DISTRICT OF COLUMBIA
COURT OF APPEALS

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ADMINISTRATIVE
SERVICE DIVISION

No. 04-CM-760

ELENA RUTH SASSOWER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPELLEE'S OPPOSITION TO APPELLANT'S MOTION FOR STAY AND FOR RELEASE PENDING APPEAL

Appellee, the United States of America, respectfully opposes appellant's motion for stay and for release pending appeal. Appellant has not carried her burden under the governing statute, D.C. Code § 23-1325(c).

ARGUMENT

Appellant has not Carried her Burden Under Section 1325(c)

A. Background

On April 20, 2004, a jury convicted appellant of disruption of Congress, in violation of D.C. Code § 10-503.16(b)(4). On June 28, 2004, appellant appeared before the Honorable Brian Holeman, who had presided over the trial, for sentencing (6-28-04 Tr. 2). At the sentencing hearing, the trial court offered

to sentence her to 92 days incarceration, with credit for time served, and the remaining period suspended (id. at 15-16). Under this proposed sentence, appellant 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, appellant 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 an additional 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).

Appellant 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 trial court was stating this last condition, appellant 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 trial court explained that this sentence of probation could not be imposed unless appellant agreed to the proposed conditions of probation, and asked appellant 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"). Appellant 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 trial court then sentenced appellant to six months incarceration, a $500 fine, and a $250 payment to the VVCCF (id.).

Later that day, appellant filed a motion for stay and for release "pending appeal of the trial court's sentencing" (Appellant's Motion at 1).

B. Applicable Legal Principles and Standard of Review

D.C. Code § 23-1325(c) "presumes that a person who has been convicted and sentenced will be detained pending appeal." Payne v. United States, 792 A.2d 237, 239 (D.C. 2001). To overcome this presumption, a defendant bears the burden of proving "by clear and convincing evidence that (1) the person is not likely to flee or pose a danger to any other person or to the property of others, and (2) the appeal . . . raises a substantial question of law or fact likely to result in a reversal or an order for a new trial." D.C. Code § 23-1325(c). This Court "will defer greatly to the trial court's factual findings," and determines *de novo* whether a substantial legal question has been raised. Payne, 792 A.2d at 240.

"'The power to affix the penalty upon conviction is vested exclusively in the trial court, and the appellate court is vested with no jurisdiction in respect of the exercise of that power, provided it does not exceed the statutory limit.'" In the Matter of L.J., 546 A.2d 429, 434 (D.C. 1988) (quoting Raymond v. United States, 26 App. D.C. 250, 257 (1905), cert. denied, 200 U.S. 619 (1906)). This Court "does not review excessiveness of sentences, . . . [and] in the absence of a fundamental defect in a sentence, this court may not reduce a sentence within statutory limits." Johnson v. United States,

628 A.2d 1009, 1015 (D.C. 1993). 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) (quoting Moore v. United States, 387 A.2d 714, 716 (D.C. 1978) (citations omitted)).

Where an appellant alleges vindictiveness by the trial court in imposing sentence, vindictiveness is presumed in only a limited number of circumstances, such as where a trial judge "sentences a defendant to a greater sentence for the same offenses after a second trial," Johnson, 628 A.2d at 1013. However, where circumstances supporting leniency in the earlier sentence are no longer present, no such presumption exists, and appellant must show actual vindictiveness. See Alabama v. Smith, 490 U.S. 794, 801 (1989) (noting that "after a trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present").[1/]

[1/] Appellant argues (Appellant's motion at 1) that she is entitled to a stay and release pending appeal under the four-part test set forth in civil cases such as Virginia Petroleum Jobbers Ass'n v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). Under this test, "to prevail on a motion for a stay, a movant must show that . . . she is likely to succeed on

(continued...)

C. Appellant has not Carried her Burden Under Section 1325(c)

Appellant is unable to defeat the presumption of detention under section 23-1325(c). Indeed, appellant does not even attempt to do so, instead making only conclusory assertions about the legality of her conviction and sentence. Appellant in effect claims only to have what she considers a good-faith basis for appeal. However, this falls far short of the more exacting

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1/(...continued)
the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by the stay, and that the public interest favors the granting of a stay." Barry v. Washington Post Co., 529 A.2d 319, 320-21 (D.C. 1987) (cited in Horton v. United States, 591 A.2d 1280, 1284 (D.C. 1991)). Although Horton was a criminal case, it pertained to an appeal of a pretrial order, rather than a sentence after conviction. Because the latter circumstance is directly addressed by section 1325(c), the government asserts that this statute, rather than the Barry four-part test, governs appellant's motion. See Collins v. United States, 596 A.2d 489, 504 n.12 (D.C. 1991) (Schwelb, J., dissenting on other grounds) (request for bond pending appeal governed by section 1325(c), and not by Barry).

In addition, under D.C. App. R. 8(a), application for a stay pending appeal must first be made to the trial court. This Court "construe[s] [Rule 8(a)] strictly," and is "loath to proceed with a stay pending the outcome of the appeal without the input of the trial court to this decision." Horton, 591 A.2d at 1284. Appellant has not filed a motion for stay or for release in the trial court, and her oral request for a stay, made in response to the trial court's asking whether she accepted the proposed terms of probation (6-28-04 Tr. 22), preceded the trial court's final imposition of sentence, and did not offer any grounds for the request, other than that she planned to file an appeal. Accordingly, under Horton, any claim under Barry is not ripe for appellate review.

requirements of section 23-1325(c).

For example, appellant makes no effort to show by clear and convincing evidence that her appeal raises "substantial questions of law or fact likely to result in a reversal or an order for a new trial" under section 23-1325(c). Regarding the legality of her conviction, appellant claims that she will challenge the constitutionality of section 10-503.16(b)(4), both facially and as applied, as well as the sufficiency of the evidence (Supp. Brief for Appellant at 2-3). However, appellant cites no authority in support of her position, much less shows by clear and convincing evidence that a reversal or new trial is likely under section 23-1325(c). Indeed, convictions under section 10-503.16(b)(4) have been repeatedly upheld against both constitutional and sufficiency challenges. See, e.g., Armfield v. United States, 811 A.2d 792 (D.C. 2002) (upholding statute against First Amendment challenge and finding evidence sufficient to convict where defendant stood up in House of Representatives gallery and called out with intent to be heard by House members) (citing Hasty v. United States, 669 A.2d 127, 132 n.5 (D.C. 1995)); Smith-Caronia v. United States, 714 A.2d 764 (D.C. 1998) (same).[2/]

[2/] The government recognizes the seriousness of any constitutional claim. We do not herein seek to fully brief the (continued...)

As to the sufficiency of the evidence against her, appellant suggests that the Senate Judiciary Committee hearing had adjourned at the time of her outburst, and that she had no notice that such an outburst was impermissible (Supp. Brief for Appellant at 2-3). However, both arguments were presented to, and rejected by, the jury at trial.[3/] For this reason, and because this Court "must view all the evidence in the light most favorable to the government," Nelson v. United States, 601 A.2d 582, 593 (D.C. 1991) (citations omitted), appellant cannot show that she is likely to prevail on the sufficiency claim.

Regarding her challenge to the legality of her sentence, appellant simply assumes that which she is required to prove, i.e., she takes it as "[g]iven that she is likely to prevail . . . [because] probation infringes on" First Amendment rights, and declares that the sentence imposed was "unconstitutional and

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[2/](...continued)
issue, but instead to note appellant's failure to carry the burden assigned to her at this stage.

[3/] Indeed, there was evidence that appellant planned to disrupt the hearing and that members of the Capitol Police had learned of these plans. The day before her arrest, appellant was informed by the United States Capitol Police that if she caused such a disruption, she would be subject to arrest. In addition, at trial the parties argued the question of whether the Congress was in session at the time of appellant's outburst, and the jury's instructions included the statute's requirement that the outburst be with "intent to impede, disrupt, or disturb the orderly conduct of any session of the Congress or either House thereof." D.C. Code § 10-503.16(b)(4).

vindictive" (Brief for Appellant at 4). As with her constitutional challenge, appellant cites nothing in support of her claim. Moreover, as with her constitutional challenge, probationary terms similar to those proposed in this 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 Gollagher 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 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).

In the present case, appellant is unable to show that the proposed conditions of probation were so clearly unrelated to rehabilitation and prevention of recidivism that she is likely to prevail on the merits of her attack on the sentence. Instead, the proposed conditions, including the letters of apology, community service, health screenings, anger counseling, stay away orders from the Capitol and certain Senators, and terms of contact with the probation officer were all well within the trial court's discretion in meeting the goals of fostering rehabilitation and deterring recidivism.

Accordingly, when appellant rejected the proposed conditions of probation, it was within the trial court's authority to impose, as an alternate sentence, incarceration for six months, with the same fine and VVCCF payment. Appellant again cites nothing to support her claim that this sentence was "unconstitutional and vindictive" (Brief for Appellant at 4). To the contrary, the trial 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, appellant removed it from the trial court's consideration, and forced the trial court to craft another means by which its rehabilitation and recidivism concerns could be addressed. Here, as in Smith, the "factors that may have indicated leniency as consideration" for appellant's agreement to the probation conditions were no longer present after she rejected the conditions. The trial court did not exceed its authority, and in any event, appellant has not shown that she is so likely to succeed in challenging it as to defeat the presumption of detention under section 1325(c).[4/] Because appellant has failed to carry her burden of demonstrating, by clear and convincing evidence, the likelihood of reversal or a new trial, she has failed to rebut the presumption of detention in section 23-1325(c). Absent such a

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[4/] Even if considered under Barry, appellant is unable to carry her burden. For example, appellant fails to show that "she is likely to succeed on the merits" of her claims under Barry, 529 A.2d at 320-21, regardless of whether "the merits" pertains to the legality of her sentence (as indicated in her original motion) or of her conviction (as indicated in her supplemental brief). Instead, as noted above, she makes only conclusory, unsupported declarations, and the relevant case law undermines her position.

In addition, under Barry, the government's and the public's interest, as reflected in section 23-1325(c)'s presumption of detention, is the same here as it is with any convicted defendant: the trial court's sentence should be carried out, unless and until it is shown, by clear and convincing evidence, that there is a "substantial question of law or fact likely to result in a reversal or an order for a new trial."

showing, appellant is not entitled to a stay of her sentence, or to release, pending appeal.

WHEREFORE, it is respectfully requested that appellant's motion for stay and for release pending appeal be denied.

Respectfully submitted,

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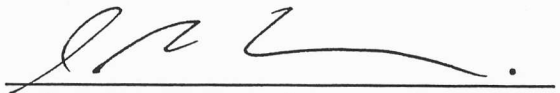
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by mail and facsimile upon the attorneys for appellant, Mark Goldstone, Esq., 9419 Spruce Tree Circle, Bethesda, MD 20814, and Andrew Frey, Esq., and Fatima Goss, Esq., Mayer, Brown, Rowe, and Maw, L.L.P., 1909 K. Street, N.W., Washington, D.C. 20006, this 6th day of July, 2004.



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