IN THE SUPREME COURT OF THE STATE OF NEVADA

JERALDINE LYNN SYLVESTRI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63244

FILED

NOV 14 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction. Fifth Judicial District Court, Mineral County; Kimberly A. Wanker, Judge.

Appellant Jeraldine Sylvestri was convicted, pursuant to a guilty plea, of attempted embezzlement and attempted grand larceny. The district court sentenced her to serve consecutive prison terms of 24 to 60 months, with both terms suspended, and placed Sylvestri on probation for a definite term of five years on each count, to be served consecutively. Numerous conditions of probation were also imposed. On appeal, we determined that the imposition of the two consecutive terms of probation was illegal, *see* NRS 176A.500(1)(b) (providing that "[t]he period of probation or suspension of sentence" must not exceed five years); *Wicker v. State*, 111 Nev. 43, 45-47, 888 P.2d 918, 919-20 (1995), and the district court abused its discretion when imposing two terms of probation, and we reversed and remanded for further proceedings. *Sylvestri v. State*, Docket

13-34148

No. 61165 (Order Affirming in Part, Reversing in Part, and Remanding, March 14, 2013). On remand, the district court imposed a prison term of 24 to 60 months for count 1 and a consecutive prison term of 24 to 60 months for count 2, with the term for count 2 to be suspended and Sylvestri to be placed on probation for a term not to exceed five years, with numerous conditions of probation. This appeal follows.

First, Sylvestri claims that the district court abused its discretion by eliminating her probation on count 1, asserting that this court did not reverse the grants of probation, rather, this court only reversed certain terms and conditions of the granted probation. We conclude this claim lacks merit. In our previous order, we reversed Sylvestri's sentence and several conditions of probation and remanded for further proceedings. *Id.* That order did not limit the proceedings on remand to modifying the terms and conditions of the prior grant of probation.

Second, Sylvestri claims that the elimination of probation on count 1 constituted a double jeopardy violation. Citing *Wilson v. State*, 123 Nev. 587, 170 P.3d 975 (2007), Sylvestri asserts that the district court could not rescind the lawful probationary sentence to impose the more harsh punishment of imprisonment. We disagree.

In *Wilson*, we reaffirmed our holding in *Dolby v. State*, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990): "When a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful

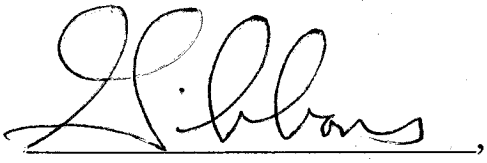
sentence on a separate count." *Wilson*, 123 Nev. at 594, 170 P.3d at 979. Here, the elimination of the grant of probation did not violate double jeopardy because the actual sentence imposed was not increased. The sentence imposed on remand was identical to the initially imposed sentence, a prison term of 24 to 60 months. The grant of probation is not the sentence imposed. *See* NRS 176A.100(1)(b) (providing that "the court shall suspend the execution of the sentence imposed and grant probation"); NRS 176A.630(4) (providing that upon violation of probation the court may "[c]ause the sentence imposed to be executed"); NRS 176A.630(5) (providing that upon violation of probation the court may "[m]odify the original sentence imposed by reducing the term of imprisonment and cause the modified sentence to be executed"). Further, although the district court eliminated probation on count 1 on remand, the grant of probation is a benefit rather than a penalty, *see Dzul v. State*, 118 Nev. 681, 696, 56 P.3d 875, 885 (2002) (concluding that under Nevada's statutory scheme probation is a benefit rather than a penalty), and therefore the elimination of probation did not equate to the imposition of a harsher sentence, *see id.* at 692-96; 56 P.3d at 882-85.

Third, Sylvestri claims that the district court abused its discretion by adding terms and conditions of probation upon remand. We disagree. NRS 176A.400(1) permits the district court to "fix the terms and conditions" of probation, including those identified in the statute, "without

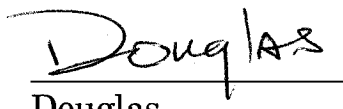
limitation," and pursuant to NRS 176A.450(1) "the court may impose, and may at any time modify, any conditions of probation."

Having considered Sylvestri's arguments and concluded that they lack merit, we

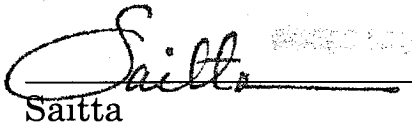
ORDER the amended judgment of conviction AFFIRMED.[1]



_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Saitta

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[1]The fast track statement and reply do not comply with the formatting requirements of NRAP 32(a)(4) because the text in the body of the brief, excluding headings, footnotes, and quotations, is not double-spaced, and the briefs do not have margins of at least 1 inch on all four sides, and they do not comply with the typeface requirements of NRAP 32(a)(5) because the text in the footnotes is not the same size as the text in the body of the brief. *See* NRAP 3C(h)(1) (requiring fast track filings to comply with the provisions of NRAP 32(a)(4)-(6)). Further, we note that appellant has improperly attached an affidavit to the reply brief in support of the argument on reply. We caution appellant's counsel that future failure to comply with the rules of this court when filing briefs may result in the imposition of sanctions. *See* NRAP 3C(n).

cc: Hon. Kimberly A. Wanker, District Judge
Paul E. Quade
Attorney General/Carson City
Mineral County District Attorney
Mineral County Clerk