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No. 93987-0 NO. 73905-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON M. BIGSBY,

Appellant.

FILED
Jul 19, 2016
Court of Appeals
Division I
State of Washington

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# BRIEF OF RESPONDENT

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## I. ISSUE

Does a sentencing court have authority to impose sanctions for violations of conditions of community custody?

## II. STATEMENT OF THE CASE

On May 13, 2015, the defendant (appellant), Brandon Bigsby, pleaded guilty to a charge of possession of a controlled substance. CP 12-27. The same day, the court sentenced him to 75 days' confinement, with credit for time served. CP 31. The court also imposed 12 months of community custody. While on community custody, the defendant was to participate in chemical dependency evaluation and fully comply with all recommended treatment. CP 32. The court required the defendant to appear for a review hearing on August 5. CP 34.

The defendant completed his jail sentence on May 27. CP ___ (Return on Commitment). Over the next two months, he failed to report to his supervising community corrections officer (CCO) three times. CP 5. On August 5, the Department of Corrections (DOC) imposed a 10-day sanction for failing to report, failing to attend school or training program, and failing to complete substance abuse treatment. The defendant completed his sanction and was released on August 10. CP 5-6. Meanwhile, since he did

not appear in court on August 5, the court issued an arrest warrant. CP ___ (Order Determining P.C., sub no. 29).

Following his release, the defendant again did not report to his supervising CCO. He was taken into custody by DOC on August 13. He was released from DOC custody on September 8, but remained in custody under the bench warrant. 9/14 RP 3. On September 14, he appeared in court for a review hearing. The court found that he had violated sentence requirements by failing to obtain a chemical dependency evaluation. It imposed a sanction of 30 days confinement, with credit for time served since September 8. The court set another review hearing for December 14. CP 3. The defendant has appealed from the order imposing sanctions. CP 1-2.

On December 14, the defendant did not appear for the review hearing. The court issued another bench warrant. CP ___ (Order Determining Probable Cause, sub no. 47). At a review hearing on December 31, the defendant was released, but he was required to appear for another review hearing on March 14, 2016. CP ___ (Order Modifying Sentence, sub no. 57). To accommodate a scheduled treatment period, that hearing was re-set to May 25. CP ___ (E-mail re-setting hearing, sub no. 59). When the defendant

did not appear on that date, he was summoned to appear on June 7. CP ___ (Summons). He again failed to appear, and the court issued another bench warrant. CP ___ (Order Determining P.C.). That warrant remains outstanding.

## III. ARGUMENT

### A. THIS COURT SHOULD REVIEW THE ISSUES NOTWITHSTANDING THEIR MOOTNESS.

Since the defendant has completed serving the sanction imposed, this appeal is moot. This court may nonetheless review the issue if it involves "matters of continuing and substantial public interest." In re Mattson, 166 Wn.2d 730, 736 ¶ 9, 214 P.3d 141 (2009). In deciding whether to review the case, "the court may consider the likelihood that the issue will escape review because the facts of the controversy are short-lived." In re Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004). In the present case, the State agrees that it will be helpful for this court to clarify the extent of a sentencing court's authority to enforce its sentence. Moreover, the issue has continuing significance in this case, because the defendant is still subject to the possibility of court-imposed sanctions. This court should therefore review the issues notwithstanding their mootness.

**B. THIS COURT HAS PREVIOUSLY RECOGNIZED THAT SENTENCING COURTS HAVE AUTHORITY TO IMPOSE SANCTIONS FOR VIOLATION OF THE SENTENCES THEY IMPOSED.**

On reviewing the issues, this court should determine that the trial court was correct. The defendant claims that DOC has sole authority to sanction a person on community custody, if that person is being supervised by the Department. This court rejected a similar argument in State v. Gamble, 146 Wn. App. 813, 192 P.3d 399 (2008). That case involved a defendant who was on community custody pursuant to a first-time offender waiver. The statute dealing with that kind of sentence gave DOC the authority to "transfer the offender to a more restrictive confinement sentence and impose other available sanctions." Id. at 400 ¶ 8, quoting former RCW 9.94A.715(3). This statute did not discuss the authority of superior courts to punish offenders for violation. Because of the omission, the defendant argued that DOC had sole authority. Gamble, 146 Wn. App. at 401 ¶ 9.

In rejecting this argument, the court pointed to former RCW 9.94A.634(1): "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." This statute unambiguously gave courts authority to impose sanctions. "[O]nly by ignoring RCW 9.94A.634 is it possible to conclude that, by giving DOC this authority [to impose sanctions], the legislature intended to remove the concurrent jurisdiction of the superior courts." Gamble, 146 Wn. App. at 818-19 ¶¶ 11-12.

**C. THE 2008 AMENDMENTS TO THE SENTENCING STATUTES DID NOT CHANGE THE AUTHORITY OF SENTENCING COURTS.**

The defendant's brief does not discuss Gamble. He argues that the sole authority for imposing sanctions is RCW 9.94A.6332. That statute sets out sanctioning authority in various situations not relevant to the present case. It then states: "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." RCW 9.94A.6332(7). The defendant claims that this statute establishes exclusive authority in DOC to impose sanctions.

Like the statutes construed in Gamble, RCW 9.94A.6332 should not be construed as removing the authority of superior courts to enforce their sentences. That statute was originally enacted as part of a clarification of the statutes dealing with community custody. Laws of 2008, ch. 231. (Gamble noted this amendment but did not consider it, because it was enacted after

the challenged order was entered. Gamble, 146 Wn. App. at 818 n. 3.) The 2008 amendments were not intended to decrease the authority of sentencing courts:

> Sections 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, except for those provisions instructing the court to apply the provisions of the current community custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to the effective date of this section to the extent that such application is constitutionally permissible.

Laws of 2008, ch. 231, § 6. RCW 9.94A.6332 was enacted by section 18, so it is covered by this statement of legislative intent.

Moreover, the 2008 amendments did not repeal RCW 9.94A.634(1), which Gamble construed as providing superior court jurisdiction. Rather, that statute was recodified as RCW 9.94B.040(1). Laws of 2008, ch. 231, § 56. That statute continues to give superior courts the authority to enforce conditions of sentences. State v. Ashenbrenner, 171 Wn. App. 237, 249 ¶ 29, 286 P.2d 984 (2012). The recodification made no substantive changes and did not alter the holding of Gamble. Ashenbrenner, 171 Wn. App. at 250 n. 13.

Under Gamble and RCW 9.94B.040(1), sentencing courts retain authority to impose sanctions for violations of their sentences. The court properly exercised that authority in the present case.

## IV. CONCLUSION

The order imposing sanctions should be affirmed.

Respectfully submitted on July 19, 2016.

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IN THE COURT OF APPEALS
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| THE STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>BRANDON M. BIGSBY,<br><br>Appellant. | No. 73905-1-I<br><br>DECLARATION OF DOCUMENT FILING AND E-SERVICE |

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 19th day of July, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Kathleen A. Shea, Washington Appellate Project, greg@washapp.org; and wapofficemail@washapp.org and Ronda Larson; Larson.ronda@yahoo.com

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of July, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office