

COURT OF APPEALS NO. 43963-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN J. RIVERA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in sanctioning appellant for violating conditions of probation that were not lawfully imposed.

Issue Pertaining to Assignment of Error

Whether the court erred in sanctioning appellant for alleged violations of probation where such conditions were not imposed by the court, but by the department, without express statutory authority or a statutorily authorized delegation of authority by the court?

B. STATEMENT OF THE CASE

Appellant Juan Rivera is appealing from the order modifying his judgment and sentence, entered on August 7, 2012, for alleged violations of community custody. CP 11-12. The case originated in 2007, when the state charged Rivera with several offenses, stemming from an alleged altercation involving Rivera's then girlfriend, Samantha Kenyon, on January 16, 2007. CP 88-92.

On January 19, 2007, the Mason County prosecutor charged Rivera with the following four counts: (1) unlawful imprisonment of Samantha Kenyon; (2) reckless endangerment of Kenyon; (3) fourth degree assault of Kenyon; and (4) reckless endangerment of Shelly Hall and/or Raffi Seropian, who were reporting parties. CP 86-87, 91.

Count 4 was dismissed without prejudice (CP 43) and Rivera was convicted of counts 1-3, following a jury trial in March 2007. CP 67-85. On the felony conviction of unlawful imprisonment, the court imposed a standard range sentence of 57 months. CP 72. The court also imposed 9-18 months of community custody. CP 72. The statutory maximum for the offense was five years. CP 69. As part of his sentence, Rivera was also ordered to pay \$2,969.88 in legal financial obligations (LFOs), at \$50.00 per month, commencing 60 days from his release from total confinement. CP 71.

For the misdemeanor counts, the court imposed concurrent sentences¹ of 365 days, suspended on condition Rivera comply with the terms of a two-year period of probation. CP 74-75. Such terms required Rivera to: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) reside at a location and under living arrangements that have been approved in advance by the CCO, and not to change such arrangements without prior approval; (3) remain within, or outside of, geographic boundaries specified by the CCO; (4) work at a Department of Corrections (DOC)-approved education, employment and/or community service program; (5) not own or possess

¹ The sentences were ordered to run concurrently to each other and concurrently to the underlying felony. CP 65.

firearms; and (6) not possess or consume any mind or mood altering substances, including alcohol, and any controlled substances, except pursuant to lawfully issued prescriptions. CP 80-81.

Regarding alcohol and controlled substances, however, the court did not check the box requiring that: “The defendant shall, at his/her own expense, submit to urinalysis and/or breathalyzer testing at the request of the CCO or treatment provider to verify compliance.” CP 81.

As further terms of probation, the court also ordered Rivera to: pay a community placement fee as determined by DOC; (7) participate in MRT and/or victim awareness education; (8) complete a certified domestic violence/anger management counseling program; (9) have no contact with Samantha Kenyon; and (10) obey all laws. CP 80-81.

Finally, on the form setting forth the terms of probation, the court also checked a box indicating: “A notice of payroll deduction may be issued or other income withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.” CP 81-82. However, the court did not check the box requiring that: “Legal financial obligation payments are to be made on a schedule established by D.O.C. to begin as directed by the D.O.C.” CP 82.

Thereafter, on August 30, 2007, the prosecutor filed an amended information charging Rivera with the following two counts involving the reporting parties: (4) third degree assault of Raffi Seropian; and (5) reckless endangerment of Shelly Hall and/or Raffi Seropian. CP 64-65. Rivera pled guilty and was sentenced on the felony (assault) to 60 months, and on the misdemeanor (reckless endangerment) to a concurrent sentence of 365 days suspended on condition he comply with the terms of a two-year period of probation. The sentences were ordered to run concurrently with the previously imposed sentences and the same terms of probation were ordered. CP 50-62.

Approximately one year later, in September 2008, the decision in Mr. Rivera's appeal of the first judgment and sentence for unlawful imprisonment became final. CP 41-49. This Court remanded the case for resentencing on grounds: the state failed to prove Rivera was on community supervision at the time of the offense – which added one point to his offender score and increased his standard range; and because the sentence as a whole – incarceration time plus the period of community custody – potentially could exceed the statutory maximum. CP 46-47.

On remand, the court imposed a standard range sentence of 43 months, based on the lowered offender score. CP 26-40. Although the sentence as a whole – incarceration time plus the period of community

custody (9-19 months) – potentially still could exceed the statutory maximum, the court included no clarifying language indicating that the combined period of both could not exceed 60 months. CP 26-40. All other terms and conditions remained the same. CP 26-40.

Rivera was released from prison on December 9, 2010, and completed his felony community custody on January 30, 2012. RP 60, 63. At the time of the violations challenged herein, Rivera was under supervision for his misdemeanor offenses only. RP 19.

On July 20, 2012, the department filed a Notice of Violation with the court alleging Rivera had violated the terms of his misdemeanor probation as follows: (1) failing to report as directed since 3/1/12; (2) failing to make himself available for urinalysis testing as directed since 3/1/12; (3) failing to provide a urinalysis specimen as directed on 3/1/12; (4) failing to provide verification for obtaining a substance abuse evaluation as directed since 3/8/12; (5) failing to notify his CCO prior to changing residences on or before 3/8/12; and (6) failing to make any payments on legal financial obligations to Mason County as directed since 3/30/11. CP 22-25.

The violation hearing was held August 7, 2012. CCO John Lyles testified he began supervising Rivera in January 2012. RP 22. Lyles gave a brief history of his supervision thus far. According to Lyles, on January

11, 2012, Rivera and the department entered into a stipulated agreement wherein Rivera admitted to using a controlled substance and the department sanctioned him to increased reporting and urinalysis testing and directed him to provide verification of obtaining a substance abuse evaluation by January 18, 2012.² RP 24.

On February 23, 2012, Rivera and the department entered into another stipulated agreement wherein Rivera admitted to failing to report, failing to make himself available for urinalysis testing, failing to obtain a substance abuse evaluation and using a controlled substance. RP 24. He was sanctioned to increased reporting and to provide verification of obtaining a substance abuse evaluation by March 8, 2012, and to enroll in MRT therapy. RP 24.

As part of the agreement, Rivera reportedly agreed to report every Thursday, beginning March 1, 2012. According to Lyles, when Rivera reported on March 1, however, he failed to provide a urinalysis specimen as directed. RP 25. Rivera indicated could not produce the specimen. Lyles directed Rivera to return on March 5 to provide one, but as of the date of the violation hearing, Rivera had failed to make any further contact

² According to Lyles, on January 9, 2010, Rivera signed the Department of Corrections' Conditions, Requirements and Instructions. "At that time he was instructed to complete a substance abuse evaluation." RP 28.

with DOC. RP 25. Accordingly, Rivera had not provided verification of a substance abuse evaluation, either.³ RP 28.

On March 8, Lyles telephoned the contact number previously provided by Rivera on March 1, and spoke to Lyles' girlfriend, with whom Rivera had been living in Westport. RP 29-30. According to Lyles, the girlfriend stated Rivera was no longer staying with her and she did not know where he was. RP 29.

Lyles testified Rivera was arrested at a residence in Mason County in July. RP 26, 29. According to Lyles, Rivera did not have permission to leave Grays Harbor County. RP 29, 31, 34.

Regarding Rivera's legal financial obligations, Lyles testified that upon his release on December 9, 2010, Rivera signed the department's conditions, requirements and instructions. He was directed to make \$20 monthly payments on his LFOs to Mason County, beginning in January 2011. Lyles testified that as of the date of the hearing, Rivera had not done so. RP 29.

Lyles was aware that Rivera subsists on \$200.00 worth of food stamps and a government subsidy of \$197.00 in cash per month. RP 33;

³ Lyles claimed he told Rivera he could obtain the evaluation and undergo free treatment at the DOC office. RP 34. Rivera disputed Lyles gave him this information. RP 45.

see also RP 45. To Lyles' knowledge, Rivera had not attempted to find employment.⁴ RP 34.

Rivera testified that while in Westport, he lived in a trailer park that was \$350.00 a month in rent. RP 45. He was able to pay the rent with his \$197.00 cash stipend and by working odd jobs. RP 45, 49-50.

Rivera admitted he left Westport March 1, and returned to Mason County to live with his mother, his only positive support. RP 46, 50. Rivera testified his only other option would have been to live in a tent or at the Union Gospel Mission. RP 46, 48. Rivera also admitted he informed Lyles he would not meet with him further, as Rivera perceived Lyles as threatening. RP 42, 47.

The court found Rivera committed violations 1, 3, 4, 5 and 6; the court found allegation 2 – failing to make himself “available” for urinalysis testing – was in essence the same as violation 1, failing to report. CP 13-15; RP 56. Regarding Rivera's LFOs, the court found Rivera has the ability to work odd jobs and therefore could have paid the minimum monthly payments scheduled by DOC. RP 57. Regarding the substance abuse evaluation and treatment, the court found Rivera could

⁴ Rivera testified that finding work was difficult, due to his criminal history, appearance and disabilities, including a painful back condition and mental health issues. RP 51-52.

have accessed free services with the department. RP 57. Accordingly, the court found each violation was willful. RP 57.

The court imposed sanctions of 150 days of incarceration in Mason County Jail. CP 14-15. Probation would toll during this period, as it had for 172 days previously, during periods when Rivera failed to report. RP 63. The court estimated probation would therefore end May 29, 2013 (two years from the date of release, plus 172 days). RP 63. However, this calculation does not appear to take into account the 150 additional days probation would toll, while Rivera served the 150-day sanction.⁵ RP 57. Rivera timely filed a notice of appeal. CP 11-12.

C. ARGUMENT

1. THE COURT ERRED IN SANCTIONING RIVERA FOR VIOLATING PROBATION CONDITIONS THAT WERE NOT LAWFULLY IMPOSED.

Three of the probation conditions Rivera was alleged to have violated were not court ordered. Specifically, the court never ordered Rivera to: undergo urinalysis testing at the direction of the department;

⁵ See State v. Robinson, 142 Wn. App. 649, 653, 175 P.3d 1136 (2008) (probation tolled during multiple, extended periods of time when he had absconded); see also City of Spokane v. Marquette, 146 Wash.2d 124, 134, 43 P.3d 502 (2002) (municipal court's two year probationary jurisdiction tolled while defendant on warrant status); State v. Campbell, 95 Wash.2d 954, 957, 632 P.2d 517 (1981) (probation tolled while the defendant committed to a mental institution).

undergo a drug and alcohol evaluation; or make payments towards his LFOs on a schedule dictated by the department. CP 80-82. Rather, these conditions were imposed by the department at the time of Rivera's release from incarceration in December 2010. However, the department did not have authority to impose these conditions. Accordingly, the trial court abused its discretion in sanctioning Rivera for their violation.

A court can only modify a sentence as authorized by statute. State v. Shove, 113 Wash.2d 83, 89, 776 P.2d 132 (1989). A trial court may not modify a sentence merely because it appears, with hindsight, that the original sentence was inappropriate. Shove, 113 Wash.2d at 88, 776 P.2d 132. But when an offender violates any requirement of a sentence, the trial court retains broad discretion to modify the sentence and/or impose additional punishment. RCW 9.94A.634(1); State v. Woodward, 116 Wash.App. 697, 703, 67 P.3d 530 (2003).

If the State proves, by a preponderance of the evidence, that the offender violated the sentence, the trial court "may impose sanctions such as work release, home detention with electronic monitoring, work crew, community restitution, inpatient treatment, daily reporting, curfew, educational or counseling sessions, supervision enhanced through electronic monitoring, jail time, or other sanctions available in the community." RCW 9.94A.634(3)(a)(i), (c)(iv).

Alternately, the trial court may convert any term of partial confinement to total confinement. RCW 9.94A.634(3)(c)(i). This Court reviews the trial court's ruling on the appropriate sanction for a violation of the sentence under the abuse of discretion standard. Woodward, 116 Wash.App. at 703, 67 P.3d 530.

Rivera committed the offenses for which he was under probation in 2007. Accordingly, the law in effect in 2007 governed his sentence. RCW 9.94A.345. At that time, former RCW 9.92.060 and RCW 9.95.210 governed the court's authority to suspend sentences on condition of probation. RCW 9.92.060 provided in relevant 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 misdemeanant probationers a probation officer employed or contracted for by the county, upon such terms as the superior court may determine.

(2) As a condition to suspension of sentence, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. In addition, the superior court may require . . .

(3) As a condition of the suspended sentence, 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. . . .

Former RCW 9.92.060; Laws of 2005 c 362 § 2, eff. May 10, 2005
(emphasis added).⁶

Former RCW 9.95.210 provided, in relevant 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.

(2) In the order granting probation and as a condition thereof, the superior court may in its discretion imprison the defendant in the county jail for a period not exceeding one year and may fine the defendant any sum not exceeding the statutory limit for the offense committed, and court costs. As a condition of probation, the superior court shall require the payment of the penalty assessment required by RCW 7.68.035. The superior court may also require . . .

(3) The superior court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. . . .

(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

⁶ For purposes here, the statute today remains essentially the same. Cf. RCW 9.92.060; Laws of 2011 1st sp.s. c 40 § 5, eff. June 15, 2011.

within its jurisdiction, the superior court misdemeanor probationer shall report to a probation officer employed or contracted for by the county. In cases where a superior court misdemeanor probationer is sentenced in one county, but resides within another county, there must be provisions for the probationer to report to the agency having supervision responsibility for the probationer's county of residence.

...

Former RCW 9.94A.210; Laws of 2005 c 362 § 4, eff. May 10, 2005 (emphasis added).⁷

These statutes granted the court authority to suspend Rivera's sentences during a two-year period of probation, based on conditions set by the court. In its discretion, the court was also authorized to order Rivera to follow the instructions of the department, under subsection (4) of RCW 9.94A.210. However, the court was not required to do so, and did not in fact do so here. As a consequence, Rivera was required to abide by those conditions set by the court in the judgment and sentence, not those set by the department upon his release, as the department had no authority to set conditions. The lower court therefore erred in imposing sanctions for violating conditions DOC was not authorized to impose.

In response, the state may argue that the department was authorized to impose affirmative conditions by virtue of the fact Rivera was also

⁷ For purposes here, this statute is essentially the same today, as well. *Cf.*

sentenced to community supervision for his felony convictions. Under RCW 9.94A.704, the department may order an offender to participate in rehabilitative programs, such as a drug or alcohol evaluation, or otherwise perform affirmative conduct. RCW 9.94A.704(4). However, this statute was not in effect at the time Rivera committed his offenses. See Laws of 2008 c 231 §10, eff. Aug. 1, 2009. Accordingly, the department did not have authority to add to those conditions imposed by the court, under the SRA, or under the statutes governing suspended sentences.

Here, the court found Rivera violated the terms of his probation *inter alia* by failing to submit a urine sample, by failing to undergo a drug and alcohol evaluation and by failing to make payments towards his LFOs on the schedule directed by DOC. None of these conditions was imposed as part of his judgment and sentence, however. The court therefore erred in imposing sanctions of 30 days for each violation. See *e.g. State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995) (“Abuse of discretion exists when “a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.”).

Rivera has since served the entire 150-day sanction imposed by the court. CP 8. Therefore, the issue of whether the 30-day sanctions for each

RCW 9.95.210; Laws of 2012 1st sp.s. c 6 § 10, eff. Aug. 1, 2012.

of the unproven violations is technically moot. Nonetheless, this Court should decide the issue, as it is likely to recur.

In determining whether an issue – despite being moot – warrants review, this Court looks to three factors:

(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.

State v. Veazie, 123 Wn. App. 392, 397, 98 P.3d 100 (2004). This Court also considers whether the case “properly and effectively addresses the issue.” Id. (citing Hart v. Dep’t of Soc. & Health Servs., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)).

The issue in this case is of a public nature because it impacts many offenders. There can be no doubt that the department supervises many offenders who were sentenced prior to the enactment of RCW 9.94A.704, which grants the department authority to impose affirmative conditions on an offender. In light of the present circumstances, there can also be little doubt that the department is imposing affirmative conditions on offenders, such as Rivera, whose offenses pre-date the statute, where the department lacks statutory authority. A determination is desirable because no case precisely addresses the issue.

As of November 2012, when the department filed an additional Notice of Violation to the court, Rivera was still serving his period of probation. CP 7-10. Accordingly, this issue is likely to recur. Given the likely number of offenders on supervision whose offense pre-dates the effective date of RCW 9.94A.704, it is likely other offenders will be sanctioned for violating conditions that were not lawfully imposed. Moreover, given the short duration of any sanction imposed in this type of case, the issue will almost always be moot by the time an appellate court can address it. This case presents a good opportunity to properly and effectively consider an important issue.

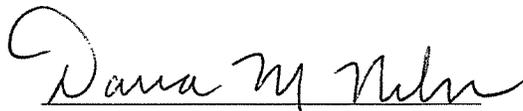
D. CONCLUSION

This Court should hold that the lower court erred in imposing sanctions for violating conditions of probation that were not lawfully imposed.

DATED this 20th day of March, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC,



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DIVISION TWO

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 43963-8-II
)	
JUAN RIVERA,)	
)	
Appellant.)	

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 20TH DAY OF MARCH 2013, 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 AND/OR VIA EMAIL.

[X] JUAN RIVERA
809 7TH AVENUE NE
OLYMPIA, WA 98501

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF MARCH 2013.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 20, 2013 - 2:50 PM

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