

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0687

The State of New Hampshire

v.

Laryssa J. Benner

**STATE'S MEMORANDUM OF LAW IN LIEU OF BRIEF
UNDER SUPREME COURT RULE 16(4)(b)**

STATEMENT OF THE CASE AND FACTS

In May 2015, the defendant, Laryssa J. Benner, pleaded guilty to one misdemeanor count of theft by deception. Def. Br. App. 17;¹ *see* RSA 637:4 (2016). The mittimus was issued on May 13, 2015. Def. Br. App. 2. The court sentenced the defendant to a term of twelve months in the House of Correction, all deferred for two years. Def. Br. App. 3. Further, the defendant was ordered to undergo a LADAC evaluation, and to have no contact with Amidon Jewelers or any of its owners, officers, and employees. Def. Br. App. 4. "The defendant [was] ordered to be of good behavior and comply with all the terms of this sentence." Def. Br. App. 4. And finally, with respect to the deferral of her sentence, the mittimus

¹ References to the defendant's brief will be made as "Def. Br. ___," and to the appendix thereto as "Def. Br. App. ___."

References to the transcript of the hearing on the defendant's deferred sentence, held on October 30, 2017, will be made as "Tr. ___."

informed her that thirty days before the expiration of the deferral period, she could petition the court “to show cause why the deferred commitment should not be imposed.” Def. Br. App. 3. It also informed her that a warrant for her arrest could be issued if she did not file such a petition. Def. Br. App. 3.

Near the end of the deferral period, in May 2017, the court *sua sponte* issued a warrant for the defendant’s arrest. Def. Br. App. 5. The defendant had not petitioned the court before the expiration of the deferral period, nor had the State filed a motion to impose the deferred sentence. Def. Br. App. 5–6.

In October 2017, the defendant filed a “Motion to Close the Case.” Def. Br. App. 5. She argued that the court lacked the authority to impose the deferred sentence because the State had never filed a motion to do so, and that although the court retained its authority to impose a deferred sentence, it could do so only “in a timely fashion” after the expiration of the deferral period. Def. Br. App. 6, 7. The defendant noted that the State still had not filed a motion to impose the deferred sentence, Def. Br. App. 8, and argued, relying on this Court’s decision in *State v. Rau*, 129 N.H. 126 (1987), that the delay in doing so meant that any motion would not be timely. Def. Br. App. 7, 8–9.

In its opposition to the defendant’s motion, the State argued that it had no duty to file a motion to impose, but rather the defendant had the burden to show cause why the sentence should not be imposed. Def. Br. App. 10–11. It further argued that a timely warrant had been issued in May 2017, and that a show-cause hearing should be scheduled upon the defendant’s arrest without any further action from the State. Def. Br.

App. 11, 14. The State relied on the specific language of the sentencing order, which put the defendant on notice both that the court retained jurisdiction to impose the deferred sentence after the expiration of the deferral period, and that the defendant—not the State—had the burden to petition the court at the end of the deferral period to show cause why the court should not impose the sentence. Def. Br. App. 14. Finally, the State argued that to allow a defendant to violate the conditions of the deferred sentence, to remain at large for an extended period of time after the issuance of a timely warrant, and then to escape punishment on the basis of timeliness would defeat the intent behind the deferred sentence. Def. Br. App. 15.

The Grafton County Superior Court (Bornstein, J.) held a hearing on the defendant's motion on October 30, 2017. At several points during the hearing, the defendant asserted her right to due process, citing *Stapleford v. Perrin*, 122 N.H. 1083 (1982). *See* Tr. 5, 10, 11, 13, 37. She argued that due process required written notice of the conduct that the State alleged violated her sentencing conditions, disclosure of the evidence that the State intended to rely on, the opportunity to be heard, the right to present witnesses, and the right to cross-examine the State's witnesses. *See* Tr. 5, 13, 14, 37. The defendant also reiterated her argument that the State had failed to act in a timely fashion and had never filed a motion to impose the sentence. Tr. 6, 37. She again argued that that untimeliness divested the court of jurisdiction. Tr. 6.

The defendant also argued that the burden was on the State because it was seeking to impose the deferred sentence, which implicated the defendant's liberty interest. *See* Tr. 5, 10, 11, 37. Based on her due-process

argument, the defendant also objected to the State's proceeding by offer of proof at the hearing. Tr. 10, 13, 14.

In response, at several points, the State reiterated its position that because the sentence was deferred as opposed to suspended, the State had no obligation to take any action at the end of the deferral period, and that the burden was on the defendant to show cause why the court should not impose the sentence. *See* Tr. 3–4, 12, 38. The State argued that it had no obligation to file a motion, give the defendant notice, or call any witnesses. Tr. 38. Further, the State argued that because the burden was on the defendant, all the due process rights set out in *Stapleford v. Perrin* should not apply. Tr. 12.

Nevertheless, the State alleged that the defendant had violated the terms of the deferred sentence in several respects: “She has not remained of good behavior. She’s been convicted in Vermont, ... [and s]he hasn’t obtained the LADC evaluation within 90 days” Tr. 12. Further, the defendant “did not provide the name of the counselor to the County Attorney’s Office nor the date of the evaluation so that [it] could provide documents to the evaluator. She had to comply with those treatment recommendations within six months; she hasn’t provided proof of that and she hasn’t remained of good behavior.” Tr. 13. There were “also additional charges pending in Lebanon District Court as well as the newer charges from Vermont for which she’s already been convicted.” Tr. 13.

The court rejected the defendant’s timeliness argument, ruling that the arrest warrant was issued quickly after the expiration of the deferral period, and that the passage of time while the defendant was at large did not affect the court’s jurisdiction to impose the sentence. Tr. 7–8. The court

also agreed with the State at several points that in the case of a deferred sentence, the defendant had the burden to petition in a timely manner and to show cause why the sentence should not be imposed, and that the burden never shifted to the State. Tr. 9, 23, 42. In the court's view, "if there was no evidence [it] could still impose the sentence unless the [d]efendant shows cause why the deferred commitment should not be imposed." Tr. 23.

The State's sole witness at the hearing was the defendant's sister, Angelique Benner. Tr. 15. She testified that the defendant had started a drug treatment program in Brattleboro, Vermont, but she did not complete it because her insurance had expired. Tr. 15–17. The defendant started another outpatient program at Bradford Psychiatric, but was "kicked out" of that program. Tr. 18, 20, 27. Angelique also testified that while the defendant was in Florida, "there was lots of meth," the defendant had tried to get into a program in Florida, but failed, and she was involved in more meth before she returned home. Tr. 22.

[The defendant] said that she was doing a lot of meth; that the people that she had gone down there with had brought a lot of meth around her; that—it was pretty much, just, she was doing a lot of meth and she wanted to come home and get clean and turn herself in on her warrants.

....

... [S]he said that when she came home that she was going to try and get herself into a treatment program and that she had warrants that she had to take care of, so it was time to face up pretty much.

Tr. 24. Angelique further testified that the defendant wanted to get into treatment, but didn't want to turn herself in before the holidays because she was worried that the deferred sentence would be imposed. Tr. 25.

Angelique was present in White River Junction, Vermont, when the defendant pleaded guilty. Tr. 26. She did not know, however, the exact dates of the events covering the charges, but she did testify that the dates of the offenses were at the end of 2015 and the beginning of 2016. Tr. 28, 31.

Angelique explained that the defendant's

domestic violence charges were dropped ... because if she pled guilty to those ... and did a 90-day inpatient program and had pled guilty to the charges that she was facing so that she did take responsibility for her actions and she was willing to get the treatment[,] and [if] the treatment was imposed on her then all of the other charges would be dropped. [The defendant] agreed to that

Tr. 32.

Angelique testified that she had been given the probation and parole paperwork covering the defendant's conditions of release. Tr. 26. Finally, she testified that there was also a check fraud charge against the defendant in Lebanon in 2015. Tr. 31.

At the end of the hearing, the State argued that the defendant had failed to sustain her burden to show that she had complied with the sentencing order, and therefore failed to show good cause. Tr. 38–39. The State pointed to the defendant's "arrest and conviction in Vermont and the pending charges in Lebanon." Tr. 40. The State also argued that the defendant had failed to comply with the conditions that she undergo a LADAC evaluation within ninety days and abide by all treatment conditions, that she provide the name of her counselor to the county attorney's office, and that she sign any releases necessary to confirm that she completed her treatment and satisfied all the conditions. Tr. 41.

The defendant argued that the sentence should not be imposed because “it would not further the goals of sentencing, specifically punishment, specific deterrence, general deterrence, and rehabilitation,” because the defendant was currently “on a bracelet” because of her probation in Vermont, and she was required to comply with the conditions of that probation, which were related to her drug abuse. Tr. 9; *see also* Tr. 39. She also argued that it didn’t “make sense to impose a deferred sentence simply because a [d]efendant didn’t petition in a timely fashion or didn’t comply with all of the requirements of the sentence.” Tr. 39.

The court ruled that the defendant had “not shown any cause why the deferred commitment should not be imposed and, ... so for that reason, and that reason alone, [the court found] that the deferred commitment should be imposed.” Tr. 42. However, the court also found, “[a]s a second independent ground, ... that the State has presented evidence of—none of which was a surprise to the [d]efendant—that establishes that the [d]efendant has not in fact complied with all of the conditions of her sentence including the good behavior and the treatment provisions in paragraph 9-I.” Tr. 42–43. The court therefore imposed the deferred sentence. Tr. 43.

On October 30, 2017, the court issued its order. Def. Br. App. 1. The court found that the defendant, “for the reasons set forth at length on the record,” “neither petitioned the court nor show[ed] cause why the deferred commitment in her 5/13/15 sentencing order ... should not be imposed.” Def. Br. App. 1.

ARGUMENT

- 1. The defendant's due process rights were not violated where she was afforded a full hearing, with the assistance of counsel, and failed to demonstrate that she was prejudiced by any lack of ability to fully prepare to meet the State's allegations.**

The defendant makes two arguments with respect to her claim on appeal that her due process rights were violated. First, the defendant claims that the lower court erred by putting the burden on her to prove that the court should not impose the deferred sentence, instead of on the State to prove that she had violated the conditions of her sentence. Def. Br. 9–10. She argues that “[t]he State bears the burden of proof at a deferred sentence hearing,” Def. Br. 9, and that “[c]onsistent with this Court’s precedent, a court may not impose a deferred sentence because the defendant failed to present evidence,” Def. Br. 10. The State does not contest this point on appeal.

“Unlike suspended sentences, deferred sentences lack explicit statutory authorization. Nevertheless, [this Court has] said the legislature impliedly condones deferred sentences.” *State v. Almodovar*, 158 N.H. 548, 550 (2009) (citations omitted); accord *State v. Rothe*, 142 N.H. 483, 485 (1997). This Court has also recognized, however, “the difficulty in interpreting the trial court’s authority in imposing deferred sentences without clear statutory authority.” *Almodovar*, 158 N.H. at 551–52.

“As to criminal defendants, [this Court has] held ‘that when the court retains the power to impose incarceration at a later time, the defendant has been afforded liberty, albeit conditional, which may not be revoked without due process.’” *Id.* at 553–54 (quoting *Stapleford v. Perrin*, 122

N.H. 1083, 1088 (1982)). The imposition of a deferred sentence implicates this liberty interest, and therefore affords a defendant the due process rights set out in *Stapleford. Id.* at 554. These rights include:

- (1) written notice of the conduct which triggers the sought after incarceration;
- (2) disclosure to the defendant of the evidence against him;
- (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 also Almodovar*, 158 N.H. at 554–55 (imposition of a deferred sentence without a hearing or the assistance of counsel violated due process). Thus, “[t]here is no question that a defendant has a due process right to a hearing before a court can impose a suspended or deferred sentence of incarceration.” *State v. Flood*, 159 N.H. 353, 355, (2009).

At the hearing, the standard of proof to determine “whether the defendant has been of good behavior or has in some way violated the terms of [her] freedom” is merely “preponderance of the evidence.” *Stapleford*, 122 N.H. at 1089. The State carries this burden of proof. *Flood*, 159 N.H. at 357 (citing *Stapleford*, 122 N.H. at 1089). This Court has recognized that at a hearing on a motion to impose a deferred sentence, “a defendant is not compelled to testify.” *Id.* at 355. “The decision whether to testify or to present evidence and witnesses at a hearing to impose is left to the defendant; it is a strategic choice.” *Id.* (citing *Stapleford*, 122 N.H. at 1088).

“At a hearing to impose, as in any criminal proceeding, the defendant has the right to remain silent.” *Id.*

The defendant’s second due process claim, however, must be rejected. On appeal, she argues that her *Stapleford* rights were violated at the hearing because she “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.” Def. Br. 13. Regardless of the lower court’s ruling on the extent of her due process rights at the hearing, the defendant has failed to demonstrate a violation of due process warranting reversal.

First, it is uncontested that the defendant was afforded a full hearing with the assistance of counsel before the lower court. At that hearing, the defendant had the opportunity to present whatever witnesses and evidence she wished to, and to confront and cross-examine the State’s witness. At the end of the hearing, the court made it clear what evidence and conclusions it had made warranting its decision to impose the deferred sentence. *See* Tr. 42–43.

Second, to the extent the State did not provide specific allegations or evidence before the hearing, this Court must not reverse without a sufficient showing of prejudice. *Cf. State v. Leavitt*, 136 N.H. 475, 476–77 (1992) (“To establish a due process violation . . . , a defendant must show that the delay [in holding his probation revocation hearing] resulted in actual prejudice to the conduct of his or her defense” (Brackets omitted.)); *State v. Dukette*, 127 N.H. 540, 548 (1986) (where there was no prejudice in the defendant’s inability to examine evidence, there was “therefore no

violation of due process”). The defendant has failed to make such a showing.

The defendant speculates that if she had had specific notice, she could have prepared to rebut the State’s claims. She alleges that she could have prepared evidence to rebut specific claims regarding her rehabilitative treatment, her failure to remain of good behavior, or her restitution obligation. Def. Br. 13. This is merely speculation, however. Having been confronted with Angelique Benner’s testimony and the State’s allegations against her at the hearing, she did not argue that any of it was untrue or misleading. Nor did the defendant ask for a continuance to gather any such evidence. Any claim that better preparation to meet the State’s evidence would have made a difference to the outcome, therefore, is unsupported by the record. This Court must therefore reject her due process claim.

2. The State presented sufficient evidence to prove, by a preponderance of the evidence, a violation of the defendant’s conditions of her deferred sentence.

The defendant argues that the State failed to prove that she violated the conditions of her deferred sentence in four ways, as set out below. “In order to prevail on appeal, the defendant must show that the evidence, viewed in the light most favorable to the State, fails to support the trial court’s decision.” *State v. Kay*, 162 N.H. 237, 244 (2011); *accord State v. Dumont*, 145 N.H. 240, 244 (2000). The standard of review on appeal is *de novo*. *Kay*, 162 N.H. at 244.

First, the defendant claims that the State failed to prove that she violated the good-behavior condition within the two-year time frame of the

deferral period set out in the sentencing order. Def. Br. 15–16. She argues that the State’s sole witness, Angelique Benner, could not establish the dates of the defendant’s offenses in Vermont or Lebanon. Def. Br. 16–17, 18. Second, the defendant argues that “the evidence that [she] 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.” Def. Br. 18. She notes that “the Court did not inquire whether [she] waived counsel or was represented in Vermont, nor did the State present evidence demonstrating the convictions were constitutionally obtained.” Def. Br. 19. Third, the defendant claims that the court committed plain error in finding that she violated her condition of good behavior based on the Vermont charges because there was no evidence that the charges were for crimes, as opposed to violation-level offenses. Def. Br. 20. And finally, the defendant claims plain error in the court’s finding that Angelique’s testimony was sufficient to prove that the defendant had failed to comply with her treatment condition. Def. Br. 21–22.

The terms of the defendant’s deferred sentence included the requirement that she remain of good behavior. Def. Br. App. 4. When proving that a defendant has violated a good-behavior condition, “[t]he State may satisfy 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.’” *Dumont*, 145 N.H. at 243 (quoting *State v. Weeks*, 141 N.H. 248, 251 (1996)).” In the absence of a criminal conviction, the fact-finder must make an independent determination that the

defendant committed the alleged violations.” *Id.* (quoting *Moody v. Cunningham*, 127 N.H. 550, 554 (1986)).

“The term ‘good behavior’ is defined ‘as conduct conforming to the law’ and does not include ‘non-criminal behavior for which the defendant must be given actual notice.’” *State v. Auger*, 147 N.H. 752, 753 (2002) (quoting *State v. Budgett*, 146 N.H. 135, 139 (2001)). “To impose a suspended or deferred sentence on the ground that the defendant has violated the implied condition of good behavior, a trial court must find that the defendant engaged in criminal conduct.” *Id.* And therefore, because “a violation does not constitute a crime, the trial court may not impose the defendant’s suspended sentences upon proof that he committed a violation-level offense” unless the defendant was given specific notice of the type of non-criminal behavior that would violate the terms of her deferred sentence. *Id.* at 754 (citation omitted); *see also State v. Palermo*, 146 N.H. 144, 146 (2001) (it was error to impose a deferred sentence based on a violation of the good-behavior condition where there was no finding “that the defendant’s disciplinary violations constituted criminal acts under New Hampshire law”).

Angelique’s testimony established not just a conviction pursuant to a plea in Vermont, but also behavior that would violate the good-behavior condition and the defendant’s failure to complete rehabilitation. Angelique testified that the defendant had started a drug treatment program in Brattleboro, Vermont, but she did not complete it. Tr. 15–17. The defendant started another outpatient program at Bradford Psychiatric, but was “kicked out” of that program. Tr. 18, 20, 27. At the end of the hearing, the State represented to the court that the defendant had failed to comply with the

condition that she undergo a LADAC evaluation within ninety days and abide by all treatment conditions. Tr. 41. The State also asserted that the defendant had failed provide the name of her counselor to the county attorney's office, or sign any releases necessary to confirm that she completed her treatment and satisfied all the conditions. Tr. 41. These failures, by themselves would have been sufficient for the court to impose the defendant's deferred sentence.

Angelique also testified, however, that while the defendant was in Florida, she had been "doing a lot of meth" with "the people that she had gone down there with" Tr. 24. She further testified that the defendant wanted to get into treatment, but didn't want to turn herself in before the holidays because she was worried that the deferred sentence would be imposed. Tr. 25. The only conclusion to draw from these statements is that the defendant was involved in the possession and ingestion of methamphetamine (a felony) during the deferral period, and that she had so far failed in her attempts at rehabilitation. *See* RSA 318-B:26, I(c)(3) (Supp. 2018) (providing for a seven-year sentence for the possession of the lowest quantity of methamphetamine). These conclusions demonstrate a clear violation of the terms of her deferred sentence. No other evidence was necessary.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State waives oral argument under Supreme Court Rule 16(4)(b).

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald

Attorney General

A handwritten signature in cursive script, appearing to read "Stephen D. Fuller", written over a horizontal line.

Stephen D. Fuller

Senior Assistant Attorney General

33 Capitol Street

603-271-3658

Stephen.Fuller@doj.nh.gov

N.H. Dept. of Justice

NH Bar ID No. 14009

December 20, 2018

CERTIFICATE OF COMPLIANCE

I, Stephen D. Fuller, hereby certify that pursuant to Supreme Court 16(4)(b), this memorandum of law in lieu of brief contains approximately 3,937 words, which is less than the total permitted by the rule. Counsel has relied on the word count of the computer program used to prepare this memorandum of law in lieu of brief.

December 20, 2018



Stephen D. Fuller

CERTIFICATE OF SERVICE

I hereby certify that I have two copies of the State's memorandum of law to counsel for the defendant, Eric S. Wolpin, Assistant Appellate Defender, by first-class mail postage prepaid, at the following address:

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

December 20, 2018


Stephen D. Fuller