

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0687

State of New Hampshire

v.

Laryssa Benner

Appeal Pursuant to Rule 7 from Judgment
of the Grafton County Superior Court

BRIEF FOR THE DEFENDANT

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QUESTIONS PRESENTED

1. Whether the court erred by revoking Benner's conditional liberty without due process.

Issue preserved by Benner's arguments, DSH 5-14, 18, 21-23, 29, 37, the State's responses, DSH 4-5, 12, 14, 19, 38-39, and the court's ruling. DSH 6-7, 9, 11, 15, 20-21, 22-23, 42.*

2. Whether the court erred by concluding the State presented sufficient evidence that Benner violated the conditions of her deferred sentence.

Issue preserved, in part, by Benner's argument that there was insufficient evidence, DSH 42, the State's argument, DSH 40, and the court's ruling, DSH 42-43; A1, and raised in part as plain error pursuant to Supreme Court Rule 16-A.

* Citations to the record are as follows:
"A" refers to the Appendix to this brief;
"DSH" refers to the transcript of the deferred sentence hearing held on October 30, 2017.

STATEMENT OF THE CASE AND FACTS

In 2015, Laryssa Benner pled guilty to one class A misdemeanor count of theft by deception in Grafton County Superior Court. A2-A4, A14. The court (McLeod, J.) sentenced her to twelve months in jail, but deferred imposition of that sentence for two years on the condition of good behavior, no contact with Amidon Jewelers, payment of \$63.00 in restitution, and a condition that she:

undergo a LADAC evaluation within 90 days and abide by all treatment recommendations. Prior to the appointment, Defendant shall provide the name of the counsellor [sic] to the [Grafton County Attorney's Office] and the scheduled date of the evaluation and sign any necessary releases allowing the evaluator/treatment provider to confirm the evaluation was complete and the defendant is abiding by all treatment recommendations; the evaluator/treatment provider shall notify the GCAO if defendant fails to have the evaluation within 90 days of sentencing or comply with treatment recommendations within 6 mo[nth]s of the evaluation.

A4. The sentencing order further specified that:

All of the sentence is deferred for a period of two years. . . . The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence. Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

A3.

Neither party motioned the court before the deferral period lapsed on May 12, 2017. DSH 5, 7; A5, A10. The following week, the court issued a warrant for Benner's arrest. A5, A10. Upon her arrest several months later,

DSH 3, 7; A5, A10, Benner moved to close the case. A5-A9. She argued that the court could not impose the sentence because the State neglected to file a timely statement of the grounds for imposition. A5-A9. The State objected, A10-A16, and the court (Bornstein, J.) held a hearing to address the motion and the sentence's imposition. DSH 1-45.

At the hearing, in addition to the untimeliness argument made in her pre-hearing motion, Benner argued that the hearing did not comport with due process. DSH 5-14, 18, 21, 23, 29, 37. She asserted that the State failed to provide her with written notice citing the basis for imposition, that the State failed to inform her of the evidence and witnesses it intended to present at the hearing, and that the court erroneously assigned her the burden of proof. Id.

The State responded that the defendant bore the burden to prove compliance and the court could impose the sentence should she fail to produce supporting evidence. DSH 4-5, 12, 14, 38-39. The court agreed, concluding that "the State doesn't have to present any evidence . . . if there was no evidence I could still impose the sentence unless the Defendant shows cause why the deferred sentence should not be imposed." DSH 23. The court thus ruled that it is "the Defendant's burden to prove that she's complied with all the conditions" of the sentence and called upon her to "[p]rove it." DSH 9, 11, 42.

Although the court allocated the burden of proof to the defendant, the State attempted to proffer evidence of Benner's alleged non-compliance with her sentence. DSH 13. Benner objected to the State proceeding by proffer,

asserting her constitutional right to confrontation. DSH 10-13. The court encouraged the State to continue, avowing that it was “not going to consider [the State’s offer of proof] as evidence,” but it wanted to “hear what [the State] has to say.” DSH 10-11. The State abandoned its proffer and called the defendant’s sister, Angelique Benner, to testify about the “situation involving” Benner. DSH 14.

On due process grounds, Benner objected to Angelique¹ testifying, arguing the State had not provided a witness list, a witness statement, or notice of the conduct it alleged violated her sentence. DSH 14-15. The State responded that it “had no obligation to bring witnesses [and thus] there would be no witness list from the State.” Id.

The court allowed Angelique to testify over Benner’s objection. DSH 15. Angelique testified that weeks earlier she attended a court hearing in Vermont at which Benner pled guilty to “charges.” DSH 26-27. Angelique could not “tell . . . exactly when [the offenses] were . . .” committed. Id. The court asked Angelique whether the charged conduct occurred after May 13, 2015, the date Benner’s good behavior period began. DSH 28. She testified that she “honestly can’t answer” the court’s question “because I’m not sure if they happened before, shortly before, or after” that date. DSH 28. She noted that she struggled to keep accurate track of her several siblings’ activities. DSH 27. Upon further inquiry, Angelique testified differently, stating that the “date of those offenses” was “2015 end of the year” and “some in the beginning of

¹ As the witness shares a last name with the appellant, she is referred to by first rather than last name throughout this brief.

2016,” in apparent reference to the same charges. DSH 31. Additionally, Angelique testified that Benner committed an “offense” in Lebanon involving “check fraud” from an unspecified date in 2015. DSH 31.

Angelique testified to Benner’s progress in substance abuse treatment. DSH 15-22, 24-27. Although Angelique’s testimony referenced numerous third-party statements, the court limited its consideration of evidence to Benner’s statements to her sister. See DSH 18 (the court declaring it “won’t consider the hearsay statements for the truth of the matter asserted.”). Benner told her sister that she did not complete treatment with her first provider because insurance did not cover the full program, DSH 17, but she participated in and completed outpatient treatment with a doctor. DSH 18, 20. Angelique testified that Benner received a “substance abuse evaluation” while engaged with that program and that Benner engaged in substance abuse counseling with at least four providers in Vermont and New Hampshire over three years. See DSH 16-18, 27 (Benner attended a detoxification program, a “Family Health Center,” a doctor in a “[p]sychiatric” practice, and, the week prior, a community treatment center in Vermont).

The State presented no additional witnesses, and the court imposed the entirety of the twelve-month sentence. DSH 42-43; A2-A4. It concluded that Benner had the burden to show why the sentence should not be imposed and that she failed to meet this burden. DSH 42. Alternatively, the court concluded that, if the State bore the burden, it proved that Benner failed to comply with

the good behavior and treatment requirements of her deferred sentence. DSH
43.

SUMMARY OF THE ARGUMENT

1. Due process affords a defendant an array of rights at a hearing to revoke her conditional liberty. Included are the right to written notice of the alleged violations, the right to disclosure of the State's anticipated evidence, and the right not to have the sentence imposed unless the State proves the violation by a preponderance of the evidence. Prior to Benner's hearing, the State did not inform her in writing of the basis for the imposition or notify her of the evidence and witnesses it intended to present. Moreover, the court erroneously required that Benner shoulder the burden of proving compliance rather than, as the law requires, requiring the State prove the violation by a preponderance of the evidence.

2. The court found that Benner violated the substance abuse treatment and good behavior requirements of her deferred sentence. The evidence, however, was insufficient to prove that Benner violated these conditions. The court thus erred in finding that the State proved Benner violated the conditions of her deferred sentence.

I. THE PROCEDURE EMPLOYED HERE DENIED BENNER DUE PROCESS.

Due process claims pose a question of constitutional law and thus the Court reviews them *de novo*. State v. Abram, 156 N.H. 646, 652 (2008); see also State v. Mouser, 168 N.H. 19, 22 (2015) (reviewing a trial court’s legal conclusions *de novo*). Likewise, “the allocation of the burden of proof [presents] a question of law,” and is reviewed *de novo*. Att’y Gen., Dir. of Charitable Trusts v. Loreto Publ’ns, Inc., 169 N.H. 68, 76 (2016) (quotation omitted). In analyzing the defendant’s due process claims, this Court looks first to the New Hampshire Constitution, and cites decisions of the United States Supreme Court and other jurisdictions only to aid in the State constitutional analysis. Abram, 156 N.H. at 651.

Although deferred sentences lack statutory authorization, the legislature has recognized their use. State v. Rothe, 142 N.H. 483, 485 (1997); RSA 625:9 VIII (discussing a “suspended or deferred jail sentence”). When the court defers a period of incarceration it effectively postpones its sentencing decision to a future date. State v. Parker, 155 N.H. 89, 92 (2007); see also State v. Almodovar, 158 N.H. 548, 554 (2009) (“A deferred sentence allows a trial court to retain jurisdiction to impose incarceration at a later time, and provides the defendant with conditional liberty.”). If at the end of the deferral period the defendant has met the sentencing conditions then she remains at liberty; if she fails to satisfy the conditions, then the court may impose some or all of the sentence.

The issues arising in this section pertain to the process due a defendant at a hearing to impose a deferred sentence. First, Benner contends that the court erroneously assigned the burden of proof to the defense. Second, she argues that the process provided at the hearing, particularly as to notice, was constitutionally inadequate.

A. The court erred by placing the burden on Benner to prove her conditional liberty should not be revoked.

At the imposition hearing, Benner asserted that the State bore the burden of proving she violated her conditions of release. DSH 11, 37 (citing Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982)). The State replied that the defendant bore the burden to show compliance and that it had no obligation to prove a violation occurred. DSH 4-5, 12, 14, 38-39. The court concluded that the defendant bore the burden and found she failed to meet that burden. DSH 23, 42. This section addresses the court's finding that Benner bore the burden.

Due process considerations determine which party bears the burden of proof. See In re Winship, 397 U.S. 358 (1970) (the level of proof demanded in a criminal trial arises from the due process clause); In re Sanborn, 130 N.H. 430, 441-46 (1988) (setting burden proof in civil commitment proceedings in accordance with due process). The State bears the burden of proof at a deferred sentence hearing. State v. Kelly, 159 N.H. 390, 391 (2009) (detailing how "the State satisfies its burden" of proving the defendant violated a condition of the deferred sentence). The State must demonstrate "by a preponderance of the evidence [that there was] a violation of the condition upon which the sentence

was deferred.” Id. In respect to the applicable burden, the Court has not distinguished deferred sentences from suspended ones. Compare Id. (requiring State prove violation of a condition of a deferred sentence by a preponderance of the evidence) with Flood, 159 N.H. 353, 357 (2009) (requiring State prove violation of a condition of a suspended sentence by a preponderance of the evidence). Allocating the burden to the State safeguards a defendant’s constitutional right to remain silent. See id. at 355 (defendant has the right to remain silent at a sentence imposition hearing).

Consistent with this Court’s precedent, a court may not impose a deferred sentence because the defendant failed to present evidence. Here, the court’s erroneous allocation of the burden prejudiced Benner as the State failed to prove the violations under the applicable burden. See infra pp. 13-22 (reviewing sufficiency of the evidence). The court erred by imposing Benner’s deferred sentence based on her failure to satisfy a burden that she did not have, and she was prejudiced by this misallocation.

B. The court erred by revoking Benner’s conditional liberty without the requisite notice.

Benner argued that the State failed to provide notice in the form of a witness list, witness statement, and the alleged grounds for the violation. DSH 13-15, 37. She objected to Angelique’s testimony on due process grounds. Id. The court permitted Angelique to testify over Benner’s objection. DSH 15, 43. Based on this testimony alone, the court found that the State met its burden.

DSH 43; see also DSH 11 (the State's offer of proof was not considered by the Court as evidence).

Under Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982), a defendant is entitled to due process "when some condition set by the court has [allegedly] not been met" and incarceration is the proposed remedy. "The liberty interest involved in imposing a deferred sentence falls squarely within" the class of proceedings afforded due process under Stapleford. Almodovar, 158 N.H. at 554; cf. Parker, 155 N.H. at 91-92 (concluding that a hearing to impose a deferred sentence is a "critical stage" of the criminal proceeding where a defendant's future liberty is at stake).

Deferred sentences differ from suspended sentences in that defendants who do not reengage with the court at the end of the deferral period are subject to arrest and hearing. Thus, *all* defendants serving a deferred sentence will be brought to court to address potential imposition through a defendant's petition or the court's warrant. In contrast, defendants serving a suspended sentence are only subject to imposition if the State motions the court. In practice, only a fraction of defendants serving a suspended sentence return to court. Although hearings to impose a deferred arrive in court by a different procedure and with different frequency, the due process protections applicable at a deferred sentence imposition hearing are no different from those applicable at one to impose a suspended sentence. Flood, 159 N.H. 355 (applying Stapleford protections to hearings to impose "*suspended or deferred sentence[s]* of incarceration.") (emphasis added). Moreover, nothing in this court's sentencing

order diminished or waived the process to which Benner was entitled. A3 (stating only that Benner “*may* petition the Court to show cause why the deferred commitment should not be imposed,” and noting that her failure to do so “will result in the immediate issuance of a warrant for the defendant’s arrest.”) (emphasis added).

To comply with due process, the trial court’s “record must show” that a defendant facing imposition of her conditional liberty was afforded:

- (1) written notice of the conduct which triggers the sought-after incarceration; (2) disclosure to the defendant of the evidence against [her]; (3) the opportunity to be heard in person and to present witnesses and evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a statement in the record by the court indicating in substance the evidence relied upon and the reasons for imposing commitment; and (6) representation by counsel, to be appointed by the court if the defendant is indigent.

Stapleford, 122 N.H. at 1088; *see, e.g., Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (holding a lawyer must be afforded at a deferred sentencing hearing); Parker, 155 N.H. at 92 (holding defendant has a right to counsel at a deferred sentence hearing); Almodovar, 158 N.H. at 554-55 (holding defendant has a right to a hearing before a deferred sentence may be imposed).

Generally, notice requirements are intended to ensure defendants have a meaningful opportunity to refute the State’s evidence and identify relevant rebuttal evidence. *See* N.H. Const. pt. I, art. 15 (“no subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him.”); Wolff v. McDonnell, 418 U.S. 539, 564 (1974) (“Part of the function of notice is to give the charged party a

chance to marshal the facts in his defense and to clarify what the charges are, in fact.”). Benner had no such opportunity in this case.

Here, the State elected not to advance a basis for imposing the sentence in its written objection, asserting it did not have an obligation to do so. A10; see also A10-A16. Thus, Benner appeared at the deferred sentence hearing without notice of the sentencing condition she allegedly violated, without notice of the conduct the State alleged constituted a violation, and without notice of the evidence the State intended to present to prove that conduct.

A defendant relies upon the State’s notice to prepare her defense. For example, here, if the State had notified Benner that the treatment-related condition was at issue, Benner may have sought documentation from her treatment providers ahead of the hearing. If the State had notified Benner it intended to argue she failed to remain of good behavior in Lebanon and of its intention to present a witness to that alleged criminal act, she could have prepared a cross-examination or conducted investigation to address that claim. If the State had notified Benner it intended to argue she violated her restitution obligation, she may have brought a receipt. Instead, Benner was left to speculate what the State might assert at her hearing and the State was free to identify violations *ad hoc* as evidence was introduced. Such a hearing does not comport with due process.

II. THE COURT ERRED IN FINDING SUFFICIENT EVIDENCE THAT BENNER VIOLATED THE GOOD BEHAVIOR AND TREATMENT CONDITIONS OF HER DEFERRED SENTENCE.

The State presented insufficient evidence that Benner violated the good behavior and treatment conditions of her sentence. The first three arguments below pertain to the good behavior condition and the last to the treatment condition. First, the evidence did not prove that Benner engaged in criminal conduct during the relevant time. Second, the court erred in relying upon convictions without establishing whether she was counseled or waived counsel on those matters. Third, the witness's observations of Benner's plea hearing did not prove that Benner committed a crime. Fourth, the witness's testimony was insufficient to prove Benner violated the treatment condition of her sentence.

At the close of evidence, the State asserted that Angelique's testimony proved that Benner did not remain of good behavior "because of the arrest and conviction in Vermont and the pending charges in Lebanon," and also proved that she violated the treatment requirements of her sentence. DSH 40-41. Benner asserted that the Vermont convictions were insufficient as the State did not prove the offense date. DSH 40. The court found that the State established that Benner failed to remain of good behavior and that she did not comply with her treatment obligations. DSH 43.

A. The court erred in finding sufficient evidence that Benner violated the good behavior condition.

"To impose a suspended or deferred sentence on the ground that the defendant has violated a condition of good behavior, a trial court must find that

the defendant engaged in criminal conduct.” State v. Smith, 163 N.H. 13, 17 (2011) (brackets and quotation omitted). The State can meet this burden “either by establishing the fact of a criminal conviction for the acts which constitute the violation or by proof of the commission of the underlying acts.” State v. Gibbs, 157 N.H. 538, 542 (2008). Here, the State sought to prove the fact of a criminal conviction and presented no evidence of the underlying acts.

First, the evidence of a violation of good behavior was insufficient as the State failed to prove the conduct occurred within the period set in the sentencing order. As this issue was raised in the trial court, it is reviewed *de novo*. State v. Morrill, 169 N.H. 709, 718 (2017) (because a challenge to the sufficiency of the evidence “raises a claim of legal error,” the Court’s standard of review is *de novo*). To prevail on a challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing the evidence and reasonable inferences from it in the light most favorable to the State, could have found, by a preponderance of the evidence, that she violated a condition of her deferred sentence. State v. Smith, 163 N.H. 13, 18 (2011); State v. Parent, No. 2014-0755, 2016 N.H. LEXIS 19, at *1 (Feb. 12, 2016) (unpublished, 3JX opinion).

To constitute a violation of good behavior, the criminal conduct must occur after the defendant is sentenced and prior to the expiration of the term provided by the sentencing order. See State v. Clark, 151 N.H. 56, 58 (2004) (condition of good behavior begins to run the date the sentence is imposed);

State v. Rau, 129 N.H. 126, 132 (1987) (“Conduct occurring after the expiration of the term of probation is not relevant and cannot be used as a factual basis in a petition alleging a violation of probation.”); see also State v. Stern, 150 N.H. 705, 713 (2004) (“Due process requires a sentencing court to clearly communicate to the defendant the exact nature of the sentence as well as the extent to which the court retains discretion to modify it or impose it at a later date.”).

Thus, the State was required to prove by a preponderance of the evidence that Benner engaged in criminal conduct between May 13, 2015 and May 12, 2017. The State did not produce court documents from Vermont or Lebanon identifying the offense date(s) or present a witness who observed or investigated the underlying conduct. Instead, the State relied exclusively on Angelique’s testimony. Angelique attended a court hearing in Vermont where Benner “pled guilty to the charges.” DSH 26. When asked whether she “kn[e]w when [the charges that she was sentenced for] happened,” Angelique was unaware of the date, explaining it was “hard to keep track of” her several siblings’ activities. DSH 27. The court asked Angelique whether “these Vermont charges . . . to which your sister pleaded guilty . . . occur[ed] after the date this sentence was imposed; that is after May 13, 2015?” DSH 28. She replied that she “honestly cannot answer that because I’m not sure if they happened before, shortly before, or shortly after.” Id. The State acknowledged that Angelique “cannot recall when the charges occurred.” DSH 29. The witness later stated that

offenses occurred in “2015 [at the] end of the year [and] some in the beginning of 2016.” DSH 31.

Angelique’s familiarity with the Vermont charges arose from her attendance at a plea hearing and possession of related court documents. DSH 26-29. She did not testify, however, that the offense dates were noted at the hearing or that she read the date in her sister’s paperwork. Although she eventually posited dates for the Vermont charges, she testified twice that she did not know whether the conduct occurred before or after the sentencing date. She did not cite any newly remembered facts that could have reasonably explained her change in testimony.

The State typically proves the fact of a criminal conviction by presenting a court record or the defendant’s admission. See State v. Blais, 104 N.H. 214, 214 (1962) (proving a former conviction by presenting a certified copy of a relevant record or the testimony of a court clerk); State v. Bol, 846 N.W.2d 241, 252 (Neb. 2014) (State can meet its burden to prove prior conviction by a preponderance of the evidence at a sentencing hearing by oral testimony of the accused or authenticated court or penal records); State v. Hunley, 175 P.3d 584, 589 (Wash. 2012) (State can prove prior conviction by a preponderance of the evidence at a sentencing by presenting a certified copy of the judgment or “comparable documents of record or transcripts of prior proceedings. . .”); cf. N.H. R. Crim. Pro. 14(b)(3) (when using criminal records at trial for impeachment, “[e]vidence of a conviction under this rule will not be admissible unless there is introduced a certified record of the judgment of conviction

indicating that the party or witness was represented by counsel at the time of the conviction unless counsel was waived.”).

Consistent with this caselaw, reliable evidence proving the Vermont offense date(s) was available to the State via court documents or a live witness with first-hand knowledge of the underlying conduct. A witness such as Angelique, who testifies inconsistently and with limited foundation as to the pertinent date, is not legally sufficient. Even viewing the evidence and reasonable inferences therefrom in the light most favorable to the State, no rational trier of fact could find this testimony proved, by a preponderance of the evidence, that the conduct to which Benner pled guilty in Vermont occurred after May 13, 2015.²

Second, the evidence that Benner violated the condition of good behavior was insufficient as the court improperly relied on convictions without establishing that they were secured in compliance with the defendant’s constitutional right to counsel. The defendant need not raise this issue to the court for it to be preserved on appeal, as “even if no objection is made to the use of prior convictions either on the issue of credibility *or in sentencing*, the trial court should secure from the defendant [her]self a valid waiver of any claim that any prior conviction was obtained without counsel or a valid waiver of counsel.” State v. Staples, 120 N.H. 278, 286 (1980) (emphasis added); see

²As to the Lebanon charge, the State presented no admissible, non-hearsay evidence that Benner was convicted of a criminal offense, that she committed the alleged acts, or that the conduct occurred after May 13, 2015. DSH 31 (Angelique testifying that Benner was charged in Lebanon with an “offense [alleging] check fraud and it was 2015, my grandmother, but she has paid the restitution back.”). That allegation could not have supported the court’s finding.

State v. Alder, No. 2005-0016, 2006 N.H. LEXIS 273 at *1-*3 (Feb. 13, 2006) (3JX, unpublished opinion) (reversing because the trial court failed to determine if a prior conviction used to impeach the defendant at trial was obtained in accordance with the right to counsel and concluding the issue was preserved for this Court's review even though the defense did not object).

A trial court, before relying upon a defendant's prior conviction, has an affirmative obligation to ensure that the conviction was obtained in conformity with the defendant's constitutional right to counsel. Staples, 120 N.H. at 285-86. Limitations on the admission of uncounseled convictions flow from the due process clause of the Constitution. See State v. Robinson, 123 N.H. 532, 535-36 (1983) (trial courts make affirmative findings that a conviction was obtained in accordance with the right to counsel "[i]n order to protect this fundamental constitutional right"); Loper v. Beto, 405 U.S. 473, 483 (1972) (plurality opinion) ("[T]he use of convictions constitutionally invalid under Gideon v. Wainwright, [372 U.S. 335 (1963)] to impeach a defendant's credibility deprives him of due process of law.").

Here, the Court did not inquire whether Benner waived counsel or was represented in Vermont, nor did the State present evidence demonstrating the convictions were constitutionally obtained. As the State presented no evidence of the underlying conduct, the alleged convictions were the only evidence of bad behavior before the court. As the court could not lawfully rely on those convictions, the court erred in finding there was sufficient evidence that Benner failed to remain of good behavior.

Third, the evidence that Benner violated the condition of good behavior was insufficient because the State failed to prove that she committed a criminal offense. As this issue was not raised before the trial court, Benner raises it here as plain error. Supreme Court Rule 16-A allows the Court to consider as plain error claims not raised at trial. This Court has identified four essential elements of a successful claim of plain error: (1) there must be error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. State v. Fiske, 170 N.H. 279, 291 (2017); see also State v. Houghton, 168 N.H. 269, 274 (2015) (finding plain error where State introduced insufficient evidence to prove essential element of charged offense); State v. Guay, 162 N.H. 375, 384 (2011) (concluding testimony was legally insufficient to prove an element of the offense and reversing because “the State could not have met its burden of proof . . .”).

Angelique testified that Benner “pled guilty to *the charges* in Vermont.” DSH 26 (emphasis added). At no point did she identify the statutory or common law title of the charges, provide a factual description of the unlawful conduct, or note the classification-level of the convictions. DSH 26. Such specificity is necessary as one who commits a violation-level offense does not run afoul of “good behavior.” State v. Auger, 147 N.H. 752, 754 (2002). Without some degree of detail as to the nature and classification of the offense, no reasonable trier of fact could find that Benner engaged in criminal conduct. As

such, the court erred in finding she violated her condition of good behavior by engaging in criminal conduct.

This error was plain as the definition of good behavior is firmly established. Auger, 147 N.H. at 754; see Houghton, 168 N.H. at 274 (concluding error was plain where the evidence was insufficient to prove an element of the offense). Additionally, where, as here, the court sentenced Benner to the maximum sentence allowed by statute for this class of offense, its erroneous finding affected Benner's substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings.

B. The court erred in finding sufficient evidence that Benner failed to comply with the treatment condition of her deferred sentence.

In addition to testifying about Benner's charges, Angelique recounted Benner's substance abuse treatment history. DSH 17-25, 27. Although Angelique's testimony included third-party, hearsay statements, the Court ruled that it "wo[uld]n't consider the hearsay statements for the truth of the matter asserted." DSH 18; see also DSH 16 ("[I]f it's hearsay [the court] won't consider it for the truth."). The court thus limited the admissible relevant evidence to statements Benner made to Angelique. DSH 23. See N.H. R. Evid. 801(d)(2)(A) (a party's statement offered against that party it is not hearsay); DSH 17 (the court's "understanding is that . . . she's testifying as to statements from the Defendant."). It found that Angelique's testimony proved Benner's failure to comply with the treatment condition of her sentence. DSH 43. In so

finding, the court erred. As this issue was not raised before the trial court, Benner raises it here as plain error.

The treatment condition of Benner's sentence required that she: (a) undergo a LADAC evaluation within 90 days, (b) abide by all treatment recommendations, (c) provide the State with information at certain times, and (d) sign a release of information. A4. Benner told Angelique that she completed an outpatient program with Dr. Hess during "the last two years." DSH 18, 20. To the extent Angelique testified substantively as to Benner's completion of a substance abuse evaluation, she stated that she thought Benner underwent such an evaluation. DSH 27. Although at some point Benner told her sister that she relapsed and was seeking further treatment, DSH 24, the evidence did not establish whether that occurred after she completed treatment or whether she was subject to "treatment recommendations" at the time. Angelique did not testify whether Benner signed pertinent releases or provided completion paperwork to the State.

Angelique's testimony did not establish that Benner violated the treatment condition of her sentence. In fact, Benner told Angelique that she finished her treatment program. Angelique's testimony was the only evidence the State presented in support of imposition. See DSH 10-11 (the court was "not going to consider [the State's offer of proof] as evidence . . ."). The evidence was legally insufficient to prove Benner's noncompliance with the treatment condition, and thus the error was plain. The court imposed a lengthy period of incarceration. As cited in the previous section, the court's erroneous finding

affected Benner's substantial rights and seriously affected the fairness, integrity or public reputation of judicial proceedings. This Court must reverse.

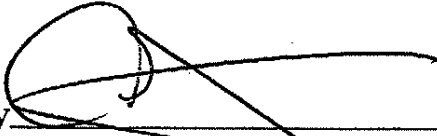
CONCLUSION

WHEREFORE, Laryssa Benner respectfully requests that this Court vacate the finding that she violated her deferred sentence.

Undersigned counsel requests 15 minutes oral argument.

The appealed decision was in writing and is appended to the brief.


Respectfully submitted,


By _____
Eric S. Wolpin, #18372
Assistant Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301



Eric S. Wolpin # 18372

DATED: July 2, 2018

A P P E N D I X

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215-2014-CR-411

Docket No.

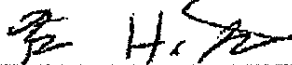
State v. Laryssa J. Benner

ORDER ON DOCUMENT NO. 14

Following a hearing, and for the reasons set forth at length on the record, the Court finds that the defendant has neither petitioned the Court nor shown cause why the deferred commitment in her 5/13/15 sentencing order (Index # 14) should not be imposed. Accordingly, the defendant's 5/13/15 deferred sentence is hereby imposed. See record.

10/30/17

Date



Signature

Presiding Justice
Peter H. Bornstein
Presiding Justice

CLERK'S NOTICE DATE

10/30/17

CC: Simon Mayo, Esq.
County Attorney

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Grafton Superior Court
3785 D.C. Highway
North Haverhill NH 03774

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

RETURN FROM SUPERIOR COURT – HOUSE OF CORRECTIONS

Case Name: **State v. Laryssa J. Benner**
Case Number: **215-2014-CR-00411**
Name: **Laryssa J Benner, 1780 Hartford Ave Wilder VT 05088**
DOB: **January 18, 1993**

Charging document: **Misdemeanor Information**

Offense:	Charge ID:	RSA:	Date of Offense:
Theft by Deception \$0-\$1000	1076291C	637:4	May 21, 2014
Disposition: Guilty/Chargeable By: Plea	T/N: _____		

A finding of GUILTY/CHARGEABLE is entered.

Conviction: **Misdemeanor**

Sentence: see attached

May 13, 2015
Date

Hon. Lawrence A. Macleod, Jr.
Presiding Justice

David P. Carlson
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **Grafton County House of Corrections**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Date _____ Attest: _____
Clerk of Court

SHERIFF'S RETURN

I DELIVERED THE DEFENDANT TO THE **Grafton County House of Corrections** and gave a copy of this order to the Superintendent.

Date

Sheriff

C: State Police DMV Dept. of Corr. Offender Recs Sheriff
 Defendant Pros. Atty Tara J. Heater, ESQ Defense Attorney Simon J. Mayo, ESQ
 Office of Cost Cont. Sex Offender Registry Other GHOC Dist Ct. _____

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Grafton County Superior Court
Case Name: State of New Hampshire vs. Larvssa J. Benner
Case Number: 215-2014-CR-0411 Charge ID Number:
(If known)

HOUSE OF CORRECTIONS SENTENCE

Plea/Verdict: Guilty True	Clerk: Carlson
Crime: Theft by Deception <\$1000	Date of Crime: 05/21/2014
Monitor: Bemis Gręska	Judge: MacLeod Bornstein Vaughan

A finding of GUILTY/TRUE is entered.

This conviction is for a Felony Misdemeanor Violation of Probation

The defendant has been convicted of the crime of domestic violence as defined in RSA 631:2-b, I and the defendant's relationship to the victim is the following: 1. Current or former spouse; 2. Parent of the victim; 3. Guardian of the victim; 4. The parties share a child in common OR The parties cohabitate/cohabitated as a 5. Spouse; 6. Parent; 7. Guardian OR the relationship of the defendant and victim is that of 11. Intimate partner; 12. Adult related by blood or marriage. Federal law prohibits a defendant convicted of misdemeanor domestic violence from possessing, receiving or purchasing any firearm including a rifle, pistol or revolver, or ammunition for any firearm.

1. The defendant is sentenced to the House of Corrections for a period of _____ day(s) / 12 month(s) / _____ year.

2. This sentence is to be served as follows:

Stand committed Commencing _____
 Consecutive weekends from _____ PM Friday to _____ PM Sunday beginning _____
 _____ of the sentence is suspended during good behavior and compliance with all terms and conditions of this order. Any suspended sentence may be imposed after hearing at the request of the State. The suspended sentence begins today and ends _____ years from today or release on charge ID no. _____

All of the sentence is deferred for a period of two years / _____ months. The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of two years / _____ months. Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.

Other: _____

3. The sentence is consecutive to _____

concurrent with _____

4. Pretrial confinement credit: _____ days.

5. The court recommends to the county correctional authority:

- A. Work release consistent with administrative regulations.
- B. Drug and alcohol treatment and counseling.
- C. Sexual offender program.
- D.

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Pursuant to RSA 499:10:a, the clerk shall notify the appropriate health care regulatory board if this conviction is for a felony and the person convicted is licensed or registered as a health care provider.

Case Name: State of New Hampshire vs. Larvasa J. Benner
Case Number: 215-2014-CR-0411
HOUSE OF CORRECTIONS SENTENCE: _____

PROBATION

- 6. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the probation/parole officer.
Effective: Forthwith Upon Release _____
The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 7. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 8. Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

OTHER CONDITIONS

- 9. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____, plus statutory penalty assessment of \$ _____
 The defendant shall also pay the time payment fee of \$25.00.
 The fine, penalty assessment and any fees shall be paid:
 Now By _____ Through the Department of Corrections as directed by the Probation/Parole Officer.
 \$ _____ of the fine is suspended for _____ year(s).
 \$ _____ of the statutory penalty assessment is suspended for _____ year(s).
 - B. The defendant is ordered to make restitution of \$ _____ plus statutory 17% administrative fee.
 Through the Department of Corrections as directed by the Probation/Parole Officer
 Through the Department of Corrections on the following terms:

 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because:

 - C. The defendant is to participate meaningfully and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. The defendant's license privilege to operate in New Hampshire is revoked for a period of _____ effective _____
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with Amidon Jewelers, its owners, officers or employees either directly or indirectly, including but not limited to contact in-person, by mail, phone, e-mail, text message, social networking sites and/or third parties.
 - H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - I. Other: Defendant shall undergo a LADAC evaluation within 90 days and abide by all treatment recommendations. Prior to the appointment, Defendant shall provide the name of the counselor to the GCAO and the scheduled date of the evaluation and sign any necessary releases allowing the evaluator/treatment provider to confirm the evaluation was complete and the defendant is abiding by all treatment recommendations. The evaluator/treatment provider shall notify the GCAO if defendant fails to have the evaluation within 90 days of sentencing or comply with treatment recommendations within 6 mos of the evaluation. Further, defendant shall pay restitution to the victim Ledyard Bank West Lebanon in the amount of \$63.00 by certified check or money order within 90 days of sentencing and shall provide proof that said restitution has been paid by forwarding a copy of the certified check or money order to the GCAO within 90 days of sentencing.

5/13/15
Date Sentenced

[Signature]
Presiding Justice

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

State of New Hampshire

v.

Laryssa J. Benner

Docket No. 2015-2014-CR-411

MOTION TO CLOSE CASE

NOW COMES the defendant, Laryssa J. Benner, by and through counsel, Simon J. Mayo, and moves the Honorable Court to close this file. In support of this motion it is stated:

FACTS

1. On May 13, 2015, Ms. Benner was sentenced to the House of Corrections for a period of 12 months. All of the time was deferred for two years on a number of conditions.
2. Thus, the deferral period for the sentence ended on May 12, 2017.
3. Ms. Benner did not formally move to suspend her deferred sentence prior to the end of the deferral period. No hearing was held on the deferred sentence at the end of the deferral period.
4. The State never moved to impose the sentence. Instead, the Court sua sponte issued a warrant for Ms. Benner's arrest.
5. Prior to the Court issuing a warrant, the State was aware that the deferral period was almost at its end. On May 2, 2017, Assistant County Attorney Tara Heater informed undersigned counsel that Ms. Benner had not petitioned to suspend her deferred

sentence and that Ms. Benner had allegedly been arrested in Lebanon. Despite knowing that the deferral period was almost over, that Ms. Benner had not filed a petition to suspend, and that Ms. Benner may not have complied with the conditions of deferral, the State took no action to seek imposition of the sentence before the deferral period ended.

6. Though no timely motion to impose has ever been filed, this Court has now issued orders that hold Ms. Benner on cash bail.

LEGAL ARGUMENT

7. The Court lacks authority to impose the deferred sentence in this case because a motion to impose was not filed in a timely fashion. Imposition at this juncture without a reasonable cause for delay would be untimely and, thus, illegal.

8. In State v. Almodovar, 158 N.H. 548 (2009), the State Supreme Court for the first time considered "whether the trial court has authority to impose a deferred sentence following the deferral or probationary period." Id. at 551. In analyzing this question, the court first recognized that state statutes provide no guidance on deferred sentences. It then discussed law from other jurisdictions, concluding that a majority of jurisdictions do not hold that a court's authority to impose a sentence ends immediately upon the termination of the deferral period or probation. Ultimately, the court looked to analogous New Hampshire case law, in particular, State v. Rau, 129 N.H. 126 (1987), which considered "whether the sentencing court had jurisdiction to revoke the defendant's probation after the period of probation ended." Almodovar, 158 N.H. at 552.

9. In Rau, the State had failed to petition to revoke the defendant's probation until

sixth months after the end of the probation, and the court held that the State had failed to present the petition "in a timely fashion." Rau, 129 N.H. at 132. "Considering [its] analysis in Rau and the absence of strict statutory limitations," the court in Almodovar held "that the trial court retains authority to impose the sentence in a timely fashion following the expiration of the deferral or probationary period." Id. at 553 (quotation omitted).

10. Thus, a trial court in New Hampshire only retains authority to impose a deferred sentence in a "timely fashion" after the deferral period. In Amodovar, the defendant's sentence was imposed forty-three days after the end of the deferral period. The defendant did not argue that his sentence was not imposed in a timely fashion after the deferral period, and the court, therefore, did not address the issue. See id. In Rau, however, the court held plainly that the sentence was NOT imposed in a timely fashion where the State, without a reasonable basis for doing so, failed to petition for revocation of probation until sixth months after the termination of probation. Rau, 129 N.H. at 132. The Almodovar court cited favorably this holding in Rau.

11. Accordingly, while the State Supreme Court has not clearly defined the term "timely fashion," it has made clear that a six-month delay after the end of the deferral period is not timely. The timeline in Rau is comparable to the timeline in this case.

12. In 2010, in State v. Tatoyian, (Docket nos. 96-S-051-054), the Grafton County Superior Court (Vaughan, J.) was presented with this very question. The Clerk's Office scheduled a show cause hearing more than a year after the expiration of the deferral period. The State sought imposition of the sentence. The Court held a hearing, after

which Judge Vaughan, by written order, held that under the authority of Almodovar and Rau, imposition would be untimely. The case was closed.

13. In other cases involving this exact issue, the County Attorney's Office has conceded that it cannot seek imposition under these circumstances. In State v. Emilie Dodge, Docket No. 2015-2006-CR-693, for example, undersigned counsel raised this precise issue after the Court took the exact same steps—issuing a warrant when the defendant did not petition to suspend a deferred sentence. The State, represented by Attorney Tara Heater, did not raise any objection at that time to Ms. Dodge's motion to close the case, which relied on the exact reasoning and law set forth in this pleading.

14. In this case, no motion to impose is pending despite the fact that the deferral period ended five months ago. There is clear evidence that the State knew of the need to file a motion and decided not to do so. The Court issued a warrant in May 2017, and the State did not move to impose. The State specifically told undersigned counsel it had reason to believe Ms. Benner might not be in compliance with the conditions of deferral and that the deferral period was almost over, but it did not move to impose. Even now, as Ms. Benner sits incarcerated on cash bail, the State has not moved to impose. There is no reasonable basis for the State's failure to move for imposition in this case in a timely fashion.

CONCLUSION

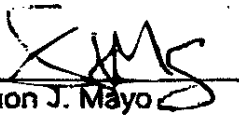
15. Even if the State were now to move to impose the underlying sentence in this case, the Court would lack jurisdiction to impose the deferred sentence because no motion was timely filed. This case should be closed because the State made no effort

to bring forward the sentence in a timely fashion.

WHEREFORE, it is respectfully requested that this Honorable Court:

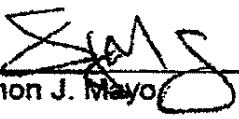
- A. Hold that it has no authority to impose the sentence in Docket No. 2015-2014-CR-411 and close this case.
- B. Issue a written order containing the Court's findings and rulings if the Court does not enter the requested legal relief.
- C. Grant any such other and further relief that justice requires.

Respectfully submitted,


Simon J. Mayo
SimonMayoLaw
PO Box 128
Woodsville, NH 03785
802-461-8689

CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of this motion to the County Attorney's office on October 6, 2017.


Simon J. Mayo

STATE OF NEW HAMPSHIRE

Grafton, SS.

Superior Court

State of New Hampshire

v.

Laryssa J. Benner

Superior Court Case: 215-2014-CR-0411

Charge ID: 1011951C, 1076291C

COPY

STATE'S OBJECTION TO MOTION TO CLOSE CASE

NOW COMES the State of New Hampshire, by and through the Office of the Grafton County Attorney, Tara J. Heater, Assistant County Attorney and states as follows:

1. The defendant has filed a Motion to Close Case in regard to a deferred sentence on the above docket.
2. On May 13, 2015, the defendant was sentenced on one count of misdemeanor Theft by Deception. The defendant was sentenced to 12 months in the House of Corrections. The 12 month sentence was deferred. The language of the sentencing order provides as follows:

All of the sentence is deferred for a period of two years. The court retains jurisdiction up to and after the deferred period to impose or terminate the sentence. Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest.
3. The defendant's petition for a show cause hearing should have been filed on or about April 13, 2017. No petition was filed and a warrant for her arrest was issued on May 18, 2017. Defendant was arrested on that warrant on or about October 5, 2017.
4. Defense filed a motion seeking to close the case because the State has failed to file a timely motion to impose the deferred sentence. The State submits that there is no burden upon the State to seek the imposition of the deferred sentence; instead, the burden is on the defendant, to show why the deferred sentence should not be imposed. If the court issues a warrant because the

defendant failed to petition the court for a hearing, a show cause hearing should be scheduled upon defendant's apprehension without further action from either the State or the defendant.

5. Unlike suspended sentences, deferred sentences lack explicit statutory authorization. State v. Rothe, 142 NH 483 (1997). However, the legislature impliedly condones them. Id. (see e.g., RSA 159:3-1, III; RSA 331-A:26, III; RSA 625:9, VII). The lack of statutory guidance combined with a lack of case law on deferred sentences prevents a clear understanding of the requirements and burdens of that sentence.
6. We do, however, have some guidance through case law as to what a lawful sentence requires. Due process in sentencing requires a sentencing court to make clear at the time of sentencing "in plain and certain terms what punishment (it is) exacting . . . as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified". Stapleford v. Perin, 122 NH 1083 (1982). The sentencing order must clearly communicate to the defendant and the society which brought him to court the exact nature of the sentence. State v. Ingerson, 130 NH 112, 115 (1987). Unless the terms of a sentence at the time it is imposed specifically allow augmentation at a later date, the court may not increase a defendant's penalty at a probation revocation hearing or a hearing on whether to impose a deferred or suspended sentence. State v. LeCouffe, 152 NH 148 (2005). Further, the Court cannot further suspend a deferred sentence when the possibility of suspension was not included in the plain language of the original sentencing order. State v. French, 163 NH 1 (2011). Every deferred sentence imposes upon the defendant an implied condition of good behavior which requires the defendant conform to the requirements of the law. State v. Clark, 151 NH 56 (2004). Finally, a deferred sentence begins to run on the date the sentence is pronounced because the defendant must immediately comply with the condition of good behavior inherent in a deferred sentence. Id.
7. Defense relies heavily upon State v. Almodovar, 158 NH 548, 553 (2009) (originating in Grafton County), State v. Tatoyian, Grafton Superior Court, 96-S-051-054 (Judge Vaughan, 2010) and State v. Emily Dodge, Grafton Superior Court, 215-2006-CR-693 (no written decision because the State did not object). The State believes that the cited cases are distinguishable from the instant case.
8. In Almodovar, the NH Supreme Court held that a deferred sentence could be imposed after the period of deferral if the sentence was imposed in a timely fashion. State v. Almodovar, relying on State v. Rau, 129 NH 126, 132 (1987) (sentence on a probation violation could be imposed following the expiration of the probationary period if the violation occurred during the probationary period if it is done in a timely fashion). In Almodovar, the defendant did not contest the issue of timeliness so the Court did not address what was timely in the imposition of a deferred sentence.

9. The facts in Almodovar are as follows: the defendant was sentenced on January 4, 1996 on two charges to 3 ½ to 7 year concurrent sentences. The imposition of those sentences was deferred for a period of five years (deferral period would end January 4, 2001). The sentencing order provided that "Defendant shall file a petition to continue deferral no later than January 4th of each year." Additionally, it provided "[t]hirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed." The defendant did not petition yearly nor did he petition at the end of the five year period. On February 15, 2001, the sentencing court issued an order, *sua sponte*, to bring forward and imposed the deferred sentence. Defendant was incarcerated on the deferred sentence and served his sentence.
10. No further action was taken on the case until February 20, 2004 when the Superior Court denied defendant's motion to correct the sentence. Again, no further action was taken until December 22, 2006 when the defendant filed a *pro se* motion to correct the illegal sentence arguing that the trial court erred in imposing the deferred sentence consecutively to the suspended sentence and after the period of probation had expired. The Superior Court held a hearing on August 3, 2007 and denied the motion as well as a motion for the appointment of counsel. That decision prompted an appeal to the New Hampshire Supreme Court. At issue on appeal was the alleged court error of running the sentences consecutively, imposing them after probation had expired and not providing the defendant with a hearing and counsel. The court specifically found that the failure to provide the defendant with appointed counsel and a hearing prior to the imposition of the deferred sentence was plain error. As a result of that holding, the court order of February 15, 2001 imposing the deferred sentence was vacated. Nothing in the Almodovar decision placed any burden upon the State to seek the imposition of the deferred sentence.
11. The Almodovar case provides the backdrop for the Tatovian case cited by counsel and decided January 6, 2011 by Judge Vaughan. In Tatovian, on August 27, 1997, the trial court sentenced the defendant to 2 ½ to 7 years at the New Hampshire State Prison. The trial court deferred that sentence for 10 years (deferral period to end August 27, 2007). The Court order, similar to that in Almodovar, provided that "[t]hirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in imposition of the deferred commitment without further hearing." The defendant failed to file a petition with the court. Having learned from Almodovar that the trial court must hold a hearing prior to the imposition of the deferred sentence, the trial court issued a scheduling notice for a show cause hearing to be held on June 5, 2008. Due to defendant's incarceration in Vermont on unrelated matters, he could not appear for that hearing. It does not appear as if a warrant was issued as a detainer. On August 11, 2008, the State filed a Motion to impose the deferred sentence. That Motion was not scheduled to be heard until December 13, 2010 (presumably following the defendant's release on the

Vermont charges). The trial court (Judge T. Vaughan) ruled that the State's petition was untimely relying on the holding in Almodovar.

12. While the Supreme Court in Almodovar did hold that the imposition of the deferred sentence had to be imposed "in a timely fashion", the Court did not define what was "a timely fashion" as it related to deferred sentences. The Court relied upon the decision in State v. Rau which addressed the imposition of sentence on a probation violation when the violation was not filed until after the term had expired. In Rau, however, the Court did indicate that their decision could have been different if the facts were different.
13. In Dodge, Attorney Mayo filed a similar motion. In that case, the State, represented by the undersigned, did not object to the closing of the case. Rather, when the undersigned reviewed the case, I came to a decision that the sentence which included the deferred sentence was illegal and therefore not enforceable. Specifically, the defendant was originally sentenced on June 19, 2007 to one to three years in State Prison. The prison sentence was suspended for five years (suspension period ends June 19, 2012). The defendant was also placed on probation for three years (probation period ends June 19, 2010). She violated her probation in 2009 and was sentenced on a violation of probation on September 10, 2009 to one to three years in State Prison. That sentence on the violation of probation was deferred for two years (end of deferral period September 10, 2011). The sentencing order specifically stated "Thirty (30) days prior to the expiration of the deferred period; the defendant may petition the Court to show cause why the deferred commitment should not be imposed. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for the defendant's arrest with three month reviews. No petition was filed by August 10, 2011 and no *capias* was issued. On March 12, 2015, three and a half years after the deferred sentence was to run, the Court issued a *sua sponte* order for a Show Cause hearing as defendant had not petitioned the court to suspend or further defer the sentencing order. The facts in Dodge, therefore are more similar to Tatovian than the instant case.
14. The State would distinguish Almodovar, Tatovian and Dodge from the instant case for several reasons: (1) the sentencing language is very different—Tatovian called for the imposition of sentence which was found to be plain error in Almodovar; the instant case called for a warrant to issue for the defendant's arrest; (2) there was never a warrant issued in Tatovian or Almodovar for that matter but a warrant did issue in the instant case when the defendant failed to petition the Court; (3) the language in the sentencing order in this case clearly indicates that the Court retains jurisdiction up to and after the period of the deferral to impose the sentence whereas in Tatovian, that language does not appear; and (4) the time lapse in Tatovian between the end of the deferral period and hearing on the Motion to Impose was more than three years whereas in the instant case, it is less than six months.
15. As there is no statutory guidance and no case law directly on point, the State submits that the clear language in the sentencing order in this case establishes

the manner in which the case should proceed and would prevent the granting of Defendant's Motion to Close Case. The language in the sentencing order also distinguishes this case from Almodovar and Tatayon.

16. Specifically, the difference in language allows the court to impose the sentence after the deferral period runs and clearly places the burden on the defendant to move for a show cause hearing why the sentence should not be imposed. The language for a deferred sentence explicitly provides that "All of the sentence is deferred for a period of one year. *The court retains jurisdiction up to and after the deferred period to impose or terminate the sentence.*" (*Emphasis added*)
17. This is clearly different from the language for a term of probation or a suspended sentence which has a finite end date. A sentencing order for probation provides that "The defendant is placed on probation for a period of ___ years ..." The language for a suspended sentence provides "The suspended sentence begins today and ends ___ years from today or release on charge _____." In the latter two examples, there is no provision in the sentencing language for jurisdiction of the court to extend beyond the finite end date specified in the order.
18. The language in a deferred sentence order also clearly establishes the burden is on the defendant as opposed to the State. Specifically, a deferred sentence provides "Thirty (30) days prior to the expiration of the deferred period, *the defendant may petition* the Court to show cause why the deferred commitment should not be imposed." (*Emphasis added*)
19. Whereas, the language for a suspended sentence provides: "Any suspended sentence may be imposed after hearing *at the request of the State.*" (*Emphasis added*) Unlike a suspended sentence, the sentencing order places the burden on the defendant to petition for a hearing to show cause why the sentence should not be executed unlike a suspended sentence which requires the State to seek imposition of the sentence. There is no burden on the State based upon the plain language of the deferred sentencing order. First, the plain language does not support an obligation on the part of the State to seek imposition. Second, if it were the State's obligation to seek imposition of the deferred sentence, there would be no identifiable difference between a suspended sentence and a deferred sentence. This cannot be the intended result.
20. The language in the sentencing order in this case also makes clear that the defendant's failure to petition the court will result in a warrant being issued for their arrest. Based upon the holding in Almodovar, upon defendant's apprehension, a show cause hearing will be held without further action by either party.
21. The defense argues that the five month delay between the expiration of the deferral period and the show cause hearing without a motion to impose being

filed by the State should result in the case being closed even though the delay was a result of the defendant's failure to do as she was required under the sentencing order. In support of that argument, he relies upon Almodovar who relied upon Rau. First, while Almodovar held that the imposition had to be in a timely fashion, the court never defined timely fashion. The Supreme Court did, however, provide some guidance going into the future. In that decision, they cited Matter of Myers, 579 P.2d 1006, 1009 (Wash. Ct. App. 1978) which held "[w]here the court elects to 'defer' or put off sentencing, the criminal prosecution has not ended and will not end until either the subsequent pronouncement of sentence or until the court grants an order of dismissal." No cases have disagreed with that definition of timeliness as it applies to the imposition of a deferred sentence. If that is to be the standard of timeliness for deferred sentences, the imposition of the deferred sentence in this case would be timely because the sentence has not been pronounced nor has there been an order of dismissal.

22. In reaching the holding in Almodovar concerning timeliness, the Court relied upon the decision in State v. Rau which addressed the imposition of sentence on a probation violation when the violation was not filed until after the term had expired. The facts in Rau are distinguishable because that case dealt with a violation of probation, not the execution of a deferred sentence. Additionally, the obligation in a probation violation is clearly upon the State to file it in a timely fashion unlike a deferred sentence which shifts the burden to the defendant. Finally, the violation of probation in Rau was filed after the expiration of the probation period's finite end. In Rau, the Court indicated that their decision was not applicable in all cases and may have been different if the facts presented were different. As addressed above, the jurisdiction of the court to impose a sentence beyond the end of the deferral period is specifically reserved to the Court which is contrary to the language concerning a violation of probation.
23. To hold that timeliness following the issuance of a warrant could result in the inability of the Court to impose the deferred sentence is antithetical to its intent. The court in sentencing a defendant to a deferred sentence conditioned upon good behavior is providing the defendant with an opportunity to be at liberty and show the court that its faith and trust was not misplaced. To say that the court cannot impose a sentence when the defendant fails to comply with the conditions of the sentence, a warrant issues and the defendant remains at large for an extended period of time only accomplishes to benefit the non-compliant defendant. In fact, under defense counsel's argument, the defendant who fully complied with the conditions of the sentence would face additional punitive conditions that the non-compliant defendant would not be required to face especially if there was a provision to further suspend or defer the sentence. That result would be illogical.
24. For the foregoing reasons, the State submits that defendant's motion must be denied. The State had no obligation to file for the imposition of sentence and the defendant's failure to comply with the conditions of the sentence should not

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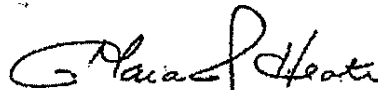
benefit her to avoid the consequences of the deferred sentence. The show-
cause hearing should go forward to determine if the defendant's deferred
sentence should be imposed.

WHEREFORE, the State requests that this Honorable Court:

- A. DENY the Defendant's Motion without a hearing; or
- B. HOLD a hearing on the matter; or
- C. Grant any other relief deemed proper and just.

October 18, 2017

Respectfully Submitted,
STATE OF NEW HAMPSHIRE



Tara J. Heater, Esq.
Assistant County Attorney
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(603) 787-6968

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded to Simon J.
Mayo, SimonMayoLaw, PO Box 128, Woodsville, NH 03785, counsel for the
defendant.

October 18, 2017

Respectfully Submitted,
STATE OF NEW HAMPSHIRE



Tara J. Heater, Esq.
Grafton County Attorney's Office

5/31/18

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Superior Court Case: 215-2014-CR-0411
Charge ID: 1076291C

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

LARYSSA J. BENNER

RECEIVED

MAY 31 2018

INFORMATION

NEW HAMPSHIRE
PUBLIC DEFENDER
DCSC-MRV12*15AM1075


Theft by Deception
RSA: 637:4
CLASS: A Misdemeanor

NOW COMES the Grafton County Attorney's Office and gives the court to know and be informed that LARYSSA J. BENNER (DOB: 01/18/1993) of or formerly of 20 Wolf Road, Apt. E106, Lebanon, NH, on or about the 21st day of May 2014, in , in the County of Grafton, aforesaid,

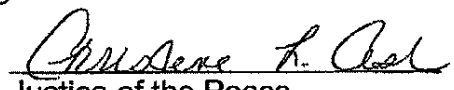
1. LARYSSA J. BENNER DID OBTAIN OR EXERCISE UNAUTHORIZED CONTROL OVER PROPERTY, TO WIT \$63.00, WHICH BELONGED TO ANOTHER, TO WIT AMIDON JEWELERS, BY DECEPTION.
2. LARYSSA J. BENNER, KNOWING A CHECK PAYABLE TO HER FROM AMIDON JEWELERS HAD BEEN ALTERED FROM AN AMOUNT PAYABLE OF \$7.46 TO \$70.46, WITHOUT PERMISSION OF AMIDON JEWELERS
3. LARYSSA J. BENNER FAILED TO CORRECT A FALSE IMPRESSION WHICH SHE PREVIOUSLY HAD CREATED OR REINFORCED AND WHICH SHE DID NOT BELIEVE TO BE TRUE WHEN SHE PRESENTED THE ALTERED CHECK TO LEDYARD BANK REQUEST PAYMENT OF \$70.46.
4. LARYSSA J. BENNER 'S PURPOSE WAS TO DEPRIVE THE AMIDON JEWELERS, OF THE SAID PROPERTY.
5. THE SAID PROPERTY VALUE DOES NOT EXCEED \$1000.

against the peace and dignity of the State.

Dated: 5/12/15


Tara J. Heater
Assistant County Attorney

On this 12th day of May, 2015, Tara J. Heater personally appeared before me and made oath that the foregoing statements are true to the best of his/her information and belief.


Justice of the Peace

Lawrence A. MacLeod, Jr.
Presiding Justice

5/13/15
Defendant = Tara J. Heater
Heater

My commission expires: 2/12/19