SUPREME COURT NO.
COA NO. 49566-0-II 95693-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

K.M.,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

Grays Harbor County Cause No. 15-8-00093-2

The Honorable David L. Edwards, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... **i**

TABLE OF AUTHORITIES ..... **ii**

I. IDENTITY OF PETITIONER **1**

II. COURT OF APPEALS DECISION **1**

III. ISSUE PRESENTED FOR REVIEW **1**

IV. STATEMENT OF THE CASE **1**

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED **3**

The Supreme Court should accept review and hold that the juvenile court violated K.M.'s right to due process by failing to delineate the evidence upon which it relied or any reasons for its decision. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).
3

VI. CONCLUSION 7

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935) 6

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) 4, 5, 6

WASHINGTON CASES

In re Blackburn, 168 Wn.2d 811, 232 P.3d 1091 (2010)..... 4

State v. Badger, 64 Wn. App. 904, 827 P.2d 318 (1992) 6

State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) 4, 5, 6

State v. Lawrence, 28 Wn. App. 435, 624 P.2d 201 (1981) 4, 5

State v. McKay, 127 Wn. App. 165, 110 P.3d 856 (2005)..... 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 4

OTHER AUTHORITIES

RAP 13.4..... 4, 6, 7

WAC 137-104-050..... 6

I. IDENTITY OF PETITIONER

Petitioner K.M., the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

K.M. seeks review of the Court of Appeals unpublished opinion entered on February 27, 2018. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

> **ISSUE 1:** Due process requires a court to provide a statement of the evidence relied upon and the reasons behind an order revoking a suspended sentence. Did the court violate K.M.'s due process rights by revoking his SSODA without providing any oral or written findings of fact or conclusions of law?

IV. STATEMENT OF THE CASE

K.M. was fifteen years old when he pleaded guilty to child molestation. CP 4-11.

The juvenile court sentenced K.M. under the statutory provisions for a Special Sex Offender Dispositional Alternative (SSODA). CP 14. His disposition of 15-36 weeks was suspended. CP 14.

K.M. moved in with his grandparents in Oregon and began treatment there at Parrott Creek through the Interstate Compact for Juveniles. *See* Ex. 1.

After about four months of treatment, the state moved to revoke K.M.'s SSODA. RP 80, 88; CP 34. The state alleged that he had "failed to follow recommendations of SSODA program." CP 34.

At a hearing on the state's motion to revoke K.M.'s SSODA, his probation officer and treatment provider testified that he had not been progressing in treatment as quickly as they would have liked. RP 88-89, 98. He was still in the beginning stages of taking responsibility for his actions. RP 93. His treatment provider thought K.M. needed a higher level of care: either residential treatment or treatment involving daily contact. Ex. 1, p. 23.

The state did not present any evidence that K.M. had failed to follow any of his treatment provider's recommendations, such as for evaluations, homework assignments, or polygraph examinations. The state did not present any evidence that he had violated the written terms of his SSODA.

The judge said that he would prefer for K.M. to attend residential treatment in the community, if possible. RP 113. But there was some confusion regarding whether that level of care was available to K.M. RP

111-113. The court continued the matter for the parties to investigate other treatment options. RP 114.

At the next hearing, the attorney for the state said that the residential treatment facility at Parrott Creek only takes referrals from Oregon's Youth Authority. RP 115.

K.M.'s attorney said that he had learned that K.M. would be able to enter residential treatment at Parrott Creek if Grays Harbor County established a contract with the program. RP 117.

The court responded as follows:

> Well, he was already at Parrott Creek and he violated the rules. He got kicked out. He's back here. He's going to JRA. Prepare the order on disposition. That's all.
> RP 118.

The court did not make any other oral ruling on the matter. RP 118. The court did not enter written findings of fact or conclusions of law. *See* CP *generally*.

K.M. timely appealed. CP 39. The Court of Appeals affirmed the order revoking his SSODA. *Opinion*.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> The Supreme Court should accept review and hold that the juvenile court violated K.M.'s right to due process by failing to delineate the evidence upon which it relied or any reasons for its decision. This

> significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

In the context of parole and probation violations, Due Process requires, *inter alia*, "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *In re Blackburn*, 168 Wn.2d 811, 884, 232 P.3d 1091 (2010); U.S. Const. Amend. XIV.

Although oral rulings are acceptable (despite the language of *Morrissey* requiring a written statement) the Washington Supreme Court has encouraged trial courts to ender written findings to "prevent …unnecessary confusion." *State v. Dahl*, 139 Wn.2d 678, 689, 990 P.2d 396 (1999).

These "minimal requirements of due process" also apply to revocation of suspended sentences. *Id.*[1]

When a trial judge fails to set forth the factual basis for his/her decision, that decision is not amenable to appellate review, as required by due process. *Id.; State v. Lawrence*, 28 Wn. App. 435, 438, 624 P.2d 201 (1981).

[1] *Dahl* addresses revocation of a SSOSA sentence in adult criminal court, but the reasoning applies equally to revocation of a SSODA disposition in juvenile court.

Due process also requires that revocation of probation or a suspended sentence be based only on "verified facts." *Lawrence*, 28 Wn. App. at 438. The court must also articulate the evidence relied upon and the basis for its decision in order to ensure that this obligation is met. *Id.*

In K.M.'s case the court did not enter any oral or written findings of fact. RP 118; CP 38. The court did not specify the evidence upon which it had relied. RP 118; CP 38. In fact, the court did not even clarify which (if any) of the conditions of the SSODA it found K.M. to have violated. RP 118; CP 38.

The court failed its obligation to delineate the evidence it relied upon and reasons supporting its decision. Accordingly, the court violated K.M.'s right to due process by making a decision that is not amenable to judicial review. *Morrissey*, 408 U.S. at 489; *Dahl*, 139 Wn.2d at 689.

Because the juvenile court did not clarify which allegations against K.M. it found to be true, this court is unable to determine whether the order revoking his SSODA is supported by substantial evidence.

Likewise, because the juvenile court did not specify the standard of proof it used when weighing the evidence, K.M. is unable to raise

appellate issues regarding the standard that should be applied to the revocation of his SSODA.[2]

The court violated K.M.'s right to due process by failing to specify the evidence upon which it relied and the reasons for its decisions revoking K.M.'s SSODA. *Morrissey*, 408 U.S. at 489; *Dahl*, 139 Wn.2d at 689. The order revoking K.M.'s SSODA must be reversed. *Id.*

This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This Court should grant review. RAP 13.4 (b)(3) and (4).

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[2] This problem is particularly stark because trial courts typically apply the "reasonably satisfied' standard of proof to revocation of SSOSA and SSODA suspended sentences, which, arguably, does not comport with due process. *See e.g. State v. Badger*, 64 Wn. App. 904, 908, 827 P.2d 318 (1992) (holding that a court must be 'reasonably satisfied' that a person violated a sentencing condition in order to find him/her in violation).

But the reasonable satisfaction standard is a relic from the days when due process depended on the distinction between a privilege and a right, rather than on whether the defendant would suffer a grievous loss of liberty. *See Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935) (holding that due process did not apply in probation revocation hearings because probation was a "privilege); *Morrissey*, 408 U.S. at 481 (more recently dispensing with the privilege / right distinction).

Washington State has appropriately abandoned the pre-*Morrissey* standard of proof in certain other types of revocation proceedings. *See* WAC 137-104-050(14) ("[t]he department has the obligation of proving each of the allegations of violations by a preponderance of the evidence" in community custody violation proceedings); *State v. McKay*, 127 Wn. App. 165, 168-69, 110 P.3d 856 (2005) (due process requires application of the preponderance of the evidence standard in DOSA revocation hearings).

If the juvenile court applied the "reasonably satisfied" standard of proof to revoke K.M.'s SSODA, it raises a significant legal issue for appeal. However, this court cannot address that issue because the juvenile court failed to provide any oral or written basis for its decision.

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of juvenile cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted March 28, 2018.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

K.M.
32700 SE Leewood Lane #30R
Boring, OR 97009

and I sent an electronic copy to

Grays Harbor County Prosecuting Attorney
lstone@co.grays-harbor.wa.us
appeals@co.grays-harbor.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 28, 2018.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

February 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. K.M. Appellant.	No. 49566-0-II UNPUBLISHED OPINION

SUTTON, J. — K.M.[1] appeals the juvenile court's order revoking his suspended sentence under a Special Sex Offender Disposition Alternative (SSODA).[2] He argues that the juvenile court violated his due process rights by failing to delineate the evidence it relied on to revoke the SSODA and that the State violated his due process rights by failing to provide adequate notice of the alleged SSODA violations. We hold that K.M.'s due process rights were not violated. Accordingly, we affirm.

FACTS

On October 22, 2015, K.M., pleaded guilty to first degree child molestation and he received a SSODA. As a condition of his SSODA, K.M. was required to "enter into and successfully participate and complete psychotherapy for sexual deviancy." Clerk's Papers (CP) at 20. K.M. moved from Grays Harbor to live with his grandparents in Oregon. He entered sex offender

[1] Per ruling of December 1, 2016, we refer to the Appellant by his initials.

[2] RCW 13.40.162.

treatment at Parrott Creek Child & Family Services in Oregon. He was supervised by an Oregon probation officer under the Interstate Compact Agreement for Juveniles.

On August 29, 2016, the State filed a motion to revoke K.M.'s SSODA. The motion alleged that K.M. "failed to follow recommendations of SSODA program" which violated the Order on Adjudication and Disposition. CP at 34. The Order on Adjudication and Disposition stated, "If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and or execution of the disposition." CP at 14. The declaration attached to the motion specifically alleged that K.M.'s probation officer had informed the State that K.M. had failed to make adequate progress in his treatment.

Brooke Gateley Meier, K.M.'s former treatment provider, testified at the SSODA revocation hearing. Meier testified that K.M. had not been making adequate progress in treatment because he continued to refuse to take responsibility for his behavior. At the time of the hearing, Parrott Creek had terminated K.M.'s treatment. Meier believed that K.M. needed to be in a more intensive sex offender treatment program that offered 24-hour supervision. Because K.M. needed a higher level of treatment, Meier stated that she would not accept K.M. back into the program.

Kisa Foley, K.M.'s Washington probation officer, also testified. Foley testified that K.M. was not complying with the conditions of his SSODA because he had not been cooperating or making adequate progress in sex offender treatment. Foley also testified that K.M. was not currently in sex offender treatment because he had been removed from treatment. And she did not know of any treatment provider that was willing to take him into a sex offender treatment program.

After the testimony, the juvenile court stated that because Meier testified that K.M. needed a higher level of sex offender treatment and because Parrott Creek was not a Washington treatment provider, it could not order Meier to accept K.M. back into the treatment program. However, the juvenile court noted that it would prefer that K.M. complete treatment, and thus, the juvenile court continued the disposition for one week to give the parties an opportunity to explore alternative treatment options.

However, the juvenile court told the parties,

> And - and if there's not treatment, then I don't have any option.
>
> I - I'm going to revoke the SSODA and - and the State can deal with him at a JRA [Juvenile Rehabilitation Administration] facility and provide whatever treatment they're able to provide in the time that remains. But if I can send him to a residential treatment facility, that would be my preference. The young man clearly still needs sex offender treatment and he hasn't even gotten past the point of accepting responsibility for his own behavior.

Transcription of Audiotaped Proceedings (TAP) at 113. When the parties returned to court, Foley informed the juvenile court that there was no residential sex offender treatment program that was a viable option for K.M. In response, K.M.'s attorney attempted to argue that K.M. may be able to be placed at Parrott Creek's residential facility if they can negotiate a contract with Grays Harbor County. The juvenile court responded,

> Well, he was already at Parrott Creek . . . and he violated the rules. He got kicked out. He's back here. He's going to JRA. Prepare - prepare the order on disposition. That's all.

TAP at 118. The juvenile court entered an order revoking K.M.'s SSODA and ordered K.M. to serve up to 36 weeks at a JRA facility. K.M. appeals.

ANALYSIS

Persons under a conditional suspended sentence, such as a SSODA, are entitled to minimum due process protections before the suspended sentence may be revoked. *State v. Nelson*, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985) (citing *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). Minimum due process protections include (1) a written statement of the evidence relied on and the reasons for revocation and (2) notice of the claimed violations. *State v. Robinson*, 120 Wn. App. 294, 299-300, 85 P.3d 376 (2004). K.M. argues that the juvenile court failed to enter a written statement of the evidence relied on and the reasons for the revocation. K.M. also argues that the State failed to provide sufficient notice of the alleged reasons for revoking his SSODA.

I. WRITTEN STATEMENT

Although the juvenile court's written order does not include a statement of the evidence relied on, the "lack of a written statement is not fatal if the trial court indicates, on the record, what evidence it relied upon." *Robinson*, 120 Wn. App. at 300-01. When the only evidence presented at the revocation hearing was the evidence regarding the violation at issue, it is possible for us to determine what evidence the trial court relied on to support the revocation. *Robinson*, 120 Wn. App. at 301. And we may look at the record as a whole to determine the reason for the revocation. *Robinson*, 120 Wn. App. at 301. Here, like in *Robinson*, the record is sufficient for us to review the court's order revoking K.M.'s SSODA.

Because there was only a single alleged violation—the failure to make adequate progress in treatment resulting in K.M.'s termination in treatment—and all the evidence presented at the revocation hearing related to K.M.'s progress in treatment, it is possible to determine what

evidence the juvenile court relied on to support the revocation. And because the juvenile court specifically referenced Meier's testimony, it indicated on the record the evidence it relied on. The juvenile court's reasons for revoking K.M.'s SSODA are also clear from the record because on two separate occasions, the juvenile court stated that it was revoking K.M.'s SSODA because he had been terminated from treatment. Accordingly, the juvenile court's failure to enter a written statement of the evidence relied on is not fatal, and K.M.'s claim fails.

II. NOTICE

K.M. also argues that the State failed to provide adequate notice of the alleged SSODA violation and that the revocation was based on reasons unrelated to the notice he received. K.M. argues that the notice was too vague as it did not allege any specific violation or facts, that the State did not present evidence of any recommendation that he had failed to follow, and that the State only alleged that his progress was inadequate and he needed a higher level of sex offender treatment. The State argues that K.M. waived his challenge to notice by failing to object below. We agree that K.M. has waived his challenge to notice.

Under RAP 2.5(a), an appellate court may decline to address an error not raised in the trial court. Washington courts have not allowed a defendant to "sit by while his due process rights were violated at a hearing and then allege due process violations on appeal." *Robinson*, 120 Wn. App. at 299. A defendant waives a challenge to notice requirements by failing to object to notice at the revocation hearing. *Robinson*, 120 Wn. App. at 299-300. Here, K.M. did not object on the

basis of notice at the revocation hearing. Because he failed to object below, we do not consider the issue on appeal under RAP 2.5(a).[3] *Robinson*, 120 Wn. App. at 300.

K.M. also argues that we should overrule *Robinson*'s holding that challenges to notice requirements may be waived if the defendant does not object at the hearing to inadequate notice of the alleged violations. We require "'a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *State v. Johnson*, 188 Wn.2d 742, 756-57, 399 P.3d 507 (2017) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). K.M. argues that (1) *Robinson* improperly relied on *State v. Nelson*, (2) by analogy, a defendant may challenge defects in the charging documents for the first time on appeal, and thus, he should be able to challenge the notice he received of the alleged SSODA violation, and (3) applying waiver would leave "offenders with no remedy for violations of the constitutional right to adequate notice." Br. of Appellant at 11. We reject these arguments.

[3] However, K.M.'s claim would also fail on its merits. K.M.'s entire argument is based on a statement in the motion to revoke the SSODA that K.M. failed to comply with the requirements of the SSODA. However, page two of the declaration attached to the motion for revocation states, "The probation counselor informed the State that the respondent has failed to make adequate progress in his treatment." CP at 35. Because the State included a specific allegation in the declaration attached to the motion for the SSODA revocation, the State clearly provided K.M. with adequate notice of the reasons for the SSODA revocation.

Further, we are concerned with the lack of candor in appellate counsel's briefing. It is apparent that a specific allegation supporting the revocation was included with the notice and counsel failed to acknowledge this allegation. Moreover, the record demonstrates that there were four prior hearings at which the specific allegations supporting the motion to revoke K.M.'s SSODA were addressed. Appellate counsel's disregard of the record is disconcerting and not well-taken.

First, K.M. recharacterizes the holding in *Nelson* as invited error rather than waiver, and then asserts that *Robinson* erred by relying on *Nelsen*. However, the *Nelson* court plainly stated that failure to object "constituted a waiver of any right of confrontation and cross examination." *Nelson*, 103 Wn.2d at 766. Accordingly, the *Robinson* court reasonably relied on *Nelson*'s statement to mean that due process rights may be waived at revocation hearings.

Second, K.M argues, by analogy, that notice in a SSODA revocation may be challenged for the first time on appeal because a defendant may challenge defects in criminal charging documents for the first time on appeal. But this analogy fails. The adequacy of a criminal charging document is governed by specific constitutional provisions and criminal court rules, and under those rules issues regarding the adequacy of the charging document may be raised for the first time on appeal. *See, e.g.*, *State v. Kjorsvik*, 117 Wn.2d 93, 102-03, 812 P.2d 86 (1991); CrR 2.1. In contrast, revocation hearings are subject to minimum procedural due process protections and do not require the same kind of procedural safeguards as a criminal trial. *Morrissey*, 408 U.S. at 481-85. Because revocation hearings are subject to minimum procedural due process requirements and not the rules governing criminal charging documents, K.M.'s argument fails.

Third, K.M.'s assertion that by applying waiver to notice offenders would be deprived of a remedy is disingenuous. The only requirement to avoid waiving a claimed error of notice is an objection at the hearing. If counsel objects and the error is not remedied, then the error may be addressed on appeal. If the alleged error "renders the offender completely unable to prepare a defense" as K.M. asserts, it is reasonable to believe that the offender would be able to object to the violation and create a record. Br. of Appellant at 11. Accordingly, there does not seem to be any

harm from requiring offenders to object to alleged notice deficiencies at the hearing. Thus, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

WORSWICK, P.J.

LEE, J.

LAW OFFICE OF SKYLAR BRETT

March 28, 2018 - 5:12 PM

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