

Supreme Court No. _____

Court of Appeals No. 75306-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICKY DESHAWN KING,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Ricky Deshawn King, through his attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

Mr. King requests review of the unpublished opinion of the Court of Appeals in 75036-1-I, filed on September 25, 2017. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this court should accept review of the trial court's violations of Mr. King's minimal due process rights for a SSOSA revocation hearing.

D. STATEMENT OF THE CASE

On December 18, 2014, Mr. King pled guilty to one count of Child Molestation in the First Degree with a standard sentencing range of 72 to 96 months with four points of criminal history. CP 1-31. Mr. King was subsequently sentenced on January 23, 2015 to the Special Sex Offender Sentencing Alternative (herein "SSOSA") with a sentence of nine months in jail imposed and an indeterminate sentence of 96 months to life suspended. CP 32-42. Community custody for a term of life was imposed, with conditions of community custody imposed as stated in Appendix H. CP 36, 41-42.

On February 5, 2016, the State filed a notice of violation report from Community Corrections Officer (herein “CCO”) Emily Isaacs of the Department of Corrections (herein “DOC”). CP 46-52. There were six alleged violations, including: (1) having unapproved contact with a minor on January 27, 2016; (2) not participating in sex offender treatment since October 27, 2015; (3) admitting to consuming alcohol on January 27, 2016; (4) failing to advise DOC of a romantic relationship with Tia Henderson on January 28, 2016; (5) consuming alcohol on December 25, 2016; and (6) having contact with minors on December 25, 2015. CP 47-52. Allegations (1), (2), (3), (4), and (6) were admitted and allegation (5) was dismissed, wherein the court imposed credit for time served as a sanction. CP 58.

On March 28, 2016, the court ordered a bench warrant for Mr. King’s arrest due to a new DOC violation report and polygraph report from March 23, 2016. CP 57-72. There were six new alleged violations contained in the DOC report: (1) having contact with minors on March 23, 2016; (2) having contact with the victim on March 23, 2016; (3) not reporting to DOC prior to his polygraph appointment as directed on March 23, 2016; (4) being unavailable for urinalysis testing on March 23, 2016; (5) leaving DOC without permission after his polygraph on March 23, 2016; and (6) not advising DOC of his address on March 23, 2016. CP 58-

63. On April 16, 2016, CCO Isaacs submitted a supplemental report alleging three additional violations, including (7) failing to comply with the Sexual Assault Protection Order by being at the victim's residence on April 1, 2016; (8) possessing the controlled substance methamphetamine on April 1, 2016; and (9) being terminated from sex offender treatment on April 1, 2016. CP 78-80.

On May 3, 2016, a SSOSA revocation hearing was held. RP 1. At the hearing, the State struck allegation (8). RP 4. Mr. King admitted allegation (1) and explained that he had telephone contact with some of his children, but not the victim. RP 6. Mr. King denied allegations (2) and (3). RP 6. Mr. King admitted allegations (4) and (5) and explained that he had to rush to work and forgot that he was supposed to wait at the DOC office for urinalysis. RP 7. Mr. King denied allegation (6). RP 7-8. Mr. King admitted allegation (7) and explained that he did not intend nor have any contact with the victim. RP 8. Mr. King admitted allegation (9) and a letter from Mr. King was submitted to the court for consideration. RP 8; CP 82-85.

CCO Isaacs argued to the court to revoke SSOSA. RP 13. The State also argued to the court to revoke SSOSA. RP 15. The court orally found that Mr. King was not engaged in treatment, that he had contact with minors, and that he was at the victim's residence. RP 18-19. The

court subsequently revoked SSOSA and made a finding that Mr. King committed all of the alleged violations. RP 19-20. The suspended sentence was imposed. RP 21. An order revoking the suspended sentence was filed with the same alleged violations listed. CP 86-87.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Mr. King’s due process rights were violated by the court by failing to conduct a requisite evidentiary hearing.

The imposition of a SSOSA sentence is governed by RCW 9.94A.670. Under that statute, 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.” RCW 9.94A.670(11). The court has discretion as to whether or not to revoke SSOSA for a violation. *State v. Partee*, 141 Wn. App. 355, 362, 170 P.3d 60 (2007). A court may revoke an offender’s SSOSA at any time if it is reasonably satisfied the offender violated a condition of the suspended sentence. *State v. Dahl*, 139 Wn.2d 678, 683, 990 P.2d 396 (1999); RCW 9.94A.670(10) (formerly RCW 9.94A.120(8)(a)(vi)(A) (2000)).

The United States Supreme Court addressed the rights to which one is entitled at a parole revocation hearing in *Morrissey v. Brewer*, 408

U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The *Morrissey* court observed: “Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.”

Morrissey, 408 U.S. at 480. The *Morrissey* court held that the Fourteenth Amendment guarantees minimal due process requirements including:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body...; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489.

The Washington State Supreme Court held that the *Morrissey* due process requirements applied at revocation hearings. *Dahl*, 139 Wn.2d at 683; U.S. Const. amend. XIV; Const. art. I, § 3. A revocation hearing, however, “should not be equated to a full-blown criminal prosecution because society had already been put to the burden of proving beyond a reasonable doubt that defendant was guilty of the crime.” *State v. Johnson*, 9 Wn. App. 766, 772, 514 P.2d 1073 (1973).

Violations of a defendant’s minimal due process rights are subject to harmless error analysis. *Dahl*, 139 Wn.2d at 688. The prosecution bears

the burden of proving beyond a reasonable doubt that the error established by the defendant was harmless. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the hearing would have been different if the error did not occur. *Id.*

Courts may limit a right to confront witnesses by admitting “substitutes for live testimony, such as reports, affidavits, and documentary evidence.” *Dahl*, 139 Wn.2d at 686. In order to comport with “minimal due process” standards, the court must find that there is good cause to rely on the hearsay evidence. *State v. Nelson*, 103 Wn.2d 760, 764, 697 P.2d 579 (1985). Good cause is established “whenever the proffered evidence bears substantial indicia of reliability.” *Nelson*, 103 Wn.2d at 581. “[T]he difficulty and expense of procuring live witnesses is an excuse for admitting hearsay testimony.” *Id.* at 581 (citing *Gagnon v. Scarpelli*, 411 U.S.778, 93 S.Ct. 1746, 1760, n5 (1973)).

In the instant case, an evidentiary hearing was never held regarding the non-stipulated violations – i.e. allegations (2), (3), and (6). The court did not explain what evidence it was relying on in finding violations for these three counts orally or in its written order of revocation, yet it found violations anyway. Likewise, Mr. King never had an opportunity to cross-examine witnesses as the State did not call any witnesses, nor did the court

make any finding of good cause to substitute live testimony for a demonstrably reliable alternative. In fact, there was no evidence proffered by the State at the hearing; only argument. Both of these errors violate the minimum due process standards as defined in *Morrissey, supra*, and as adopted by *Dahl, supra*.

Even though the defense stipulated to allegations (1), (4), (5), (7), and (9), the court considered all of the violations in their entirety in coming to its decision to revoke the suspended SSOSA sentence. The State cannot prove beyond a reasonable doubt that the above errors are harmless because there is a reasonable possibility that the court would not have revoked Mr. King's sentence if one or more of the contested violations were found to be not committed. Accordingly, because Mr. King's SSOSA revocation hearing was tainted with multiple due process violations, this court should remand for a new hearing that complies with due process.

This court should accept review because this case involves an issue involving a significant question of law under the United States Constitution. RAP 13.4(b)(3); *see Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (detailing minimum due process requirements for revocation hearing pursuant to U.S. Const. amend. XIV); *State v. Dahl*, 139 Wn.2d 678, 687-688, 990 P.2d 396 (1999) (detailing

right to confrontation in probation violation setting pursuant to U.S. Const. amend. XIV).

F. CONCLUSION

Given the foregoing, Petitioner respectfully requests this court to grant review.

DATED this 23rd day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the King County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on October 23, 2017 to email address paoappellateunitmail@kingcounty.gov. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Ricky King, a true and correct copy of the document to which this certification is affixed via first class mail postage prepaid to Ricky Deshawn King, BA #

217016196, King County Correction Facility – Seattle, 500 5th Avenue,
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APPENDIX A

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

THE STATE OF WASHINGTON,)	No. 75306-1-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
RICKY DESHAWN KING,)	
)	
Appellant.)	FILED: September 25, 2017

SCHINDLER, J. — Ricky DeShawn King pleaded guilty to child molestation in the first degree. The court agreed to impose a suspended sentence under the special sex offender sentencing alternative (SSOSA). RCW 9.94A.670. King claims the decision to revoke his SSOSA violated his right to due process. We disagree, and affirm.

FACTS

In 2014, Ricky DeShawn King and Artia Henderson lived together with their children, twin six-year-old boys and a four-month-old daughter, and Henderson's seven-year-old son and nine-year old daughter A.W.H. In March 2014, the State charged King with child molestation of A.W.H. in the first degree.

King agreed to enter a plea of guilty of child molestation in the first degree. The State agreed to recommend a special sex offender sentencing alternative (SSOSA) and King agreed to nine months confinement.

On January 23, 2015, the court imposed a SSOSA. The court sentenced King to 96 months to life and suspended the sentence subject to compliance with a number of conditions. The judgment and sentence required King to undergo sex offender treatment for five years and “enter, make reasonable progress in, and successfully complete” the treatment program with Steve Silver at Northwest Treatment Associates. Appendix H of the judgment and sentence sets forth additional SSOSA conditions, including King (1) have no direct or indirect contact with the victim, (2) have no contact with other minors and avoid places where minors congregate, (3) inform his community corrections officer (CCO) of any romantic relationship, (4) submit to polygraph and urinalysis (UA) testing, and (5) update the Washington State Department of Corrections (DOC) with any change of address. The court scheduled a review hearing for January 20, 2016.

The court later rescheduled the review hearing for January 27, 2016. At the hearing on January 27, CCO Emily Isaacs informed the court that King had not been in group sessions for sex offender treatment since October 27, 2015. The court continued the hearing until February 10, 2016. King was seen leaving the courthouse with an adult female and a female child.

On February 3, 2016, DOC submitted a “Notice of Violation.” The report alleged King violated the conditions of his SSOSA by (1) having unapproved contact with a minor on or about January 27, 2016; (2) having unapproved contact with minors on or about December 25, 2015; (3) failing to advise DOC of a romantic relationship with Henderson; (4) not participating in sex offender treatment since October 27, 2015; and (5) admittedly consuming alcohol.

At the violation hearing on February 16, 2016, King admitted the violations. CCO Isaacs recommended that the court revoke King's SSOSA. The court did not revoke the SSOSA. The court entered an order finding King violated the SSOSA conditions and imposed credit for time served.

On March 25, 2016, DOC submitted a Notice of Violation. The Notice of Violation alleged King failed to comply with the conditions of supervision by (1) having contact with minors on or about March 23, 2016; (2) having contact with the victim on or about March 23, 2016; (3) not reporting to DOC prior to his polygraph appointment as directed on March 23, 2016; (4) being unavailable for UA testing on March 23, 2016; (5) leaving DOC without permission after his polygraph on March 23, 2016; and (6) not advising DOC of his address on or about March 23, 2016.

On March 28, 2016, the court issued a bench warrant. Officers arrested King outside Henderson's residence.

On April 4, 2016, DOC submitted a "Supplemental Notice of Violation" alleging King (7) did not comply with the "Sexual Assault Protection Order" by being at the victim's residence on or about April 1, 2016; (8) did not comply with the conditions of supervision by possessing methamphetamine on or about April 1, 2016; and (9) was terminated from sex offender treatment on or about April 1, 2016.

At the revocation hearing on May 3, 2016, the State struck allegation (8), possession of methamphetamine. King admitted allegation (1), having contact with minors on or about March 23, 2016; allegation (3), not reporting to DOC prior to his polygraph appointment as directed on March 23, 2016; allegation (4), being unavailable for UA testing on March 23, 2016; allegation (5), leaving DOC without permission after

his polygraph on March 23, 2016; allegation (7), not complying with the Sexual Assault Protection Order by being at the victim's residence on or about April 1, 2016; and allegation (9), termination from sex offender treatment on or about April 1, 2016. King denied allegation (2), having contact with A.W.H. and allegation (6), failing to advise DOC of his address.

At the hearing, the State, DOC, and King addressed allegations (2) and (6). The court also considered the two DOC violation reports, a letter from King's sex offender treatment provider Steve Silver, and a letter from King.

Silver said King attended only six sessions in 12 months. The letter states, in pertinent part:

Given client's history, lack of cooperation on supervision, lack of engagement in counseling, severity of allegations, and recent flight, it would appear that risk in [the] community is escalating. . . .

Mr. King is not welcome to return to our program.

In his letter to the court, King admits that he failed the polygraph examination, that he left the probation office without permission, that he lied during the polygraph test after "knowingly having talked to my sons," and that he "had to go see my wife and kids" after fleeing the probation office.

The court entered an order finding King willfully violated the terms and conditions of his SSOSA and each of the alleged conditions. The court revoked the SSOSA.

ANALYSIS

King argues the court violated his right to due process by finding he violated the conditions of his SSOSA by having contact with A.W.H. and failing to inform DOC of his address.¹

“The revocation of a suspended sentence is not a criminal proceeding.” State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). In SSOSA revocation hearings, offenders are entitled to the same minimal due process rights as those afforded in probation or parole revocation hearings. Dahl, 139 Wn.2d at 683.

Minimal due process requires (a) written notice of the claimed violations, (b) disclosure to the parolee of the evidence against him, (c) the opportunity to be heard, (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation), (e) a neutral and detached hearing body, and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

“Courts have limited the right to confrontation afforded during revocation proceedings by admitting substitutes for live testimony, such as reports, affidavits and documentary evidence.” Dahl, 139 Wn.2d at 686. The court may consider hearsay evidence if there is good cause to forego live testimony. Dahl, 139 Wn.2d at 686.

We review a court’s decision to revoke a SSOSA suspended sentence for abuse of discretion. State v. Badger, 64 Wn. App. 904, 908, 827 P.2d 318 (1992). “A trial court abuses its discretion when its decision is manifestly unreasonable or is based on

¹ King argues in his brief that he also denied allegation (3), failing to report to DOC prior to his polygraph. However, the record establishes King admitted to this violation. At the May 3 revocation hearing, defense counsel stated King “didn’t meet with his CCO before the polygraph. He admits that.”

untenable grounds.” State v. Partee, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). The court has the statutory authority to revoke a SSOSA 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. RCW 9.94A.670(11); State v. Miller, 180 Wn. App. 413, 416, 235 P.3d 230 (2014).

Because the undisputed record establishes that King did not make “reasonable progress” in a treatment program and that Silver terminated King from the treatment program, the court had the authority to revoke his SSOSA on that ground alone. But the record also shows that King admitted he violated the conditions of his SSOSA by having contact with minors, failing to report to DOC prior to his polygraph, being unavailable for UA testing, leaving DOC without permission, and being at the victim’s residence.

Nonetheless, King argues the court violated his right to due process and the right to confrontation by finding he willfully violated the SSOSA when he had contact with A.W.H. The SSOSA prohibits direct or indirect contact with the victim. The Notice of Violation cites King’s own statement as evidence that he had contact with A.W.H. During his polygraph examination, King told the examiner, in pertinent part:

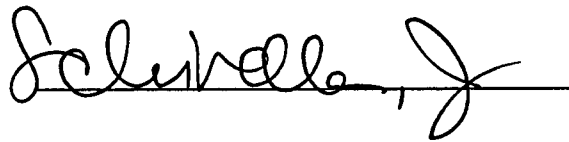
Mr. King said the victim is always with his wife, Tia Henderson, so she [the victim] may have been at his father’s house when he stopped by. Mr. King followed that up by saying he “couldn’t say for sure.”^[2]

In his letter, King admitted he saw Henderson and his children prior to his arrest at Henderson’s residence. The record supports finding King violated the SSOSA by having contact with A.W.H.

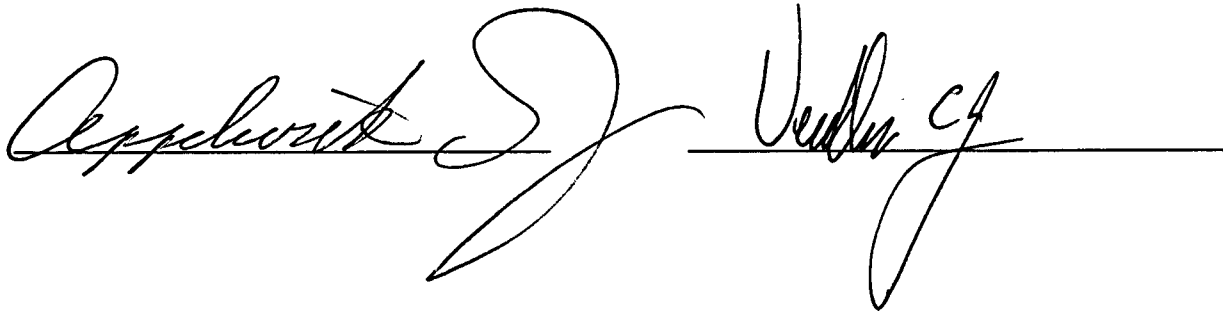
² Alteration in original.

King also challenges the finding that he did not advise DOC of his correct address. The Notice of Violation alleged King referred to "his house" and "his room" on several occasions despite informing DOC that he slept at the Seattle City Hall Shelter. At the hearing, King denied the change of address allegation. Defense counsel told the court King was still "living in shelters" but admitted King spent time at his father's residence, received mail at his father's residence, and referred to his father's residence as " 'my house.' " The attorney stated that because King's father "lives in a retirement community," King cannot "stay the night there." Sufficient evidence supports finding King failed to report his address to DOC.

We affirm.

A handwritten signature in cursive script, appearing to read "Schwall", written over a horizontal line.

WE CONCUR:

Two handwritten signatures in cursive script, one reading "Appelwhite" and the other "Verduin", both written over horizontal lines.

GRECCO DOWNS, PLLC

October 23, 2017 - 10:52 AM

Transmittal Information

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