NO. 98885-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VRAJESH PATEL
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS JULY 16, 2020 DECISION IN STATE V. PATEL COA#36732-1-III

LISE ELLNER
Attorney for Petitioner

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

FEDERAL CASES

TABLE OF AUTHORITIES

Page

RULES, STATUTES, AND OTHERS

A. IDENTITY OF MOVING PARTY

Petitioner Vrajesh Patel through his attorney, Lise Ellner, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Vrajesh Patel requests review of the Court of Appeals July 16, 2020 ruling. A copy of the decision is attached (Appendix A).

C. ISSUE PRESENTED FOR REVIEW

1. The court of appeals added language to the Stipulated order of Continuance (SOC) agreement, contrary to this Court's precedent, to provide the state a non-contractually agreed upon remedy.

D. STATEMENT OF THE CASE

Dr. Patel and the state entered an agreed order of continuance ("SOC") on February 21, 2018. CP 27. The relevant SOC provisions at issue are as follows:

> 1.8-Conditions of Deferral of Prosecution:
>
> I agree to the deferral of the prosecution of the charge(s) in the above-entitled action on the following conditions with which I must fully comply during the deferral period, which ends 2/21/19.
>
> 1.9-Dismissal of Charges:
> I understand that the charge(s) against me will be dismissed at the end of the deferral if I have fully complied with the conditions set forth in paragraph 1.8 herein.

> I agree to show cause at any time prior to *212* //19 , why I should not be found to have failed to comply with one or more of the conditions set forth in paragraph 1.8 herein. I may be found in violation of any of the conditions set forth 1.8 by a preponderance of the evidence in a hearing held without a jury before any Judge or Judge pro tempore of the above entitled Court.
>
> I understand that the court may order the clerk of the court to issue a bench warrant for my arrest if I fail to appear at any show cause hearing. I further agree that the waiver of my right to a speedy trial set forth in paragraph 1. 7 herein shall be extended by my failure to appear at any show cause hearing. If I fail to appear at a show cause hearing, I may be tried by the submittal of the materials identified in paragraph 1.11 herein, within 90 days of the date that I thereafter personally appear before this court or at any time prior to the date set forth in paragraph 1.7 herein, whichever is later.
>
> 2.1 The deferral period shall end on 2/21/19. The prosecution of the charge(s) in the above-entitled action is deferred on the following conditions:

CP 27.

The state filed a notice of non-compliance on February 21, 2019, despite alleging it believed Dr. Patel violated the SOC as early as January 25, 2019. CP 32. The term of the SOC expired on February 21, 2019, but the time for filing for show cause expired on February 20, 2019. Id.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should grant review under RAP 13.4(b)(1), and (4). This provision provides relevant part:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, the court of appeals ignored the fundamental principles of contract interpretation to achieve the result it sought, without regard for this Court's legal precedent. The court of appeals opinion conflicts with *State v. MacDonald*, 183 Wn.2d 1, 8, 346 P.3d 748 (2015); *State v. Bisson,* 156 Wn.2d 507, 522-23, 130 P.3d 820 (2006); and *Hearst Communications, Inc. v. Seattle Times,* 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Specifically, the court of appeals failed to give the words in the SOC agreement their ordinary, usual, and popular meaning and failed to "not interpret what was intended to be written but what was

written." *Seattle Times,* 154 Wn.2d at 504.The court of appeals decision is in direct conflict with Supreme Court precedent and presents an issue of substantial public importance because when the state enters into an agreement with an individual regarding his liberty, the error cannot be deemed harmless. *MacDonald*, 183 Wn.2d at 8.

a. Basic Contract Interpretation Principles Ignored

Because an SOC is a contract like a plea agreement, issues concerning interpretation of the agreement are issues of law reviewed de novo. *Bisson*, 156 Wn.2d at 517. The court of appeals correctly identified some of the basic legal principles involved in interpreting contracts, but failed to address others related to the legal principles that require each party perform its obligations as stated in the contract, and failed to apply the legal principles it did acknowledge.

The Court of Appeals provided the following boiler plate authority in its opinion:

> The goal of contract interpretation is to give effect to the parties' intent. *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003). Interpreting a contract requires courts to not only "look at the language of the agreement," but also to view "the contract as a whole,

> the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."
>
> *Id.* (quoting *In re Marriage of Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261 (2002)). Issues concerning the interpretation of a pretrial diversion agreement are questions of law that we review de novo. *See State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006) (interpreting plea agreement).

(Opinion at 5-6). While this is a correct statement of the law, the court did not apply the required legal principles that the interpretation must be in accord with **both** parties understanding of the agreement, rather than just the state's desired interpretation, and that it could not infer or add language not present in the agreement. (Opinion at 5-6).

The Court's opinion also omitted significant contract principles such as:

(1) Deferred prosecutions, plea agreements and diversion agreements are contracts where the **parties each agree to specific terms**. *MacDonald*, 183 Wn.2d at 8; *State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984).

(2) **Contracts are construed against the drafter and**

when the government is the drafter, the government shall be held "to a greater degree of responsibility than the defendant". *Bisson,* 156 Wn.2d at 522-23.

(3) The reviewing Court uses **an objective standard to determine if a party breached the plea agreement**. *MacDonald*, 183 Wn.2d at 8.

(4) Independent judicial review of contracts "safeguards the appellant's right to have the agreement administered equitably, with full protection of the constitutional rights relinquished in the bargain." *Marino*, 100 Wn.2d at 725.

(5) When the state breaches the agreement, it eliminates the basis of that bargain, which precludes the state from benefitting from the bargain. *MacDonald*, 183 Wn.2d at 8 (citing *State v*. *Carreno–Maldonado,* 135 Wn. App. 77, 88, 143 P.3d 343 (2006)).

Our State Supreme Court in *Seattle Times*, reiterated in that the reviewing courts role in contract interpretation requires it to "give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Seattle Times,* 154 Wn.2d 493, 504 (citing

Universal/Land Construction Company, 154 Wn.2d 493, 504, 115 P.3d 262 (2005)).

The Court further clarified that it does "not interpret what was intended to be written but what was written." *Seattle Times,* 154 Wn.2d at 504 (citing *J.W Seavey Hop Corp. of Portland v. Pollock,* 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)). This reasoning further emphasizes that the subjective intent of the parties "is generally irrelevant." *Seattle Times,* 154 Wn.2d at 503-04 (citing *City of Everett v. Estate of Sumstad,* 95 Wn.2d 853, 855, 631P.2d366 (1981)).

(6) Harmless error review does not apply when the state breaches a plea agreement. *MacDonald*, 183 Wn.2d at 8 (citing *Carreno–Maldonado,* 135 Wn. App. at 87–88; *accord Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)

Here the court of appeals did not apply these principles to interpret the provision providing the deferral date ends February 21, 2019, but the state was required to show cause for any suspected violation by February 20, 2019. CP 27. Section 2.1 expressly addresses the deferral period, and 1.8 addresses the date through

which Dr. Patel must comply. Section 1, 9 addresses how or when the state may challenge a suspected violation by Dr. Patel.

> 1.9-Dismissal of Charges:
> I understand that the charge(s) against me will be dismissed at the end of the deferral if I have fully complied with the conditions set forth in paragraph 1.8 herein.
>
> I agree to show cause at any time prior to *212* //19 , why I should not be found to have failed to comply with one or more of the conditions set forth in paragraph 1.8 herein. I may be found in violation of any of the conditions set forth 1.8 by a preponderance of the evidence in a hearing held without a jury before any Judge or Judge pro tempore of the above entitled Court.
>
> I understand that the court may order the clerk of the court to issue a bench warrant for my arrest if l fail to appear at any show cause hearing. I further agree that the waiver of my right to a speedy trial set forth in paragraph 1. 7 herein shall be extended by my failure to appear at any show cause hearing. If I fail to appear at a show cause hearing, I may be tried by the submittal of the materials identified in paragraph 1.11 herein, within 90 days of the date that I thereafter personally appear before this court or at any time prior to the date set forth in paragraph 1.7 herein, whichever is later.

CP 27.

The court of appeals recognized ”[t]he dismissal provision could have been more artfully drafted” (Opinion at 8). This may be true, but it does not permit the court to add the following language

to permit the state to move to revoke the agreement when the language plainly indicates the state's sole remedy for moving for revocation requires it to file for show cause prior to February 20, 2019, and thereafter prove a violation in a court hearing. CP 27.

> Fairly read, however, the SOC creates rights that arise *after* the deferral period: if Dr. Patel has violated a deferral condition, the State is entitled to submit the criminal charges to the court; if Dr. Patel has complied, he is entitled to dismissal of the charges. **Having learned of his violation so late in the deferral period, the State did not need to initiate a show cause procedure. Under the plain language of the agreement, it could have submitted the charges to the court.**

(Emphasis added) (Opinion at p. 5-6).

The above noted portion of the court of appeals opinion adds the language that the "SOC creates rights that arise after the deferral period". This is incorrect. The SOC provides the state does not have any rights after the deferral period; rather it file for show cause by February 20, 2019,and then attempt to prove a violation in a hearing before the trial court. CP 27. This added language is not supported by the facts or law. Either the state files for a violation by February 20, 2019 to preserve its right to a hearing or such opportunity is lost.

The state learned of the violation almost one month before the end of the deferral period but chose to ignore the SOC provision requiring a show cause before February 21, 2019.

The court of appeals also created the following notion that the show cause was an "**early termination procedure**", but the contract does not support this analysis. (Emphasis added Opinion at 7). Rather, a show cause hearing was the **only** way for the state to seek termination of the agreement, and to obtain such relief, the state was required to request a show cause hearing by February 20, 2019, regardless of when the state learned of a potential violation during the deferral period. There is no also mechanism, as the Court suggests for the state to summarily terminate the agreement without a show cause hearing. (Opinion at 7).

The court of appeals decision is in conflict with *MacDonald*, 183 Wn.2d at 8; *Bisson,* 156 Wn.2d at 522-23; and *Seattle Times,* 154 Wn.2d at 504, which do not permit the court to add language or assume that the parties intended to permit the state to ignore the February 20, 2019 deadline to file for show cause when the state learned of a violation on January, 25, 2019. CP 81-146.

In addition to adding language, the court of appeals supplied its own interpretation of the party's subjective intent and failed to refrain from interpreting what was intended to be written instead of correctly applying the plain language to what was actually written. *MacDonald*, 183 Wn.2d at 8; *Seattle Times,* 154 Wn.2d at 504.

The SOC plainly states that Dr. Patel had certain obligations and the state was obliged to bring a show cause to challenge a suspected lack of compliance by. Dr. Patel by February 20, 2019. CP 27. The facts demonstrate that the state was well aware of the alleged failure to comply based on its January 25, 2019 deposition of Dr. Patel which the state initiated. CP 81-146.

The state's failure to timely file for show cause after this deposition cannot be fixed by creating fictional language in a contract that is plain on its face. The court of appeals decision ignoring the plain language of the SOC is in conflict with *MacDonald*, 183 Wn.2d at 8; *Bisson,* 156 Wn.2d at 522-23; and *Seattle Times,* 154 Wn.2d at 504.

Dr. Patel agrees the contract is in-artfully drafted using almost an entirely passive voice, and using "I", to delineate the obligations of both parties, even when referring to the state's

obligations, such as when the state must bring a show cause to terminate the agreement, but even though in-artful, the plain language is clear regarding the February 20, 2019 deadline for the state to file for show cause. CP 27.

The state's appellate brief does not explain why the state failed to file for show cause before February 21, 2019 when it had ample notice and opportunity. Rather it argues irrelevant matters to obfuscate its own errors, and focused on Dr. Patel's conduct, rather than addressing the terms of the SOC. agreement. (Respondent's Brief *ad passim*). Dr. Patel's shortcomings do not create a non-contractual remedy for the state. The court of appeals opinion is wrongly decided and contrary to this Court's precedent. *MacDonald*, 183 Wn.2d at 8; *Bisson,* 156 Wn.2d at 522-23; *Seattle Times,* 154 Wn.2d at 504.

b. Any Ambiguity is Interpreted/Construed Against the Drafter

An SOC is treated the same as a plea agreement for contract interpretation *MacDonald*, 183 Wn.2d 8. Our supreme court in *Bisson* instructs that SOC's such as the one at issue in this case, apply the rule of ambiguity to interpret ambiguous provisions

against the drafter and in favor of the defendant. *Bisson*, 156 Wn.2d at 522-23. This rule provides that: “A plea agreement reasonably susceptible to different interpretations is ambiguous”. Id. (citations omitted).

This Court in *Bisson*, adopted the *Harvey* Court reasoning explaining that interpreting the contract against the drafter was “particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement”. *Bisson*, 156 Wn.2d at 523 (quoting *United States v. Harvey*, 791 F.2d 294, 301 (4th Cir. 1986)). Other states too (Kansas), interpret “construing an ambiguity in a plea agreement against the State…. requires that it be strictly construed in favor of the accused.: *Bisson*, 156 Wn.2d at 523 (quoting *State v. Magness,* 240 Kan. 719, 721, 732 P.2d 747 (1987)).

In *Bisson*, this Court held the state responsible for drafting a plea agreement which like an SOC is a contract to be interpreted against the drafter. *Bisson*, 156 Wn.2d at 511-12, 521-23. In *Bisson*, the plea agreement listed but did not expressly inform Bisson that his 5 weapons enhancements had to run concurrently, and incorrectly cited to the wrong sentence enhancement statute

(RCW 9.94A.310(3)(e)(1995)). Id. The Court held and the state conceded the plea was not voluntary due to this ambiguity, and permitted Bisson to withdraw his plea. *Bisson*, 156 Wn.2d at 511-12, 521-23.

Dr. Patel maintains there is no ambiguity in the contract, but if one exists it must be construed in his favor. For the sake of argument alone, if this Court finds the SOC agreement ambiguous, under *Bisson,* this Court must apply its interpretation against the state as the drafter because "both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant" …"for imprecisions or ambiguities in plea agreements." *Bisson*, 156 Wn.2d at 523 (quoting *Harvey*, 791 F.2d at 200).

Contrary to the court of appeals decision, the state did not have the authority to waive its noncompliance with the February 20, 2019 deadline to permit the state to seek enforcement of the agreement after the contractually agreed time. Rather, any ambiguity must be interpreted against the state to disallow a non-contractual remedy.

c. Remedy

A defendant is entitled to the benefit of his bargain and specific performance for an agreement with a legally viable sentence/resolution. *State v. Barber*, 170 Wn.2d 854, 862-63, 872-73, 248 P.3d 494 (2011) (mutual mistake did not allow specific performance for illegal sentence).

Here, by contrast to *Barber,* the terms of the agreement construed against the state do not indicate a mutual mistake or an illegal remedy. Rather, the SOC provides for dismissal because the state did not move for a show cause for noncompliance by February 20, 2019.

This Court should accept review and permit Dr. Patel to choose specific performance.

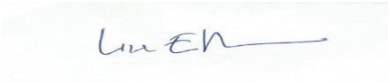
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review and permit Dr. Patel to choose specific performance.

DATED THIS 11th day of August 2020.

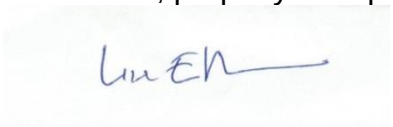
Respectfully submitted,

LAW OFFICES OF LISE ELLNER



_____
LISE ELLNER, WSBA 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Walla Walla County Prosecutor's Office jnagle@co.walla-walla.wa.us and Vrajesh Patel/DOC#415463, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001 on August 11, 2020. Service was made electronically to the prosecutor and to Vrajesh Patel by depositing in the mails of the United States of America, properly stamped and addressed.



_____Signature

APPENDIX A

APPENDIX A

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

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July 16, 2020

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CASE # 367321
State of Washington v. Vrajesh K. Patel
WALLA WALLA CO SUPERIOR COURT No. 171003473

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Attachment

c: **E-mail**—Hon. John W. Lohrmann

c: Vrajesh K. Patel, #415463
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

FILED
JULY 16, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 36732-1-III
Respondent,	)	
	)	
v.	)	
	)	
VRAJESH K. PATEL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Trial of five criminal charges against Vrajesh Patel was deferred by agreement for a year, subject to Dr. Patel waiving rights and complying with conditions during the deferral period. On the last day of the deferral period, the State gave notice of noncompliance. At its request, the trial court found Dr. Patel guilty and

entered a judgment and sentence. Dr. Patel challenges the timeliness of the State's action and the trial court's finding of noncompliance. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In October 2017, Vrajesh K. Patel, M.D., was charged with three counts of assault in the second degree and two counts of harassment, all involving a woman with whom he had been romantically involved. On February 21, 2018, he and the State agreed to a one-year stipulated order of continuance (SOC) that was approved and entered by the superior court. Among terms and conditions with which he was required to "fully comply during the deferral period, which ends on 2/21/19" was that he

> shall continue to undergo and will successfully complete and follow any further treatment recommendations in his DV/anger management treatment with First Step Community Counseling Services in Kennewick, WA and the Moral Reconation Therapy Program through WW District Court. He should also continue to follow any substance abuse treatment recommendations, and provide proof of successful completion of any previous substance abuse treatment.

Clerk's Papers (CP) at 55 (boldface omitted).

On February 19, 2019, the prosecutor learned that Dr. Patel had admitted when deposed in a civil suit brought by his victim that he was untruthful during the SOC chemical dependence evaluation performed in May 2018. Specifically, the prosecutor was provided with information that Dr. Patel testified that all of the following information provided to evaluator Judi Rozsa was false: he told her that drinking did not cause him problems prior to August 2017, that he never tried any drugs in his life except

alcohol, that he cut back on tobacco use to only three cigarettes a day in 2013, and that he had no arrests prior to August 2017. He also failed to tell Ms. Rozsa about employee assistance program (EAP) assessments that had been required of him by his former employer. Based on the information provided, Ms. Rozsa had provided the following level of care recommendation:

> [I]t appears that Dr. Patel does not fit the DSM V diagnostic criteria for an alcohol or other substance use disorder. It appears that the incident which precipitated his arrival in my office was the only time in his life that drinking has caused him any problems, or was at least related to a problem that he got into. He has not had any problems ceasing his use of this drug. In addition, Dr. Patel's drinking in general did not appear to be excessive anyway.
>
> I am therefore going to refrain from recommending any formal therapeutic intervention.

CP at 138.

Two days later, on February 21, 2019—the last day of the deferral period—the State filed a notice of noncompliance signed by Dr. Patel's probation officer and a motion for an order to show cause why the court should not find him guilty of the deferred charges. A summary of Dr. Patel's falsehoods concluded, "Patel's conduct completely contravenes the purpose and goal of the SOC, which requires Patel complete [sic] treatment recommended by his evaluators. Patel should not be deemed to have successfully completed his SOC conditions." CP at 41.

Dr. Patel responded with a motion to strike, arguing that not only had he *not* violated any condition of the SOC, but the State's action also came too late under paragraph 1.9 of the SOC, which provides in part:

> I agree to show cause at any time *prior to 2/21/19*, why I should not be found to have failed to comply with one or more of the conditions set forth in paragraph 1.8 herein.

CP at 56 (emphasis added).

At a hearing at which the trial court entertained both the motion to strike and the order to show cause, it rejected Dr. Patel's challenges and entered an order finding a willful violation of the terms of the SOC, found him guilty of the criminal charges, and set a sentencing hearing.

Dr. Patel moved for reconsideration. In a letter opinion, the trial court denied the motion but found it valuable to "revisit its thinking on its ruling" and explained why its hearing had been a sufficient evidentiary hearing and why it found the evidence sufficient to prove a violation of the terms of the SOC. CP at 160.

The court later sentenced Dr. Patel to a standard range sentence of 60 months' confinement and 18 months of community custody. Dr. Patel appeals.

ANALYSIS

I. THE "SHOW CAUSE" PROVISION RELIED ON BY DR. PATEL DID NOT REQUIRE THE STATE TO ACT BEFORE FEBRUARY 21, 2019

Dr. Patel's contention that the State acted too late requires us to construe the language of the SOC. Pretrial diversion agreements, like plea agreements, are contracts, and are construed by applying contract principles. *See State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). The goal of contract interpretation is to give effect to the parties' intent. *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003). Interpreting a contract requires courts to not only "look at the language of the agreement," but also to

> view "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties."

Id. (quoting *In re Marriage of Litowitz*, 146 Wn.2d 514, 528, 48 P.3d 261 (2002)). Issues concerning the interpretation of a pretrial diversion agreement are questions of law that we review de novo. *See State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006) (interpreting plea agreement).

Dr. Patel contends that the SOC requires the State to catch and act on a violation of a deferral condition *within* the one-year deferral period, failing which he has a right to dismissal. Fairly read, however, the SOC creates rights that arise *after* the deferral period: if Dr. Patel has violated a deferral condition, the State is entitled to submit the criminal charges to the court; if Dr. Patel has complied, he is entitled to dismissal of the

charges. Having learned of his violation so late in the deferral period, the State did not need to initiate a show cause procedure. Under the plain language of the agreement, it could have submitted the charges to the court. Dr. Patel, believing himself to have complied, could have argued his right to dismissal of the charges. The following provisions support this construction of the SOC:

> 1.8—Conditions of Deferral of Prosecution:
>
> I agree to the deferral of the prosecution of the charge(s) in the above-entitled action on the following conditions with which I must fully comply during the deferral period, which ends on 2/21/19:
>
> . . . .
>
> (b) Vrajesh K. Patel . . . should also continue to follow any substance abuse treatment recommendations, and provide proof of successful completion of any previous substance abuse treatment.
>
> . . . .
>
> 1.9—Dismissal of Charges:
>
> I understand that the charge(s) against me will be dismissed at the end of the deferral if I have fully complied with the conditions set forth in paragraph 1.8 herein.
>
> . . . .
>
> 1.10—Waiver of Jury Trial:
>
> I FULLY UNDERSTAND AND AGREE THAT THE STATE'S CASE WILL BE SUBMITTED ON THE RECORD IF I FAIL TO COMPLY WITH ANY OF THE CONDITIONS SET FORTH IN PARAGRAPH 1.8 HEREIN. . . .

CP at 55-56 (boldface omitted). Following signatures of Dr. Patel, defense counsel, and the prosecutor, and some preliminary findings, the SOC contains the following order:

> IT IS HEREBY ORDERED:
>
> 2.1 The deferral period shall end on 2/21/19. The prosecution of the charge(s) in the above-entitled action is deferred on the following conditions:
>
> . . . .
>
> (b) Vrajesh K. Patel . . . should also continue to follow any substance abuse treatment recommendations, and provide proof of successful completion of any previous substance abuse treatment.
>
> . . . .
>
> 2.2 The charge(s) in the above-entitled matter will be dismissed after conclusion of the deferral period if defendant has fully complied with the conditions set forth in paragraph 2.1 of this Order.
>
> 2.3 If defendant fails to fully comply with the conditions set forth in paragraph 2.1 of this Order, the Court will set the matter on the docket for trial. At that time, the Court will review the materials identified in paragraph 1.11, herein, and based upon that evidence, the Court will enter judgment, and if appropriate, sentence Defendant according to law.

CP at 59-60 (boldface omitted).

Recognizing that the State might become aware of a violation before the year has passed and wish to immediately terminate the SOC and proceed with prosecution, paragraph 1.9 includes a show cause option. In that event, it imposes a duty on Dr. Patel to submit to the early termination procedure. The following language describes the early termination option:

> I agree to show cause at any time prior to 2/21/19, why I should not be found to have failed to comply with one or more of the conditions set forth in paragraph 1.8 herein. I may be found in violation of any of the conditions set forth 1.8 by a preponderance of the evidence in a hearing held without a jury before any Judge or Judge pro tempore of the above-entitled Court.

> I understand that the court may order the clerk of the court to issue a bench warrant for my arrest if I fail to appear at any show cause hearing.

CP at 56. It is unsurprising that a response to the show cause option would be required "prior to 2/21/19" because on and after February 21, 2019, the State could simply submit its case on the record under paragraph 1.10 of the agreement.

The dismissal provision could have been more artfully drafted by making clear that Dr. Patel was entitled to judicial review of a claimed violation whether or not the show cause procedure was followed. But the right to judicial review would exist whether provided by the agreement or not. *See State v. Marino*, 100 Wn.2d 719, 724, 674 P.2d 171 (1984).[1] Viewed as a whole, the SOC is reasonably read to permit the State to proceed with prosecution at the conclusion of the deferral period whether or not it initiated a show cause proceeding prior to February 21, 2019.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT DR. PATEL VIOLATED THE SOC BY BEING UNTRUTHFUL WHEN EVALUATED FOR TREATMENT

Dr. Patel's remaining assignment of error is to the trial court's findings and conclusion that he violated the SOC by failing to be truthful with his substance abuse treatment provider on May 1, 2018. As elaborated upon by its letter denying Dr. Patel's

[1] Under pretrial diversion agreements like the SOC, the prosecutor establishes the conditions the defendant must satisfy and supervises performance. *State v. Ashue*, 145 Wn. App. 492, 501, 188 P.3d 522 (2008). When a prosecutor decides to revoke a diversion agreement, however, the defendant is entitled by due process to an independent judicial determination that the diversion agreement was violated, by a preponderance of the evidence, with the burden of proof on the State. *Marino*, 100 Wn.2d at 725.

motion for reconsideration, the trial court found that the doctor's "lies were directed to the people who were in the best position to know whether he needed treatment for drinking. As a result of his untruthfulness he deprived them of the opportunity to make appropriate treatment recommendations." CP at 161. The trial court found the misrepresentations to be material and that they "were such that the Court can only infer that they were done with the intent to mislead the listener into thinking that he had no drinking problem—a denial that is characteristic of those who do." *Id.*

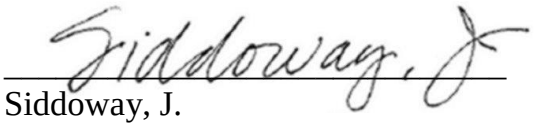
Dr. Patel does not deny that he *was* untruthful; instead, he argues that it was not a condition of the SOC that he be truthful. Whether this was an implied obligation under the SOC implicates the legal effect of the contract, an issue we review de novo. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617 (1978).

Dr. Patel acknowledges that an implied duty of good faith and fair dealing exists in every contract. Br. of Appellant at 17 (citing *Sledge*, 133 Wn.2d at 839). The implied duty does not inject substantive terms into the parties' contract; it requires only that the parties perform in good faith the obligations imposed by their agreement. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

It could hardly be clearer that to perform *in good faith* his obligation to follow substance abuse treatment recommendations, Dr. Patel needed to provide truthful information to the treatment evaluator. The trial court properly concluded that the deferral condition was violated.

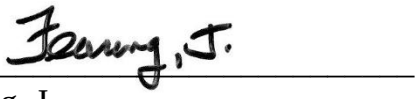
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

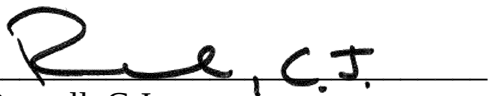


Siddoway, J.

WE CONCUR:



Fearing, J.



Pennell, C.J.

LAW OFFICES OF LISE ELLNER

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Superior Court Case Number:	17-1-00347-3

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