

66938-1

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COA NO. 66928-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CATHERINE ASHENBERNER,

Appellant.

**REC'D**  
**DEC 19 2011**  
King County Prosecutor  
Appellate Unit

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

The Honorable Hollis R. Hill, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT LACKED AUTHORITY TO IMPOSE THE REPORTING REQUIREMENT AS A SENTENCING CONDITION FOR WHICH ASHENBERNER COULD BE SANCTIONED FOR NONCOMPLIANCE.

a. The Issue Is Not Waived.

As set forth in the opening brief, the issue is whether the plain language of RCW 9.94A.760 and established rules of statutory construction demonstrate the court (1) lacked authority to impose the clerk reporting requirement under RCW 9.94A.760(7)(b) as a condition of Ashenberner's sentence and (2) lacked authority to punish Ashenberner for noncompliance with that requirement. Brief of Appellant (BOA) at 1, 7-14.

The State claims Ashenberner waived appellate review of the June 16, 2009 modification order in which the clerk reporting requirement was imposed as part of the sentence because "she affirmatively agreed to the modifications." Brief of Respondent (BOR) at 10-11. This Court should decline to consider that assertion because the State cites no legal authority in support and the argument is completely undeveloped.

"Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290, review denied, 136 Wn.2d 1015, 966 P.2d 1278 (1998). Argument for which no authority is cited nor

supported may not be considered on appeal. King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706, 717, 846, 846 P.2d 550 P.2d 550 (1993). The failure to cite authority constitutes a concession that the argument lacks merit. State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997). Furthermore, "[i]t is not the function of . . . appellate courts to do counsel's thinking and briefing." Orwick v. City of Seattle, 103 Wn.2d 249, 256, 692 P.2d 793 (1984).

In any event, established authority demonstrates the State's waiver claim fails. "[A] defendant cannot empower a sentencing court to exceed its statutory authorization." State v. Eilts, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (although restitution order was based largely on defendant's promise to pay, restitution ordered for uncharged crimes was in excess of trial court's statutory authority and needed to be vacated); see also State v. Wallin, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (rejecting State's argument that defendant invited error when he agreed to previous court order that unlawfully extended community custody after defendant violated terms of release), review denied, 155 Wn.2d 1012, 122 P.3d 186 (2005); State v. Phelps, 113 Wn. App. 347, 354-55, 357, 57 P.3d 624 (2002) (reversing part of sentence extending statute of limitations as void: "Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.")

(citing In re Pers. Restraint of Moore, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991) ("Since the sentence to which petitioner agreed and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.")); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (defendant's request to receive mental health treatment as part of community custody does not give the court authority to impose it), review denied, 163 Wn.2d 1025, 185 P.3d 1194 (2008), overruled on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Inclusion of the clerk reporting requirement as a condition of the sentence without statutory authority is a legal error, not a factual one. When it comes to sentencing, a defendant may waive factual errors but cannot waive legal errors predicated on lack of statutory authority. State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010).

- b. The Reporting Requirement Is Not An Authorized Sentencing Condition And Therefore Noncompliance With That Requirement Cannot Be Punished As A Violation Of The Sentence.

Moving to the merits of the issue, the State points to former RCW 9.94A.142(1), which provides in part:

*The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during either the initial ten-year period or subsequent ten-year period if the criminal judgment is extended, regardless of the*

expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

(emphasis added).<sup>1</sup>

The plain language of former RCW 9.94A.142(1) shows modification of terms and conditions of the sentence concerning restitution is authorized. But modified terms and conditions must be statutorily authorized to carry the force of law. A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). "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).

Former RCW 9.94A.142(1) does not tell us which modified terms and conditions of a sentence are statutorily authorized. We need to look to other statutes for the answer. RCW 9.94A.760 provides the answer. That statute contains the clerk reporting requirement at RCW 9.94A.760(7)(b), but only includes the nonpayment of a monthly sum as a condition or

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<sup>1</sup> The State cites to a version of the statute that was not in effect at the time of Ashenberner's offenses. BOR at 12. Former RCW 9.94A.142, Laws of 1997 ch. 121 § 4, was in effect and provides "The portion of the sentence concerning restitution may be modified as to amount, terms and conditions during either the initial ten-year period or subsequent ten-year period if the criminal judgment is extended, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum for the crime."

requirement of a sentence that subjects an offender to penalties for noncompliance. RCW 9.94A.760(10).

The only way to read former RCW 9.94A.142(1) to avoid absurd results is to presume modified terms and conditions must be statutorily authorized. See State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003) (interpretation of statute that results in absurd consequences must be avoided). The State's argument, however, presumes former RCW 9.94A.142(1) authorizes the inclusion of any term or condition in a sentence, regardless of whether other statutes show the term or condition lacks statutory authorization.

Indeed, the State's argument assumes the very thing at issue: whether the clerk reporting requirement is a statutorily authorized condition of a sentence for which an offender may be sanctioned for noncompliance. Sentencing conditions do not become authorized by statute simply because they are added as a later modification. A void sentencing condition is an absolute nullity. See Black's Law Dictionary 1604 (8th Ed.) ("void" means "of no legal effect; null.").

The State also relies on RCW 9.94B.040(1) (former RCW 9.94A.634(1), which provides "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."

The State's reliance on RCW 9.94B.040(1) is misplaced for much the same reason its reliance on former RCW 9.94A.142(1) is misplaced. RCW 9.94B.040(1) does not authorize a court to punish offenders for violating a condition or requirement of a sentence that is statutorily unauthorized. If a sentencing condition is unauthorized, the court does not have the authority to sanction based on a violation of the condition. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996).

Restitution is a legal financial obligation. RCW 9.94A.030(29). RCW 9.94A.760(10) specifies "*[t]he requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740.*" (emphasis added). The statute does not specify the clerk reporting requirement constitutes a part of the judgment and sentence.

RCW 9.94A.760(7)(b) authorizes *the county clerk* to require the offender to report to the clerk. Nothing in RCW 9.94A.760 authorizes *the court* to impose that requirement *as part of the sentence*. RCW 9.94A.760 authorizes the court to impose various requirements related to legal financial obligations as part of the sentence, but the clerk reporting requirement is not one of them. See RCW 9.94A.760(1) ("court may order the payment of a legal financial obligation as part of the sentence.");

RCW 9.94A.760(3) ("The court may add to the judgment and sentence or subsequent order to pay a statement that a notice of payroll deduction is to be issued immediately."); RCW 9.94A.760(10) ("The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or 9.94A.740.").

As set forth in the opening brief, established principles of statutory interpretation show the clerk reporting requirement contained in RCW 9.94A.760 cannot be imposed as part of the sentence. BOA at 7-12. Ashenberner cannot be punished for violating an unauthorized sentencing condition.

The State cites State v. Gamble for this proposition: "in the absence of statutory language indicating otherwise, a sentencing court has jurisdiction to enforce the requirements of a sentence imposed until those requirements are met and/or a certificate of discharge is provided to the offender upon completion of his or her sentence." State v. Gamble, 146 Wn. App. 813, 820, 192 P.3d 399 (2008) (quoting State v. Johnson, 54 Wn. App. 489, 491, 774 P.2d 526 (1989)).

Gamble is inapposite. Jurisdiction to enforce the requirements of a sentence is not at issue here. The issue is whether there is statutory

authority to punish Ashenberner for violating a sentence requirement that is not statutorily authorized in the first place. Again, the court lacks authority to punish an offender for violating an unauthorized sentencing requirement. Raines, 83 Wn. App. at 316. A contrary interpretation of the statute would be absurd, as it would allow courts to punish people for things that the legislature never intended to be punished.

Finally, the State does not address the rule of lenity argument presented in the opening brief. BOA at 13. Even if the State's interpretation of the statute is reasonable, the rule of lenity requires the statute be interpreted in Ashenberner's favor. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

c. This Appeal Is Not Moot And Review Is Otherwise Appropriate.

In the opening brief, Ashenberner argued the issue on appeal is not moot, in part because the issue is capable of repetition yet evades review. BOA at 14-15. In a perfunctory footnote, the State maintains the issue is moot and any possible future sanction is not ripe. BOR at 18 n.24. Argument presented in a footnote should not be addressed. State v. N.E., 70 Wn. App. 602, 607 n.3, 854 P.2d 672 (1993). Moreover, the State does not dispute Ashenberner's alternative argument that the issue merits review because it is of continuing and substantial public interest. See In re

Detention of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it."); BOA at 15-17.

B. CONCLUSION

Ashenberner requests that this Court vacate the trial court's order sanctioning her for violating the reporting requirement and strike the sentencing condition as void.

DATED this 14<sup>th</sup> day of December 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66928-1-I
	)	
CATHERINE ASHENBERNER,	)	
	)	
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 19<sup>TH</sup> DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CATHERINE ASHENBERNER  
12839 SE 40<sup>TH</sup> PLACE, #A6  
BELLEVUE, WA 98006

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF DECEMBER 2011.

x Patrick Mayovsky

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