

71225-0

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NO. 71225-0-1

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

STATE OF WASHINGTON

Respondent

v.

MOHAMMED DABBAGH,

Appellant

SHIRLEY G. ...
...
...

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 9

 A. THE COURT DID NOT MODIFY THE SENTENCE WHEN IT
 CLARIFIED A COMMUNITY CUSTODY CONDITION..... 9

 B. THE DEFENDANT’S DUE PROCESS RIGHT WAS NOT
 VIOLATED WHEN THE COURT IMPOSED TREATMENT AS A
 SENTENCE CONDITION AND THEN SANCTIONED THE
 DEFENDANT FOR VIOLATING THAT CONDITION. 14

 1. The Treatment Condition Did Not Violate The Defendant’s Due
 Process Right. 14

 2. The Sanction For Violating Community Custody Was Provided
 For By The Sentencing Reform Act..... 20

IV. CONCLUSION 21

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Dike v. Dike</u> , 75 Wn.2d 1, 448 P.2d 490 (1968)	9
<u>Smith v. Whatcom County District Court</u> , 147 Wn.2d 98, 52 P.3d 485 (2002)	15
<u>State v. Brown</u> , 108 Wn. App. 960, 33 P.3d 433 (2001).....	10, 12
<u>State v. Dorenbos</u> , 113 Wn. App. 494, 60 P.3d 1213 (2002), <u>review denied</u> , 149 Wn.2d 1006 (2003).....	9
<u>State v. Harkness</u> , 145 Wn. App. 678, 186 P.3d 1182 (2008).	10, 12
<u>State v. Johnson</u> , 180 Wn. App. 318, 327 P.3d 704 (2014).....	11
<u>State v. McCormick</u> , 166 Wn.2d 689, 213 P.3d 32 (2009)	16, 19
<u>State v. McDougal</u> , 120 Wn.2d 334, 841 P.2d 1232 (1992)	20, 21
<u>State v. Moultrie</u> , 143 Wn. App. 387, 177 P.3d 776, <u>review denied</u> , 165 Wn.2d 1035 (2008).....	10, 11
<u>State v. Murray</u> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	10, 12
<u>State v. Shove</u> , 113 Wn.2d 83, 776 P.2d 132 (1989)	9, 10, 12
<u>State v. Woodward</u> , 116 Wn. App. 697, 67 P.3d 530 (2003).....	20
<u>State v. Zavala-Reynoso</u> , 127 Wn. App. 119, 110 P.3d 827 (2005)	9, 10

FEDERAL CASES

<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d (1983).....	15, 16
--	--------

OTHER CASES

<u>In re Robert M.</u> , 163 Cal. App. 3d 812, 209 Cal. Rptr. 657 (1985)	15, 16
--	--------

WASHINGTON STATUTES

RCW 9.94A.633(1)(a).....	20
RCW 9A.20.021.6333	20
RCW 9A.20.021(1)(b).....	21
RCW 9A.36.021(2)(a).....	21

COURT RULES

RAP 5.2(a).....	9
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I. ISSUES

1. Did the court unlawfully modify the defendant's sentence when the sentence included a condition that the defendant participate in state certified domestic violence batterers treatment and fully comply with all recommended treatment and later clarified that "comply" meant to make reasonable progress in treatment?

2. When violating a treatment condition of a sentence posed a potential threat to society, and the record demonstrated the defendant was capable of meaningfully participating in treatment had he wanted to, was it fundamentally unfair to sanction the defendant for being terminated from treatment?

3. May the court impose confinement as a sanction for violating a sentence condition when the defendant was sentenced to the top end of the standard range?

II. STATEMENT OF THE CASE

The defendant, Mohammad Dabbagh, was charged with one count of child molestation second degree and one count of second degree incest. 1 CP 94. The charges arose from allegations that the defendant had been sexually assaulting his daughter S.D. from the time that she was 10 until she was 15 years old. 1 CP 90-93.

Ultimately the parties resolved the case when the defendant agreed to plead guilty to an amended information charging second degree assault. 1 CP 74-89. In his statement of defendant on plea of guilty the defendant admitted "On or about May 20, 2012, in Snohomish County, WA I did intentionally assault S.D. and did recklessly inflict substantial bodily harm." 1 CP 80.

The defendant's standard range was 3-9 months confinement. On February 1, 2013 the court sentenced the defendant to 9 months confinement and 12 months community custody. The court ordered as a condition of community custody that "the defendant shall participate in the following: [X] A one-year State certified domestic violence batterers treatment program, and fully comply with all recommended treatment, for one year. No evaluation, just treatment, starting as soon as possible." 1 CP 67. In addition to batterers treatment the court ordered "beginning as soon as practicable, the defendant shall participate in the following crime-related treatment or counseling services: Get an evaluation from a state-certified sexual deviancy treatment provider and comply with all recommendations in a timely manner." Id.

On May 28, 2013 Mr. Norman Nelson, a certified domestic violence therapist submitted a progress report to the court. Mr.

Norman noted that although the defendant was eager to engage in sessions, he completely denied any wrongdoing regarding his parenting and the care he provided his daughter. The defendant only admitted that he grabbed S.D. Mr. Norman suggested weekly sessions. He was hopeful that as the defendant became more comfortable with his therapy style that their sessions would result in meaningful discussions. 1 CP 57.

On June 13, 2013 Mr. Norman submitted a second progress report to the court. In that report Mr. Norman stated that he did not think the defendant was an appropriate candidate for domestic violence treatment for two reasons; the defendant's English language skill was limited, and the defendant did not accept any responsibility for his abusive behavior. Mr. Nelson concluded that although the defendant had a friendly and cooperative attitude he "is unwilling to examine his core beliefs, disclose information he thinks may reflect poorly on him or family, or be transparent. Without transparency there is little hope for a beneficial outcome." 1 CP 52-53.

At a hearing on July 2, 2013 Mr. Nelson clarified that his opinion was not that the defendant was an inappropriate candidate for domestic violence treatment; only that he believed the

defendant was not a good candidate for group therapy. He believed that the presence of an interpreter would be too disruptive to the therapy process. He believed the defendant was a better candidate for individual therapy covering the same material that would have been covered in group treatment. 2 RP 17-18.¹ Mr. Nelson requested that the sexual deviancy treatment and batterers treatment be combined into a single weekly session. 2 RP 31. The defense asked the court to adopt that suggestion and set a review hearing in 8 weeks. 2 RP 20.

The trial judge agreed to allow the defendant to complete batterers treatment in individual therapy as long as the defendant was completing an equivalent treatment program held in group therapy. 2 RP 33-34. The court found that since the defendant had done a sexual deviancy evaluation that he was in compliance with that part of the condition. The court clarified that “comply with all recommendations” of treatment meant to make reasonable progress in treatment. If the defendant failed to make reasonable progress in treatment then the court could find him in violation of that condition. 2 RP 32-33. The court then signed an order stating

¹ The State adopts the defendant's method of referencing the report of proceedings.

“the defendant shall comply with all DV and sexual deviancy treatment recommendations. ‘Comply’ means make reasonable progress.” 1 CP 50. The defendant did not object to this clarification. He acknowledged that he understood the court’s order. 2 RP 36.

Mr. Nelson filed a domestic violence assessment dated July 28, 2013, a sexual deviancy assessment dated August 14, 2013, and a progress report dated August 28, 2013. 1 CP 18-49. In both assessments Mr. Norman stated the defendant adamantly denied any form of abuse, physical or sexual, toward his children. He only admitted to grabbing S.D. 1 CP 24, 28, 29, 46, 48.

Mr. Norman reported that the defendant blocked any effective discussion during therapy by minimizing or denying anything that would put him or his family in a bad light. His answers to open ended questions were brief and did not disclose much. After three requests for the names of people who could provide information about the defendant’s family life the defendant provided the names of three people, but forbade the evaluator from talking to those people about sexual matters or the charges against the defendant. 1 CP 23, 25, 27, 47.

Mr. Norman opined that the defendant's prognosis for batterers treatment was poor. However he recommended that the defendant continue with treatment because the defendant showed promise that he may be more receptive now that treatment had started. The defendant had completed one written and oral report assigned. Mr. Norman recommended that sexual deviancy treatment be terminated due to the defendant's adamant refusal to admit any sexual contact with S.D. 1 CP 29, 48.

In the August 28 progress report Mr. Norman stated that the defendant had either not been willing or able to participate in treatment that was the equivalent of a standard certified program. He had not made reasonable progress in treatment and was therefore out of compliance with the court's order. As a result of the defendant's conduct in treatment Mr. Norman notified the court that it was his intent to discontinue the defendant in treatment. 1 CP 20-21.

On September 30 the court held another review hearing. At that hearing the parties discussed with the court what options were available in light of the defendant's poor cooperation with treatment. The State suggested imposing a sanction. Ultimately the court

requested that the State file a motion to modify the sentence for violation of the domestic violence treatment condition. 2 RP 39-52.

The State filed a petition to revoke or modify the sentence alleging the defendant violated the conditions of his sentence by (1) failing to comply with the order of the court by being terminated from his domestic violence treatment program, (2) failing to comply with his sexual deviancy treatment program by forbidding the treatment provider from making any references to sexual matters or the legal charges, and (3) failing to comply with his sexual deviancy treatment program by refusing access to need-to-know persons that potentially hold information relevant to the defendant's treatment. 1 CP 15.

Prior to the hearing on the petition Mr. Norman filed a termination of DV/SO treatment report. Mr. Norman stated that he was terminating treatment because the defendant refused to be transparent and accept any responsibility for his broken family. Mr. Norman had attempted a number of strategic approaches to create a therapeutic relationship with the defendant with no success. Mr. Norman concluded "at no time did I suspect that decision making skills or level of intelligence precluded him from engaging in

meaningful therapy. However it is evident that any psychotherapy is unwanted.” 1 CP 13-14.

At a hearing on the petition Mr. Norman testified that the defendant would talk to him, but resisted the materials Mr. Norman attempted to present to him regarding how to implement discipline and punishment. If the defendant had been open to discussing and considering approaches that differed from the cultural approaches the defendant claimed he relied on, then Mr. Norman thought that they could have made some progress in treatment. Mr. Norman stated that the defendant’s unwillingness to be more forthcoming with information was a problem; had the defendant been more open he could have begun to make reasonable progress in treatment. 3 RP 15-16, 33.

At the conclusion of the hearing the court found the defendant committed violation 1, having been terminated from domestic violence treatment and not making adequate progress in treatment. The court also found violation 3, that he refused access to the need-to know persons that potentially held information relevant to the treatment. The court did not find the defendant committed violation 2. The court sentenced the defendant to 60

days on violation 1 and 0 days on violation 3. 3 RP 57-58, 62; 1 CP 9-10.

III. ARGUMENT

A. THE COURT DID NOT MODIFY THE SENTENCE WHEN IT CLARIFIED A COMMUNITY CUSTODY CONDITION.

The defendant argues that the July 2 order unlawfully modified his sentence when the court ordered that “comply” as used in the conditions relating to sexual deviancy and batterers treatment meant “make reasonable progress.” The defendant did not file a notice of appeal from this order within the time prescribed by RAP 5.2(a). The defendant’s challenge to this order is therefore limited to claims that it was entered beyond the court’s jurisdiction and is therefore void. Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) (a challenge to a void order may be attacked collaterally). He may not raise any issue of error that, if true, would only render the court’s order voidable. State v. Dorenbos, 113 Wn. App. 494, 497, 60 P.3d 1213 (2002), review denied, 149 Wn.2d 1006 (2003).

Once the trial court imposes a sentence its authority to modify that sentence is limited by the provisions of the Sentencing Reform Act (SRA). State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989). Where a court lacks the authority to enter the order at issue the order is void. State v. Zavala-Reynoso, 127 Wn. App.

119, 122, 110 P.3d 827 (2005). Thus the defendant may challenge the July 2 order on the basis that it was entered in excess of the court's authority under the SRA.

A court acted in excess of its authority when it reduced a jail sentence originally imposed when there was no provision in the SRA that allowed it to do so. Shove, 113 Wn.2d at 87-89. Similarly the court lacked inherent statutory authority to modify the defendant's work release sentence to allow the defendant to serve the remainder of her sentence on home detention. State v. Murray, 118 Wn. App. 518, 77 P.3d 1188 (2003). Nor did the court have any authority to modify a defendant's sentence from a standard range to a DOSA once the standard range sentence had been imposed. State v. Harkness, 145 Wn. App. 678, 685-686, 186 P.3d 1182 (2008). Nor did the court have authority to modify a no contact order in a judgment and sentence by adding additional names to that order. State v. Brown, 108 Wn. App. 960, 33 P.3d 433 (2001).

While a court may not modify a sentence without the express authorization by the SRA, it may clarify a sentence it previously imposed. In Moultrie this court found a community custody condition prohibiting a defendant from having unsupervised contact with "vulnerable, ill, or disabled adults" was unconstitutionally

vague. State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776, review denied, 165 Wn.2d 1035 (2008). Although “vulnerable” and “disabled adults” were defined by statute those terms were more specific than those used by the court. Id. at 397-398. The remedy was to remand the case to the trial court in order for that court to clarify what it meant by those terms. Id. Similarly where a community custody condition prohibiting the defendant from contact with physically or mentally vulnerable individuals was unconstitutionally vague the court remanded to the trial court to either clarify the condition or strike it. State v. Johnson, 180 Wn. App. 318, 327 P.3d 704 (2014).

Here the court’s July 2 order clarified a sentence condition imposed at sentencing. The court had originally ordered the defendant to “comply with all recommendations” of a state certified sexual deviancy treatment provider after an evaluation. 1 CP 67. (emphasis added). It ordered the defendant to “fully comply with all recommended [domestic violence batterers] treatment. Id. (emphasis added). The most obvious interpretation of those orders was that the defendant had to fully participate in treatment and successfully complete the program by learning to implement the materials taught in treatment. However the defendant’s conduct

suggested that he interpreted the condition to mean that he merely had to show up timely for his appointments.

The July 2 order made it clear that compliance meant that the defendant had to do more than just show up for his appointments; he had to meaningfully engage in the treatment program in order to make some reasonable progress. The order put the defendant on notice that he could be held in violation of the conditions of his sentence if he continued to merely show up for appointments without actually discussing the issues that were integral to any domestic violence treatment.

The defendant argues that the July 2 order modified the sentence because the court expanded the scope of what was required. If anything the order narrowed what was required. The court expected reasonable progress; it did not expect perfection to successfully complete batterers treatment.

Additionally, the July 2 order is far different from the orders that the court has found to constitute an unlawful sentence modification. In Shove, Murray, Harkness, and Brown the court's orders actually changed what the court had originally ordered. The July 2 order does not add or subtract any sentence condition not originally ordered. Nor does it change the character of the

treatment ordered. For that reason the court's order was not an unlawful sentence modification. The court did not exceed its authority when it ordered compliance with treatment meant "to make reasonable progress."

The defendant also argues that the court should vacate the order modifying his sentence by imposing 60 days confinement because the court exceeded its statutory authority when it entered the July 2 order. But the court did not find the defendant in violation of the condition that he make reasonable progress in treatment. The defendant was sanctioned for being terminated from treatment. These are two separate things; the defendant would not necessarily have been terminated from treatment even if the provider reported the defendant was not making reasonable progress. Here Mr. Norman continued to treat the defendant even after he submitted the August 28 report indicating that the defendant was being terminated from treatment. He was not officially terminated from treatment until October 16. 1 CP 13, 20-21; 2 RP 44.

Even if the court's order was an unlawful modification that would not be a basis to vacate the order modifying the defendant's sentence and imposing confinement. There is no question that Mr. Nelson terminated the defendant before he completed the one year

of domestic violence batterers treatment ordered by the court. At best, if the court believes the July 2 order was not merely a clarification of a sentence condition but an unlawful modification of the sentence, then the remedy is to remand to the trial court and strike that portion of the July 2 order.

B. THE DEFENDANT'S DUE PROCESS RIGHT WAS NOT VIOLATED WHEN THE COURT IMPOSED TREATMENT AS A SENTENCE CONDITION AND THEN SANCTIONED THE DEFENDANT FOR VIOLATING THAT CONDITION.

The defendant next argues that the court violated his right to due process in two respects. First he claims that it was fundamentally unfair to impose a treatment condition on him that he was incapable of meeting and then to sanction him for violating that condition. Second, he argues that was fundamentally unfair to impose a sanction of confinement beyond that authorized by the Sentencing Reform Act for finding him in violation of a sentence condition that he could not satisfy. The court should reject each of these arguments.

1. The Treatment Condition Did Not Violate The Defendant's Due Process Right.

Under certain circumstances the court has found it is fundamentally unfair to sanction an offender for violation of a sentence condition. Factors which bear on that question are

whether the offender has failed to comply with the sentence condition through no fault of his own, whether the court has considered alternatives to incarceration for the violation, and whether a violation of the condition presents a danger to the community.

When an offender violates his sentence by failing to pay a fine due process requires the trial court to inquire into whether the defendant willfully failed to pay, or whether the failure was due to reasons beyond the offender's control. Bearden v. Georgia, 461 U.S. 660, 668-669, 103 S.Ct. 2064, 76 L.Ed.2d (1983), Smith v. Whatcom County District Court, 147 Wn.2d 98, 112, 52 P.3d 485 (2002). If the offender has made all reasonable efforts to pay and has failed to do so through no fault of his own a court may not revoke probation without first considering whether alternative methods for punishing the defendant are available. Bearden, 461 U.S. at 669.

This frame work applies when there is an alleged violation of a non-financial sentence condition as well. In re Robert M., 163 Cal. App. 3d 812, 816-817, 209 Cal. Rptr. 657 (1985). In Robert M. the court found that it was fundamentally unfair to sanction a juvenile offender for violating the condition that he maintain

satisfactory grades when he was placed in a grade five grade levels above the one he was currently functioning at, and there was evidence that remedial classes could assist him academically. Id. at 817.

However, courts have distinguished violations that have no impact on community safety from those that do present a danger to society. Where the violation may endanger the community a court may revoke probation even without finding the violation was willful. In both Bearden and Robert M. the court suggested that a court may revoke a chronic drunk driver when efforts to control that behavior have failed. Bearden, 461 U.S. at 668, n. 9, Robert M., 163 Cal. App. at 818. Similarly due process did not prevent a court from revoking the defendant's SSOSA for violating that sentence by going to places where minors were known to congregate without first finding the violation was willful because that conduct constituted a threat to society. State v. McCormick, 166 Wn.2d 689, 700-703, 213 P.3d 32 (2009).

This case is different from Bearden and Robert M. for two reasons. First, the court found the defendant wilfully violated the sentence by being terminated from the domestic violence treatment program. 1 CP 9. The record supports that finding.

The defendant admitted in his plea agreement that he had intentionally assaulted S.C. "and did recklessly inflict substantial bodily harm." 1 CP 80. By the time he got to treatment however, he completely minimized his behavior, admitting only that he grabbed S.D., without causing her any harm. He otherwise denied any wrongdoing regarding the parenting and care he provided his children. 1 CP 24, 28, 46-48, 53, 57.

The defendant had limited English language skills which presented a challenge to treatment, but he still willingly conversed with the therapist in English on subjects other than those covered by treatment. Despite that, when the interpreter did not appear for a session and Mr. Nelson attempted to engage in conversation directed at treatment, the defendant refused. 1 CP 13.

Mr. Nelson tried a number of strategic approaches to develop a therapeutic relationship. He obtained the court's permission to modify the program to individual therapy instead of group therapy to accommodate the defendant's English deficits and allow for the presence of an interpreter. 2 RP 17, 33-34. But even with the interpreter the defendant was unwilling to discuss anything that would reflect negatively on him, his parenting style, or family members. Mr. Nelson believed that the defendant used his lack of

language skills as an excuse to avoid talking about things or act defensively, making it difficult for Mr. Nelson to collect any data necessary for treatment. 1 CP 13, 27.

Mr. Nelson stated that the defendant set up other barriers to treatment. He reluctantly gave Mr. Nelson the names of persons who could provide information about his family, but prohibited Mr. Nelson from talking to those people about anything relevant to treatment. 1 CP 23; 3 RP 13. While the defendant demonstrated that he had some ability to speak English, he refused to test his English skills. His degree of fluency in English was relevant to whether he could take certain tests considered necessary for an evaluation. 3 RP 9-10. The defendant refused to consider any information that Mr. Nelson gave him that differed from his cultural beliefs. Had the defendant been open to learning and considering that new information, and been more forthcoming in his discussions with Mr. Nelson, he could have made reasonable progress in treatment. 3 RP 15-16.

The defendant also argues that there was no effort to follow the therapists recommendation that another provider be found who could speak Arabic and who the defendant would regard as an authority figure. BOA at 10. He does not suggest who had the

responsibility to locate an alternate therapist. Mr. Nelson's suggestion was an example of how he as the therapist attempted to help the defendant cooperate with treatment. The defendant's rejection of Mr. Nelson as an "authority figure" in the treatment setting is one more example of his own wilful choice to not cooperate with treatment.

Mr. Nelson did not believe that the defendant's decision making skills or intelligence level precluded him from engaging in meaningful therapy. Rather the reason he failed in treatment was that the defendant did not want therapy, and was unwilling to engage in meaningful treatment. 1 CP 14. For that reason, there is ample evidence in the record that the defendant's termination from treatment resulted from wilful conduct that violated that sentence condition.

Second, as the court recognized, the treatment condition here was designed to protect at least one segment of the community, the defendant's other children. 2 RP 24. Had the defendant complied with treatment by making reasonable progress it could have prevented future assaults on those children. Like the condition at issue in McCormick violating the condition here presented a threat to that segment of society. The court was

therefore not required to find the defendant's conduct resulting in termination from treatment was wilful.

2. The Sanction For Violating Community Custody Was Provided For By The Sentencing Reform Act.

The defendant also argues that the 60 day sanction imposed by the court was unfair because he had already been sentenced to and served the high end of the standard range, and that the sanction amounted to an exceptional sentence without the necessary fact finding to support it.

The court may impose up to 60 days confinement for each violation of any condition or requirement of a sentence. RCW 9.94A.633(1)(a), RCW 9.94A.6333. The court may impose consecutive terms of confinement for each violation as long as the total period of confinement does not exceed the maximum term for the underlying conviction. State v. Woodward, 116 Wn. App. 697, 702, 67 P.3d 530 (2003). Thus it was not unreasonable for the court to impose consecutive 45 day sanctions for 10 separate violations even though the top of the standard range was only 90 days. State v. McDougal, 120 Wn.2d 334, 352, 841 P.2d 1232 (1992).

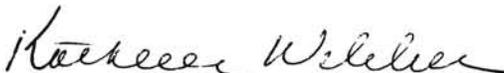
The maximum penalty for Assault 2 is 10 years confinement. RCW 9A.36.021(2)(a), RCW 9A.20.021(1)(b). The 60 day penalty did not exceed the maximum penalty for the defendant's offense. Contrary to the defendant's claim the penalty was not an end run around the maximum penalty. It was an additional penalty that the court was statutorily authorized to impose when the defendant violated the conditions of his sentence, thereby moving himself outside the initial protections of the Sentencing Reform Act. McDougal, 120 Wn.2d at 352.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the trial court's July 2 order clarifying the sentence conditions and the order modifying the defendant's sentence violating the conditions of that sentence.

Respectfully submitted on October 31, 2014.

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