

COA NO. 48226-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKARY BRAME,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE COURT LACKED AUTHORITY TO IMPOSE CONDITIONS OF PROBATION FOR THE MISDEMEANOR CONVICTION BECAUSE THE COURT SENTENCED BRAME TO SERVE THE MAXIMUM TERM OF CONFINEMENT.

The State claims a judgment and sentence order, like other judicial decrees, is interpreted using the general rules of statutory interpretation. Brief of Respondent (BOR) at 4-5. The State cites no applicable authority for that proposition. Id. (citing Kruger v. Kruger, 37 Wn. App. 329, 331, 679 P.2d 961 (1984) (divorce decree); Callan v. Callan, 2 Wn. App. 446, 448-49, 468 P.2d 456 (1970) (divorce decree)). There is none.

The standard is different for judgment and sentence orders. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Consistent with this mandate, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). Offenders, attorneys, community corrections officers and judges should not have to resort to principles of statutory construction to figure out what a court-ordered sentence means.

Even if rules of statutory construction were applicable to judgment and sentences, one applicable principle is relevant here: no language can be considered superfluous. City of Seattle v. Edwards, 87 Wn. App. 305, 309, 941 P.2d 697 (1997), overruled on other grounds by State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) (addressing ambiguity in no-contact order's expiration date). Giving effect to all the language in the misdemeanor judgment and sentence means giving effect to the conditions plainly but improperly incorporated into the order. Hence, the error.

The State contends the reference to "conditions" in the misdemeanor judgment and sentence does not mean conditions were imposed as part of the misdemeanor judgment and sentence. Instead, according to the State, the "conditions" merely refer to those imposed as part of the felony sentence. BOR at 6.

The actual language of the court order plainly shows otherwise. The court's order expressly refers to conditions of the misdemeanor sentence, including payments of LFOs. CP 83-84. On its face, the court's order on the misdemeanor sentence incorporates the felony judgment conditions into the misdemeanor sentence. The court ordered "upon completion of any incarceration imposed the defendant shall be released from the custody of the Sheriff of Pierce County and *report to the authorized Probation Officer* of this district, to receive his instructions."

CP 84 (emphasis added). The misdemeanor judgment and sentence expressly refers to "revocation of this probation" for failure to pay LFOs. CP 84.

All of this is error under State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009). As a matter of law, Brame is not subject to supervised conditions as part of his misdemeanor sentence. Having imposed the maximum jail term for the misdemeanor offense, there can be no probationary conditions attached to the sentence. Gailus, 136 Wn. App. at 201.

The State argues the judgment and sentence is ambiguous. BOR at 5. Even if the State were right on this point, describing the judgment and sentence as ambiguous is the functional equivalent of admitting the judgment and sentence is indefinite and uncertain. That is error. Jones, 93 Wn. App. at 17. Ambiguous sentences require remand to make them unambiguous. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997); see also State v. Iniguez, 143 Wn. App. 845, 860, 180 P.3d 855 (2008) (even where oral ruling clarifies court's potentially ambiguous judgment and sentence, remand for correction required), overruled on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009).

As a backup argument, the State asks this Court to treat the matter as a clerical error and for remand for correction of the sentence. BOR at 7. This is not a clerical error. There is nothing in the record that shows the challenged language is the product of an unintentional drafting mistake. See State v. Hendrickson, 165 Wn.2d 474, 478-79, 198 P.3d 1029 (2009) (clerical errors are mistakes in a document that do not reflect the trial court's actual intention, as reflected in the record).

But in the end it does not matter. The remedy is the same one that Brame seeks: removal of the challenged language from the misdemeanor judgment and sentence so that no one labors under the illusion that his misdemeanor sentence carries any conditions with it, including the condition to pay LFOs. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remanding to trial court for correction of the scrivener's errors in the judgment and sentence); State v. Naillieux, 158 Wn. App. 630, 646-47, 241 P.3d 1280 (2010) (same). The mess needs to be cleaned up, whatever the analytical road taken to arrive at this result.

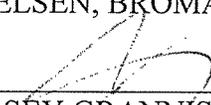
B. CONCLUSION

For the reasons set forth above and in the opening brief, Brame requests that this Court remand to strike the erroneous probationary conditions from the gross misdemeanor sentence.

DATED this 14th day of July 2016

Respectfully Submitted,

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