

**STATE OF RHODE ISLAND**

**PROVIDENCE, SC.**

**SUPERIOR COURT**

**[Filed: November 18, 2022]**

**STATE OF RHODE ISLAND**

:

**VS.**

:

**P2-2018-3891A**

:

**LYDIA ALICEA**

:

:

**DECISION**

**MONTALBANO, J.** Before this Court is Lydia Alicea’s (Ms. Alicea) appeal of a Superior Court Magistrate’s (the Magistrate) decision dated June 15-16, 2022 finding that Ms. Alicea violated her deferred sentencing agreement, and thereafter sentenced Ms. Alicea to three years of probation and \$1,300 in restitution. Jurisdiction is pursuant to G.L. 1956 § 8-2-11.1(d).

**I**

**Facts and Travel**

On June 19, 2020, Defendant Lydia Alicea pled nolo contendere to a charge of obtaining property by false pretenses under G.L. 1956 § 11-41-4. (Disposition, dated June 19, 2020.) On that same date, Ms. Alicea entered into a deferred sentencing agreement (DSA) for a period of two years pursuant to G.L. 1956 § 12-19-19. (State’s Ex. 1 DSA, June 19, 2020.) One of the fifteen conditions of Ms. Alicea’s DSA, relevant to this appeal, is that Ms. Alicea agreed to pay restitution in the amount of \$1,800.00. *Id.* ¶ 12 (“SPECIAL CONDITIONS: Restitution of \$1800.00”); *see also id.* ¶ 7 (“I will make all payments of monies as directed by the court.”).

On May 27, 2022, the Attorney General’s Office (the State), filed a 32(f) Violation Report (the Report) in anticipation of the expiration of Ms. Alicea’s deferred sentence. (32(f) Violation

Report, May 27, 2022.) The Report alleged that Ms. Alicea had not attempted to pay any restitution and thus failed to comply with a specific condition outlined in her DSA. *Id.* The Report further noted that Ms. Alicea's DSA was set to expire on June 18, 2022. *Id.* On June 9, 2022, Ms. Alicea made a payment of \$500.00 toward her restitution; however, a majority of the balance remained outstanding. (State's Ex. 2, Certified Copy of Restitution Payments<sup>1</sup>.) Ms. Alicea was then referred to the Public Defender's Office and a violation hearing was scheduled. (Clerk's Note, June 9, 2022.)

On June 15, 2022, prior to the expiration of Ms. Alicea's DSA, Ms. Alicea was before the Magistrate for a technical violation hearing on her deferred sentence for failure to comply with the restitution condition. (Hr'g Tr. 4-16, June 15, 2022.) The Magistrate found Ms. Alicea to be in violation of her DSA. *Id.* 7:17-18. The following day, the Magistrate converted Ms. Alicea's deferred sentence to three years of probation and required the payment of the remaining restitution amount of \$1,300, requiring monthly payments of \$36.15. (Hr'g Tr. 28:25, 29:1-6, June 16, 2022.) However, given the minimal financial information submitted by Ms. Alicea, the Magistrate also allowed Ms. Alicea to reserve the right to a hearing regarding her ability to pay the restitution. *Id.* 27:4-11.

On June 17, 2022, pursuant to § 8-2-11.1(d) and 2.9(h) of the Superior Court Rules of Practice, Ms. Alicea timely filed an appeal of the Magistrate's decision.<sup>2</sup> (Appeal of Magistrate's Decision, June 17, 2022.) On July 29, 2022 Ms. Alicea filed a motion to stay the Magistrate's decision as well as restitution payments during the pendency of this appeal. (Def.'s Mot. Stay, July

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<sup>1</sup> The certified copy of restitution payment receipt states that Ms. Alicea made a payment on June 9, 2022 of \$500 toward restitution and \$16.25 for a convenience fee for a total of \$516.25. (State's Ex. 2, Certified Copy of Restitution Payments.)

<sup>2</sup> Ms. Alicea, through counsel, requested transcripts on June 17, 2022 and said transcripts were filed on August 23, 2022. (Letter of Mr. DiLauro, June 17, 2022.)

29, 2022.). The appeal was assigned to Associate Justice Montalbano on August 24, 2022. (Order, Aug. 24, 2022.) On September 16, 2022, a judgment of civil liability with regard to Ms. Alicea's restitution was entered and her restitution payments were stayed during the pendency of this appeal. (Judgment of Civil Liability-Restitution, Sept. 16, 2022; Order, Sept. 20, 2022.) Ms. Alicea filed her appellate memorandum (Def.'s Mem.) on October 6, 2022, and the State filed its memorandum (State's Mem.) on October 20, 2022. Oral arguments took place on November 17, 2022.

## II

### Standard of Review

#### Review of a Magistrate's Decision

A Superior Court Justice's review of a decision of a magistrate is governed by § 8-2-11.1(d) which provides, in pertinent part:

“A party aggrieved by an order entered by the . . . magistrate shall be entitled to a review of the order by a justice of the superior court. Unless otherwise provided in the rules of procedure of the court, the review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by the . . . magistrate.” Section 8-2-11.1(d).

Rule 2.9(h) of the Superior Court Rules of Practice presently governs the review standard, and provides:

“The Superior Court justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject or modify, in whole or in part, the judgment, order or decree of the magistrate. The justice, however, need not formally conduct a new hearing and may consider the record developed before the magistrate, making his or her own determination based on that record whether there is competent evidence upon which the magistrate's judgment, order or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter with instructions.” R.P. 2.9(h).

The record on appeal includes “[t]he original papers and exhibits filed with the Superior Court, the transcript of the proceedings, and the docket entries.” R.P. 2.9(f).

### **III**

#### **Analysis**

##### **A**

#### **Review of the Record and Relevant Procedural and Statutory Provisions**

Superior Court Rules of Criminal Procedure 32(f) dictates the procedures which must be followed in proving, finding, and revoking a deferred sentence based on a violation of the deferred sentencing agreement, and provides in pertinent part:

“The court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed . . . Prior to the hearing the State shall furnish the defendant and the court with a written statement specifying the grounds upon which action is sought under this subdivision. No revocation shall occur unless the State establishes by a fair preponderance of the evidence that the defendant breached a condition of the defendant’s probation or deferred sentence or failed to keep the peace or remain on good behavior.” Super. R. Crim. P. 32(f).

Rhode Island’s statutory scheme governing the court’s powers when a defendant has violated the terms of his or her deferred sentencing agreement is outlined in § 12-19-19. Subsection (b) provides in pertinent part: “A violation of any condition set forth by the written deferral agreement shall violate the terms and conditions of the deferment of sentence and the court may impose a sanction or impose sentence.” Section 12-19-19(b) (emphasis added). Subsection (c) as well as §§ 12-1.3-2 and 12-1.3-3 dictate a unique aspect of entering into a deferred sentencing agreement, in that a defendant is eligible for consideration of expungement if the defendant

completes all the terms of the deferred sentencing agreement, including payment in full of any restitution.<sup>3</sup> Sections 12-19-19(c), 12-1.3-2, 12-1.3-3.

In this case, the Magistrate made her determination as to Ms. Alicea's deferred sentence violation and subsequent sentencing in accordance with the aforementioned procedures and statutes. The Magistrate found that the State filed its 32(f) Violation Report on May 27, 2022 and thereby provided Ms. Alicea with a written statement specifying the grounds upon which the violation was based, i.e., that Ms. Alicea had not attempted to pay any restitution since entering into her DSA on June 19, 2020. (Super. R. Crim. P. 32(f); the Report, May 27, 2022; (Hr'g Tr. 12:7-9, 13:25, June 15, 2022.) Subsequently, Ms. Alicea was afforded a hearing, before the expiration of her DSA, to present evidence and witnesses in response to the State's allegation that Ms. Alicea had violated her deferred sentence for failure to comply with the condition of paying the restitution in full. (Hr'g Tr. 4-16, June 15, 2022); Super. R. Crim. P. 32(f) ("The court shall not revoke probation or revoke a suspension of sentence or impose a sentence previously deferred except after a hearing at which the defendant shall be afforded the opportunity to be present and apprised of the grounds on which such action is proposed.").

During the technical violation hearing on June 15, 2022, the full exhibits demonstrated that Ms. Alicea had paid \$500.00 toward her restitution, and that her deferred sentence was conditioned upon her paying \$1800.00. (State's Ex. 2, Certified Copy of Restitution Payments; State's Ex. 1, DSA ¶ 12.) The Magistrate found that the exhibits established that Ms. Alicea had not paid the full restitution amount agreed upon in her DSA, and articulated that "[T]he purposes of this 32(f) [hearing] is solely to establish whether or not [Ms. Alicea] violated what was stipulated to. There's

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<sup>3</sup> Another distinction between entering into a deferred sentencing agreement as opposed to being sentenced to probation, is that the Court monitors the satisfaction of all deferred sentence agreement conditions. (State's Ex. 1, DSA ¶ 4, June 19, 2020.)

only \$500 paid. The condition of the deferred [agreement] was \$1,800.” (Hr’g Tr. 10:16-20, June 15, 2022.) Accordingly, the Magistrate appropriately determined that based on the exhibits, “[t]he 32(f) standard has been met. The fair preponderance of the evidence is that the deferred agreement was not met . . . the Court has found that she has not paid the restitution. So that is in violation of the Deferred Sentencing Agreement.” (Hr’g Tr. 14:15-18, 12:7-9, June 15, 2022.)

After finding that Ms. Alicea had violated her deferred sentence, the Magistrate appropriately imposed sentence pursuant to the relevant statutory provisions. Sections 12-19-2, 12-19-14, 12-19-19.<sup>4</sup> Upon the finding of a violation of any condition set forth in a written deferred sentence agreement, the court may impose a sentence within the limits prescribed by law, which is precisely what the Magistrate did in Ms. Alicea’s case. Sections 12-19-2(a), 12-19-19(b). Based on Ms. Alicea’s crime, the maximum sentence the Magistrate could have imposed by statute was imprisonment for up to three years and/or a fine of not more than \$1,500. Section 11-41-5(a)(1). Therefore, the Magistrate was well within the relevant sentencing parameters when she imposed three years of probation, conditioned on the payment of the remaining \$1,300 in restitution. (Hr’g Tr. 28:25, 29:1-6, June 16, 2022.)

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<sup>4</sup> Ms. Alicea’s DSA also contained the following relevant provision:

“In the event after review and hearing, the court declares that I have violated the terms and conditions of my deferred sentence, I understand that the court may impose sentence or impose a sanction upon me up to and including the maximum sentence allowable by law. The determination of whether a violation has occurred shall be made by the court in accordance with procedures relating to violation of probation in court rules and G. L. 1956 §§ 12-19-2 and 12-19-14.” (State’s Ex. 1, DSA ¶ 13, June 19, 2020.).

Consequently, for the reasons stated, this Court finds that the Magistrate properly followed all procedural and statutory provisions in ruling that Ms. Alicea violated her deferred sentence, and in the subsequent sentencing of Ms. Alicea.

## **B**

### **Distinguishing *State v. Regan***

On appeal to a Superior Court Justice, Ms. Alicea's primary argument is that the Rhode Island Supreme Court's ruling in *State v. Regan* is applicable to violations of deferred sentences when the basis of the violation is failure to make the required restitution payments. *State v. Regan*, 273 A.3d 116, 116 (R.I. 2022). However, the Magistrate ruled that the holding in *Regan* was not applicable to Ms. Alicea's deferred sentence. (Hr'g Tr. 12:6-25, June 15, 2022.)

In *State v. Regan*, the Rhode Island Supreme Court held that a probation sentence cannot be extended for purposes of restitution payments. *Regan*, 273 A.3d at 121. The defendant in *Regan* pled nolo contendere to a charge of unlawful appropriation in an amount greater than \$1,000, and was sentenced to ten years of imprisonment, eight years suspended with probation, and restitution in the amount of \$520,295.46. *Id.* at 116. Before his probation expired, defendant had not paid his restitution in full. *Id.* at 118. In anticipation of his probation period ending, the State filed a violation notice pursuant to Rule 32(f) of the Superior Court Rules of Criminal Procedure, alleging that defendant failed to comply with his restitution obligation and was therefore in violation of his probation. *Id.* The Superior Court then conducted a violation hearing and found defendant to be a probation violator for his failure to pay his restitution in full prior to the expiration of his probationary period. *Id.* The Superior Court determined that defendant's sentence could be kept open past the time defendant's probation would have otherwise expired to review defendant's payment progress, and that at any time the Court could remove the suspended period of time and

order defendant to serve all or a portion of the amount of suspended time at the Adult Correctional Institutions. *Id.*

The Supreme Court determined that the trial court erred because the defendant's probation ended as of January 2021, and thereafter, there no longer existed a sentence to impose. *Id.* at 121. The Court reasoned that extending the defendant's sentence after his probation expired was not a remedy that the trial court had authority to fashion in a case of an alleged probation violation for failure to pay restitution in full. *Id.* at 120. The Court ruled that while a defendant remains civilly liable for any outstanding restitution upon the expiration of the probationary period, failure to pay restitution cannot result in an extension of a sentence after the probation period has expired. *Id.* at 121; *see also State v. Tavares*, 837 A.2d 730, 733 (R.I. 2003).

In the instant appeal, the Magistrate properly ruled that *Regan* was inapplicable to Ms. Alicea's failure to pay her restitution in full during the duration of her deferred sentence because Ms. Alicea was not on probation, nor had she yet been violated and subsequently sentenced. (Hr'g Tr. 20:10-15, June 16, 2022.) The Magistrate acknowledged that while a probation violation and deferred sentencing agreement may have similar procedural mechanisms, the major difference between Ms. Alicea's violation and that in *Regan* is that in her case, Ms. Alicea was not on a probationary sentence:

MAGISTRATE: "When it's a deferred sentence, the sentence is deferred. So [Ms. Alicea] was never placed on probation . . . Once she's found in violation of the deferred agreement, in accordance with a hearing which we did yesterday [June 15, 2022], she was found to be a violator of the Deferred Sentence Agreement. You used the avenue of a probation violation [32(f) Violation Report], but it's not a violation of probation. It's a violation of the Deferred Sentence Agreement . . . And, thus, [the violation] . . . made the deferred sentence null and void. And the only thing that's up to the Court now is to . . . impose [a] sentence." (Hr'g Tr. 20:10-12, 20:15-22, 21:21-25, June 16, 2022.)

In *Regan*, the gravamen of the Court’s decision was that the defendant’s probation had expired at the time he was found by the trial court to be in violation of his probation for failure to pay restitution, and as such, his sentence could no longer be kept open and “hanging over [his] head.” *Regan*, 273 A.3d at 119, 121. However, unlike in *Regan*, Ms. Alicea was not sentenced at the time the Magistrate found her to be in violation of her deferred sentence, and therefore, there was no sentence for the Magistrate to keep “hanging over [Alicea’s] head” for nonpayment of restitution. *Id.* at 121; (Hr’g Tr. 14:6-19, June 15, 2022.) There was only the question of whether the DSA conditions were violated by Ms. Alicea’s nonpayment of restitution, and if so, whether the Magistrate could impose a sentence, in essence, for the first time. Super. R. Crim. P. 32(f); § 12-19-19(b). This Court finds that because Ms. Alicea was not on a sentence at the time she was found to be in violation of her deferred sentence, the Magistrate properly ruled that *Regan* was inapplicable.<sup>5</sup> (Hr’g Tr. 20:10-15, June 16, 2022.)

Furthermore, as discussed ante, the Magistrate followed the proper procedures because Ms. Alicea was given a written notice of her failure to pay restitution prior to the expiration of her deferred sentence and she was provided a hearing with counsel regarding her alleged violation.<sup>6</sup> *Id.* Only after having found a technical violation of her deferred sentence by a preponderance of

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<sup>5</sup> Once Ms. Alicea’s three-year probationary sentence is complete, the principles expressed by the Rhode Island Supreme Court in *Regan* will apply and the victim will be left with a civil judgment of liability. *Regan*, 273 A.3d at 121.

<sup>6</sup> In *Regan*, the Court emphasized that the defendant was never provided with a hearing when he was sentenced regarding his ability to satisfy his restitution obligation. *Regan*, 273 A.3d at 118, 120 (“Imposition of a restitution order . . . in the absence of a hearing on the accused’s ability to pay ought to be avoided”). The Magistrate acknowledged this concern expressed in *Regan* in reviewing Ms. Alicea’s financial statement provided on the day of the hearing and concluded, “I just don’t think [the financial statement is] enough for the court to really flush out a full ability to pay hearing [], this Supreme Court asked this court to do in *State v. Regan* . . . So I’ll [] let the defendant reserve the right to have a full ability to pay hearing.” (Def.’s Ex. A Full (Financial Statement)); (Hr’g Tr. 29:11-15, 27:6-8, June 16, 2022.)

the evidence did the Magistrate sentence Ms. Alicea to three years' probation. *Id.* The Magistrate also considered sufficient evidence in the record in making her determination with respect to Ms. Alicea's deferred sentence violation and subsequently imposed sentence.<sup>7</sup>

#### IV

#### Conclusion

For the reasons set forth in this Decision, after *de novo* consideration of the Magistrate's June 15-16, 2022 Decision, this Court affirms the Decision of the Magistrate in whole and further determines that competent evidence in the record supports said Decision. Having upheld the Magistrate's Decision, the stay of Ms. Alicea's restitution payments is vacated and said payments in the minimum amount of \$36.15 per month shall resume on December 1, 2022.

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<sup>7</sup> On appeal, Ms. Alicea advances two arguments relating to the sufficiency of evidence utilized by the Magistrate in Ms. Alicea's violation and sentencing determinations. First, Ms. Alicea argues that even if *Regan* is inapplicable to deferred sentences, the evidence introduced at Ms. Alicea's violation hearing is inadequate for a finding that a violation of a deferred sentence took place under the standard articulated in *Bearden v. Georgia*, 461 U.S. 660, 660-61 (1983), a case cited by the Rhode Island Supreme Court in *Regan*. *Regan*, 273 A.3d at 119. *Bearden* holds that if a probationer willfully refused to make a bona fide effort to acquire resources to pay fines or restitution, the court may revoke probation and sentence the defendant within the range of its sentencing authority. *Bearden*, 461 U.S. at 660-61. However, if a probationer could not pay, despite sufficient efforts to do so, the court must consider alternative measures of punishment other than imprisonment. *Id.* Ms. Alicea argues that because she made a payment of \$500 toward her restitution on June 9, 2022, the Magistrate could not have found her failure to pay restitution to be willful. However, Ms. Alicea's argument is misplaced, because if *Regan* is inapplicable, then it follows that *Bearden* is inapplicable, as both *Bearden* and *Regan* specifically address the issue of violations of probation based on failure to pay fines or restitution, and do not address violations of deferred sentences. *Regan*, 273 A.3d at 119-21; *Bearden*, 461 U.S. at 660-61. As such, the Magistrate was not required to make a finding of willfulness as to Ms. Alicea's deferred sentence violation. *Regan*, 273 A.3d at 119-21.

Second, Ms. Alicea argues that the evidence used in the Magistrate's determination of Ms. Alicea's DSA violation and subsequent sentence was "[a]t best... unclear." However, the Magistrate utilized full exhibits in the record, including the DSA as well as restitution payment receipts, and was within statutory guidelines with respect to her sentence of three years of probation and the remaining \$1,300 in restitution. (Hr'g Tr. 23:17-29:6, June 16, 2022.) Consequently, the Magistrate properly relied upon evidence in the record in making her determination.

Counsel shall submit an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** State of Rhode Island v. Lydia Alicea

**CASE NO:** P2-2018-3891A

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** November 18, 2022

**JUSTICE/MAGISTRATE:** Montalbano, J.

**ATTORNEYS:**

**For Plaintiff:** Gabrielle R. Perlmutter, Esq.

**For Defendant:** Michael A. DiLauro, Esq.