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COA NO. 66928-1-1

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

FILED
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

CATHERINE ASHENBERNER,

Appellant.

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

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court lacked statutory authority to penalize appellant's failure to report income to the county clerk as a violation of a sentencing condition.

Issue Pertaining to Assignment Of Error

Whether the plain language of the statute governing legal financial obligations and established rules of statutory construction demonstrate the court lacked authority (1) to punish appellant for not reporting income to the county clerk and (2) to impose this requirement as a condition of appellant's sentence?

B. STATEMENT OF THE CASE

In 2001, Catherine Ashenberner pleaded guilty to seven counts of first degree theft and one count of second degree perjury. CP 37-38, 45-46. The court imposed 43 months confinement. CP 96. The court also ordered Ashenberner to pay a total of \$169,679.31 in restitution. CP 95, 102.

In 2004, the court modified the sentence in various ways, including a condition that "The defendant shall provide all information required by the clerk's office. This includes all information about the use of the money stolen from Seattle Federal Mortgage or Western Federal Mortgage." CP 109-10.

In 2009, the court again modified the sentence, including a condition that "The defendant shall provide pay stubs or other evidence of income to the clerk's office monthly." CP 111-12.

In 2011, the State alleged Ashenberner should be sanctioned for violating the conditions of her sentence as follows: (1) failure to make required payments towards legal financial obligations (restitution); (2) failure to provide pay stubs and other evidence of income to the clerk's office; (3) failure to advise employer of her conviction; (4) failure to notify King County prosecutor's office upon accepting job employment. 3RP¹ 48-51.

Among other things, the defense argued the 2004 sentence modification unlawfully required Ashenberner to report to the prosecutor's office in place of a community corrections officer. 3RP 5-8. The State asserted the court had the power to supervise offenders in the absence of Department of Corrections (DOC) supervision. 3RP 13-14, 16-17. The court agreed with the State. 3RP 19-21.

An evidentiary hearing was held, during which a clerk's office employee testified Ashenberner paid a total of \$823.42 in restitution to date, with \$50 paid in 2010 and \$30 paid in 2009. 3RP 25, 27-28. The

¹ The verbatim report of proceedings is referenced as follows: 1RP - 7/26/01; 2RP - 9/21/01; 3RP - 3/17/11.

clerk claimed Ashenberner collected income under different names and social security numbers. 3RP 28-30. The court did not uphold defense counsel's due process objections to the use of hearsay evidence. 3RP 28, 36-38, 51.

The clerk also testified Ashenberner provided inaccurate financial information to the clerk's office, such as not providing pay stubs showing employment income. 3RP 31-35. Exhibits showing Ashenberner's employment and her declaration regarding income were admitted. Ex. 2, 3.

Following the hearing, the State informed the court that the violation for failing to pay restitution and the violation for failing to provide pay stubs and evidence of income to the clerk's office should be treated as a single violation. 3RP 50-51. The court nonetheless concluded Ashenberner committed two separate violations of the sentence: (1) failing to pay legal financial obligations; and (2) failing to provide pay stubs and employment records to the clerk's office based as required by the 2009 sentencing modification. CP 113; 3RP 53-54. The court ordered Ashenberner to serve 60 days for each violation in the King County Jail with work release authorized. CP 113. This appeal follows. CP 115-17.

C. ARGUMENT

1. THE COURT LACKED AUTHORITY TO IMPOSE THE REPORTING REQUIREMENT AS A SENTENCING CONDITION FOR WHICH ASHENBERNER COULD BE SANCTIONED FOR NONCOMPLIANCE.

The trial court's order sentencing Ashenberner to confinement for violating the reporting requirement under RCW 9.94A.760(7)(b) is void as a matter of law. The court lacked authority to penalize Ashenberner for violating this requirement and also lacked authority to insert this requirement into her sentence.

- a. The Reporting Requirement Is Not Punishable As A Sentencing Violation And Is Not Even An Authorized Sentencing Condition.

A trial court may sanction an offender who violates a condition of her sentence. RCW 9.94B.040(1).² The court may sanction the offender to confinement for a period not to exceed sixty days for each violation. RCW 9.94B.040(3)(c).

In 2009, the court entered an order modifying the conditions of the sentence to include the following requirement: "The defendant shall provide pay stubs or other evidence of income to the clerk's office monthly." CP 112. The court, as part of the 2011 hearing at issue here,

² The legislature recodified former RCW 9.94A.634 (Laws of 2002, ch. 175 § 8; Laws of 1998, ch. 260 § 4) as RCW 9.94B.040. Laws of 2008, ch. 231, § 56. The recodification did not substantively affect the statute.

found Ashenberner violated this sentencing condition and imposed 60 days incarceration. CP 113; 3RP 53-54.

The court, however, lacked statutory authority to punish Ashenberner for noncompliance with this requirement. RCW 9.94A.760³ does not allow the court to impose the reporting requirement as a condition of the sentence for which an offender may be sanctioned for noncompliance.

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "If the trial court exceeds its sentencing authority, its actions are void." State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981 is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Ashenberner's theft offenses were committed between November 11, 1999 and June 27, 2000. CP 93, 99. Any sentence imposed under the authority of the Sentencing Reform Act "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. The sentencing condition requiring an offender to provide pay stubs and employment records to the clerk's office did not exist at the time

³ Formerly codified at RCW 9.94A.145.

of Ashenberner's offenses. Former RCW 9.94A.145 (Laws of 2000 ch. 226 § 4; Laws of 1999, ch. 196 § 6).

In 2003, the legislature amended the statute to include the following provision, currently codified as RCW 9.94A.760(7)(b):

Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the county clerk sets the monthly payment amount, the clerk may modify the monthly payment amount without the matter being returned to the court. *During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.*

Former RCW 9.94A.760(7)(b) (Laws of 2003, ch. 379 § 14, eff. Oct. 1, 2003) (emphasis added).

The legislative intent behind this amendment was to improve the processes for billing and collecting legal financial obligations. Laws of

2003, ch. 379 § 13.⁴ This amendment applied to all those currently subject to sentences with legal financial obligations. Laws of 2003, ch. 379 § 24.⁵

The plain language of RCW 9.94A.760 and established rules of statutory construction compel the conclusion that the court lacks authority to sanction Ashenberner for noncompliance with this reporting requirement.

Under RCW 9.94A.760(1), "the court may order the payment of a legal financial obligation as part of the sentence." RCW 9.94A.760(1) further directs the court to set the monthly payment amount or failing that, authorizes the DOC or the county clerk to do so. RCW 9.94A.760(7)(b), meanwhile, provides in part: "If the county clerk sets the monthly payment amount, or if the department set the monthly payment amount and the

⁴ Laws of 2003, ch. 379 § 13 provides: "The legislature intends to revise and improve the processes for billing and collecting legal financial obligations. The purpose of sections 13 through 27 of this act is to respond to suggestions and requests made by county government officials, and in particular county clerks, to assume the collection of such obligations in cooperation and coordination with the department of corrections and the administrative office for the courts. The legislature undertakes this effort following a collaboration between local officials, the department of corrections, and the administrative office for the courts. The intent of sections 13 through 27 of this act is to promote an increased and more efficient collection of legal financial obligations and, as a result, improve the likelihood that the affected agencies will increase the collections which will provide additional benefits to all parties and, in particular, crime victims whose restitution is dependent upon the collections."

⁵ Laws of 2003, ch. 379 § 24 provides: "The provisions of sections 13 through 27 of this act apply to all offenders currently, or in the future, subject to sentences with unsatisfied legal financial obligations."

department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court."

The crucial provision for this appeal is RCW 9.94A.760(10), which specifies "The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740."⁶ RCW 9.94A.760(10) plainly lists the only RCW 9.94A.760 condition or requirement that subjects an offender to penalties for noncompliance under RCW 9.94B.040.⁷ The legislation provides for no other.

When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "[C]ourts are to give effect to that plain meaning

⁶ RCW 9.94A.737 authorizes the DOC to sanction an offender for violating any condition or requirement of community custody. RCW 9.94A.740 refers to community custody violators. Ashenberner was not on community custody. Supp CP ___ (sub no. 22, Acknowledgement of 5990 Closure, 4/2/04).

⁷ Earlier versions of the statute likewise limited penalties for noncompliance to the failure to pay legal financial obligations. See Former RCW 9.94A.145 (Laws of 2000 ch. 226 § 4; Laws of 1999, ch. 196 § 6).

as an expression of legislative intent." State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). For this reason, courts "may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

The only way Ashenberner could lawfully be sanctioned for violating the reporting requirement under RCW 9.94A.760(7)(b) is if RCW 9.94A.760 specified the violation of that requirement subjects the offender to penalties for noncompliance. The legislature chose not to say that. Courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) (quoting Delgado, 148 Wn.2d at 727). "In giving effect to the plain meaning of the legislature's words, we do not question the wisdom or the public policy behind the statute." In re Pers. Restraint of Spires, 151 Wn. App. 236, 240, 211 P.3d 437 (2009).

Similarly, it is a well-settled principle of statutory construction that "[t]he Legislature 'does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.'" In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting John H. Sellen Constr. Co. v. Dep't of Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). If the legislature intended to

subject offenders to punishment for violating any requirement set forth in RCW 9.94A.760 in addition to the nonpayment of legal financial obligations, then it would have no reason to single out the nonpayment of legal financial obligations as a condition or requirement of a sentence that subjects the offender to punishment.

Furthermore, the legislature's intent is unmistakable under the *expressio unius est exclusio alterius* rule of statutory construction. "Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies." Washington State Republican Party v. Washington State Public Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). In such circumstances, "the silence of the Legislature is telling" and must be given effect. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (quoting Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)).

Here, the legislature specifically included the nonpayment of a monthly sum as a condition or requirement of a sentence that subjects an offender to penalties for noncompliance. RCW 9.94A.760(10). The legislature deliberately chose not to include any other requirements of RCW 9.94A.760 as a basis to punish for noncompliance. "[S]pecific inclusions exclude implication." Hopkins, 137 Wn.2d at 901.

RCW 9.94B.040(1) provides "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." The State may argue RCW 9.94B.040(1) allows the court to sanction Ashenberner for failing to comply with the clerk reporting requirement. But this provision must be read in light of the specific limitations expressed in RCW 9.94A.760(10), which explicitly references RCW 9.94B.040. "The specific statute supersedes a general statute when both apply." General Tel. Co. v. Utilities & Transp. Comm'n, 104 Wn.2d 460, 464, 706 P.2d 625 (1985); see also State v. Walls, 81 Wn.2d 618, 622, 503 P.2d 1068 (1972) ("where general and special laws are concurrent, the special law applies to the subject matter contemplated by it to the exclusion of the general law.").

More fundamentally, the reporting requirement at issue cannot even be considered a condition or requirement *of a sentence*, which takes it out of the ambit of RCW 9.94B.040(1) altogether. RCW 9.94A.760(7)(b) authorizes *the county clerk* to require the offender to report to the clerk. Nothing in RCW 9.94A.760 authorizes *the court* to impose that requirement *as part of the sentence*.

RCW 9.94A.760(10) supports this argument: "The requirement that the offender pay a monthly sum towards a legal financial obligation

constitutes a condition or requirement of a sentence[.]” Under the plain language of the statute, only the requirement to pay legal financial obligations is a condition or requirement of a sentence. The requirement to report to the clerk is not included as a condition or requirement *of a sentence*. Words cannot be added to an unambiguous statute when the legislature has chosen not to include that language. Salavea, 151 Wn.2d at 144.

Moreover, under the rule of *expressio unius est exclusio alterius*, there is a presumption that the legislature intended all omissions where a statute specifically lists the things upon which it operates. Washington State Republican Party, 141 Wn.2d at 280; Hopkins, 137 Wn.2d at 901. The legislature chose to exclude the clerk reporting requirement as something that could be included as a requirement or condition of a sentence under RCW 9.94A.760.

In 2009, the court imposed the clerk reporting requirement as a condition of Ashenberner's sentence. CP 112. But the court lacked authority to do that for the reasons set forth above. If a sentencing condition is unauthorized, the court does not have the authority to sanction based on a violation of the condition. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996).

Even if there is some ambiguity in the statute, "in criminal cases the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." Hopkins, 137 Wn.2d at 901. The rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The rule of lenity requires the statute be interpreted in Ashenberner's favor. The court lacked authority to punish her for noncompliance with the clerk's office reporting requirement.

Defense counsel did not raise this error below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Hunter, 102 Wn. App. 630, 633-34, 9 P.3d 872 (2000). Sanctions imposed under RCW 9.94B.040 are criminal sanctions added to the original sentence. State v. Nason, 168 Wn.2d 936, 947, 233 P.3d 848 (2010). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and

the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

b. This Appeal Is Not Moot And Review Is Otherwise Appropriate.

A case is moot when a court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). Appeals presenting moot issues are generally dismissed. State v. G.A.H., 133 Wn. App. 567, 573, 137 P.3d 66 (2006).

Ashenberner has served her confinement time for noncompliance with the reporting requirement but her case is not moot. A case is not moot if the error complained of is capable of repetition yet evades review. In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992). This case is a classic example of the phenomenon. The short duration of confinement as a sanction for violating a sentencing condition (60 days maximum) ensures an appellant will be released before any appeal can be adjudicated on its merits.

Furthermore, review remains appropriate when "there is the possibility that [the court] can provide effective relief," such as when it is unclear whether the appellant will suffer future adverse consequences if the issue is not decided. In re Interest of Mowery, 141 Wn. App. 263, 274, 169 P.3d 835 (2007). In Raines, for example, this Court held an appeal was not

moot even though the appellant had served his entire sentence because the appellant could potentially suffer adverse consequences in the future if the challenged sentence remained in effect. Raines, 83 Wn. App. at 315. This Court reasoned "a future sentencing court could impose additional demanding conditions of community placement. Likewise, the modified sentence could sway a future sentencing court to impose the high end of the standard range. Finally, the modified sentence potentially affects Raines' offender score." Id.

In other words, the possibility that the appellant could suffer adverse consequences resulting from the error presented on appeal if convicted of a future crime is sufficient to avoid the mootness problem. The same rationale applies here. Ashenberner has been subject to multiple modification hearings in the past to address the ongoing problem of failing to pay legal financial obligations. CP 109-112. If history is any guide, she will be subject to further penalties in the future. There is a grounded possibility that she will be subject to the same violation in the future if the issue is not addressed now, and that the trial court may consider her previous violation to her detriment in crafting an appropriate sentence in the future.

Review is warranted even if this appeal is technically moot. This Court has the power to decide a technically moot case to resolve issues of continuing and substantial public interest. State v. Peterson, 145 Wn. App.

672, 675, 186 P.3d 1179 (2008), aff'd, 168 Wn.2d 763, 230 P.3d 588 (2010).

Courts consider three criteria in determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance of public officers; and (3) the likelihood of future recurrences of the issue. G.A.H., 133 Wn. App. at 573.

The criteria favor review of this case. Most cases in which appellate courts utilize the exception to the mootness doctrine involve issues of statutory or constitutional interpretation. In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. Mines, 146 Wn.2d at 285.

This appeal squarely raises a statutory interpretation issue as a matter of first impression. And because this is a matter of first impression, a decision from this Court will provide guidance to trial judges, prosecutors, and the defense bar regarding whether the court may impose the requirements of RCW 9.94A.760(7)(b) as a sentencing condition for which an offender may be violated.

Given the number of offenders subject to legal financial obligations now and in the future, it is likely this issue will reoccur. Cf. City of Yakima v. Mollett, 115 Wn. App. 604, 606-07, 63 P.3d 177 (2003)

(moot case reviewed due to absence of applicable case law interpreting court rule and corresponding need to provide judicial guidance; problem likely to recur given busy criminal docket). The likelihood of recurrence factor is not limited to the questions of whether the appellant herself would be subjected to the same violation. Likelihood of recurrence includes whether the issue would recur for *others* in the future. In re Pers. Restraint of Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986); State v. Sansone, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005). Review is warranted.

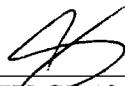
D. CONCLUSION

Ashenberner requests that this Court vacate the trial court's order sanctioning her for violating the reporting requirement and strike the sentencing condition as void.

DATED this 7th day of August 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66928-1-I
)	
CATHERINE ASHENBERNER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CATHERINE ASHENBERNER
12839 SE 40TH PLACE, #A6
BELLEVUE, WA 98006

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2011.

x *Patrick Mayovsky*

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