

Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

MALIK CHEATHAM,) **S. Ct. Crim. No. 2008-026**
) Re: Super. Ct. Crim. No. 393/2007
Appellant/Defendant,)
)
v.)
)
PEOPLE OF THE VIRGIN ISLANDS,)
)
Appellee/Plaintiff.)
_____)

On Appeal from the Superior Court of the Virgin Islands
Considered and Filed: March 27, 2009

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

Debra S. Watlington, Esq.
Territorial Public Defender
St. Thomas, U.S.V.I.
Attorney for Appellant

Dolace McLean, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee

OPINION OF THE COURT

PER CURIAM.

Appellant Malik Cheatham (hereafter “Cheatham”) appeals from a Superior Court order imposing a sentence of six months probation after a period of six months incarceration. For the following reasons, we shall vacate the sentencing order and remand the matter for re-sentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 2007, the Virgin Islands Police Department was dispatched to investigate a

burglary at Sosa's Restaurant in Cruz Bay, St. John. Luisa Pacheco, who was employed at the restaurant, informed the investigating officer that her camera had been removed from her office. The police spoke with Cheatham, who was sitting in the restaurant at the time. Without being asked, Cheatham, who had a camera with him, stated that he knew a digital camera was stolen but that he won his camera at a dice game from a white male who had just been released from a correctional facility. Cheatham was arrested on the same day, and the People of the Virgin Islands (hereafter "People") filed a criminal complaint against him on October 16, 2007, charging him with one count of possession of stolen property in violation of title 14, section 2101(b) of the Virgin Islands Code.

Cheatham initially pled not guilty to this charge. After Cheatham's arraignment, the trial court entered an order on October 27, 2007, which, after invoking title 14, section 4 of the Virgin Islands Code, stated that "should [Cheatham] be convicted in a bench trial, he will not be sentenced to more than six (6) months in prison." (J.A. at 9.) However, at a change of plea hearing held on January 30, 2008, Cheatham pled guilty to one count of possession of stolen property in exchange for a recommended sentence of six months probation and a fine. After the trial judge examined Cheatham pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the judge accepted the plea, ordered a pre-sentence report, and scheduled sentencing for February 29, 2008. On March 17, 2008,¹ the trial court orally sentenced Cheatham to one year incarceration, with credit for time served, with six months suspended and replaced with supervised probation on the condition that Cheatham obtain, maintain, and submit proof of gainful employment. (J.A. at 41-42.) However, in a subsequent written order entered on March

¹ Cheatham's sentencing was re-scheduled due to his failure to report to the Office of Probation to assist with the preparation of the pre-sentence report.

18, 2008, the trial court ordered six months incarceration and six months probation without explicitly suspending any part of Cheatham's sentence. In its written order, the trial court also imposed a \$500.00 fine, court costs of \$75.00, and a \$200.00 fee for the administrative costs of probation. Cheatham filed a notice of appeal on March 19, 2008.

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4 § 32(a). Because the order sentencing Cheatham was entered on March 18, 2008, and his notice of appeal was filed on March 19, 2008, the notice of appeal was timely filed. *See* V.I.S.CT.R. 5(b)(1).

"Generally, this Court will not review a sentence which falls within the bounds prescribed by the applicable statute. In that regard, the trial court's sentencing determination will be interfered with only upon a showing of illegality or abuse of discretion." *Warner v. Gov't*, 332 F.Supp.2d 808, 810 (D.V.I. App. Div. 2004) (citations omitted). This Court's review of the trial court's construction of a statute is plenary. *V.I. Public Services Commission v. V.I. Water and Power Authority*, 49 V.I. 478, 482 (V.I. 2008).

B. Cheatham's Sentence Constitutes an Illegal Split Sentence

Cheatham argues that the trial court entered an illegal sentence when it imposed probation after the maximum period of incarceration. According to Cheatham, section 4 of title 14, which the trial court had invoked in its October 27, 2007 order, authorizes the trial judge to

impose a maximum penalty of six months incarceration in misdemeanor cases.² Because section 3711(a) of title 5 only allows a trial court to order probation when the maximum punishment is more than six months, and then only after it has first suspended the imposition or execution of a sentence, Cheatham contends that there is no period of incarceration to suspend and replace with probation after his six months incarceration is completed and therefore this Court should vacate both the period of probation and the \$200.00 probation fee and remand the matter for re-sentencing.

The People argue that the trial court did not abuse its discretion because the statute codifying the offense under which Cheatham was convicted allows a defendant who received, bought, or possessed stolen property worth less than \$100.00 to “be fined not more than \$2,000 or imprisoned not more than one year, or both.” 14 V.I.C. § 2101(b). According to the People, the fact that “the trial court sentenced the defendant only to six months imprisonment . . . leads to the inescapable conclusion that the trial court suspended the other six months allowable under the (sic) section 2101.” (Appellee’s Br. at 9.) Furthermore, the People note that section 4 of title 14 only limits the term of imprisonment to six months, and thus does not change the maximum possible sentence, which may include a punishment other than imprisonment.

The plain language of title 14, section 4 clearly states that a trial judge may “*limit* the term of imprisonment to six months in prison,” and therefore allow for a bench trial in lieu of a jury trial. (emphasis added). The People are correct, however, that this statute only appears to limit the *term* of incarceration, and thus, for purposes of interpreting title 5, section 3711, the

² This statute reads, in its entirety:

In misdemeanor cases only, trial judges are authorized to limit the term of imprisonment to six months in prison; in which event, the defendant may be tried by the court, except in cases where a mandatory sentence is imposed.

14 V.I.C. § 4.

trial court's invocation of title 14, section 4 does not change the maximum *punishment* available under title 14, section 2101(b). Thus, we agree that section 3711(a) of title 5 does not bar the trial court from imposing a period of probation in addition to a period of incarceration when title 14, section 4 is invoked so long as the combined period does not exceed six months.

Nevertheless, we hold that the trial court entered an illegal sentence in this matter. This Court has previously held that “[a] split sentence that imposes probation without suspending a portion of the sentence is illegal.” *St. Louis v. People*, S.Ct. Crim. No. 2007-086, 2008 WL 5605712, at *3 (V.I. 2008) (quoting *Gov’t of the V.I. v. Martinez*, 239 F.3d 293, 297 (3d Cir. 2001)). “[I]n the absence of a written judgment reflecting that the court is suspending a part of the sentence, if the [trial] court orally states when imposing sentence that it is suspending part of the sentence, the oral sentence takes precedence over the judgment.” *Martinez*, 239 F.3d at 298 (citing *United States v. Raftis*, 427 F.2d 1145, 1146 (8th Cir. 1970)). Accordingly, the trial court's March 17, 2008 oral judgment, in which it sentenced Cheatham to a year of incarceration and then suspended six months of that sentence and replaced it with supervised probation, takes precedence over the March 18, 2008 written judgment to the extent they conflict. *See United States v. Rosario*, 386 F.3d 166, 168 (2d Cir. 2004) (holding that when there is variation “between an oral pronouncement of sentence and a subsequent written judgment, the oral pronouncement controls.”).

Because the trial judge invoked title 14, section 4, it could not impose a combined period of incarceration and probation greater than six months, even if all but six months incarceration is ultimately suspended. Notably, Virgin Islands law allows for a trial court to reinstate a previously suspended sentence. For instance, if Cheatham were to violate the terms of his probation—such as by not obtaining gainful employment as the trial court required, or failing to

report to his probation officer—the trial court would have the discretion to revoke his probation and order his incarceration. 5 V.I.C. § 3720. Significantly, if Cheatham were to be convicted of a crime of violence while on probation, section 3711(b) of title 5 would *require* the trial court to rescind its order suspending Cheatham’s sentence and enter an order directing his incarceration for the full term of his sentence without credit for time spent on probation. Accordingly, this Court shall vacate Cheatham’s sentence and remand the matter to the Superior Court so that it may correct the illegal sentence.

III. CONCLUSION

Since the trial court invoked title 14, section 4 of the Virgin Islands Code, it could not sentence Cheatham to a term of incarceration greater than six months. Although the Court had the discretion to suspend a portion of Cheatham’s sentence and replace it with supervised probation, the Court could not impose a split sentence in which the total period of incarceration and supervised probation exceeded six months. Therefore, this Court vacates the Superior Court’s sentencing order and remands the matter so that it may determine a new sentence in proceedings consistent with this opinion.

Dated this 27th day of March, 2009.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court