

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,)	
)	CRIMINAL NO. ST-96-CR-382
Plaintiff,)	
)	V.I. Code Ann. tit. 14, §§ 1081, 1083, 444(1)
v.)	
)	
WARRINGTON E. MARSHAM,)	
(D.O.B.: 11-09-74))	
)	
Defendant.)	
_____)	

MEMORANDUM OPINION AND ORDER

THIS MATTER came on for a hearing on November 6, 2009, on Defendant Warrington Marsham's Memorandum of Law on the Legality of Sentence of Probation. The People were represented by Brenda Scales, Esq., Assistant Attorney General, who was appearing on behalf of Douglas Dick, Esq., Assistant Attorney General. The Defendant was present and represented by Vincent A. Fuller, Jr., Esq. After having heard the arguments and representations of counsel, and considering the pertinent statutes and case law, the Court will set aside the Order of probation and will not revoke Defendant's probation because it was not legal to place Defendant on Probation after imposing a period of incarceration lasting more than six (6) months. Nevertheless, the Order of Restitution will stand and it will be up to the People or the victims – Quality Foods and Western Auto – to take the steps reasonably necessary to collect said restitution.

FACTS

In an Amended Judgment and Commitment dated December 1, 2003, the Defendant in this matter was sentenced to three terms of incarceration: two ten-year terms and one seven-year

term, all with credit for time served and all to run concurrently. Upon completion of his incarceration, Defendant was to be placed on supervised probation for three years, during which time Defendant was ordered to pay a court cost of Twenty-Five Dollars (\$25.00) and to make restitution in the amounts of Two Hundred Fifty Dollars (\$250.00) to the Virgin Islands Water and Power Authority, Five Thousand Three Hundred Dollars and Thirty-Three Cents (\$5,300.33) to Quality Foods, and Seven Thousand Dollars (\$7,000.00) to Western Auto. Defendant was brought before the Court for a hearing to determine whether or not his probation should be revoked because he had failed to make restitution to the victims.¹

Defendant now argues the legality of the imposed sentence. The People do not contest that the Court cannot impose a period of probation after the termination of a sentence of imprisonment exceeding six (6) months, as was done in this case. However, the People maintain that the order of restitution should stand.

DISCUSSION

Order of Probation

The pertinent portion of V.I. Code Ann. tit. 5, § 3711(a) (1997) provides that:

Upon entering a judgment of conviction of any offense against the laws of the Virgin Islands not punishable by life imprisonment, if the maximum punishment provided for such offense is more than six months, the district court or a Superior Court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

¹ It appears from the record that the restitution for the Virgin Islands Water and Power Authority ("WAPA") has been paid or that WAPA is no longer seeking payment of restitution.

In *St. Louis v. People of the V.I.*, S. Ct. Crim. No. 2007-086, 2008 WL 5605712, at *4 (V.I. Oct. 10, 2008), the Virgin Islands Supreme Court held that, pursuant to § 3711(a), the Superior Court judges must “limit[] custodial incarceration to six months when a split sentence – a sentence comprised of a period of probation after a term of incarceration – is imposed.” Moreover, “[a] split sentence that imposes probation without suspending a portion of the sentence is illegal.” *Gov’t of the V.I. v. Martinez*, 239 F.3d 293, 297 (3d Cir. 2001) (citing *U.S. v. Guevremont*, 829 F.2d 423, 427 (3d Cir. 1987)). “The Court may not require a defendant to submit to probationary supervision unless the execution of part of his prison term is suspended Absent such a suspension[,] the authority of the court over the defendant during the period of probation is lacking,” thereby making the probation order invalid. *U.S. v. Stupak*, 362 F.2d 933, 934 (3d Cir. 1966).

“The court may correct an illegal sentence at any time” Super. Ct. R. 136. In this matter, Defendant’s sentence of incarceration far exceeded six (6) months. Furthermore, none of that period was suspended. In the case of an illegal split sentence such as this, the Court can correct the illegality in one of two ways: (1) impose a split sentence including both a custodial and probationary term with the custodial portion partially suspended; or (2) vacate the provision for probation. As the Defendant in this case has already completed his custodial term, and has begun to serve his probationary term, the only appropriate option in this case is to vacate the provision for probation. Because the imposition of the period of probation was illegal, and therefore invalid, the Court cannot revoke Defendant’s probation.

Order of Restitution

Because Defendant has failed to make restitution to the victims, the Office of Probation sought to have his probation revoked. The legality of the order of restitution is not at issue in

this proceeding because the matter has already been resolved by the United States Court of Appeals for the Third Circuit for this specific case. *See Gov't of the V.I. v. Marsham*, 293 F.3d 114 (2002). The Defendant has informed the Court that he has been unable to make restitution because he has to assist his mother financially and provide for his daughter. Defendant has indicated that he would be in a better position to make restitution if the payments were stretched over a long period of time. It will be up to the People or the victims – Quality Foods and Western Auto – to take the steps reasonably necessary to collect said restitution.

Accordingly, it is hereby

ORDERED that the application for revocation of probation is **DENIED**; and it is further

ORDERED that the order of probation contained in the Court's Amended Judgment and Commitment dated December 1, 2003, is **VACATED**; and it is further

ORDERED that the remainder of the Amended Judgment and Commitment dated December 1, 2003, including the order of restitution, shall remain unchanged; and it is further

ORDERED that a copy of this Order of Dismissal shall be served personally upon the Defendant, Warrington E. Marsham, and copies thereof shall be directed to Vincent A. Fuller, Jr., Esq., counsel for the Defendant, and to Douglas Dick, Esq., Assistant Attorney General.

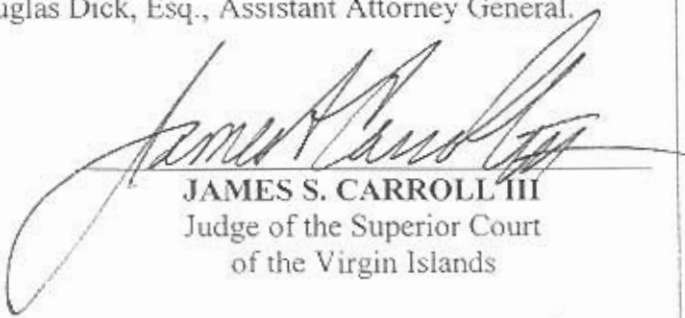
DATED: February 5, 2010

ATTEST:

VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: 

ROSALIE J. GRIFFITH
Court Clerk Supervisor 318 110


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 5/9/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Court Clerk