68849-9

68849-9

No. 68849-9

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

STATE OF WASHINGTON,

Respondent,

v.

JASON P. MATHISON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Jason Mathison did not receive adequate notice that his termination from sex offender treatment could result in revocation of his suspended sentence, in violation of constitutional due process.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To satisfy constitutional due process, sentencing conditions must be sufficiently definite that ordinary people can understand what conduct is proscribed. If the sentencing court affirmatively misleads the offender about what is proscribed, the offender has not received adequate notice. Here, Mr. Mathison was affirmatively informed at the time of his guilty plea and again at sentencing, both orally and in writing, that as a condition of his suspended sentence, he would be required to complete up to three years of sex offender treatment. Yet, when he was terminated from treatment after participating for *six years*, the court revoked his suspended sentence. Was revocation of the suspended sentence in violation of constitutional due process where Mr. Mathison was never informed that he would be required to complete more than six years of sex offender treatment?

C. STATEMENT OF THE CASE

One day, nine-year-old P.I. told a friend that she was "having sex" with 25-year-old Mr. Mathison. CP 3. Mr. Mathison lived next door to P.I. and often picked her up from school when her father was at work. CP 3.

The State charged Mr. Mathison with two counts of first degree rape of a child, RCW 9A.44.073, and one count of possession of depictions of minors engaged in sexually explicit conduct, RCW 9.68A.070. CP 34-35. Counts one and two allegedly occurred between September 1, 2004, and January 21, 2005. CP 34-35.

The parties entered a guilty plea agreement. CP 26. The State agreed to recommend that the court suspend the indeterminate sentence for the two rape of a child counts and impose a special sexual offender sentencing alternative (SSOSA). CP 31. The State would recommend that Mr. Mathison serve a total of 12 months in jail and then be on community custody for the remainder of the maximum term of life. CP 31. One of the conditions of community custody would be mandatory treatment "for up to three years duration." CP 31. The plea agreement further stated, "*The State recommends that the court order the defendant to enter, to make reasonable progress in, and to successfully*

complete a specialized program for the treatment of sexual deviancy for a period of three years with: Northwest Treatment & Associates." CP 31. The agreement also stated that "[f]ailure to comply with any term or condition of the suspended sentence and/or failure to make satisfactory progress in treatment may result in revocation of the order suspending sentence and the execution of the sentence." CP 31.

Mr. Mathison pled guilty as agreed. CP 8-18. In the plea statement, he acknowledged that if the court suspended the sentence and imposed a SSOSA, he would be "placed on community custody for the length of the statutory maximum sentence of the offense." CP 14. He also would be "ordered to participate in sex offender treatment" and be subject to other conditions. CP 14.

A guilty plea hearing was held. In a colloquy with Mr. Mathison, the court reiterated that the State would recommend, as a condition of the suspended sentence, that Mr. Mathison "be in treatment for a period of three years with Northwest Treatment Associates." 8/18/05RP 10-11. The court accepted the guilty plea. 8/18/05RP 14.

The court decided to follow the State's recommendation as to sentencing. 9/30/05RP 17. For the two rape of a child counts, the

court suspended the indeterminate sentence and imposed a SSOSA. CP 39-40. The court ordered Mr. Mathison to serve a total of 12 months in jail and then be on community custody for the length of the maximum term of life. CP 40, 44. One of the conditions of community custody was that Mr. Mathison "undergo sex offender treatment . . . for three years." CP 40. Another condition was that he have no contact with minors without permission of his community corrections officer and treatment provider. CP 44.

Mr. Mathison was released from jail in April 2005 and began treatment with Northwest Treatment Associates in January 2006. CP 48, 50. On May 5, 2006, Northwest Treatment Associates filed a progress report with the court. CP 48. According to the report, Mr. Mathison's attendance in both individual and group sessions was "excellent." CP 50. He was an active participant in treatment and appeared to be in compliance with the conditions of his suspended sentence. CP 50.

Although Mr. Mathison continued to participate in treatment for the next six years, Northwest Treatment Associates never filed another progress report with the court as required by statute.[1] Also, the court

[1] The version of the SRA in effect at the time of the offense is the version that applies. In re Pers. Restraint of LaChappelle, 153 Wn.2d 1, 6-

never set a treatment termination hearing, although the statute required it to do so at the time of sentencing.[2]

Several years after Mr. Mathison began serving the suspended sentence, on January 31, 2012, DOC filed a notice that he had violated conditions of the sentence. CP 53. This was his first violation. CP 59. DOC alleged that Mr. Mathison was engaged in a romantic relationship with a woman who had a one-year-old daughter, without disclosing the nature of the relationship to his community corrections officer or treatment provider as required, and that he had unapproved contact with the baby. CP 54. DOC recommended revocation of the suspended sentence. CP 61-62.

On February 8, 2012, Mr. Mathison was terminated from treatment. CP 63. DOC filed a supplemental notice of violation, urging the court to revoke the suspended sentence based on the additional violation. CP 65.

7, 100 P.3d 805. Former RCW 9.94A.670(7) (2004) provided: "the sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties." This requirement is currently codified at RCW 9.94A.670(8)(a). For the Court's convenience, a copy of former RCW 9.94A.670 (2004) is attached to this brief as an appendix.

[2] Former RCW 9.94A.670(6) (2004) provided: "At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment." This requirement is currently codified at RCW 9.94A.670(7).

A hearing was held. Tina Boss testified that Mr. Mathison was the boyfriend of Laurie Pratt, who was a friend of her daughter. 5/18/12RP 14. Ms. Pratt was 19 years old and had a one-year-old daughter. 5/18/12RP 95-96. Ms. Pratt and her baby had lived with Ms. Boss for a few months earlier that year. 5/18/12RP 15. During that time, Mr. Mathison would come over nearly every day. 5/18/12RP 15. He would often take care of the baby and would give her baths or change her diaper. 5/18/12RP 16-17. But according to Ms. Boss, he was left alone with the baby on only two occasions. 5/18/12RP 32-33.

Ms. Boss was aware Mr. Mathison was a sex offender and was not supposed to be around children without permission. 5/18/12RP 16. She was not concerned about that until she found out he had a Facebook account and was using a false name. 5/18/12RP 19, 31. At that point, she called police. 5/18/12RP 19-21.

Mr. Mathison stipulated that he was engaged in a sexual relationship with Ms. Pratt and did not inform his treatment group about it as required. 3/29/12RP 26-27. He also stipulated that he had unapproved contact with Ms. Pratt's daughter but stated he was never alone with the child. 3/29/12RP 28. Finally, he stipulated to being terminated from treatment. 3/29/12RP 29.

Mr. Mathison provided the testimony of a new treatment provider who had recently evaluated him, concluded he was amenable to treatment, and was willing to accept him into her treatment program. 3/29/12RP 32-34; 5/18/12RP 75. Mr. Mathison informed the court that he was otherwise doing well in the community: he was living independently, had graduated from college and got a job, and was a good employee with a glowing recommendation from his employer. 3/29/12RP 29-30, 34-35. The new proposed treatment provider testified that Mr. Mathison had a strong social support network, which would facilitate successful treatment. 5/18/12RP 80.

Nonetheless, the court revoked the suspended sentence. 5/18/12RP 126-28; CP 139-40. The court found Mr. Mathison violated the conditions of the sentence by (1) having unapproved contact with Ms. Pratt's daughter and (2) being terminated from treatment. 5/18/12RP 126-28; CP 139. The court ordered Mr. Mathison to serve the remainder of his indeterminate sentence of 131 months in prison and be subject to community custody upon release. CP 140.

D. ARGUMENT

Mr. Mathison's constitutional due process right to notice was violated because he was not adequately informed that his suspended sentence could be revoked if he was terminated from treatment after completing the three years of treatment ordered by the court

A trial court's sentencing authority is derived wholly from statute and is further constrained by the requirements of the constitution. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008).

The Sentencing Reform Act (SRA) authorizes a trial court to impose a suspended sentence for certain first-time sex offenders who are amenable to treatment under the special sex offender sentencing alternative, RCW 9.94A.670. The statute reflects the Legislature's judgment that a sex offender's behavior is compulsive and likely to continue without treatment, and that providing alternatives to confinement may result in increased reporting of sex crimes. State v. Jackson, 61 Wn. App. 86, 92-93, 809 P.2d 221 (1991). The statute gives a court the option of imposing a SSOSA if the court determines that suspending the sentence and ordering treatment would be in the best interests of the offender and the community. Id.; former RCW 9.94A.670(4) (2004).

Under the statute in effect at the time of the offenses, if the court determined a SSOSA was appropriate, the court imposed a sentence within the standard range and then suspended the sentence and ordered the offender to serve up to six months in jail.[3] Former RCW 9.94A.670(4), (5) (2004). Upon release from jail, the offender was placed on community custody for the statutory maximum term. Former RCW 9.94A.670(4)(a) (2004). As a condition of the suspended sentence, the court was required to order sex offender "[t]reatment for any period up to three years in duration." Former RCW 9.94A.670(4)(b) (2004). The court was also authorized to order specific crime-related prohibitions. Former RCW 9.94A.670(5)(b) (2004).

A court may revoke a suspended sentence only if there is sufficient proof to reasonably satisfy the court that the offender has either violated a condition of the suspended sentence or failed to make satisfactory progress in treatment. Former RCW 9.94A.670(10) (2004); State v. McCormick, 166 Wn.2d 689, 705, 213 P.3d 32 (2009). Once a SSOSA is revoked, the original sentence is reinstated. State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999).

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[3] Mr. Mathison was ordered to serve 12 months in jail as an exceptional sentence upon agreement of the parties. CP 37.

"Loss of a SSOSA is a significant consequence to defendants." State v. Sims, 171 Wn.2d 436, 443, 256 P.3d 285 (2011). A court abuses its discretion in revoking a SSOSA if the revocation is based upon an error of law. State v. Miller, 159 Wn. App. 911, 918, 247 P.3d 457 (2011).

1. A trial court may not revoke a SSOSA on the basis that the offender violated a condition of the suspended sentence if the offender did not receive adequate notice of the condition.

The "void for vagueness" doctrine of the Due Process Clause requires that citizens have fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752; U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Const. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

Washington courts apply to sentencing conditions the same vagueness doctrine that applies to statutes and ordinances, with one exception. Bahl, 164 Wn.2d at 753. Unlike statutes and ordinances, sentencing conditions are not presumed valid. Id. A court abuses its discretion if it imposes a condition that is unconstitutionally vague. Id.

A sentencing condition is unconstitutionally vague if it (1) does not define the violation with sufficient definiteness that ordinary people

can understand what conduct is proscribed; or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 752-53. "[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." American Legion Post #149 v. Dept. of Health, 164 Wn.2d 570, 612, 192 P.3d 306 (2008) (quotation marks and citation omitted).

In deciding whether a sentencing condition is unconstitutionally vague, the terms are not considered in a vacuum but are considered in the context in which they are used. Bahl, 164 Wn.2d at 754. The condition will meet the requirements of due process only if "persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement." Id.

2. Mr. Mathison was not adequately warned that his suspended sentence could be revoked if he was terminated after participating for more than six years in treatment because he was affirmatively advised that he would be required to complete only three years of treatment.

Mr. Mathison was affirmatively and repeatedly advised, both orally and in writing, that as a condition of his suspended sentence, he would be required to complete no more than three years of sex offender

treatment. First, the guilty plea agreement stated that one of the conditions the State would recommend was mandatory treatment "for up to three years duration." CP 31. Second, at the guilty plea hearing, the court affirmed that the State's recommendation was "treatment for a period of three years." 8/18/05RP 10-11. Third, in the judgment and sentence, the court ordered Mr. Mathison to undergo sex offender treatment for "three years." CP 40.

At no time was Mr. Mathison advised on the record that he would be required to participate in sex offender treatment for *more than six years*, and that if he was terminated from treatment after six years, his suspended sentence could be revoked. Because the record is silent as to whether Mr. Mathison received such notice, this Court assumes no notice was given. State v. Minor, 162 Wn.2d 796, 800, 174 P.3d 1162 (2008). In the absence of such notice, a person of ordinary intelligence would not understand that he must successfully complete more than six years of sex offender treatment and that his suspended sentence could be revoked if he did not.

Not only was Mr. Mathison not affirmatively advised he must successfully compete more than six years of treatment, he was repeatedly *misadvised* he would be required to complete only three

years of treatment. CP 31, 40; 8/18/05RP 10-11. If a sentencing court affirmatively misleads an offender about the consequences of a sentence, the offender has not received adequate notice of what conduct is proscribed. See Minor, 162 Wn.2d at 803. In Minor, the juvenile court did not provide the offender with oral or written notice of his loss of firearm rights as required by statute. Id. at 798, 800; see former RCW 9.41.047(1)(a) (2003) (at adjudication for qualifying offense, juvenile court "shall notify the person, orally and in writing, that the person . . . may not possess a firearm"). Not only did the court fail to provide the affirmative notice required, the court also failed to check the following paragraph in the order on adjudication and disposition: "FELONY FIREARM PROHIBITION: Respondent shall not use or possess a firearm, ammunition or other dangerous weapon until his or her right to do so is restored by a court of record." Id. at 798. The Washington Supreme Court held that, "by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required by former RCW 9.41.047(1), but, we conclude, *affirmatively represented* to Minor that those paragraphs did not apply to him." Id. at 803 (emphasis added). Thus, despite the general rule that ignorance of the law is no excuse for

criminal behavior, the Supreme Court reversed the adjudication for unlawful possession of a firearm and dismissed the charge. Id. at 804.

Here, like in Minor, the court affirmatively represented to Mr. Mathison that he would be required to complete no more than three years of treatment. Mr. Mathison was never informed on the record that his suspended sentence could be revoked if he did not successfully complete *more than six years* of treatment. Because an ordinary person in Mr. Mathison's position would not understand the nature of this sentencing condition, it is unconstitutionally vague. Bahl, 164 Wn.2d at 754. Mr. Mathison may not be punished for violating it. Id.

3. The order revoking the suspended sentence must be reversed and the case remanded for a new hearing.

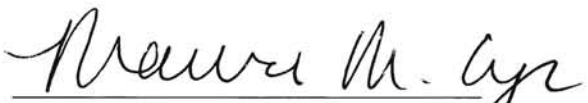
If the court violates due process in revoking a suspended sentence, the offender is entitled to a new revocation hearing that is untainted by the error. Dahl, 139 Wn.2d at 689. Because Mr. Mathison did not receive adequate notice that his suspended sentence could be revoked if he did not successfully complete more than six years of treatment, the court was not authorized to rely upon that violation in revoking the sentence. Mr. Mathison is entitled to a new

hearing at which the court may not consider termination from treatment as a basis for revocation. Id.

E. CONCLUSION

Revocation of Mr. Mathison's suspended sentence violated constitutional due process because he was not warned that the sentence could be revoked if he did not successfully complete more than six years of treatment. The order revoking the suspended sentence must be reversed and Mr. Mathison is entitled to a new hearing at which the court may not rely upon termination from treatment as a basis to revoke the sentence.

Respectfully submitted this 11th day of December, 2012.



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APPENDIX

West's RCWA 9.94A.670

West's Revised Code of Washington Annotated Currentness
Title 9. Crimes and Punishments (Refs & Annos)

9. 94A. 670. Special sex offender sentencing alternative *(Effective until July 1, 2005)*

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

(a) "Sex offender treatment provider" or "treatment provider" means a certified sex offender treatment provider or a certified affiliate sex offender treatment provider as defined in RCW 18.155.020.

(b) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense;

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state; and

(c) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

(a) The report of the examination shall include at a minimum the following:

(i) The offender's version of the facts and the official version of the facts;

(ii) The offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.

The report shall set forth the sources of the examiner's information.

(b) The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(i) Frequency and type of contact between offender and therapist;

(ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(iv) Anticipated length of treatment; and

(v) Recommended crime-related prohibitions.

(c) The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this section. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

(b) The court shall order treatment for any period up to three years in duration. The court, in its

discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

(5) As conditions of the suspended sentence, the court may impose one or more of the following:

(a) Up to six months of confinement, not to exceed the sentence range of confinement for that offense;

(b) Crime-related prohibitions;

(c) Require the offender to devote time to a specific employment or occupation;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer;

(f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030;

(g) Perform community restitution work; or

(h) Reimburse the victim for the cost of any counseling required as a result of the offender's crime.

(6) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.

(7) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(8) Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. Either party may request, and the court may order, another evaluation regarding the advisability of termination from treatment. The offender shall pay the cost of any additional evaluation ordered unless the court finds the offender

to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment for up to the remaining period of community custody.

(9) If a violation of conditions occurs during community custody, the department shall either impose sanctions as provided for in RCW 9.94A.737(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (6) and (8) of this section.

(10) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(11) Examinations and treatment ordered pursuant to this subsection shall only be conducted by certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW unless the court finds that:

(a) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; or

(b)(i) No certified sex offender treatment providers or certified affiliate sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and

(ii) The evaluation and treatment plan comply with this section and the rules adopted by the department of health.

(12) If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment.

CREDIT(S)

[2004 c 38 § 9, eff. July 1, 2004; 2002 c 175 § 11; 2001 2nd sp.s. c 12 § 316; 2000 c 28 § 20.]

West's RCWA 9.94A.670, WA ST 9.94A.670
Current with all 2004 legislation
Current with all 2004 legislation

END OF DOCUMENT

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68849-9-I
v.	)	
	)	
JASON MATHISON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF DECEMBER, 2012.

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