

[Cite as *State v. Mohamed*, 2005-Ohio-193.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84615

STATE OF OHIO	:	
	:	ACCELERATED DOCKET
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
KAMEL MOHAMED	:	
	:	
Defendant-Appellant	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	January 20, 2005
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CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court Case No. CR-437931
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JUDGMENT:	VACATED
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DATE OF JOURNALIZATION:	_____
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APPEARANCES:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor MARY MCGRATH, Assistant 1200 Ontario Street, 8 th Floor Cleveland, Ohio 44113
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For Defendant-Appellant:	JOHN P. PARKER The Brownhoist Building 4403 St. Clair Avenue Cleveland, Ohio 44103
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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶ 2} On June 5, 2003, appellant was indicted on two counts of gross sexual imposition, in violation of R.C. 2907.05. On December 11, 2003, appellant pled guilty to disorderly conduct, in violation of R.C. 2917.11(A)(3), a first-degree misdemeanor. Appellant was sentenced to 30-days incarceration and one-year community control sanctions.¹ Appellant began to serve his sentence on December 19, 2003.

{¶ 3} On January 7, 2004, and at the request of the probation department, the trial court, without conducting a hearing, ordered appellant's community control supervision be transferred to the sex offender unit of the probation department.² On April 8, 2004, however, a hearing was conducted on the matter and again the court referred appellant to the sex offender unit. The order was stayed pending the instant appeal.

{¶ 4} Appellant appealed and has advanced three assignments of

¹As part of appellant's community control sanctions he would receive basic supervision, which included an order to maintain employment and have no contact with the victim. Appellant's probation is due to expire on January 18, 2005.

²This unit required that a defendant undergo counseling, attend classes, and be subject to polygraph examinations. The program is charged to the defendant and can cost upwards of \$300.

error

{¶ 5} for our review.

I.

{¶ 6} In his first assignment of error, appellant argues that "the trial court violated [his] right to due process under the fourteenth amendment of the U.S. Constitution and Crim.R. 43(A) when it amended or modified his sentence without notice and without him being present." We agree.

{¶ 7} Crim.R. 43(A) provides, in relevant part, that "[t]he defendant shall be present at *** every stage of the trial, including *** the imposition of sentence, except as provided by these rules." It is clear from the record that the court changed the conditions of appellant's sentence without affording him notice or the opportunity to be heard.

{¶ 8} The state argues that "*** the transfer of supervision is not an amendment to appellant's sentence but rather is an administrative change within the probation department based on an evaluation of the appellant once he was placed on community control supervision." The state offers no authority in support of this position.

{¶ 9} This court has previously found that "once a sentence has been executed, the trial court no longer has the power to modify

the sentence except as provided by the legislature.”³ *State ex rel. Mason v. Gaul*, Cuyahoga App. No. 83836, 2004-Ohio-2342. We do not agree with the state that the modification made was simply administrative. By being placed under the supervision of the sex offender unit, appellant was subject to additional requirements and costs not associated with basic supervision.⁴ The concerns of the probation department should have been raised to the trial court prior to sentencing, during the sentencing hearing, or immediately thereafter. Nothing in the record explains why the probation department waited until January 7, 2004 to request appellant’s supervision be transferred.

{¶ 10} Appellant’s first assignment of error is sustained. The trial court’s order referring appellant to the supervision of the sex offender unit is hereby vacated.

II.

{¶ 11} Because appellant’s first assignment of error has been sustained, we need not address his second and third assignments of error. App.R. 12(A)(1)(c).

Judgment vacated.

³One such exception is when the violations of probation are violated. However, in the case sub judice, appellant “has not been charged as a probation violator.”

⁴Had the change involved a clerical mistake or involved the changing of a name or address, the state’s argument would be more persuasive. In this case, however, the modification substantially affected the nature of appellant’s sentence.

This cause is vacated and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR.
JUDGE

JAMES D. SWEENEY, J.*, CONCURS;

SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY
(SEE SEPARATE CONCURRING OPINION ATTACHED).

*Sitting by assignment: Judge James D. Sweeney, retired, of the Eighth District Court of Appeals.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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	:	CONCURRING
Plaintiff-Appellee	:	
	:	OPINION
vs.	:	
	:	
KAMEL MOHAMED	:	
	:	
Defendant-Appellant	:	
	:	
	:	

DATE: January 20, 2005

SEAN C. GALLAGHER, J., CONCURRING IN JUDGMENT ONLY:

{¶ 12} I concur in judgment only with the majority disposition on the first assignment of error.

{¶ 13} I write separately to raise a voice of caution regarding the risk that this case will stand to place limitations on administrative decisions made by probation departments absent specific court review. I reject such analysis.

{¶ 14} Probation departments should have the administrative flexibility to assign probationers to supervision units and programs that best serve the interests of justice. Those assignments should be related to the underlying conviction, but the recognition must exist that, in many instances, the problems exhibited by the probationer may not be related to the underlying

conviction. In such cases, such as determinations regarding alcohol or drug rehabilitation, the probation department must have the flexibility to fashion a reasonable remedy without additional court review.