

COA NO. 48226-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ZACKARY BRAME,

Appellant.

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

The Honorable James Orlando, Judge

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BRIEF OF APPELLANT

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CASEY GRANNIS  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The court erred in ordering probation conditions for the gross misdemeanor conviction under count 2. CP 83-85.

Issue Pertaining to Assignment of Error

Where the court ordered the maximum term of confinement for the misdemeanor conviction, whether the court lacked statutory authority to impose probation conditions associated with a suspended sentence?

B. STATEMENT OF THE CASE

The State charged Zachary Brame with motor vehicle theft, possession of motor vehicle theft tools, and felony harassment. CP 3-4. The case proceeded to trial, where the jury acquitted Brame of harassment but convicted on the remaining two counts. CP 53, 55-56. The court imposed a standard range sentence of 50 months confinement on the vehicle theft conviction. CP 72-73. It sentenced Brame to 364 days confinement for the gross misdemeanor conviction of possession of motor vehicle theft tools, to run concurrent with the felony. CP 81-82, 84. The court also entered an order setting forth sentence conditions for the gross misdemeanor conviction. CP 83-85. Brame appeals. CP 94-114.

C. ARGUMENT

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.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and actually suspends none of it, the court lacks the authority to impose probation. 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). The sentence imposed for the gross misdemeanor conviction under count 2 violates the rule of Gailus.

The court imposed a sentence of 364 days with zero days suspended. CP 81; see also RP<sup>1</sup> 318-19. The court entered an order entitled "conditions on ~~suspended~~ sentence," which states "the Court having sentenced the defendant Zackary Allen Brame to the term of 364 days for the crime(s) of Making Or Possessing Motor Vehicle Theft Tools and the Court having suspended that term, the Court herewith orders the following conditions and provisions: . . . 3. (x) Defendant will pay the

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: RP - five consecutively paginated volumes consisting of 9/30/15, 10/1/15, 10/5/15, 10/6/15, 10/16/15.

following amounts to the Clerk of the Superior Court, Pierce County, Washington . . . see felony J+S."<sup>2</sup> CP 83. The order further provides "Revocation of this probation for nonpayment shall occur if defendant wilfully fails to make the payments having the financial ability to do so or wilfully fails to make a good faith effort to acquire means to make the payment." CP 84. "Further conditions" were imposed, which include "364 days imposed with 0 days suspended" and "see felony judgment + sentence for other conditions." CP 84. The felony judgment and sentence includes a 10-year no contact order as a condition. CP 72.

A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2). The court imposed the maximum term of confinement of 364 days for count 2 with zero days suspended. CP 81, 84. But it entered an order that purported to impose probationary conditions associated with a suspended sentence. CP 83-84. Because this sentence did not actually suspend any jail time, the associated probation conditions must be vacated for count 2. Gailus, 136 Wn. App. at 201. Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

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<sup>2</sup> The felony judgment and sentence imposed \$800 in legal financial obligations. CP 71.

D. CONCLUSION

For the reasons set forth, Brame requests that this Court remand to strike the erroneous probationary conditions for the gross misdemeanor sentence.

DATED this 31<sup>st</sup> day of March 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
\_\_\_\_\_  
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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 31<sup>ST</sup> DAY OF MARCH 2016, 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]      ZACKARY BRAME  
          DOC NO. 306379  
          CEDAR CREEK CORRECTIONS CENTER  
          P.O. BOX 37  
          CONNELL, WA 98556

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MARCH 2016.

X *Patrick Mayovsky*

**NIELSEN, BROMAN & KOCH, PLLC**

**March 31, 2016 - 2:29 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 48226-6

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