NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

BRUCE D. WHITE, CHIEF JUDGE
RANDY I. BELLOWS
ROBERT J. SMITH
BRETT A. KASSABIAN
MICHAEL F. DEVINE
JOHN M. TRAN
GRACE BURKE CARROLL
DANIEL E. ORTIZ
PENNEY S. AZCARATE
STEPHEN C. SHANNON
THOMAS P. MANN
RICHARD E. GARDINER
DAVID BERNHARD
DAVID A. OBLON
DONTAÈ L. BUGG

JUDGES

COUNTY OF FAIRFAX CITY OF FAIRFAX

THOMAS A. FORTKORT
J. HOWE BROWN
F. BRUCE BACH
M. LANGHORNE KEITH
ARTHUR B. VIEREGG
KATHLEEN H. MACKAY
ROBERT W. WOOLDRIDGE, JR.
MICHAEL P. McWEENY
GAYLORD L. FINCH, JR.
STANLEY P. KLEIN
LESLIE M. ALDEN
MARCUS D. WILLIAMS
JONATHAN C. THACHER
CHARLES J. MAXFIELD
DENNIS J. SMITH
LORRAINE NORDLUND
DAVID S. SCHELL
JAN L. BRODIE

RETIRED JUDGES

June 5, 2020

LETTER OPINION

Mr. Robert Bezilla
Assistant Commonwealth's Attorney
Office of the Commonwealth's Attorney
4110 Chain Bridge Road
Fairfax, VA 22030

Counsel for the Prosecution

Mr. Dale Edwin Sanders
Attorney at Law
218 North Lee Street
Alexandria, VA 22314

Counsel for Defendant

Re: *Commonwealth of Virginia v. Darrick Wallace, Jr.*
Case No. FE-2019-293

Dear Counsel:

This case presents an issue of apparent first impression: under what circumstances, if any, a defendant given a deferred finding pursuant to Virginia Code § 18.2.251 may be excused from completing the minimum 100 hours of community

service referenced in that statute and yet still be eligible to have his case dismissed. The General Assembly chose its words with care by stating in Code § 18.2-251 that the Defendant must *"comply with a plan"* of at least 100 hours of community service, but not that the hours must be *completed*. The Court thus holds the statutory scheme affords the Court the discretion to dismiss the case where a) the court determines that the defendant has "compl[ied] with the plan of at least 100 hours"[1] as required by § 18.2-251, b) due to no fault of his own or his immigration status, the defendant has been unable to complete those hours, c) it is not currently reasonably feasible to comply with the community service requirement, and d) an extension of the duration of probation to complete said hours would result in undue prejudice to the defendant. This Court finds that the Defendant completed 60 of his 100 assigned hours of community service, manifesting intent to comply with the prescribed plan, but has not placed before this Court sufficient facts[2] from which to conclude that compliance is reasonably infeasible or that undue prejudice would result from an extension of probation. Therefore, this Court shall by separate order deny the Motion to Dismiss without prejudice and extend the period for completion of community service by six months. The Defendant may either complete the remaining hours assigned if reasonably able to do so, whereupon he may seek an early dismissal of the case, or alternatively, approach this Court anew should he develop facts justifying

---

[1] The statute requires 100 hours when the charge to be dismissed is a felony and 24 hours if a misdemeanor.

[2] The only relevant fact offered by Defendant in support of his Motion to Dismiss is that Maryland Probation has reported to Virginia Probation that his community service hours have been "suspended" due to the COVID-19 pandemic.

the relief sought for inability to comply not inconsistent with the judicial discretion detailed in this opinion.

BACKGROUND

The Defendant appeared before the Court on May 17, 2019, wherein the Court withheld a finding of guilt in a drug possession case pursuant to Code § 18.2-251, placed him on probation, and set the case for dismissal on May 1, 2020, upon satisfactory compliance with the Court's dispositional order. On April 20, 2020, Defendant's Virginia probation officer advised this Court that Maryland Probation, which is supervising the Defendant as a courtesy, advised the Defendant had completed 60 of the 100 hours of assigned community service and was otherwise in compliance with the terms of probation requisite for dismissal of his case, but that due to the COVID-19 pandemic "scheduled hours were suspended until further notice by his Maryland Probation officer." Defense counsel requested the case be dismissed due to the Defendant's "inability" to complete his hours through no fault of his own. The Court invited written input from both the Commonwealth and the Defense as to whether this Court has the authority to excuse completion of the remaining number of community service hours assigned. The Assistant Commonwealth's Attorney, while sympathetic to the Defendant's plight, responded that Code § 18.2-251 is unforgiving in its requirement that a minimum of 100 hours of community service be completed before the case could be dismissed.

The parties waived oral argument and submitted the issue in controversy to this Court under its "on papers" procedure, implemented by the judges of this Court to provide an avenue for adjudication of disputes during the period where even remote appearances

were not yet explicitly authorized for non-emergency matters in light of the pandemic. The Court took the issue under advisement and has turned to its resolution in the pages of this opinion.

ANALYSIS

Virginia Code § 18.2-251 provides in relevant part that "the court shall require the accused… (d) to *comply with a plan* of at least 100 hours of community service for a felony…" Va. Code Ann. § 18.2-251 (emphasis added). At first blush, it would appear that if the accused does not timely complete the community service hours, irrespective of the cause, the Court may not dismiss the case until the hours have first been satisfied. The Court also clearly does not have the statutory authority to prescribe less than one hundred hours in its original dispositional order. However, it is presumed that "the General Assembly, in framing a statute, chose its words with care." *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100 (2001). "When statutory terms are plain and unambiguous, [courts] apply them according to their plain meaning without resorting to rules of statutory construction." *Smith v. Commonwealth*, 282 Va. 449, 454-55 (2011) (citing *Halifax Corp.*, 262 Va. at 99-100).

Code § 18.2-251 requires the defendant "*comply with a plan*" of community service rather than "complete 100 hours" or "comply with completing 100 hours" or some other more restrictive directive. This prescient choice of words appears to be no accident. The General Assembly knows well how to write a statute with more specific requirements. In fact, one of the other subparts of § 18.2-251 contains a clear example of this specificity which requires the defendant "to successfully *complete* treatment or education program

or services." The fact that the statute requires defendants to *comply with a plan* of 100 hours of community service rather than to *complete* 100 hours of community service suggests that the General Assembly intended to clothe the courts with some discretion to excuse completion of the hours when there has been good faith compliance or attempted compliance with the plan, but unforeseen circumstances intervene to prevent completion.

In determining the confines of such discretion, this Court next resorts to guidance from the appellate courts for when the discretion to excuse completion of the assigned hours of community service may be exercised. No case of which this Court is aware addresses directly the bounds of the Court's authority to excuse the community service hours. However, several cases helpfully frame the discretion this Court possesses in similar contexts, which appear applicable to the community service requirement here.

In a case where the defendant did not comply with any of the probationary requirements of Code § 18.2-251 due to being deported and not having access to the requisite programs, the Court of Appeals of Virginia held, "[t]he court was not required to continue the case indefinitely, armed only with the faint hope that appellant might one day be in a position to satisfy the terms of the court's deferred disposition order." *Nunez v. Commonwealth*, 66 Va. App. 152, 160 (2016). Two takeaways emerge from *Nunez*. First, if the accused's immigration status prevents completion of probationary terms, that will not excuse compliance therewith in the context of Code § 18.2-251. Second, the Court is "not required to continue the case indefinitely," which in the current case has application

because the Court has not been advised of a time when Maryland Probation[3] may restore its assignment and supervision of community service hours. *Id.*

In a case where the defendant was on conditional probation under Code § 19.2-316.2 and was unable to complete the program due to medical and psychological reasons, the Supreme Court of Virginia reversed the trial court and held that

> [t]here is surely a distinction between the willful failure of an inmate to comply with the requirements of the detention center program and the conditions of his suspended sentence permitting his participation in that program and the subsequent inability of the inmate to do so resulting from an *unforeseen* medical condition.

Peyton v. Commonwealth, 268 Va. 503, 511 (2004) (emphasis added). The Supreme Court further held that when "the trial court revoked Peyton's suspended sentence without considering reasonable alternatives to imprisonment even while expressly finding that Peyton's failure to complete the program was caused by his medical condition and was contrary to his desire to continue in the program," the revocation and imposition of the previously suspended sentence was an abuse of discretion. *Id* at 511. It follows from *Peyton* that when a probationary condition fails due to circumstances outside the control of the defendant, which were unforeseen when imposed, the defendant may not suffer a punishing consequence as a result thereof.

The Court of Appeals of Virginia applied *Peyton* similarly in a case where Defendant appealed the revocation of her sentence based on a good-faith belief that she had complied with her probation.

> Thus, although a trial court has the authority to revoke the suspension of a sentence for the purpose of effectuating a condition of the suspension that

[3] The Court notes further that in relying on courtesy supervision by another state, this Court does not possess the direct authority to compel how the probation agency in such state should conduct supervision.

> has—*through no fault of the defendant*—become impossible to fulfill, it does not otherwise have the authority to find a defendant in violation of probation or revoke the suspension of a sentence without finding the defendant has some culpability with respect to a violated condition. In other words, the trial court may not hold a defendant strictly liable for failure to comply with the conditions of probation. If this Court permitted a defendant to be found in violation without regard to fault, it would teach a defendant "that good conduct on h[er] part will [not] expedite h[er] complete restoration to society." This Court will not do so."

Deja Lachee McNair v. Commonwealth of Virginia, No. 0306-19-4, 2020 WL 543602, at *4 (Va. Ct. App. Feb. 4, 2020) (quoting *Word v. Commonwealth,* 41 Va. App. 496, 505 (2003) (emphasis added)).

> The true objective of suspended sentencing [and probation] is to rehabilitate and to encourage a convicted defendant to be of good behavior. To accomplish this it is necessary that good conduct be rewarded. It is important that a defendant know that good conduct on his part will expedite his complete restoration to society.

Hamilton v. Commonwealth, 217 Va. 325, 328 (1976).

The Defendant alleges that due to the COVID-19 pandemic, he has the "inability" to complete the balance of the 100 hours of community service ordered as a term of his probation. Virginia Probation sent a letter to the Court which confirms completion of 60 of 100 hours of community service and all other requirements of his probation but advises that his "scheduled hours were suspended until further notice by his Maryland Probation officer."

The situation raised by the COVID-19 pandemic is an unusual one, which could lead to the practical inability of compliance with community service as many non-essential activities have ceased. While there is no case law directly on point, the cases cited above, taken as a collective, suggest that it is permissible for the Court to find that the Defendant,

through no fault of his own, cannot complete the plan with which he has substantially complied, and therefore, the Court may find that he has satisfied the requirements for dismissal of the offense.

Peyton holds that the imposition of a suspended sentence without consideration of alternatives to avoid incarceration is an abuse of discretion where the Defendant's inability to complete a probationary program is involuntary and "contrary to his desire to continue in the program." *Peyton*, 268 Va. at 511. On the other hand, *Nunez* directs that the court is "not required to continue the case indefinitely." *Nunez*, 66 Va. App. at 160. The middle ground then, provides for a scenario in which a) the court determines that the defendant has "compl[ied] with the plan of at least 100 hours" as required by § 18.2-251, b) due to no fault of his own or his immigration status, the defendant has been unable to complete those hours, c) it is not currently reasonably feasible to comply with the community service requirement, and d) an extension of the duration of probation to complete said hours would result in undue prejudice to the defendant. In such circumstance, in order to ensure the principle that "good conduct on his part will expedite his complete restoration to society," *Hamilton* 217 Va. at 328, is carried out, the court could find the defendant has satisfied his obligation under the deferred finding disposition order.

In this case, however, the Court has not received the requisite proof to satisfy the above elements in order to enable exercise of its discretion to excuse the remaining community service hours. The letter from Virginia Probation demonstrates that the Defendant has complied with the plan and completed 60 of the 100 hours of community

service. However, Virginia Probation, in stating Maryland Probation has suspended his scheduled hours, has not specifically stated there is a reasonable inability for the Defendant to complete his hours of community service under the supervision of Virginia Probation.[4] The Court is thus unable to determine from the sparse facts alleged by Defendant that he has the present inability to comply and that an extension of time for completion of the hours would be of undue prejudice.

CONCLUSION

The Court has considered this case presenting an issue of apparent first impression: under what circumstances, if any, a defendant given a deferred finding pursuant to Virginia Code § 18.2.251 may be excused from completing the minimum 100 hours of community service referenced in that statute and yet still be eligible to have his case dismissed. The General Assembly chose its words with care by stating in Code § 18.2-251 that the Defendant must *"comply with a plan"* of at least 100 hours of community service but not that the hours must be *completed*. The Court thus holds the statutory scheme affords the Court the discretion to dismiss the case where a) the court determines that the defendant has "compl[ied] with the plan of at least 100 hours" as required by § 18.2-251, b) due to no fault of his own or his immigration status, the defendant has been unable to complete those hours, c) it is not currently reasonably

[4] If Virginia Probation were to certify, for instance, that the Defendant was unable to complete the community service hours due to an absence of reasonably available placements resulting from the COVID-19 pandemic, this Court could find that to be prima facie evidence of inability to comply as Virginia Probation has been delegated power to supervise felony probation requirements, and is an arm of the Executive Branch along with the prosecuting Commonwealth's Attorney. The Commonwealth could then, of course, avail itself of the further opportunity to rebut such evidence by showing that there is a reasonable alternative course for Defendant to complete his community service, and the defense could respond to such evidence as warranted, before the Court determined whether the community service hours could be excused.

feasible to comply with the community service requirement, and d) an extension of the duration of probation to complete said hours would result in undue prejudice to the defendant. This Court finds that the Defendant completed 60 of his 100 assigned hours of community service, manifesting intent to comply with the prescribed plan, but has not placed before this Court sufficient facts from which to conclude that compliance is reasonably infeasible or that undue prejudice would result from an extension of probation. Therefore, this Court shall by separate order deny the Motion to Dismiss without prejudice and extend the period for completion of community service by six months. The Defendant may either complete the remaining hours assigned if reasonably able to do so, whereupon he may seek an early dismissal of the case, or alternatively, approach this Court anew should he develop facts justifying the relief sought for inability to comply not inconsistent with the judicial discretion detailed in this opinion.

The Court shall enter an order incorporating its ruling herein and THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER