

No. 29738-1-III
(Consolidated with No. 29802-7-III)

FILED

NOVEMBER 1, 2011

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAY FREDERIC FISCHER,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in imposing two years supervision to be monitored by the Benton County Clerk's Office as part of Mr. Fischer's suspended sentence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Since the superior court lacked statutory authority to assign supervision of Mr. Fischer to the county clerk's office, was the Court's action of suspending the sentence with the enumerated conditions void?

C. STATEMENT OF THE CASE

Jay Fischer was convicted by a jury of fourth degree assault. CP 47. The Court imposed a suspended sentence on condition that Mr. Fischer pay all fees, fines, costs and restitution within two years. CP 50. The Court also ordered two years supervision to be monitored by the Benton County Clerk's Office. CP 51. This appeal followed. CP 60.

D. ARGUMENT

Since the superior court lacked statutory authority to assign supervision of Mr. Fischer to the county clerk's office, the Court's action of suspending the sentence with the enumerated conditions was void.

A trial court lacks inherent authority to suspend a sentence. *State v. Lopez*, 105 Wn. App. 688, 697, 20 P.3d 978 (2001) (citing *State v. Bird*,

95 Wn.2d 83, 622 P.2d 1262 (1980); *State v. Clark*, 91 Wn. App. 581, 585, 958 P.2d 1028 (1998)). The power to suspend a sentence or defer imposition or execution thereof must be granted by the Legislature. *Bird*, 95 Wn.2d at 85; *State ex rel. Woodhouse v. Dore*, 69 Wn.2d 64, 69, 416 P.2d 670 (1966). The terms of the statutes granting courts power to suspend sentences and defer imposition of sentences are mandatory and when the statutory provisions are not followed, the action of the court is void. *Clark*, 91 Wn. App. at 585, 958 P.2d 1028; *State ex rel. Schock v. Barnett*, 42 Wn.2d 929, 259 P.2d 404 (1953).

More specifically, it has been held that failure to place a defendant whose sentence was suspended " 'under the charge of a parole or peace officer' " as provided by statute rendered the portion of the judgment suspending sentence void. *State v. Hall*, 35 Wn. App. 302, 305, 666 P.2d 930 (1983) (citing *State ex rel. Pence v. Koch*, 173 Wash. 420, 421, 23 P.2d 884 (1933)).

RCW 9.92.060, entitled Suspending Sentences, provides in pertinent part:

(1) Whenever any person is convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, rape of a child, or rape, the superior court may, in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by the superior court, and that the sentenced person be

placed under the charge of a community corrections officer employed by the department of corrections, or if the county elects to assume responsibility for the supervision of all superior court misdemeanor probationers a probation officer employed or contracted for by the county, upon such terms as the superior court may determine.

In addition, RCW 9.95.210, entitled Conditions of Probation,

provides in pertinent part:

(1) In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

....

(4) In granting probation, the superior court may order the probationer to report to the secretary of corrections or such officer as the secretary may designate and as a condition of the probation to follow the instructions of the secretary. If the county legislative authority has elected to assume responsibility for the supervision of superior court misdemeanor probationers within its jurisdiction, the superior court misdemeanor probationer *shall* report to a probation officer employed or contracted for by the county. . . .

(emphasis added)

As a general rule, the word "shall" possesses a mandatory or imperative character. *Ballasiotes v. Gardner*, 97 Wn.2d 191, 642 P.2d 397 (1982); *Spokane Cy. ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 97 P.2d 628 (1940).

In contrast to the Legislature's use of "shall" in establishing a reporting requirement, the Legislature used "may" with reference to

granting or denying probation (RCW 9.95.200), suspending sentence, imprisoning the defendant in the county jail, ordering payment of fines or restitution (RCW 9.95.210), and revoking probation (RCW 9.95.220). *Hall*, 35 Wn. App. at 306, 666 P.2d 930. Presumably, the Legislature intended to distinguish the reporting requirement, making it mandatory, from the other discretionary ("may") requirements. *Id.* (citing *Scannell v. Seattle*, 97 Wn.2d 701, 648 P.2d 435 (1982)).

Both RCW 9.92.060 and RCW 9.95.210 authorize the superior court to assign supervision of misdemeanor probationers, as in the present case, to either community corrections officer employed by the department of corrections, or a county probation officer. Neither statute authorizes the superior court to assign supervision of misdemeanor probationers to the county clerk's office, as was done in this case. Since the superior court, herein, assigned supervision of Mr. Fischer to the county clerk's office, the statutory provisions were not followed, and the action of the court in suspending the sentence with the enumerated conditions is void.

E. CONCLUSION

For the reasons stated, the case should be remanded directing the court below to correct the judgment and sentence to comply with the provisions of RCW 9.92.060 and RCW 9.95.210

Respectfully submitted November 1, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 1, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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