SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA		
	Criminal No.	M-4113-03
v.	Calendar 1:	Judge Holeman
	Sentencing Date:	June 28, 2004
ELENA SASSOWER		

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully opposes defendant's motion to correct an illegal sentence. This Court had the authority to sentence defendant to six months' incarceration after she refused to consent to the Court's reasonable conditions of probation. Therefore, this Court's sentence was not illegal.

ARGUMENT

The Court's Sentence Was Not Illegal.

Defendant claims that this Court violated her constitutional rights by "doubling her sentence" after she refused "to write the required words of remorse" (Defendant's Motion at 6). Because this Court's conditions of probation were reasonably related to the

rehabilitation of defendant and the protection of the public, and because the Court had the authority -- after defendant rejected probation -- to impose an alternate sentence of six months' incarceration, defendant's motion should be denied.

A. Background

On April 20, 2004, a jury convicted defendant of disruption of Congress, in violation of D.C. Code § 10-503.16(b)(4). On June 28, 2004, defendant appeared before this Court for sentencing (6-28-04 Tr. 2). At the sentencing hearing, the Court offered to sentence her to ninety-two days' incarceration, with credit for time served, and the remaining period suspended in favor of a period of probation with specified conditions (id. at 15-16). Under this proposed sentence, defendant would pay a $500 fine, would pay $250 to the Victims of Violent Crimes Compensation Fund (VVCCF), and would be placed on probation for two years, with several conditions of probation (id. at 16). Specifically, defendant would be required to obey the law, maintain appointments with the probation officer, abstain from illegal drug use, notify the probation officer of any change in address, and obtain permission from the probation officer before leaving her home jurisdiction for more than two weeks (id. at 16-17). Regarding employment, she would be required to work a minimum of forty hours per week, and, because

she was self-employed, document her work activities and times (id. at 17). She would also be required to perform 300 hours of community service, with 200 hours in her home state of New York, and 100 hours in the District of Columbia (id. at 17-18).

Also while on probation, she would be required to submit to substance abuse, medical and mental health assessments, and to comply with any testing or treatment deemed appropriate (6-28-04 Tr. 18). She would also be required to attend anger management counseling every six months, and to stay away from the United States Capitol Complex and several Senators (id. at 18-21). Defendant would also be required to write letters of apology to several Senators "which state the fact of [her] conviction . . . and [her] remorse for any inconvenience caused . . . by [her] action" (id. at 21). As the Court was stating this last condition, defendant interrupted to say, "I am not remorseful and I will not lie," and, "[The letters] will not be sent because they will not be written" (id.).

The Court explained that a sentence of probation could not be imposed unless defendant agreed to be placed on probation, and asked defendant if she agreed to the proposed conditions (6-28-04 Tr. 21-22). See D.C. Code § 16-710(a) ("A person may not be put on probation without [her] consent"). Defendant responded, "I am requesting a stay of sentence, pending appeal. This case will be

appealed." (Id. at 22). The Court again asked if she accepted the proposed conditions of probation, and she -- after consulting with her attorney advisor -- answered, "No" (id.). The Court then sentenced defendant to six months' incarceration, a $500 fine, and a $250 payment to the VVCCF (id.).

B. Applicable Legal Principles

"The power to affix the penalty upon conviction is vested exclusively in the trial court." In the Matter of L.J., 546 A.2d 429, 434 (D.C. 1988) (quotation omitted); see also Walden v. United States, 366 A.2d 1075, 1076-1077 (D.C. 1976) (a motion to reduce sentence "is addressed to the trial court's sound discretion"). Regarding probation conditions, the trial court's "discretion in formulating terms and conditions of probation is . . . limited by the requirement that the conditions be reasonably related to the rehabilitation of the convicted person and the protection of the public." Gotay v. United States, 805 A.2d 944, 946 (D.C. 2002) (quotation omitted).

C. The Proposed Conditions Of Probation Were Not Unconstitutional.

Despite defendant's broad claim (at 6-10) that "this Court's decision to impose the apology as a condition of probation violated

[] the . . . Constitution,"[1] probationary terms similar to those proposed in the instant case have been repeatedly upheld against similar challenges. See, e.g., United States v. Clark, 918 F.2d 843, 847-48 (9th Cir. 1990) ("Neither [of the defendants] have admitted guilt or taken responsibility for their actions [in committing perjury]. Therefore, a public apology may serve a rehabilitative purpose") (citing Gollaher v. United States, 419 F.2d 520, 530 (9th Cir.) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault"), cert. denied, 396 U.S. 960 (1969)); Huffman v. United States, 259 A.2d 342, 346 (D.C. 1969) (upholding conditions not "immoral, illegal, or impossible of performance" and rejecting claim that "a condition can never be imposed which would restrict [the defendant's] constitutional rights, because the alternative is imprisonment in jail which certainly restricts their rights. The choice is theirs to either

[1] Notably, defendant does not cite to a single case from this jurisdiction in support of her claim, but rather argues (at 9) that the Court's requirement was unconstitutional because it would have "compel[led] her to abandon her long-held political beliefs." This argument is meritless. The requirement that defendant express remorse for her crime did not deprive her of any fundamental rights. Moreover, the case law makes clear that this Court may impose a condition of probation implicating fundamental rights if, as in this case, the conditions are reasonably related to the rehabilitation of defendant and the protection of the public. See supra pp. 4-6.

serve a jail sentence or accept the condition"); United States v. Schave, 186 F.3d 839, 843 (7th Cir. 1999) (upholding alcohol and associational restrictions, and holding that "a court will not strike down conditions of [supervised] release, even if they implicate fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism"); United States v. Ritter, 118 F.3d 502, 504-506 (6th Cir. 1997) (same holding).

Notably, the Court's proposed condition that defendant write letters of apology to several Senators "stat[ing] the fact of [her] conviction . . . and [her] remorse for any inconvenience caused . . . by [her] action" (6/28/04 Tr. at 21), did not require defendant to change her personal beliefs. Indeed, contrary to defendant's claim (at 6) that the letters "would have required [defendant] to espouse a political view with which she did not agree," this Court simply required defendant, as a condition of her probation, to apologize for her criminal conduct towards Congress.

In sum, defendant is unable to show that the proposed conditions of probation were so clearly unrelated to rehabilitation and prevention of recidivism that they were illegal. Instead, the proposed conditions, including the letters of apology, were all well within the Court's discretion in meeting the goals of fostering rehabilitation and deterring recidivism.

D. The Six Month Sentence of Incarceration Was Not Illegal.

Although defendant claims (at 10-11) that the Court "could not increase [her] sentence for refusing to accept the probation offered," it was well within this Court's authority to impose, as an alternate sentence, incarceration for six months, with the same fine and VVCCF payment. Indeed, the Court, by initially offering a ninety-two day suspended jail term, indicated its desire to address rehabilitation and recidivism without the need for a six month jail term. By rejecting this option, however, defendant removed it from the Court's consideration, and forced this Court to craft another means by which its rehabilitation and recidivism concerns could be addressed.

Significantly, this is not a case where a trial court imposed sentence after a defendant had already violated the terms of probation. This is also not a case where, as defendant contends (at 10-12), a trial court "doubled" or "increased" a defendant's sentence for refusing probation. On the contrary, the Court in this case never signaled that a ninety-two day suspended sentence was, in and of itself, an adequate sentence for defendant. Rather, the ninety-two day suspended sentence was always accompanied by a two-year probationary period with several specified conditions of probation (6/28/04 Tr. 15-16).

Accordingly, this is simply a case where defendant rejected probation and, as a result, the Court imposed an alternate sentence of incarceration. Thus, defendant's reliance on D.C. Code § 24-304(a) is misplaced. Rather, as in Alabama v. Smith, 490 U.S. 794, 801 (1989), the "factors that may have indicated leniency as consideration" for defendant's agreement to probation were no longer present after she rejected it. Therefore, the Court's six month sentence was not illegal.[2]

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[2] Defendant's citations to Superior Court Rule of Criminal Procedure 32(c) and to D.C. Code §§ 16-710(a) and 23-110, are unavailing. The record is clear that the Court, in compliance with Rule 32(c), twice asked defendant if she agreed to the proposed conditions of probation, and that defendant freely and voluntarily answered, "No" (6-28-04 Tr. 21-22). Consequently, this Court never imposed or "pronounced" sentence upon defendant until after she rejected probation. Moreover, there is no evidence in the record that -- after defendant did not consent to probation -- the Court's "pronounced" sentence of six months' incarceration was "an inherently coercive and punitive action" (as boldly claimed by defendant at 12), in violation of § 16-710(a).

WHEREFORE, it is respectfully requested that defendant's motion to correct an illegal sentence be denied.

Respectfully submitted,

Kenneth Wainstein /AHM

KENNETH L. WAINSTEIN
United States Attorney

John Fisher /AHM

JOHN R. FISHER
Assistant United States Attorney

AARON H. MENDELSOHN
Assistant United States Attorney
D.C. Bar No. 467570
555 4th Street, N.W. - Rm. 8104
Washington, D.C. 20530
(202) 514-7088

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - MISDEMEANOR BRANCH

UNITED STATES OF AMERICA v. ELENA SASSOWER, Defendant.	:	M-4113-03 Judge Holeman Closed Case

ORDER

Upon consideration of the Defendant's Motion to Correct an Illegal Sentence, and the government's opposition thereto, it is HEREBY ORDERED that the motion is DENIED.

SIGNED IN CHAMBERS

Brian Holeman
Associate Judge

Copies Mailed to:

Steven Lieberman, Esquire
Rothwell, Figg, Ernst & Manbeck, P.C.
1425 L Street, N.W., Suite 800
Washington, D.C. 20005

John R. Fisher, Esquire
Chief, Appellate Division
U.S. Attorney's Office
555 4th Street, N.W. - Rm. 8104
Washington, D.C. 20530