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SUMMARY
October 28, 2021

2021COA131

**No. 19CA1546, *People v. Delfeld* — Criminal Law — Protection
Order Against Defendant — Postconviction Remedies —
Correction of an Illegal Sentence**

A division of the court of appeals considers the impact the illegality of a sentence has on the mandatory protection order that, under section 18-1-1001(1), C.R.S. 2020, remains in effect until the completion of a sentence. The division concludes that where a defendant is serving an illegal sentence but hasn't obtained a court order reversing or vacating the judgment of conviction, entering a new sentence, or modifying or dismissing the mandatory section 18-1-1001(1) protection order, and where the illegal portion of the sentence can't be severed, the protection order remains in effect through the entire sentence and any violation of the order is

punishable. The division accordingly affirms the judgment of conviction for violation of a protection order.

Court of Appeals No. 19CA1546
Arapahoe County District Court No. 18CR3194
Honorable Shay K. Whitaker, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Brian Allan Delfeld,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE GOMEZ
Harris and Vogt*, JJ., concur

Announced October 28, 2021

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.
VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 The parties to this case agree, as do we, that defendant Brian Allan Delfeld’s sentence to imprisonment and probation on different counts in the same case was illegal under *Allman v. People*, 2019 CO 78. But Delfeld has already served that sentence and is not directly attacking it in this case. Instead, he challenges his conviction for violation of the mandatory protection order that, under section 18-1-1001(1), C.R.S. 2021, was in effect until he completed his earlier, illegal sentence. Specifically, he contends that his illegal sentence — and, with it, the section 18-1-1001(1) protection order — should be deemed to have ended when he completed his term of prison and parole, lopping off the probation portion of the sentence. Thus, he contends, the protection order was no longer in place on the day he was found to have violated it. So we must determine what impact, if any, the illegality of his earlier sentence had on the protection order.

¶ 2 We conclude that where a defendant is serving an illegal sentence but hasn’t obtained a court order reversing or vacating the judgment of conviction, entering a new sentence, or modifying or dismissing the mandatory section 18-1-1001(1) protection order, and where the illegal portion of the sentence can’t be severed, the

protection order remains in effect through the entire sentence and any violation of the order is punishable. Therefore, we affirm the judgment of conviction entered after a jury found Delfeld guilty of violation of a protection order and harassment.

I. Background

¶ 3 In an earlier case, the prosecution charged Delfeld with several offenses arising out of a domestic violence incident. Pursuant to section 18-1-1001(1), the trial court entered a protection order prohibiting Delfeld from, among other things, harassing, contacting, or communicating with the victim. The protection order stated that it would remain in effect “until final disposition or further order of Court.”

¶ 4 Later, the parties reached a plea agreement whereby Delfeld would plead guilty to three counts; the prosecution would dismiss the remaining counts; and Delfeld would serve a sentence of one year of imprisonment on two of the counts, followed by two years of mandatory parole, and three years of probation on the third count, to be served consecutively to his prison sentence but concurrently with his parole. The court accepted the plea and imposed the stipulated sentence.

¶ 5 Delfeld served that sentence. He apparently was released from prison in June 2016 and, after serving some additional prison time following parole violations, was discharged from parole in May 2018. Thereafter, he was only on probation. Based on a complaint filed in November 2018, his probation was revoked and he was resentenced to eighteen months in jail, which he has since served.

¶ 6 Meanwhile, in this case, the prosecution charged Delfeld with violation of the protection order and harassment, both as crimes of domestic violence by a habitual domestic violence offender. The charges stemmed from Delfeld's altercation with the victim in September 2018 — which was after he had completed his prison sentence and been discharged from parole but while he remained on probation (and before his probation was revoked).

¶ 7 A jury convicted Delfeld of the violation of a protection order and harassment counts and found that both offenses were acts of domestic violence. The trial court then found Delfeld was a habitual offender and sentenced him to three years in prison. Delfeld now appeals, challenging only the judgment of conviction for violation of a protection order.

II. Analysis

¶ 8 The dual nature of Delfeld’s earlier sentence rendered that sentence illegal and subject to correction under Crim. P. 35(a). *See Allman*, ¶ 28.¹ It also rendered his guilty plea subject to potential vacation, to the extent that the agreement to an illegal sentence may have been a material term of the plea agreement. *See Chae v. People*, 780 P.2d 481, 485-86 (Colo. 1989). Delfeld, however, hasn’t filed such a motion and doesn’t seek such relief in this case. Instead, he challenges only his later conviction for violation of the protection order.

¶ 9 Delfeld raises a single issue on appeal: Is there a basis to support his conviction for violation of a protection order that was entered in a case in which he received an illegal sentence? Delfeld argues that only the probation portion of his earlier sentence was illegal and, therefore, the sentence should be deemed to have ended when he was discharged from parole in May 2018. Thus, he

¹ None of the offenses in Delfeld’s earlier case were sex offenses under the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), which are treated differently under the rule set forth in *Allman*. *See People v. Keen*, 2021 CO 50, ¶ 2; *People v. Manaois*, 2021 CO 49, ¶ 5.

argues, the protection order terminated by operation of law in May 2018, prior to the date of the offenses in this case, and there was no basis after that point for the trial court to enforce the order or for the jury to find he had violated it.

¶ 10 Reviewing this issue de novo, *see McCoy v. People*, 2019 CO 44, ¶ 27 (we review sufficiency claims de novo); *People v. Pellegrin*, 2021 COA 118, ¶ 37 (we review questions of statutory interpretation de novo); *People v. Sims*, 2019 COA 66, ¶ 13 (we review questions of subject matter jurisdiction de novo), we disagree.

¶ 11 The supreme court issued its decision in *Allman* a few months after Delfeld's sentencing in this case. Thus, the issue he raises now is not one he raised in the trial court. Nonetheless, we agree with the parties that the argument didn't need to be preserved to the extent that it raises an issue of subject matter jurisdiction, *see People v. Jennings*, 2021 COA 112, ¶ 9 (challenges to a trial court's subject matter jurisdiction may be raised at any time), and challenges the sufficiency of the evidence to support his conviction, *see McCoy*, ¶ 27 (sufficiency claims may be raised for the first time on appeal, and when they are, they are not subject to plain error review).

¶ 12 Our review requires us to interpret section 18-1-1001. Our primary purpose in doing so is to ascertain and effectuate the General Assembly’s intent. *See McCoy*, ¶ 37. To do so, we look first to the language of the statute, giving its words and phrases their plain and ordinary meanings, reading those words and phrases in context, and construing them according to the rules of grammar and common usage. *Id.*

¶ 13 Section 18-1-1001(1) provides, in relevant part,

There is hereby created a mandatory protection order against any person charged with a violation of any of the provisions of this title, which order shall remain in effect from the time that the person is advised of his or her rights at arraignment or the person’s first appearance before the court and informed of such order until final disposition of the action. Such order shall restrain the person charged from harassing, molesting, intimidating, retaliating against, or tampering with any witness to or victim of the acts charged.

¶ 14 The phrase “[u]ntil final disposition of the action’ means until the case is dismissed, until the defendant is acquitted, or until the defendant completes his or her sentence.” § 18-1-1001(8)(b). Thus, for instance, “[a]ny defendant sentenced to probation is deemed to have completed his or her sentence upon discharge from

probation,” and “[a] defendant sentenced to incarceration is deemed to have completed his or her sentence upon release from incarceration and discharge from parole supervision.” *Id.*; *see also People v. Sterns*, 2013 COA 66, ¶ 10 (“An ‘action’ [under section 18-1-1001(8)(b)] ‘refers to the entire judicial process of dispute resolution, from invocation of the courts’ jurisdiction to entry of a final judgment that is not subject to further appeal.’”) (citation omitted).

¶ 15 The parties may, at any time, seek modification or dismissal of the protection order. § 18-1-1001(3). “The trial court retains jurisdiction to enforce, modify, or dismiss the protection order until final disposition of the action.” *Id.* Delfeld didn’t seek, and the trial court didn’t enter, any modification under this provision.

¶ 16 Significantly, the protection order wasn’t entered as part of the illegal sentence in the earlier case. Rather, under the mandatory provisions of section 18-1-1001(1), the court entered the protection order after Delfeld was charged with violations of title 18, advised of his rights at his first appearance, and informed of the order — all of which occurred before the court accepted his guilty plea and

sentenced him. Thus, the illegality of Delfeld’s earlier sentence doesn’t itself call into question the validity of the protection order.

¶ 17 The question remains, however, when the protection order terminated. Under section 18-1-1001(8)(b) and the terms of the protection order, the order terminated upon final disposition of the action, meaning when Delfeld completed his sentence.

¶ 18 Delfeld argues that he completed his sentence when he was discharged from parole in May 2018. His argument presumes that the legal part of his sentence was the term of imprisonment followed by parole, and the illegal part was the term of probation. Thus, under section 18-1-1001(8)(b), he argues that the protection order automatically expired upon his discharge from parole.

¶ 19 Not so. The two parts of Delfeld’s sentence are not severable, such that we can treat one component as illegal and the other as legal. See *Delgado v. People*, 105 P.3d 634, 637 (Colo. 2005) (“[A]s long as any aspect of a sentence is inconsistent with statutory requirements, the complete sentence is illegal.”); *People in Interest of J.S.R.*, 2014 COA 98M, ¶ 51 (the defendant’s illegal sentence to commitment and probation could not be remedied by “lopping off the illegal probation term” but instead required resentencing);

People v. Bassford, 2014 COA 15, ¶¶ 44-50 (the defendant’s illegal sentence could not be remedied by lopping off the probation portion but instead required resentencing). Thus, while in some cases courts have deemed a sentence that exceeds the statutory maximum to be invalid only as to the excess, see *Abeyta v. People*, 112 Colo. 49, 51-52, 145 P.2d 884, 885 (1944), sentences like Delfeld’s have consistently been held to be nonseverable.

¶ 20 And, under the plain language of section 18-1-1001(8)(b), Delfeld’s original sentence ended only when he was released from incarceration, discharged from parole, and discharged from probation. In other words, his sentence wasn’t complete — and there was no “final disposition of the action” — until he had completed all portions of his sentence. Thus, Delfeld was still serving his sentence, and the protection order remained in effect, at the time of the events leading to the charges in this case.

¶ 21 Nor did the illegality of Delfeld’s original sentence render the initial action “final” under section 18-1-1001(8)(b). To be sure, the judgment would be subject to amendment if his plea were to be vacated or his sentence corrected based on his filing of a postconviction motion (which, as indicated, he has not done). See

Leyva v. People, 184 P.3d 48, 49 (Colo. 2008). But if that were to happen, the action would not be final and the protection order would remain in effect until a new judgment was entered and any further sentence was served. In any event, the illegality of the sentence didn't prevent the protection order from remaining in effect through the time of the events leading to the charges in this case.

¶ 22 Accordingly, we hold that under these circumstances — when a defendant is serving an illegal sentence but hasn't obtained a court order reversing or vacating the judgment of conviction, entering a new sentence, or modifying or dismissing the section 18-1-1001(1) mandatory protection order, and the illegal portion of the sentence can't be severed — the protection order remains in effect through the entire sentence and any violation of the order is punishable.

III. Conclusion

¶ 23 The judgment is affirmed.

JUDGE HARRIS and JUDGE VOGT concur.