

NO. 71225-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

MOHAMMED DABBAGH,

Appellant.

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

The Honorable Anita L. Farris, Judge

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BRIEF OF APPELLANT

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A handwritten signature, possibly 'J. Sweigert', is written in black ink over a vertical stamp. The stamp contains some illegible text and numbers, including '11-11-11' at the bottom.

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A. ASSIGNMENTS OF ERROR

1. The court order requiring appellant to make reasonable progress in treatment was an unlawful sentence modification. CP 50.

2. The court order requiring appellant to make reasonable progress in treatment imposed a manifestly unreasonable condition of community custody in violation of due process. CP 50.

3. The court orders modifying appellant's sentence and imposing sanctions violated due process. CP 5, 9-10.

Issues Pertaining to Assignments of Error

1. The terms and conditions of a criminal sentence may not be modified after the judgment is final except in specific circumstances authorized by statute. Appellant was ordered to comply with domestic violence treatment. He began treatment and attended several sessions, but the treatment provider found him not amenable to treatment. The court then entered an order requiring him to make reasonable progress in treatment. By expanding the scope of what was required after the fact, did the order amount to an impermissible sentence modification?

2. Community custody conditions may be reversed on appeal when they are manifestly unreasonable. When the treatment provider had already determined appellant an inappropriate candidate for treatment, was

it fundamentally unfair to require that appellant make progress in treatment and sanction him for failing to do so?

B. STATEMENT OF THE CASE

The King County prosecutor charged appellant Mohammed Dabbagh with one count of second-degree child molestation and one count of second-degree incest. CP 1. Dabbagh pled guilty to one count of second-degree assault. CP 74, 80. As a factual basis for the plea, Dabbagh admitted he intentionally assaulted his daughter and recklessly caused substantial bodily harm. CP 80. As part of his guilty plea, Dabbagh agreed the court could consider the affidavit of probable cause<sup>1</sup> for purposes of imposing the sentence. CP 82.

The court sentenced him to nine months in prison, the high end of the standard range, and 12 months of community custody. CP 66-67. As conditions of community custody, the court required Dabbagh to obtain a sexual deviancy evaluation and comply with any recommended treatment and comply with domestic violence batterer's treatment. CP 67. Dabbagh contested imposition of the sexual deviancy evaluation. IRP<sup>2</sup> 14-15.

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<sup>1</sup> According to the probable cause certification, Dabbagh's daughter accused him of having sexual contact with her two or three times a week for the past five years. CP 91-92.

<sup>2</sup> There are four volumes of Verbatim Report of Proceedings referenced as follows: IRP – Jan. 14, Jan. 25, 2013; 2RP – Feb. 1, July 2, Sept. 30, 2013; 3RP – Nov. 22, 2013; 4RP – Dec. 4, 2013.

Dr. Norman Nelson evaluated Dabbagh on March 12, 2013. CP 56. Due to difficulties with obtaining a qualified interpreter, treatment did not begin until May 7. CP 56. On June 13, 2013, Nelson wrote the court and reported Dabbagh “attends his sessions in a timely fashion, is consistently friendly, and cooperative.” CP 52. However, Nelson reasoned Dabbagh could not benefit from treatment because his English was too limited to be able to discuss the necessary issues and he refused to accept any accountability for his abusive behavior. CP 52-53. Nelson found him non-compliant because he was unwilling to examine his core beliefs or disclose information. CP 53. After six counseling sessions, Nelson concluded Dabbagh “is not an appropriate candidate for DV treatment.” CP 52.

At a review hearing on July 2, 2013, the court entered an order declaring that in order to “comply” with treatment, as required by the judgment and sentence, Dabbagh would now be required to make reasonable progress in treatment.<sup>3</sup> CP 50.

On July 30, 2013, Nelson submitted a domestic violence evaluation reporting that, after 10 sessions, Dabbagh had made progress by agreeing his religion could not explain or excuse abuse. CP 48. Nelson recommended continuing cognitive behavioral therapy with an Arabic-speaking counselor

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<sup>3</sup> The court also ordered that the same treatment provider could combine sexual deviancy and domestic violence treatment so long as the requirements of state certified programs in each realm were adhered to. CP 50.

that Dabbagh would accept as an authority figure. CP 48-49. On August 23, 2013, Nelson submitted a sexual deviancy evaluation in which he recommended stopping the treatment. CP 29-30. Nelson determined the treatment was doing more harm than good because Dabbagh did not believe he needed it. CP 29-30.

On September 6, 2013, Nelson submitted a final progress report saying he was discontinuing treatment because he was unable to make any significant progress with Dabbagh after 16 sessions. CP 20-21. He reported there was no trust and Dabbagh considered the topics unimportant. CP 20. He determined Dabbagh was out of compliance because he had not made reasonable progress, and Dabbagh's transparency and receptiveness fell far short of expectations in a domestic violence treatment program and because Dabbagh refused to discuss sexuality. CP 20.

On September 30, 2013, the court ordered the State to file a formal allegation that Dabbagh had violated his community custody by failing to comply with domestic violence treatment. CP 16. The State did so, alleging Dabbagh failed to comply with the conditions of his sentence by 1) being terminated from domestic violence treatment, 2) failing to comply with sexual deviancy treatment by forbidding the treatment provider from referring to sexual matters or the legal charges in this case, 3) refusing to

allow the sexual deviancy treatment provider to access other persons with information relevant to the treatment. CP 15.

On November 5, 2013, Nelson submitted a report of his termination of Dabbagh from domestic violence and sexual deviancy treatment as of October 15 stating Dabbagh was unwilling to voluntarily engage in meaningful treatment. CP 14.

At the hearing on November 22, 2013, Nelson testified Dabbagh signed releases for him to talk to three friends, but then told him not to talk to them about any sexual matters or about this case. 2RP 13, 25. Dabbagh testified he told Nelson it was improper to talk to others about the sexual offense he had not committed and had not pled guilty to doing. 2RP 41-42.

Dabbagh testified Nelson told him his religion was crooked and forced him to treat children harshly. 2RP 40-41. Nelson, however, denied terminating Dabbagh because of his devout Muslim beliefs. 2RP 36-37. Nelson claimed Dabbagh refused to consider alternatives to the way he himself was raised, refused to consider information about the differences between discipline and punishment, and simply fell back on his cultural teachings. 2RP 15, 33. Nelson therefore concluded Dabbagh had failed to make reasonable progress in domestic violence treatment. CP 15.

The court found Dabbagh willfully committed the first and third alleged violations by being terminated from domestic violence treatment and

denying the treatment provider access to persons who could provide relevant information. CP 9. The court ordered 60 days confinement in jail as a sanction for the first violation, but no time on the third. CP 10. The court supplemented the order nunc pro tunc to clarify that the court found Dabbagh willfully and in bad faith failed to make a good faith effort to comply with domestic violence and sexual deviancy treatment and that the court would also have imposed the same sanction for either violation alone. CP 5. Dabbagh timely filed notice of appeal from the court's order finding the violations and imposing sanctions. CP 1.

C. ARGUMENT

1. THE ORDER REQUIRING DABBAGH TO MAKE REASONABLE PROGRESS IN TREATMENT WAS AN IMPROPER SENTENCE MODIFICATION.

A court may impose sentence only as authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981 (SRA) is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Final judgments in criminal cases may be altered only in limited circumstances where the interests of justice "most urgently require." State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132, 135 (1989) (citing RCW 9.94A.150; RCW 9.94A.260; CrR 7.8(b); CR 60(b)). Modification of a

judgment is not permitted merely because it appears, in retrospect, that a different decision might have been preferable. Shove, 113 Wn.2d at 88. Absent a violation, the court has no authority to modify any part of the sentence once the sentence is final. See January v. Porter, 75 Wn.2d 768, 773, 453 P.2d 876 (1969) (“Upon the entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the [prison].”).

The court framed its order in terms of defining what it meant by “comply” in the original judgment and sentence. But by requiring reasonable progress, the court actually expanded the scope of what was required. After several sessions, Nelson reported Dabbagh was friendly and cooperative, but unwilling to examine core beliefs or be transparent. CP 53. It was only after this report that the court altered the judgment and sentence to require not just compliance with treatment, but reasonable progress. CP 50.

Adding or expanding conditions of community after the fact is not permitted. Conditions of community custody may be imposed at sentencing. RCW 9.94A.703. If the Department of Corrections is supervising the offender, the Department may add conditions based on its assessment of risk. RCW 9.94A.704. But the court may not add conditions of community custody after the offender has begun serving the

term. Cf. State v. Brown, 108 Wn. App. 960, 962-63, 33 P.3d 433 (2001) (court may not add names to the no-contact order after sentencing). If the offender violates a condition of the sentence, the court may modify the sentence. RCW 9.94A.6333. The modification here was improper because when the court added the requirement of reasonable progress, it had not yet found any violation. CP 50.

By defining compliance as making reasonable progress, the court engaged in impermissible, after-the-fact modification of Dabbagh's sentence. Dabbagh cannot be sanctioned for violating an unlawful condition of his sentence. "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). Therefore, the order modifying his sentence and imposing 60 days of jail time should also be reversed.

2. THE COURT VIOLATED DUE PROCESS BY ADDING A CONDITION DABBAGH WAS INCAPABLE OF MEETING AND IMPOSING SANCTIONS FOR VIOLATING IT.

Conditions of community custody must be reversed when the condition imposed is manifestly unreasonable under the circumstances. State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Claims related to sentencing conditions may be raised for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204 n. 9, 76 P.3d 258 (2003). Dabbagh

requests this Court reverse the condition that he make reasonable progress in treatment and reverse the order modifying his sentence and imposing sanctions because the condition is manifestly unreasonable.

Fundamental fairness is the touchstone of due process in sentence modification proceedings. State v. Stone, 165 Wn. App. 796, 812, 268 P.3d 226 (2012) (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788-90, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)). A condition that violates constitutional due process is manifestly unreasonable. Valencia, 169 Wn.2d at 792. Unlike legislative enactments, conditions of community custody are not presumed constitutional. Id. at 792-93.

The California Court of Appeals recognized it was fundamentally unfair to find a juvenile violated a probation condition requiring him to maintain satisfactory grades when he lacked the intellectual capacity to do so and his violation posed no threat to society. In re Robert M., 163 Cal. App. 3d 812, 815-17, 209 Cal. Rptr. 657 (1985). Similarly, in the context of sentencing conditions that require payments, courts may only sanction willful recalcitrance but may not punish a true inability to pay due to poverty. Smith v. Whatcom County District Court, 47 Wn.2d 98, 52 P.3d 485 (2002); State v. Woodward, 116 Wn. App. 697, 706, 67 P.3d 530 (2003). In short, it is fundamentally unfair to impose, and sanction an

offender for violating, a sentencing condition that the offender is incapable of meeting. That is what occurred here.

It was fundamentally unfair to order Dabbagh to make progress in treatment after the treatment provider had determined he was an inappropriate candidate for treatment and essentially unable to make that progress. CP 52-53. Additionally, no effort was made to follow the treatment provider's recommendation that a different provider be found who could speak Arabic and who Dabbagh would regard as an authority figure. CP 48-49.

It was also fundamentally unfair and a violation of due process to use an impossible-to-satisfy condition of community custody to impose confinement beyond that authorized by the SRA. Under the circumstances, the court essentially added two months to Dabbagh's sentence. But the court's authority to impose sentence is carefully proscribed by the Sentencing Reform Act, chapter 9.94A RCW. State v. Ammons, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). To add two months to Dabbagh's sentence would have been unlawful since the court had already imposed the high end of the standard range for Dabbagh's offense, and there were no facts found to warrant an exceptional sentence. CP 66; RCW 9.94A.535.

To impose a condition Dabbagh was incapable of satisfying was fundamentally unfair and manifestly unreasonable. Moreover, doing so amounted to an end-run around the SRA's standard sentencing range. The court's order modifying Dabbagh's sentence to impose 60 days confinement as a sanction for violating the conditions of his community custody should be reversed.

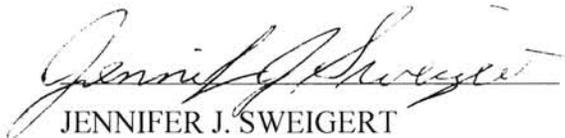
D. CONCLUSION

For the foregoing reasons, Dabbagh requests this Court reverse the order modifying his sentence and requiring him to serve an additional 60 days in jail.

DATED this 27<sup>th</sup> day of August, 2014.

Respectfully submitted,

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	)	
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v.	)	COA NO. 71225-0-1
	)	
MOHAMMED DABBAGH,	)	
	)	
Appellant.	)	

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**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 27<sup>TH</sup> DAY OF AUGUST 2014, 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 AND/OR VIA EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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SIGNED IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF AUGUST 2014.

x Patrick Mayovsky

2014 AUG 27 PM 4:11  
STATE OF WASHINGTON  
COURT OF APPEALS DIVISION ONE