

DISTRICT OF COLUMBIA
COURT OF APPEALS

CO-1239
No. 04-~~CM-760~~

ELENA R. SASSOWER,

Appellant,

v.

UNITED STATES,

Appellee.

EMERGENCY APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

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Dated: October 6, 2004

DISCLOSURE STATEMENT

Pursuant to Rule 28(a)(2) of the Rules of the District of Columbia Court of Appeals, counsel for Appellant Elena R. Sassower certifies the following:

1. The full name of the party in the trial court proceeding is Elena Ruth Sassower.
2. The names of all law firms and the attorneys that appeared for the party in the trial court proceeding or are expected to appear in this appellate court are:

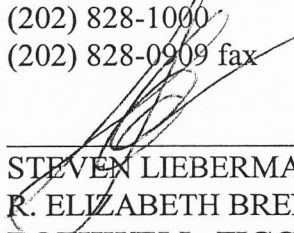
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ISSUE PRESENTED

Whether Ms. Sassower should be immediately released from the D.C. Correctional Treatment Facility pending appeal so that issues regarding her sentence will not be rendered moot by her completion of that sentence.

STATEMENT OF THE CASE

On September 23, 2004, Ms. Sassower filed in this Court an Unopposed Emergency Motion For Release to Preclude Mootness of Appellate Issue, which this Court denied “without prejudice to refile in the Superior Court.” Exhibit 1. Ms. Sassower then immediately refiled her unopposed motion in the Superior Court, which denied the motion on September 24, 2004. Exhibit 2. A notice of appeal was filed October 6, 2004. Exhibit 3. Ms. Sassower now returns to this Court for review of the Superior Court’s denial of that motion. All papers necessary to the Court’s decision of this Emergency Appeal are attached as exhibits to this motion, including information required by sworn affidavit under Rule 9 of this Court and Form 6. Exhibit 4.

Ms. Sassower was originally sentenced to 92 days’ imprisonment for the offense of disruption of Congress. Her sentence was then doubled to 180 days when she declined to consent to probation conditioned on, *inter alia*, her writing letters of apology to the Senators and judicial nominee involved. Ms. Sassower has now served 101 days in jail for doing no more than requesting to testify at a Senate Judiciary Committee Hearing on Judicial Nominations. Pursuant to Rules 4(b)(1), 4(c)(2), and 9(b) of this Court, Ms. Sassower seeks immediate release from the D.C. Correctional Treatment Facility pending appeal so that issues regarding her sentence will not be rendered moot by her completion of that sentence.

STATEMENT OF FACTS

Ms. Sassower is a person dedicated to judicial reform and accountability. She is Cofounder and Coordinator of the Center for Judicial Accountability, whose stated mission is

“To improve the quality of our judiciary by removing political considerations from the judicial selection process and by ensuring that the process of disciplining and removing judges is effective and meaningful.” <http://www.judgewatch.org/mission.htm>. Ms. Sassower is also an active member and leader in her synagogue community in White Plains, New York. Exhibit 5.

On May 22, 2003, the Senate Judiciary Committee held a hearing on the nomination of Richard C. Wesley to be United States Circuit Judge for the Second Circuit. As the hearing adjourned, Ms. Sassower requested that she be able to testify in opposition to Mr. Wesley’s nomination. She was forcibly removed from the room, handcuffed, and arrested for the misdemeanor offense of disruption of Congress under D.C. Code § 10-503.16(b)(4).

Ms. Sassower served two days’ imprisonment following her initial arrest before she was released on her personal recognizance. Ms. Sassower represented herself at a trial before Judge Brian F. Holeman, where a jury convicted her of disruption of Congress on April 20, 2004. She remained free on her personal recognizance after her conviction.

Under D.C. Code § 10-503.18(b), the maximum penalty for this misdemeanor offense is six-months’ imprisonment and a \$500 fine. After pre-sentence investigation, the U.S. government recommended a five-day suspended sentence and six months’ probation conditioned on completion of an anger-management course. Exhibit 6. The D.C. government recommended only the imposition of a fine *without* jail time. Exhibit 7.

Ms. Sassower voluntarily appeared for sentencing on June 28, 2004, before Judge Brian Holeman, again appearing *pro se*. Exhibit 8. After permitting Ms. Sassower a few minutes to make a statement regarding her sentencing, Judge Holeman stated that he was “ready to impose sentence,” *id.* at 14, “ready to pronounce sentence,” *id.* at 15, and “about to impose sentence,” *id.* Judge Holeman thereafter pronounced his sentence as follows:

Ms. Sassower, I’m sentencing you to 92 days, I’m going to give you credit

for any time served in this case. I'm going to suspend execution as to all remaining time.

I will place you on two years probation. During the probationary term – well, let me back up then before I get into the probationary term.

You will pay a \$500 fine, within 30 days of the sentencing date, so that's within 30 days of today.

You will pay \$250 to the Victims of Violent Crimes Compensation Fund within 30 days of today.

id. at 16. Judge Holeman's sentence thus far exceeded that recommended by either the U.S. or D.C. government.

Judge Holeman thereafter specified his conditions of probation, which consumed six pages of transcript. *Id.* at 16-21. His conditions were unusually extensive and included requirements that Ms. Sassower detail and keep records of her employment by tenths of an hour, that she serve 300 hours of community service, that she undergo anger-management therapy every six months, that she stay away from the United States Capitol complex (including the Library of Congress and the Supreme Court Building), and that she write letters of apology and remorse to five Senators and the judicial nominee at whose hearing she requested to testify. *Id.* None of these conditions of probation were recommended by either the U.S. or D.C. government. Exhibits 6, 7.

Based on firmly held opinions regarding Mr. Wesley's nomination, Ms. Sassower objected to the requirement that she write letters of apology, and did not consent to probation under Judge Holeman's conditions, as is permitted under the concluding sentence of D.C. Code § 16-710(a) ("A person may not be put on probation without his consent"). *Id.* at 21-22.

Instead of executing the sentence he had just pronounced, however, Judge Holeman disregarded his previous sentence and increased Ms. Sassower's sentence to the maximum statutory penalty:

THE COURT: Very well. Then, sentence is imposed as follows:
You are sentenced to six months incarceration.

You will pay, within 30 days, following your incarceration, \$500 as the fine that attaches to the penalty as to the offense for which you've been convicted.

You will also pay, within 30 days, following your incarceration, the \$250 compensation – contribution to the Victims of Violent Crimes Fund.

Ms. Sassower, once again, your pride has gotten in the way of what could have been a beneficial circumstance for you. This incarceration begins forthwith; step her back.

Id. at 22.

Judge Holeman thereafter recalled Ms. Sassower and advised Ms. Sassower of her right to appeal, at which time Ms. Sassower orally requested a stay of her sentence pending appeal. Judge Holeman denied the request, stating: "To do so would be to show you favorable treatment that I have not in the past shown any other convicted criminal defendant in this courtroom and I won't start that practice now." *Id.* at 24.

Ms. Sassower filed a notice of appeal on June 29, 2004. Ms. Sassower has filed numerous *pro se* motions in both this Court and the Superior Court, all of which were denied. Exhibit 9. Ms. Sassower retained the present counsel in mid to late September and on September 23, 2004, Ms. Sassower, through counsel, filed in this Court an Unopposed Emergency Motion For Release to Preclude Mootness of Appellate Issue, which was denied that same day without prejudice to refile in the Superior Court. Exhibit 1. The motion was refiled in the Superior Court the same day and denied by Judge Holeman on September 24, 2004. Exhibit 2. A notice of appeal was filed October 6, 2004. Exhibit 3. Ms. Sassower returns to this Court for review of the Superior Court's denial of that motion.

Ms. Sassower has been imprisoned since her June 28th sentencing hearing. Judge Holeman's 92-day sentence would have ended on September 25, 2004. As of today, October 6, 2004, Ms. Sassower has now served 101 days' imprisonment for requesting to testify in opposition to the nomination of Mr. Wesley's appointment to the judiciary at a Senate Judiciary Committee Hearing on Judicial Nominations. She now seeks immediate release from the D.C.

Correctional Treatment Facility pending appeal so that issues regarding her sentence will not be rendered moot by her completion of that sentence.

ARGUMENT

I. Ms. Sassower's Appeal of Her Sentence Should not be Permitted to be Mooted by Service of the Remainder of that Sentence

Judge Holeman changed his original sentence of 92 days' imprisonment, with credit for time previously served, to the maximum 180 days because Ms. Sassower exercised her statutorily guaranteed right not to consent to the terms of her probation. As will be discussed below, that 180-day sentence raises serious issues for determination by this Court on appeal. Specifically, the 180-day sentence was illegal under, *inter alia*, D.C. Code § 24-304(a), D.C. Code § 16-710(a), and Rule 32(c)(2) of the Criminal Rules of the Superior Court, and also constituted an abuse of discretion.

Because of the existence of these issues, Ms. Sassower, who has now spent an unprecedented 101 days in jail for the offense of disruption of Congress, respectfully requests this Court to order her immediate release to prevent her appeal of Judge Holeman's 180-day sentence becoming a moot issue.

II. If Under D.C. Code § 24-304(a) a Court May not Increase a Defendant's Sentence for Violating a Condition of Probation, *A Fortiori* the Court also Cannot Increase Ms. Sassower's Sentence for Refusing to Accept the Probation Offered.

District of Columbia Code § 24-304(a) enumerates the sanctions that a Court can impose for violations of conditions of probation:

... At any time during the probationary term the court may modify the terms and conditions of the order of probation, or may terminate such probation, when in the opinion of the court the ends of justice shall require, and when the probation is so terminated the court shall enter an order discharging the probationer from serving the imposed penalty; or the court may revoke the order of probation and cause the rearrest of the probationer and *impose a sentence and require him to serve the sentence or pay the fine originally imposed, or both, as the case may be, or any*

lesser sentence. ...

(emphasis added).

It is well settled that § 24-304(a) provides that upon revocation of probation a court may only impose a new sentence that is *no more severe* than the original sentence. *Moore v. U.S.*, 468 A.2d 1331, 1332 (D.C. App. 1983)(quoting *Mulky v. U.S.*, 451 A.2d 855, 856 (D.C. App. 1982) (“[T]he trial court has discretion to impose any sentence that the court could have imposed upon conviction, provided that the new sentence is *no more severe* than the original sentence.”)(emphasis added)); *see also Jones v. U.S.*, 560 A.2d 513, 517 (D.C. App. 1989)(“[V]iolation of a condition of probation may be sanctioned only through revocation of probation and imposition of all or part of the original sentence.”).

If a court cannot increase a defendant’s sentence for violating a condition of probation, *a fortiori* a court also cannot increase a defendant’s sentence for refusing to accept the terms of probation offered. In other words, if it would have been illegal under § 24-304(a) for Judge Holeman to increase Ms. Sassower’s sentence had she broken the probation he offered her, it must also be illegal for Judge Holeman to increase Ms. Sassower’s sentence for not consenting to the probation in the first place. But that is exactly what Judge Holeman did: he increased Ms. Sassower’s sentence to 180 days’ imprisonment because she would not accept the probation he offered in lieu of his previously imposed 92-day sentence. Under § 24-304(a), the only action Judge Holeman was permitted to take upon Ms. Sassower’s refusal of probation was to impose his original 92-day sentence, or a lesser sentence.

III. Judge Holeman’s Increased Sentence Violated D.C. Code § 16-710(a) by Punishing Ms. Sassower for not Consenting to the Probation Offered.

Judge Holeman’s increased sentence also violated D.C. Code § 16-710(a), which states in pertinent part as follows:

[I]n criminal cases in the Superior Court of the District of Columbia, the court may, upon conviction, ... impose sentence and suspend the execution thereof, or impose sentence and suspend the execution of a portion thereof, for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby. In each case of the imposition of sentence and the suspension of the execution thereof, or the imposition of sentence and the suspension of the execution of a portion thereof, the court may place the defendant on probation under the control and supervision of a probation officer. ... *A person may not be put on probation without his consent.*

(emphasis added).

Ms. Sassower undisputably had a statutory right under § 16-710 to decline probation under the conditions required by Judge Holeman in lieu of his 92-day non-probationary sentence. *Jones v. U.S.*, 560 A.2d at 516 n.3; *see also Jamison v. U.S.*, 600 A.2d 65, 70 (D.C. App. 1991)(“That subsection provides for the suspension of imposition or execution of sentence and authorizes the court in such circumstances to place the defendant on probation. However, it contains the specific proviso that “a person may not be put on probation without his consent. ... [T]he language here is clear....”).

Consent is generally recognized to be invalid unless it is freely and voluntarily given, and not the result of duress or coercion, express or implied. *Martin v. U.S.*, 567 A.2d 896, 905 (D.C. App. 1989). Judge Holeman’s punishment of Ms. Sassower for exercising her statutory right was an inherently coercive and punitive action. If a court can punish a defendant with a longer or harsher sentence for not consenting to the terms of probation, the statutory right not to consent to probation is meaningless.

IV. Judge Holeman’s Increased Sentence also Violated Rule 32(c) of the Criminal Rules of the Superior Court.

Rule 32(c)(2) of the District of Columbia Superior Court Rules of Criminal Procedure, directs that “[s]entence shall thereafter be pronounced.” It is well settled that the equivalent provision of the Federal Rules of Criminal Procedure prohibits a District Judge from revising his

or her orally pronounced sentence either upward or downward because of a change of heart. *See, e.g., U.S. v. Aguirre*, 214 F.3d 1122, 1125 (9th Cir. 2000); *U.S. v. Layman*, 116 F.3d 105, 108 (4th Cir. 1997); *U. S. v. Abreu-Cabrera*, 64 F.3d 67, 73 (2nd Cir. 1995); *U.S. v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994). Judge Holeman's revised sentence was purely punitive, there being no new facts or circumstances occurring between the time he pronounced his original sentence and the time he doubled that sentence other than Ms. Sassower's refusal to consent to probation. A Court should be prohibited from taking such punitive action as a matter of law under Rule 32(c)(2).

V. Judge Holeman's 180-day Sentence Constituted an Abuse of Discretion.

Judge Holeman's 180-day and the original 92-day sentences for disruption of Congress are both simply *unprecedented*. Although permitted by statute, disruption of Congress is *not* an offense for which jail time is normally served. Indeed, Ms. Sassower's counsel has found *no* reported instance of a convicted defendant serving time in jail for disruption of Congress in the case law.

Obviously the government found no basis for the imposition of either of Judge Holeman's sentences, for it recommended only a *5-day* suspended sentence, with a 6-month probation conditioned on completion of an anger-management course. Community Supervision Services recommended only the imposition of a fine *without* jail time. These recommendations were *more* lenient than sentences imposed on *protestors* who *intended* to disrupt the workings of Congress. *See, e.g., Markowitz v. U.S.*, 598 A.2d 398 (D.C. App. 1991)(demonstrators in a Capitol building convicted of violating D.C. Code § 9-112(b)(7) and sentenced to five days' imprisonment, suspended on six months' probation and 25 hours' community sentence); *Marcinski v. U.S.*, 479 A.2d 856 (D.C. App. 1984)(protestor in Senate gallery convicted of disrupting Congress sentenced to 60 days' confinement, suspended on one year's probation);

Rowland Cordero v. U.S., 456 A.2d 837 (D.C. App. 1983)(protestor in Senate gallery convicted of disruption of Congress in violation of D.C. Code § 9-112(b)(4) and sentenced to 30 days' imprisonment, suspended on payment of \$300 fine). All Ms. Sassower did was request to testify at a public hearing.

Judge Holeman's 180-day sentence also bore no relation to the offense for which Ms. Sassower was convicted. The only basis in the record for the increased sentence is that Ms. Sassower would not agree to probation in lieu of the Court's 92-day sentence. Judge Holeman then *doubled* an already unprecedented sentence, for this reason only. Ms. Sassower respectfully submits that the sentence constituted an abuse of discretion.

VI. Immediate Relief By this Court is Warranted.

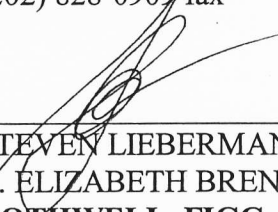
Because Ms. Sassower's service of 92 days' imprisonment was completed on September 25, 2004, and she has already served 101 days in jail, Ms. Sassower will continue to suffer irreparable harm until she is released from jail. The government previously did not oppose Ms. Sassower's immediate release pending resolution of her appeal. Judge Holeman denied that unopposed request for release without opinion. Hence it is both appropriate and in the interest of justice for this Court to consider and grant the requested relief.

CONCLUSION

For the foregoing reasons, the Court should order Ms. Sassower's immediate release from the D.C. Correctional Treatment Facility, subject to travel limitations acceptable to the government, pending determination of her appeal. Should further information be necessary to this Court's decision on the relief sought, Ms. Sassower requests that the Court contact the undersigned counsel.

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