STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 12, 2014)

STATE OF RHODE ISLAND	:	
	:	
vs.	:	**P1/92-0104A**
	:	
JULIO ALICEA	:	

DECISION

KRAUSE, J. Defendant Julio Alicea appeals from an Order of Special Magistrate John F. McBurney III (the Magistrate) adjudging the Defendant a probation violator and ordering him to serve the entirety of an 18-year jail term that had originally been imposed but suspended on June 8, 1993, by Associate Justice Mark A. Pfeiffer (now retired).

The Defendant contends that the Magistrate (1) impermissibly exceeded his statutory authority when he ordered him incarcerated; (2) erroneously jailed him on an expired suspended sentence; (3) adjudged him to be a violator without sufficient evidence; and, (4) ordered him to serve an excessive period of incarceration.

The Court disagrees.

The Defendant has accumulated a significant history of child molestation. He has been convicted on three separate occasions of sexually assaulting children. All of his convictions were the result of his having entered pleas of *nolo contendere* and accepting agreed-upon sentences in the following cases:

P1/90-3278A. Sentenced by Cresto, J., on September 22, 1992 to 20 years, 5 years to serve, 15 years suspended with probation (2 counts of 1st degree child molestation).

P1/92-0104A. Sentenced by Pfeiffer, J., on January 8, 1993 to 30 years, 12 years to serve, 18 years suspended with probation (7 counts of 1st degree child molestation).

P1/93-2207A. Sentenced by Pederzani, J., on December 14, 1993 to 30 years, 12 years suspended, 18 years suspended with probation (1 count of 1st degree and 1 count of 2nd degree child molestation).

On May 31, 2013, a Violation Report was filed by the State pursuant to Rule 32(f), Super. R. Crim. P., alleging that the Defendant had violated the terms and conditions of the suspended/probationary sentence which Judge Pfeiffer had imposed in P1/92-0104A in January of 1993. The basis for the violation was a new child molestation charge which allegedly occurred in the spring of 2013. The Violation Report did not allege that the Defendant was a violator of either of the other two cases, P1/93-2207A or P1/90-3278A, the suspension in the latter case having expired, in any event, prior to the new April 2013 allegation.

On June 10, 2013, the Defendant, in open court, personally and through counsel, rejected overtures to resolve the matter and opted to proceed with a violation hearing. Thereafter, the State presented three witnesses: Veronica, the ten-year old complaining witness; Christine Robinson, her fourth grade health education teacher; and, Yahaira Medina, Veronica's mother. The Defendant offered testimony from his wife, Carmen Alicea. He did not testify. The gist of the State's allegation was that the Defendant had engaged in 2nd degree sexual contact with Veronica over her clothing while playing hide and seek in the Defendant's basement on April 1, 2013.

All of the testimony was concluded at the June 10, 2013 hearing, and the Magistrate heard oral argument from both attorneys on June 14, 2013. On July 15, 2013, he issued a Bench Decision finding the Defendant to be a probation violator. He ordered the Defendant to serve all of the 18 years that had previously been imposed but suspended by Judge Pfeiffer in 1993.

1. The Special Magistrate's Authority

The Defendant's principal contention in this appeal is that the Magistrate exceeded his statutory authority when he ordered the Defendant incarcerated. He claims that the statute prescribing the Magistrate's authority does not include the power to incarcerate a probation violator.[1] The short answer to that claim is that the Defendant has waived his opportunity to make it.

Review of a Magistrate's order is "appellate in nature." G.L. 1956 § 8-2-39(e). It is a settled rule of Rhode Island appellate practice that a litigant who fails to raise an issue in the first instance has, absent special circumstances, waived his right to do so later in a subsequent appeal. State v. Bido, 941 A. 2d 822, 828 (R.I. 2008). The Supreme Court has carved out a narrow exception to that general rule: "[T]he alleged error must be . . . harmless, and the exception must implicate an issue of constitutional dimension

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[1] A special magistrate's authority and responsibilities are co-extensive with those of a general magistrate. Sec. 8-2-39.1. They are fully set forth in § 8-2-39 and include, in pertinent part:

> "(c) The general magistrate will be empowered to hear all motions, pretrial conferences, arraignments, probable cause hearings, bail hearings, bail and probation revocation hearings, and to review all such matters including, but not limited to the above, and to modify the terms and conditions of probation and other court-ordered monetary payments including, but not limited to, the extension of time for probation and court-ordered monetary payments as provided by law."

derived from a novel rule of law that could not reasonably have been known to counsel at the time of trial." State v. Breen, 767 A.2d 50, 57 (R.I. 2001).

Significantly, neither before the Magistrate nor in his instant appeal does the Defendant make any claim that the Magistrate acted unconstitutionally or that the statute is in any way constitutionally infirm. Moreover, the record is bereft of any complaint by the Defendant that the Magistrate was without the authority to convene the violation hearing, complete it, and—if he adjudged the Defendant a violator—to convert the Defendant's suspended sentence to a period of incarceration. Indeed, prior to the commencement of the proceedings, settlement efforts were made to avoid a hearing, inviting the very Magistrate about whom the Defendant now complains, to convert a portion of the suspended sentence to a jail term.

Plainly, the Defendant has relinquished and let pass every avenue to have advanced the argument that he belatedly makes now. Having run afoul of the "raise-or-waive rule," he has forfeited the opportunity at this late juncture to raise the issue. Indeed, a similar appeal belatedly challenging a general magistrate's authority (on constitutional grounds) failed for the same raise-or-waive reason in the Supreme Court. State v. Bouffard, 945 A.2d 305 (R.I. 2008).

* * *

Even on its merits, the Defendant's claim remains flawed. He concedes, as he must, that the Magistrate is statutorily authorized to conduct a violation hearing. Sec. 8-2-39(e). He insists, however that the Magistrate had no statutory ability to "impose" a sentence after he had adjudged the Defendant a violator. He is mistaken.

The Defendant misunderstands what the Magistrate did. The Magistrate did not *impose* any sentence at all. Judge Pfeiffer was the one who actually imposed the sentence in 1993, not the Magistrate in July 2013. "It is well settled that a trial justice does not impose a new sentence after a probation revocation hearing, but rather executes the previously imposed sentence." State v. Brown, 821 A.2d 695, 696 n.2 (R.I. 2003), citing State v. Rice, 727 A.2d 1229, 1231 (R.I. 1999) (trial justice did not vacate initial sentence and impose new sentence on defendant, but *merely decreased the suspension time* of his original sentence); accord State v. Quaweay, 799 A.2d 1016, 1018 (R.I. 2002).

Thus, the Magistrate simply gave effect to what Judge Pfeiffer had already envisioned in 1993 in the event that the Defendant later violated his probation. A magistrate's modification of a Superior Court judge's previously suspended sentence, by decreasing the period of the suspension and converting it to a period of incarceration, is not an exercise of authority beyond that which is limned by the statute. Indeed, the statute, § 8-2-39(c), contemplates sentence modifications by a magistrate:

> "(c) The general magistrate will be empowered to hear all . . . probation revocation hearings, and to review all such matters including, but not limited to the above, and to modify the terms and conditions of probation . . . . "

Further, the Legislature expressly mandated that the magistrate's authority and responsibilities "be afforded liberal construction." Sec. 8-2-39(h) (emphasis added).

In the face of such clear and expansive language, the Defendant's contention, that the Magistrate was without authority to direct a violator to serve a sentence that had *already* been imposed, is a cramped and awkward conclusion. Courts do not subscribe to formulas that yield such absurd results. Oladapo v. Charlesgate Nursing Corp., 590 A.2d 405, 407 (R.I. 1991) ("[W]e must interpret the statute to give it effect and avoid

making it a nullity."); State v. Russell, 890 A.2d 453, 458 (R.I. 2006) ("We will not indulge in hypothetical situations that would lead to absurd results."); State v. DeMagistris, 714 A.2d 567, 573 (R.I. 1998) ("[N]o construction of a statute should be adopted that would demote any significant phrase or clause to mere surplusage.").

2. The Violation Case at Issue

The Defendant disingenuously avers that he was impermissibly adjudicated a violator on the wrong case, P1/90-3278A, wherein Judge Cresto's 15-year suspended sentence had already expired. Defense counsel apparently bases this specious claim on the courtroom clerk having mistakenly announced the wrong case number at the July 15, 2013 proceeding and the prosecutor's erroneous echoing of that incorrect number. (Tr. at 1, 9.)[2]

There is no question that Judge Cresto's sentence had, as noted earlier, lapsed by the time the new child molestation allegation arose. Counsel for the Defendant, who also represented the Defendant in both of those cases in 1992 and 1993, has always known that the violation proceedings before the Magistrate targeted only Judge Pfeiffer's 18-year suspended sentence in P1/92-0104A. The 32(f) Violation Report recited only that case number; the cover sheets of the June 10 and 14, 2013 transcripts bear only that case number; and the pleadings—including the Defendant's recent Memorandum of Law—bear only that number. Defense counsel's own statements and those of the Defendant himself at the June 10, 2013 proceedings, at pages 4-7, plainly reflect that they knew that

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[2.] Their mistakes also caused the Court Reporter to incorrectly number the cover page; even the date thereon ("May 15") is inaccurate, although page one of that transcript clearly identifies the date as July 15.

they were always dealing with the 18-year suspended sentence in the instant case, and not Judge Cresto's 15-year expired suspended sentence:

> THE CLERK: Your Honor, the matter before the Court is P1-92-104A, on for a violation hearing. Would counsel identify themselves for the record.
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> MS. SIGNORE: Shannon Signore for the State, your Honor.
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> MR. RUGINSKI: John H. Ruginski, Junior, for the defendant, your Honor.
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> THE COURT: Are you ready to proceed?
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> MS. SIGNORE: Yes, Judge.
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> THE COURT: Before we go with any witnesses, Mr. Ruginski, would you put on the record, please, sir, what you've explained to your client as to his options in this matter.
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> MR. RUGINSKI: Yes, Judge. I explained to my client that we're here today because the State is alleging that he violated the terms and conditions of probation, and he is charge (sic) with two crimes of second-degree child molestation, that although he has spent the last 13 years out of prison, he is still subject to 18 years suspended, 18 years probation, and that the State has made him an offer that if he admits violation, they would give him 15 years to serve. He has rejected that offer.
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> Also, I informed him, as the Court said, your Honor, if he admits violation, you would give him 12 years to serve. He has rejected that offer.
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> * * *
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> THE COURT: Well, Mr. Alicea, I'm going to try this again. Mr. Alicea, you are before me this afternoon, and the State has alleged that you have violated the terms and conditions of your probation.
>
> THE DEFENDANT: Uh-hum.
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> THE COURT: If I am reasonably satisfied that you did violate the terms and conditions of your probation, I can sentence you up to 18 years in prison for that violation. Do you understand that?
>
> Answer "yes" or "no," please.

THE DEFENDANT: I understand that.

The ministerial inaccuracies in the July 15, 2013 transcript, which defense counsel knows full well were mere misstatements and which he speciously purports to rely upon, shield the Defendant not at all from having been adjudged a violator in the within case. Counsel's bogus suggestion that the Defendant was somehow subjected to punishment for the wrong case is most ill-advised, and it is rejected out of hand.

3. Sufficiency of the Evidence

Virtually as an afterthought, at the conclusion of his memorandum, the Defendant says that the evidentiary basis for the violation is lacking and "equivocal." That claim is without merit.

The sole purpose of a violation hearing is to determine whether the Defendant has kept the peace and acted within the bounds of good behavior while on probation. State v. Hazard, 68 A.3d 479, 499 (R.I. 2013). At such a hearing the State need only prove to the hearing justice's reasonable satisfaction that such a breach has occurred. Id. Review of a probation revocation decision is limited to determining whether the hearing justice acted arbitrarily or capriciously. State v. Rivera, 873 A.2d 115, 118 (R.I. 2005). A reviewing court will rightly conclude that a hearing justice does not act unreasonably or arbitrarily when he opts to accept, as more credible, one version of events over another when there is a rational reason to make that choice. State v. Ferrara, 883 A.2d 1140, 1144 (R.I. 2005).

On April 1, 2013, Yahaira Medina brought her daughter Veronica and two sons (ages 7 and 11) to the Defendant's home to retrieve some documents from the Defendant's wife Carmen Alicea and to confer with her about some personal matters.

The Defendant was also present. Mrs. Medina testified that she had known that the Defendant had been in jail previously, but she said that Mrs. Alicea had told her it was because of drug convictions. Mrs. Alicea testified, however, that she had told Mrs. Medina that the prior incarcerations stemmed from child molestation cases.

While at the Defendant's house, Mrs. Medina was aware that the children were in the yard for a while, but when she couldn't see them she went outside with Mrs. Alicea to look for them. They were not there, and neither was the Defendant. Looking through a ground level window, she said she saw the two boys in the basement. The Defendant and all three of the children then came upstairs from the basement. Veronica was a bit red in the face, and she told her mother that there was something she needed to talk to her about privately.

Mrs. Alicea contradicted Mrs. Medina's account. She said that while sitting with Mrs. Medina and reviewing documents at the kitchen table, she was always able to see the children playing in the yard and that the Defendant always remained outside, too. She said that they nor the Defendant ever went into the basement. Veronica, however, testified that, although she very much wanted to stay outside and enjoy the fresh air, she and the others did, in fact, go into the basement at the Defendant's behest.

During that excursion, she said that the Defendant called for a game of hide and seek, designating her the hider and the boys the seekers. Veronica testified that she was good at finding hiding spots herself, but that the Defendant insisted on helping her find a place to hide. He then secreted himself with her, wrapped his arms around her from behind, and pushed his hard "private part" into her buttocks while his body wiggled and shook behind her. She also said that the Defendant rubbed his hands and fingers across

her chest. She testified that it felt uncomfortable and weird, and that she was "grossed out."

Veronica testified that she didn't tell her mother immediately because, before they left, the Defendant had looked at her in a menacing way that frightened her, "like something bad was going to happen to me"; as if "he's going to come after me, to do something." Veronica did, however, disclose the episode to Christine Robinson, her health education teacher, after a lesson on "good and bad touching." The school notified Mrs. Medina, who by that time had already spoken with Veronica about some of the events in the basement. Mrs. Medina then contacted the police.

After weighing all of the evidence, the Magistrate fully credited Veronica's testimony and found Mrs. Medina's version of events more credible than that of the Defendant's wife. The Magistrate stated at page 6 of the July 15, 2013 transcript:

> "This Court finds that . . . the witnesses presented, by the State witnesses, Mrs. Robinson, Veronica Consuela, and Mrs. Medina, the testimony of those witnesses was and is credible. This Court cannot get by the notion that Mrs. Medina, who had been friendly with this family, has known the defendant's wife for many years, considered her a confidant, one that she could go to and discuss issues with, would ever, ever, make this story up. It makes no sense to this Court that she would ever fabricate the fact that she went to that house that day, that the children were in the basement, that they came out of the basement, that her daughter told her about the incident in the basement. It just does not ring true that she would ever make up that story, or make up the story that she didn't know that the defendant was a registered sex offender. I find, based on the evidence presented to me and the witness' testimony, that this defendant did violate the terms and conditions of his probation, in that he failed to keep the peace and be of good behavior."

Credibility decisions such as those are quintessentially entrusted to the fact finder, who is a front row observer of the testimony and the evidence as it unfolds before him. "Determining the relative credibility of witnesses at a probation-revocation hearing is

uniquely the function of the hearing justice." Rivera, 873 A.2d at 118. A "great deal of respect [is afforded] to the factual determinations and credibility assessments made by the judicial officer who has actually observed the human drama that is part and parcel of every trial and who has had an opportunity to appraise witness demeanor and to take into account other realities that cannot be grasped from a reading of a cold record." State v. DiCarlo, 987 A.2d 867, 872 (R.I. 2010); State v. Woods, 936 A.2d 195, 198 (R.I. 2007) ("We will not interfere with the hearing justice's conclusions with respect to the credibility of the complaining child-witness. We do not have the same vantage point as the presiding judge, and we are unable to assess the witness' demeanor, tone of voice, and body language. Our perspective is limited to analyzing words printed on a black and white record.").

This Court has carefully reviewed the record before the Magistrate and finds no basis whatsoever upon which to conclude that he arbitrarily or capriciously erred in accepting Veronica's statements, which plainly reflect sexual misconduct by the Defendant.

4. Sentence Reduction Is Not Available

Lastly, the Defendant claims that requiring him to serve 18 years is "unwarrantedly excessive," and he entreats this Court to reduce the sentence.

Neither a magistrate nor a Superior Court judge has any jurisdiction to reduce a legal sentence previously imposed unless the sentence reduction motion shall have been filed within 120 days from the time that the original sentence was imposed. Super. R. Crim. P. 35. In the context of a probation violation, the relevant sentence is not the term of incarceration ordered by the judge *after* a probation revocation hearing; rather, the

actual sentence at issue is the one that was *originally* imposed, and any motion to reduce it was required to have been filed within 120 days of that date. Brown, 821 A.2d at 696-97; Quaweay, 799 A.2d at 1018.

Here, the sentence in question is Judge Pfeiffer's original 1993 sentence. Obviously, the Defendant's request to recalibrate that sentence is untimely. Accordingly, the Defendant's invitation to reduce his sentence finds no jurisdictional basis, whether before the Magistrate or a Superior Court judge.

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For all of the foregoing reasons, the Defendant's appeal is hereby denied. Further appellate review, should it be sought by the Defendant, may be had pursuant to § 8-2-39(f) in the Supreme Court.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Alicea**
CASE NO:	**P1/92-0104A**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 12, 2014**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
For Plaintiff:	**Shannon G. Signore, Esq.**
For Defendant:	**John H. Ruginski, Jr., Esq.**