. Id. We discern legislative intent from the statute's plain language, related provisions, and the statutory scheme as a whole. Id. (citing State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)).

Bigsby relies on RCW 9.94A.6332, a 2008 amendment to the SRA that outlines procedures for imposing sanctions based on the sentencing scheme applicable to the offender's crime. After addressing several sentencing schemes not applicable here, the statute provides that "[i]n any other case, if the offender is being supervised by the department, any sanctions shall be imposed by the department . . . ." RCW 9.94A.6332(7). The statute further states that "[i]f the offender is not being supervised by the department, any sanctions shall be imposed by the court . . . ." RCW 9.94A.6332(8). Bigsby contends that by its plain language, RCW 9.94A.6332 only authorizes the trial court to impose sanctions when an offender is not under DOC supervision.

The State relies on RCW 9.94B.040(1), which authorizes the trial court to impose sanctions "[i]f an offender violates any condition or requirement of a sentence . . . ." The State asserts that, based on the previous version of this statute, this court determined that the trial court and DOC have concurrent jurisdiction to impose sanctions in State v. Gamble, 146 Wn. App. 813, 820, 192 P.3d 399 (2008).

In that case, the trial court sentenced Gamble to a term of community custody and imposed conditions related to substance abuse treatment. Id. at 815. Gamble violated the conditions and the trial court imposed a sanction. Id. at 815-16. The statutes governing Gamble's sentence expressly authorized DOC to impose sanctions but were silent as to the trial court's authority. Id. at 817. Gamble argued that the specific grant of sanctioning authority to DOC indicated that DOC was the only entity that could impose sanctions. Id.

This court considered Gamble's argument in light of former RCW 9.94A.634(1) recodified as 9.94B.040 (Laws of 2008, ch. 23, §56). Id. at 818. That statute expressly authorized the trial court to impose sanctions "[i]f an offender violates any condition or requirement of a sentence . . . ." Id. (quoting former RCW 9.94A.634(1)). The Gamble court held that this provision "unambiguously demonstrates that the superior courts retain authority ... to enforce the conditions of the sentences that they impose." Id. By expressly granting DOC authority to impose sanctions in specific circumstances, the legislature may have signaled that this was the preferred procedure in those cases. Id. at 818-19. But we determined that we could only conclude that DOC had sole sanctioning authority in those circumstances by ignoring former RCW 9.94A.634(1). Id. at 819. Giving effect to both statutory grants of authority, we held that the trial court and DOC have concurrent sanctioning authority. Id. at 820.

Former RCW 9.94A.634(1) was recodified as RCW 9.94B.040 as part of the SRA's 2008 amendments. Laws of 2008, ch. 23, §56. The text of the statute did not change. The statute states: "If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section." RCW 9.94B.040.

The State argues that Gamble controls in this case. It asserts that, just as former RCW 9.94A.634 authorized a trial court to impose sanctions under the previous provisions of the SRA, RCW 9.94B.040(1) authorizes a trial court to

impose sanctions under the current SRA.[2] Bigsby argues that Gamble does not control. He contends that the recodified statute, RCW 9.94B.040, only applies to crimes committed before the current community custody provisions took effect. We agree with the State.

Bigsby relies on RCW 9.94B.010(1), which states that ch. 9.94B RCW "codifies sentencing provisions that may be applicable to sentences for crimes committed prior to July 1, 2000." But, while the statute refers to pre-2000 offenses, it does not state that the chapter applies only to those offenses. By stating that the chapter "may be applicable," RCW 9.94B.010(1) is permissive as to pre-2000 offenses. See State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (stating that, unlike the word "'shall,'" the word "'may'" indicates discretion or permission) (quoting, e.g., Crown Cascade, Inc., v. O'Neal, 100 Wn.2d 256, 668 P.2d 585 (1983)). And the statute is silent as to post-2000 offenses.

At oral argument, Bigsby also argued that RCW 9.94B.040 only applies to pre-2000 offenses because any other reading is incompatible with RCW 9.94A.6332. Chapter 9.94A.6332(7) states that "if the offender is being supervised by the department, any sanctions shall be imposed by the

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[2] The State relies on Ashenberner, 171 Wn. App. 237, to support the proposition that Gamble continues to apply. The Ashenberner court relied on Gamble and RCW 9.94B.040(1) to conclude that the court has authority to impose sanctions for violation of a restitution order. Id. at 250. But the underlying crimes in that case were committed prior to July 1, 2000. Id. at 239. Ashenberner does not address whether RCW 9.94B.040(1) applies to crimes committed after that date.

department." Bigsby contends that reading RCW 9.94B.040(1) to authorize the trial court to impose sanctions renders RCW 9.94A.6332 meaningless.

We read the provisions of the SRA together. Ashenberner, 171 Wn. App. at 246 (citing Millay v. Cam, 135 Wn.2d 183, 199, 955 P.2d 271 (1990)). Where provisions of an act appear to conflict, we may discern legislative intent by examining the legislative history of the enactments. Gorman v. Garlock, Inc., 155 Wn.2d 198, 211, 118 P.3d 311 (2005) (citing Timberline Air Serv., Inc., v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305, 312, 884 P.2d 920 (1994)).

In this case, the legislature provided statements addressing both applicability and intent. Laws of 2008, ch. 231, §6, §55. The legislature enacted the 2008 amendments to the SRA in 61 sections. Laws of 2008, ch. 231. The statutes at issue, RCW 9.94A.6332 and RCW 9.94B.040, were enacted in sections 18 and 56. Laws of 2008, ch. 231, §18, §56. Section 55 addresses applicability and states that "[s]ections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective date of this section." Laws of 2008, ch. 231, §55(1). The statement of intent specifies that "[s]ections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision . . . ." Laws of 2008, ch. 231, §6.

We conclude that RCW 9.94B.040(1) applies to crimes committed after the 2008 amendments took effect and that those amendments did not divest the

trial court of authority to enforce the conditions of a sentence that it imposes. By granting specific sanctioning authority to DOC, the "legislature may ... have intended that this be the preferred procedure for enforcing community custody conditions . . . . " Gamble, 146 Wn. App. at 818-19. But as the SRA also expressly grants the sentencing court authority to impose sanctions, the trial court did not err in sanctioning Bigsby for failing to comply with sentence conditions.

In the event that he does not prevail, Bigsby requests that we deny any claim for costs of appeal. We may consider whether to impose appellate costs when the issue is raised in the appellant's brief. State v. Sinclair, 192 Wn. App. 380, 388-89, 367 P.3d 612 (2016) review denied, 185 Wn.2d 1034, 377 P.3d (2016) (citing RAP 14.4). When the trial court has determined that the appellant is indigent, indigency is presumed to continue throughout the appeal. Id. at 393.

The trial court determined that Bigsby was indigent. The State makes no argument concerning appellate costs and presents no evidence to rebut the presumption that Bigsby is indigent. We decline to award costs of appeal to the State.

Affirmed.

WE CONCUR:

Spearman, J.

Leach, J.

Cox, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73905-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 29, 2016