

NO. 63216-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

V.G.,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUN 30 PM 3:47

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE
DIVISION

The Honorable Thomas Verge, Commissioner

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The disposition court erred when it fined appellant \$250.00 for violating the terms of her community supervision.

Issue Pertaining to Assignment of Error

RCW 13.40.200(3) authorizes a penalty of up to thirty days' detention for willful violations of community supervision. In appellant's case, the court used this provision to impose detention. The court then added, however, an additional penalty in the form of a fine. Where the court had no statutory authority to impose an additional fine for violating community supervision, should the fine be stricken?

B. STATEMENT OF THE CASE

In August 2007, juvenile appellant V.G. pled guilty to Criminal Trespass in the First Degree and Theft in the Third Degree. CP 37-42. The court imposed 8 days' confinement (with credit for 8 days already served), 40 hours' community service, and 12 months' community supervision. CP 32-34.

On January 31, 2008, V.G. received 9 days in jail for violating various terms of her supervision. CP 19-24, 27-28. On March 20, 2008, the State alleged additional violations. CP 17-18. V.G. did not appear and a bench warrant was issued for her arrest.

RP 4. The matter was not resolved until a hearing on February 10, 2009. RP 4.

At that hearing, a representative of the probation department recommended that the court impose 15 days in jail, a \$250.00 fine, and terminate V.G.'s probation. RP 5. The State concurred. RP 5. Defense counsel asked the court not to impose the \$250.00 and reduce jail time to 7 days. RP 6-7. The court imposed 15 days and a \$250.00 fine and terminated probation. RP 8; CP 15-16.

Defense counsel filed a late Notice of Appeal on March 23, 2009. CP 3-5. On June 10, 2009, however, this Court granted a motion to enlarge the time in which to file the Notice of Appeal. See Order Granting Motion (Commissioner Ellis).

C. ARGUMENT

THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A FINE IN ADDITION TO JAIL TIME FOR VIOLATING COMMUNITY SUPERVISION.

A sentencing court errs when it imposes a sentence for which there is no statutory authority. Such an error may be raised for the first time on appeal.¹ State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) ("In the context of sentencing, established

case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (“when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal,” quoting State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024 (1993)).

Where a respondent fails to comply with one or more conditions of her supervision, as V.G. did, RCW 13.40.200 defines the court’s discretion:

(1) When a respondent fails to comply with an order of restitution, community supervision, penalty assessments, or confinement of less than thirty days, the court upon motion of the prosecutor or its own motion, may modify the order after a hearing on the violation.

. . . .

(3) If the court finds that a respondent has willfully violated the terms of an order it may impose a penalty of up to thirty days’ confinement. Penalties for multiple violations occurring prior to the hearing shall not be aggregated to exceed thirty days’ confinement. Regardless of the number of times a respondent is brought to court for violations of the

¹ In a motion for reconsideration, V.G. did challenge the sentencing court’s statutory authority to impose a fine. CP 7-14. That motion was never heard, however.

terms of a single disposition order, the combined total number of days spent by the respondent in detention shall never exceed the maximum term to which an adult could be sentenced for the underlying offense.

RCW 13.40.200(3). Noticeably absent under subsection (3) is any authority to impose a fine. The only option listed is confinement up to 30 days.

This Court has never been asked to determine whether, as a sanction for failure to comply with community supervision conditions, the sentencing court can impose a monetary fine in addition to the confinement authorized under RCW 13.40.200(3). Language in this Court's opinion in State v. B.D., 97 Wn. App. 401, 985 P.2d 946 (1999), suggests that courts possess this authority. See B.D., 97 Wn. App. at 403 (rejecting notion that "RCW 13.40.200 only authorizes confinement, not to exceed 30 days in length, as a sanction for violations of conditions of disposition."). But B.D. did not address the precise question presented in this case.

B.D. pleaded guilty to one count of attempted explosive devices activity without a license and received a sentence that included three months' community supervision. B.D., 97 Wn. App. at 403. Just prior to expiration of the three-month term, the State

moved to modify the term because B.D. had used marijuana. The court granted the motion, extending supervision an additional three months. On appeal, the issue was whether the sentencing court was authorized to modify supervision in this manner. Id. B.D. argued that the court had been limited to imposing up to thirty days' detention under RCW 13.40.200(3). Id. at 404.

In finding that the sentencing court was authorized to extend the period of supervision, the B.D. Court cited two cases. The first is In re Welfare of Hoffer, 34 Wn. App. 82, 659 P.2d 1124 (1983). B.D., 97 Wn. App. at 404. Hoffer was ordered to pay restitution. When he failed to do so, just prior to his 18th birthday the sentencing court extended its jurisdiction until Hoffer's 21st birthday. Hoffer, 34 Wn. App. at 84. Hoffer argued that because RCW 13.40.200(3) authorized imposition of a penalty of up to 30 days' confinement for violation of a restitution order, confinement was the only alternative available to the sentencing court for his failure to pay. Id. at 86. The Hoffer Court rejected this argument, finding that RCW 13.40.200(3) addresses an added penalty for willful violations, and does not limit the authority under 13.40.200(1) to otherwise modify a restitution order by extending jurisdiction over the offender. Id. at 86-87.

The second case relied on in B.D. is State v. Martin, 102 Wn.2d 300, 684 P.2d 1290 (1984). B.D., 97 Wn. App. at 405. Martin received 8 days in detention for failing to pay restitution or complete community service. The only issue on appeal was whether RCW 13.40.200 required he be given credit for his detention with a corresponding reduction in his restitution and community service obligations. Martin, 102 Wn.2d at 301-02. In finding no such requirement, the Supreme Court noted that “section 3 guides the court’s discretion in imposing penalties” for violations. Id. at 303.

Relying on the Hoffer Court’s conclusion that RCW 13.40.200(1) authorizes extended periods of jurisdiction for violations of restitution orders, and the Martin Court’s statement that RCW 13.40.200(3) is merely a guide (as opposed to a limitation on modifications), the B.D. Court held that nothing prevented the sentencing court from extending B.D.’s term of community supervision for noncompliance with the original order. The Court rejected the notion that the sentencing court’s only option had been to impose up to 30 days’ confinement:

In addition to the cases construing the statute, it is clear that the court’s imposition of a sanction for violation of a disposition order is permissive because

of the use of the word “may” in the section at issue. It is permissive in the sense that the court may or may not choose to impose confinement as the sanction. There is nothing in the statute that suggests that the court is prohibited from imposing the less onerous sanction of extended community supervision in lieu of confinement. To read the statute as requiring confinement in all cases of sanction makes no sense. We decline to adopt such a construction.

B.D., 97 Wn. App. at 405.

It is clear from B.D., Hoffer, and Martin that courts are authorized under RCW 13.40.200(1) to modify the terms, conditions, and length of supervision when a juvenile fails to comply with the terms of an order. As this Court recognized in B.D., RCW 13.40.200(3) is permissive “in the sense that the court may or may not choose to impose confinement as the sanction.” B.D., 97 Wn. App. at 405. But none of these courts were asked to determine whether, as a sanction for a willful community supervision violation, a sentencing court could choose confinement under RCW 13.40.200(3) – thereby exercising the “may” option as the sanction – and then *also* supplement that punishment in the form of an additional fine.

Construction of a statute is a legal question this Court reviews de novo. B.D., 97 Wn. App. at 403. It is the court’s duty to ascertain the Legislature’s intent. Statutes “must be construed as a

whole, and effect should be given to all the language used. Also, all of the provisions of the Act must be considered in their relation to each other, and, if possible, harmonized to ensure proper construction of each provision." Tommy P. v. Board of Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

Washington courts abide by the rule of *expressio unius est exclusio alterius*, which means "[w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." In re Personal 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)). Thus, the Legislature's failure to authorize imposition of an additional fine when the sentencing court chooses to impose up to thirty days' detention for willful violations is presumed intentional.

V.G. asks this Court to find that when a sentencing court chooses not to impose confinement under RCW 13.40.200(3), but otherwise modifies the terms of the order, RCW 13.40.200(1) provides the court with broad authority to do so, including an extension of the period of community supervision and modification of the terms of supervision. However, when the court chooses to

penalize a juvenile up to thirty days' confinement under RCW 13.40.200(3), it cannot impose an additional penalty beyond confinement since confinement is the only option listed. This interpretation gives meaning to, and harmonizes, the language of RCW 13.40.200(1) and (3).

When the court chose to penalize V.G. under RCW 13.40.200(3) by imposing a period of confinement and terminating supervision, it had no authority to add an additional penalty in the form of a fine.

D. CONCLUSION

This Court should strike the \$250 sanction for violation of V.G.'s supervision.

DATED this 31st day of June, 2009.

Respectfully submitted,

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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 30TH DAY OF JUNE, 2009, 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] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

[X] V.G.
2762 CAGEY ROAD
BELLINGHAM, WA 98226

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF JUNE, 2009.

x Patrick Mayovsky