

No. 43963-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JUAN J. RIVERA

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 07-1-00030-5

BRIEF OF RESPONDENT

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A. STATE'S COUNTERSTATEMENT OF ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

The misdemeanor conditions of probation ordered by the superior court in this case were lawfully imposed, and the court did not err by sanctioning Rivera for violating those conditions.

B. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts Rivera's recitation of the procedural history and facts, except for the following distinctions and additional facts:

The August 7, 2012, court order that modified or revoked Rivera's sentence because of the misdemeanor probation violations which are the subject of this appeal is found at CP 13-15.

At page 2 of the Opening Brief of Appellant, Rivera correctly cites to the first judgment and sentence entered in this case (CP 71) and states that the sentencing court ordered that legal financial obligations be paid at the rate of \$50.00 per month beginning 60 days after release from confinement. However, that judgment and sentence was later amended, and the amended judgment and sentence did not set a minimum payment or a start date. CP 30. Instead, the amended judgment and sentence

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defaulted to boilerplate language that “payments shall be made ... on a schedule established by DOC....” CP 30.

The State agrees that the trial court ordered all counts sentenced in this case to run concurrently. CP 31, 33, 72, 74. But the concurrent sentences are ordered in boilerplate language of the judgment and sentence rather than from CP 65, which was cited by Rivera.¹

In addition to the partial list of conditions of his misdemeanor probation that are cited by Rivera in his brief, the judgment and sentence also orders as follows:

Defendant shall report to DOC, SHELTON, WASHINGTON, not later than 72 hours after release from custody; and the defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC.

CP 34. These probation conditions, which pertain to the misdemeanor convictions, closely resemble -- but are in addition to -- the community custody conditions that pertain to the felony conviction. CP 31-32, 34.

¹ It is probably a minor point that is of no consequence to the issue on appeal, but to clarify the record, it is pointed out that CP 65, rather than to order concurrent sentences in regard to the five counts charged under the current cause number, actually is an order amending the judgments and sentences in this cause number together with a separate

C. ARGUMENT

The State made six separate allegations that Rivera had violated conditions of supervision. CP 19. The court found allegations 1, 3, 4, 5, and 6 committed. CP 14. Of the five committed violations, Rivera challenges only three, as follows:

Allegation 3: Failing to provide a urinalysis specimen as directed on 3-1-12.

Allegation 4: Failing to provide verification of obtaining a substance abuse evaluation as directed since 3-8-12.

Allegation 6: Failing to make any payments on Legal Financial Obligations to Mason County as directed since 3-30-11.

CP 19. Rivera's only challenge to these allegations, and the court's finding of committed in regard to each allegation, is that he was not required to follow the related conditions because, he asserts, those conditions "were not court ordered." Appellant's Opening Brief at p.9. Specifically, Rivera concedes that the related conditions were imposed by the Department of Corrections (DOC), but he argues that he is not

cause number, so as to specify that the sentences arising under the two cause numbers run concurrently with each other.

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required to obey conditions that are imposed by DOC rather than the court. *Id.* at p.10.

Rivera's probation in the instant case arises out of his conviction of misdemeanor offenses that he committed on January 16, 2007. CP 26. Thus, disposition of the case is controlled by the law that was in effect on January 16, 2007. *State v. Schmidt*, 143 Wn. 2d 658, 673-74, 23 P.3d 462 (2001).

RCW 9.92.060(1) (2007) empowers the superior court to suspend misdemeanor sentences, place the convicted defendant on probation, and place the defendant under the supervision of the DOC. See also, RCW 9.95.200. When ordering probation or suspending the 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." RCW 9.92.060(4) (2007); RCW 9.95.210(4) (2007). DOC is required by RCW 9.95.210(5) (2007) to "promulgate rules and regulations for the conduct of the person during the term of probation."

Rivera asserts that the trial court did not order him to follow the instructions of the DOC. Opening Brief of Appellant at p.13. However,

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as pointed out by the State in the facts section above, the judgment and sentence ordered by the trial court did order Rivera to report to the DOC and to “perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC.” CP 34.

a) Argument specific to Allegations 3 and 4.

Among the conditions of probation directly imposed by the court were conditions that Rivera not possess or use controlled substances and that he obey all laws. CP 81, 82.

Prior to the allegations of non-compliance that led to the sanctions imposed in the instant case, there were at least two incidents where Rivera violated the terms of probation by using controlled substances. CP 18. In response to Rivera’s use of controlled substances, DOC ordered Rivera to submit to urinalysis testing and to provide verification of a substance abuse evaluation. *Id.* Rivera’s use of controlled substances was a violation of the probation conditions that he not possess or use controlled substances and that he obey all laws. Thus, it follows that DOC’s requirements that Rivera obtain a substance abuse evaluation and that he submit to urinalysis testing were tools of monitoring his compliance.

The court may impose monitoring tools to enforce compliance with other lawful conditions of probation. *State v. Julian*, 102 Wn. App. 296, 305, 9 P.3d 851 (2000), citing *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), abrogated on other grounds by *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In the instant case, the court directed that DOC monitor and enforce Rivera's probation. CP 34. Under the authority of RCW 9.95.210(6) (2007) and RCW 9.92.062(5) (2007), the provisions of RCW 9.94A.501 (2007) apply to misdemeanor probation. Rivera has a prior conviction for assault in the first degree (CP 27); therefore, DOC was required to supervise his misdemeanor probation. RCW 9.94A.030; RCW 9.94A.501(2)(ii)(B) and (C). The monitoring tools that DOC required in this case were "affirmative acts necessary to monitor compliance with the orders of the court." CP 34.

b) *Argument specific to Allegation 6.*

Some sections of the Sentencing Reform Act apply exclusively to felony offenses, such as RCW 9.94A.505(1), which specifies that "[w]hen a person is convicted of a felony, the court shall impose punishment as provided in this chapter." Without specifying whether the conviction is

for a felony or a misdemeanor, however, and without limiting its application to only felony convictions, RCW 9.94A.760(1) states that “[w]henver a person is convicted in superior court, the court may order a legal financial obligation as part of the sentence.”

In the instant case, the original judgment and sentence ordered by the court required Rivera to make a minimum payment of \$50.00 per month to begin 60 days after release from confinement. CP 71. But the judgment and sentence was amended on September 22, 2008, and the amended order omitted a specified minimum payment amount and not specify a commencement date. CP 30. RCW 9.94A.760(1) states that “[i]f the court fails to set the offender monthly payment amount, the department shall set the amount if the department has active supervision of the offender.”

Arguably, RCW 9.94A.760 should not provide the basis of a misdemeanor probation violation, because “[t]he [Sentencing Reform Act] does not control the imposition of probationary conditions upon misdemeanant offenders.” *State v. Williams*, 97 Wn. App. 257, 983 P.2d 687 (1999), citing RCW 9.94A.010. But the express inclusion of provisions related to misdemeanors in RCW 9.94A.501 demonstrates that

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not every section of the Act is limited in its application to only felony cases. RCW 9.94A.760 is not a probationary condition; instead, it is an authorization for DOC to set the minimum payments that probationers under its supervision, whether for misdemeanor offenses or for felony offenses, or both, must pay on legal financial obligations. The probation violation itself is derived not from DOC's authority as granted by RCW 9.94A.760 but instead from Rivera's disobedience of the court's order that as a condition of probation he make the minimum payments "on a scheduled established by DOC." CP 30.

D. CONCLUSION

Because the probation conditions at issue in this case arise out of misdemeanor convictions in the superior court, the court had authority under RCW 9.92.060(4) (2007) and RCW 9.95.210(4) (2007) to order Rivera, as a condition of probation, to follow the instructions of DOC.

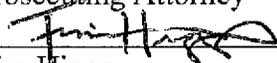
Because Rivera, by using controlled substances, violated court-imposed conditions that he not use or possess controlled substances and that he obey all laws, the subsequent instructions of DOC included that Rivera submit to a urinalysis test and complete a substance abuse

evaluation. These instructions were monitoring tools that DOC used to enforce and monitor Rivera's compliance with court-ordered conditions. When Rivera refused to follow these instructions, he violated the court-imposed probation condition that he follow instructions of DOC.

Finally, Rivera violated a court-imposed probation condition when he failed to make any payment toward his legal financial obligations after DOC, with authorization from the court, set the minimum payment at the rate \$20.00 per month.

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